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 JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's interlocutory order waiving Mr. LeCroy's attorney/client privilege and right to confidentiality, 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 to designate references to the records, followed by the appropriate page number, shall be as follows:

"R. ____"	Record on appeal to this Court in the original proceedings.
"PC-R. ____"	Record on appeal from the Rule 3.850 proceedings.
"Supp PC-R."	Supplemental record on appeal from the Rule 3.850 proceedings.

All other citations will be self-explanatory or will be explained.

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RESPONSE TO STATE'S STATEMENT OF THE CASE AND FACTS

Mr. LeCroy disagrees with the appellee's statement that the "the advising jury voted for "death" on both counts of murder." (Appellee's Brief at 2). In fact, the jury recommended a life sentence for Count I (John Hardiman) and a death sentence for Count II (Gail Hardiman) (R. 3730-31).

The appellee's allegation (Appellee's Brief at 3) that the state only requested limited access to the trial attorney's files is simply not true. The State repeatedly requested access to "all files and records of defense counsel" (Supp. PC-R. 39; PC-R. 220, 228). The state's disavowal of its actions below demonstrate its bad faith. The issue below as raised by the state was its right to copy and inspect "all files and records of defense counsel." Yet now before this Court, the state denies such action and concedes that it is not entitled to the complete file.

The state does note that Mr. LeCroy asserted that the state was not entitled to inspect and copy his trial file. However, the state is less than candid as to the grounds asserted by Mr. LeCroy. At no time did the state cite a rule or a statute which authorized disclosure. Mr. LeCroy relied upon this failure and the only case directly on point, Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990), which in fact holds "[trial counsel's files] are the private records of [the post-conviction litigant]" at 1068, and are immune from disclosure. Finally, collateral counsel relied upon trial counsel's conclusion that the file contained nothing

on which he needed to rely in order to respond to the allegations contained in the motion to vacate. In such circumstances, the law is clear that the privilege is intact.

The state erroneously claims that Mr. LeCroy objected to having Mr. Eisenberg review the file. Mr. Eisenberg had already reviewed the file and determined that he needed nothing in the file to respond to the allegations in the motion.

Mr. LeCroy also objects to, and disagrees with, the arguments which are improperly included within the appellee's statement of the case.

ARGUMENT

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 appellee's reply brief is rife with contradictory and misleading statements. On the one hand, the appellee alleges that Mr. LeCroy has argued that the state "cannot see the evidence, cannot see the reports, and cannot see any other portion of the file (Appellee's brief at 6). On the other hand the appellee alleges, the appellant "now concedes the state's right to access to his files" (Appellee's Brief at 6).[1] Neither

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[1]Appellee seems once again not to grasp Mr. LeCroy's position. Having pled an ineffective assistance of counsel claim, it is Mr. LeCroy's burden to prove his claim at an evidentiary hearing. At the hearing, Mr. LeCroy was going to call his trial counsel in order to present evidence to meet his burden. In presenting the evidence, the attorney-client privilege would be waived to the extent necessary for trial counsel to respond to the questions asked by Mr. LeCroy and as necessary to respond to allegations of wrongdoing. In

(continued...)

of these contradictory statements is true.

In assessing the appellee's argument, it is important to keep in mind the legal process involved in a 3.850 proceeding. The purpose of a motion to vacate is to set out the grounds upon which a movant believes he is entitled to relief. Fla. R. Crim. P. 3.850(a). A movant is entitled to an evidentiary hearing on his 3.850 claims unless the motion itself is insufficient or the files and records conclusively show the movant is not entitled to relief. Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

The purpose of an evidentiary hearing is to take evidence on the claims alleged in the 3.850 motion. It is at the evidentiary hearing that evidence is presented. The movant, of course, has the burden of proof at the evidentiary hearing. If s/he does not prove up the case, relief will be denied.

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[1](...continued)
anticipation of that hearing, Mr. LeCroy's trial counsel reviewed the trial file and determined that there was nothing in the file which was necessary for him to disclose in response to the motion to vacate. Accordingly, the privilege was intact and court ordered disclosure in error.

Access to the trial file as explained in the initial brief only occurs where trial counsel determines disclosure of a particular document is necessary to respond and where Mr. LeCroy agrees. Where trial counsel and Mr. LeCroy disagree, an in camera inspection is necessary. In the latter circumstances, access occurs only if the circuit court agrees with trial counsel that disclosure is necessary to respond to a claim of wrongdoing.

The state is not "defending" trial counsel during 3.850 proceedings. The state is defending the Constitution. United State v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). Further, a trial defense attorney is not a "de facto agent of the State," as the appellee claims. See cases cited by this Court in Kight v. Dugger, 574 So. 2d 1066, 1069 (Fla. 1990): Polk County v. Dodson, 454 U.S. 312, 318-19, 102 S.Ct. 445, 449-50, 70 L.Ed.2d 509 (1981) (public defender does not act under color of state law, for purposes of Civil Rights Act, when performing a lawyer's traditional functions as counsel to defendant in a criminal proceeding); West v. Atkins, 487 U.S. 42 108 S.Ct. 2250, 2256, 101 L.Ed.2d 40 (1988) (public defender's professional and ethical obligation as an attorney require him to act in role independent of and in opposition to the state).

The mere pleading of an ineffective assistance claim does not of itself constitute a blanket waiver of the attorney-client privilege, and only relevant documents or confidences should be revealed. Appellee apparently agrees:

> The third issue deals with "how" the delivery of "relevant" portions of the file should be made.

Appellee's Brief at 11.

The appellee argues that the mere pleading of an ineffective assistance of counsel claim waives the privilege as to relevant documents and requires disclosure to the state. Although, the appellee cites three cases, none of the cited cases find that

mere pleading waives the privilege. Appellee's brief at 9.[2] Both Delap and Hoyas involve issues of defense testimony which placed a specific and very narrow confidential communication at issue. The Home Insurance Co. case cited by the appellee actually holds to the contrary that a pleading does not waive the privilege and Florida law should follow the general rule that the mere bringing of an action cannot be said to have waived the attorney-client privilege:

> The attorney-client privilege is of course "designed precisely to enable people to bring and defend lawsuits. Consequently, if the mere bringing of a lawsuit waived the privilege, it would have little meaningful existence." *Connell v. Bernstein-Macaulay, Inc.*, 407 F.Supp. 420, 422 (S.D.N.Y. 1976).

Home Insurance Co., 443 So. 2d at 168. Contrary to the state's averment, simply bringing an action does not waive the attorney/client privilege and does not require disclosure.[3] See also Tucker v. State, 484 So. 2d 1299, 1300 (Fla. 4 DCA 1986) (the state could not subpoena a defense mental health expert

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[2]Delap v. State, 440 So. 2d 1242 (Fla. 1983) (defendant cannot present a witness to testify as to some aspects of the defendant's state of mind but assert the privilege as to other aspects); Hoyas v. State, 456 So. 2d 1225 (Fla. 3 DCA 1985) (defendant who testified about a conversation with his attorney waived the privilege as to the attorney's testimony regarding the same conversation); Home Insurance Co. v. Advance Machine Co., 443 So. 2d 165 (Fla. 1 DCA 1983) (defendant asserted that appointed counsel refused to file an appeal when asked to do so).

[3]Appellee completely ignores the distinction between the testimony of the trial attorney and the forced disclosure of Mr. LeCroy's personal file. The cases relied upon by appellee involved efforts to limit testimony of witnesses called by the defendant.

after his name had been withdrawn from a witness list); rev. denied, 494 So. 2d 1153 (Fla. 1986); Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329, 332 (Fla. 3 DCA 1983) (waiver does not occur until there has been an actual disclosure of a confidential communication).

It is important to draw a distinction between an attorney's right to respond to an allegation of wrongful conduct and the state's right to review a trial attorney file in postconviction litigation regarding ineffectiveness of counsel. As this court has noted, only rarely do ineffective assistance of counsel claims rise to the level of wrongful conduct. The Florida Bar v. Sandstrom, 609 So. 2d 583 (Fla. 1992). It is only in the rare case of an allegation of "wrongful conduct" that an attorney may waive the privilege and then only to the extent necessary. Turner v. State, 530 So. 2d 45 (Fla. 1987); Wilson v. Wainwright, 248 So. 2d 249 (Fla. 1 DCA 1971). In this case, trial counsel reviewed the trial files and indicated that he would not need any documents contained therein to rebut Mr. LeCroy's ineffective assistance of counsel claims.

The issue before the Court is one of first impression. The appellee can cite no authority or rule authorizing the state to a prehearing review of a trial attorney's file in a postconviction proceeding.[4] The cases cited by the appellee for the proposition

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[4]Moreover, the order at issue here is the circuit court's direction that trial counsel act as an agent of the State and disclose all documents which may be relevant from the state's point of view.

that the state can "invade" the privilege (Appellee's Brief at 8) relate only to testimony by an attorney in response to an allegation of wrongful conduct. Turner; Wilson.

In Kight, this Court found that the records included in a trial attorney's file "are the private records of Mr. Kight". Kight v. Dugger, 574 So. 2d 1066,1068 (Fla. 1990). Furthermore, this court found that the records are part of an active file which is not subject to Chapter 119 review. The issue before the Court is Mr. LeCroy's right to maintain the confidentiality of his file and not the trial attorney's right to defend himself. Trial counsel has reviewed the file and is prepared to testify having determined that he does not need to disclose documents in the file in responding to the motion to vacate.

Not only must trial counsel determine disclosure is necessary, consideration must be given as to whether a disclosure is relevant to the narrow issue before the court. Adelman v. Adelman, 561 So. 2d 671 (Fla. 3 DCA 1990), (a lawyer may only reveal confidential information to the extent necessary to defend himself); Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329, 332 (Fla. 3 DCA 1983) (waiver by disclosure limited to other unrevealed communications only to the extent that they are relevant to the communication already disclosed); see also Yoho v. Lindsley, 248 So. 2d 187, 191 (Fla. 4 DCA 1971) (same holding as to waiver of psychiatrist-patient privilege). If a particular confidence or document is relevant, the court must then carefully balance the interests

> . . . on the one hand as to the attorney and client in their right to the protection of the privilege, and on the other hand in the public and the state for the proper administration of law and justice.

Sepler v. State, 191 So. 2d 588, 590 (Fla. 3 DCA 1966).

The Second District Court of Appeals has addressed the issue of attorney-client privilege in a series of cases involving the balancing of the public interest in maintaining the privilege against the state's interest in criminal prosecution:

> While we are acutely conscious of the interest of the public in effective criminal prosecution and while it appears that Mr. Korones' testimony would conclusively show that the petitioner once had the stolen property in his possession, we believe that to require Mr. Korones to testify under these circumstances would be to do violence to the fundamental concept of the attorney-client privilege.

Anderson v. State, 297 So. 2d 871, 875 (Fla. 2 DCA 1974). In subsequent cases, the Second District protected the attorney-client privilege from further erosion. Roberts v. Jardine, 366 So. 2d 124 (Fla. 2 DCA 1979) (lower court reversed for forcing an attorney to testify regarding a confidential communication); Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So. 2d 764 (Fla. 2 DCA 1981) (lower court reversed for requiring the production of privileged documents).

In most instances, the defendant will want to introduce previously confidential documents in support of his claim since failure to do so would mean a weakening of his case. However, where trial counsel determines no disclosure is necessary to respond, there is no waiver. Only where trial counsel wants to

reveal information over the defendant's objection is there an issue. First, there should be a determination as to whether all of the information sought is relevant to an issue before the court. Secondly, the court should conduct a balancing of the public interest in maintaining the attorney-client privilege with the public interest in criminal prosecution. In this balancing process the exceptions to the privilege must be very narrowly applied or the result will be a complete erosion of the fundamental concept of the attorney client privilege.

If the trial attorney identifies a document in his file which he believes to be necessary to respond to direct or cross-examination and Mr. LeCroy raises an attorney-client privilege, the Court will be required to conduct an in camera review to first decide if the document is relevant. If the document is relevant, the court will then have to balance the public interest in the attorney-client privilege against the state's interest in reviewing the document. However, at this point in Mr. LeCroy's case, trial counsel is on record as asserting that he does not believe the file contains material necessary to respond to the motion to vacate.

CONCLUSION

For each of the foregoing reasons and those stated in his initial brief, Appellant asks this Court to quash the order which requires the trial attorney to review the file for the state, and to grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 29, 1993.

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