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IN THE DISTRICT COURT OF APPEAL

FOURTH DISTRICT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

LAWRENCE FRANCIS LEWIS,

Respondent.

CASE NO. 93-03310

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

By order dated November 17, 1993, this Court directed **LAWRENCE FRANCIS LEWIS** to respond to the State's November 5, 1993, Petition for Writ of Certiorari. Accordingly, Mr. Lewis submits this Response.

JURISDICTION

In its Petition for a Writ of Certiorari, the State failed to mention State v. Kokal, 562 So. 2d 324 (Fla. 1990). There, the Florida Supreme Court found it had jurisdiction over an interlocutory appeal in Rule 3.850 proceedings in a capital case. This was after the District Court of Appeal for the First District entered an order transferring the appeal to the Florida Supreme Court. A copy of that order is attached. In Kokal, the Florida Supreme Court noted its prior decisions holding that it possessed jurisdiction over appeals from either the grant or denial of Rule 3.850 relief in capital cases. See State v.

Sireci, 502 So. 2d 1221 (Fla. 1987); State v. White, 470 So. 2d 1377 (Fla. 1985).

Here, Mr. Lewis is under sentence of death. He has filed a Rule 3.850 motion to vacate his conviction and sentence of death. Under Kokal, Sireci and White, appellate jurisdiction over Mr. Lewis' case rests with the Florida Supreme Court. Accordingly, the proper court for interlocutory review is also the Florida Supreme Court. Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); State v. Kokal, 1st DCA No. 88-2890 (July 18, 1989) (order attached).

STATEMENT OF FACTS

Mr. Lewis takes exception to the "facts" set forth in the petition. First, most of these "facts" are not relevant to the issue at hand. Second, the State does not accept the allegations contained in the Rule 3.850 motion as true. Since an evidentiary hearing has yet to be held, the law is quite clear that at this stage, the facts set forth in Mr. Lewis' motion to vacate must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).[1]

The relevant facts are simply that Mr. Lewis is under a sentence of death. As a result, CCR is obligated to represent him and provide him with effective assistance of counsel in

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[1]For example, the State asserts, "Lewis voluntarily, knowingly, and intelligently waived his right to present evidence in mitigation after consulting with counsel." Petition at 4. Mr. Lewis has alleged exactly the opposite. There could be no knowing, voluntary and intelligent waiver because there was inadequate investigation. See Deaton v. Dugger, 18 Fla. L. Weekly S529 (Fla. Oct. 71993). Until an evidentiary hearing has occurred, Mr. Lewis' allegation must be accepted as true.

pursuing collateral relief. See Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). To that end, CCR filed on behalf of Mr. Lewis a motion to vacate his conviction and sentence of death.

Subsequent to filing the motion to vacate, CCR filed a motion to disqualify the trial judge because the trial judge had a personal relationship with Mr. Lewis' trial attorney, the trial judge had personal animosity towards Mr. Lewis that was expressed in a letter not part of the judicial proceedings, the trial judge had expressed to the media his view that his goal is to put criminal defendants who walk into his courtroom away for as long as possible, and the judge had a conflict of interest due to Broward County's budgeting practices of taking the cost of appointed special public defenders and expert witnesses from the funds available to a judge for administrative costs and capital improvements. This motion to disqualify was based upon information collateral counsel learned through investigation of Mr. Lewis' case. The motion to disqualify was granted. Judge Kaplan, based upon collateral counsel's investigation so far, likely possesses additional information that may provide a basis for claims for relief.

Mr. Lewis' CCR counsel represent other individuals sentenced to death by Judge Kaplan who have litigation currently pending before Judge Kaplan. Mr. Lewis' attorneys cannot ethically discuss the facts of Mr. Lewis' case with Judge Kaplan because to do so would violate the prohibition against initiating ex parte contact. However, Mr. Lewis' attorneys are obligated to learn

the facts so that they may diligently pursue available collateral relief. Because Judge Kaplan is a material and necessary witness, Mr. Lewis' counsel scheduled a deposition of Judge Kaplan -- the only ethical way to interview him. The State filed a motion to quash which was denied because Judge Lebow agreed that Judge Kaplan was a necessary and material witness and that the only way for Mr. Lewis' counsel to ethically communicate with him regarding the facts, given his presiding over similarly situated clients, is via a deposition.

ARGUMENT

The issue in this appeal is not discovery. CCR agrees with the State; there is no formal discovery in post-conviction. The issue is CCR's obligation to diligently investigate and pursue collateral relief. In Agan v. State, 560 So. 2d 222 (Fla. 1990), collateral counsel's failure to use due diligence to investigate relevant information barred later presentation of the claim arising from that information.

Here, Mr. Lewis' attorneys are simply trying to use due diligence to investigate all claims that Mr. Lewis may have in challenging his conviction and sentence of death. If the State wishes to call investigation an effort "to 'fish' for information," Petition at 8, so be it. Nevertheless, investigation has been recognized as an integral and essential part of an attorney's job in representing a capital defendant. See Deaton v. Dugger, 18 Fla. L. Weekly at S531 ("counsel failed to adequately investigate"). CCR has an obligation to provide

effective legal representation. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). CCR is simply attempting to fulfill its obligation to Mr. Lewis.

CONCLUSION

Jurisdiction over this matter rests in the Florida Supreme Court. Alternatively, the State's petition should be denied.

I HEREBY CERTIFY that a true copy of the foregoing Response has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 3, 1993.

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DISTRICT COURT OF APPEAL, FIRST DISTRICT

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Telephone (904) 488-6151

DATE July 18, 1989

CASE NO. 88-2890

83-8975-CF

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CAPITAL COL

STATE OF FLORIDA
appellant/petitioner

vs.

GREGORY ALAN KOKAL
appellee/respondent

ORDER

The court has carefully considered appellee's motion to dismiss this appeal and the response thereto. It finds the order sought to be reviewed is neither a final order nor a non-final order for which appellate review is authorized. Thus, it appears the only available remedy to appellant is by extraordinary writ. It further finds, however, that the proper court to consider such a petition is the court with supervisory appellate jurisdiction, Nellen v. State, 226 So.2d 354 (Fla. 1st DCA 1969); Bundy v. Rudd, 366 So.2d 440 (Fla. 1978). Although this court recognizes that the Florida Supreme Court has no certiorari jurisdiction, Vetrick v. Hollander, 464 So.2d 552 (Fla. 1985), it believes that court may wish to entertain this proceeding under its "all writs necessary" jurisdiction, see The Florida Senate v. Graham, 412 So.2d 360 (Fla. 1982). Accordingly, this cause is transferred to the Florida Supreme Court for further proceedings.

Appellee's motion for leave to respond is denied as moot.

By order of the court

RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Robert A. Butterworth
Judith J. Dougherty
Sid J. White
Henry W. Cook

K. Leslie Delk
Richard A. Mullenay

Sondra Joyner
Deputy Clerk

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA