WOOA
app req.

IN THE SUPREME COURT OF FLORIDA

JOHN F. CURRY

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Second DCA
Case No.: 93-01827

FSC
Case No.: 85,910

INITIAL BRIEF OF PETITIONER

On Appeal From the Second District
Court of Appeal and
the Sixth Judicial Circuit
In and For Pinellas County

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PRELIMINARY STATEMENT

Petitioner, JOHN CURRY, will be referred to as "Curry." Respondent, STATE OF FLORIDA, will be referred to as "the State." Reference to the record will be by the use of the symbol "R," followed by the appropriate page number(s) in the record. All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

John Curry was charged with violations of Section 800.04, Florida Statutes in early 1991. (R 12, 58-59, 93-94). Curry hired Paul Levine, Esquire, to defend him and Levine filed his Notice of Appearance and entered a plea of not guilty on Curry's behalf. (R 4-5, 95-96). Levine also procured psychiatric treatment for Curry. (R 8-12).

Subsequently, on April 1, 1992, Levine moved to withdraw based on an alleged conflict which prevented him from proceeding as Curry's counsel. (R 22-23). Curry filed a motion to appear in objection to Levine's motion to withdraw the next day. (R 24-25). On April 7, 1992, Judge Luten granted Levine's motion to withdraw by an order which indicated Curry was present. (R 26).

Thereafter, Curry was represented by the public defender's office. (R 32). Curry continued to receive psychiatric treatment through various rehabilitation programs. (R 162).

On April 7, 1993, a change of plea hearing was held before Judge Beach. (R 111). At the commencement of the plea hearing defense counsel sought unsuccessfully to negotiate a plea, as opposed to entering a straight-up plea. (R 113). The court expressed concern that a negotiated plea was inappropriate because Curry previously had been before the Court. (R 113). The Court was also concerned that, given the delay in the case, Curry was "jerking the system around." (R 123). In response to these concerns, Curry and his defense counsel attempted to explain that a change in counsel and Curry's participation in rehabilitation had delayed the proceedings and that Curry did not previously have an opportunity to negotiate a plea. (R 113-114, 116, 119-123).

During the course of this explanation, defense counsel, but not Curry, explained certain events that occurred during Curry's representation by Levine. (R 121-122). Defense counsel merely explained that Levine was hired by Curry to represent him with respect to the charges and that Levine subsequently moved to withdraw from the case. (R 121). Defense counsel further explained her understanding that the hearing on Levine's motion was held ex parte, a statement which was not disputed by the State, and that, at that time, the defendant had concerns about what might have been said during the hearing. (R 121). The trial court required the defendant to enter a straight-up plea, (R 129-131), and Curry pled guilty to the charges against him. (R 134).

The following day, April 8, 1993, a sentencing hearing was conducted before Judge Beach to determine an appropriate sentence. (R 140-241). At the sentencing hearing, defense counsel proceeded to inform the court of the steps Curry had taken to "turn his life around," and overcome his history of family problems and alcohol and drug abuse. (R 144-146). This included: (1) that Curry had sought and obtained various scholarships and grants to attend school; (2) that Curry was enrolled full time as a student at St. Petersburg Junior College; and (3) that he was working full time in the evenings in a position in which he supervised others. (R 144-145).

Defense counsel also advised the trial court that since Curry's arrest, he had attended and completed several programs for alcohol and drug treatment to deal with his substance abuse problem and manic-depressive illness. (R 146-147). In each case, defense counsel explained Curry's compliance with the program's requirements. (R 147).

In further support of factors mitigating Curry's past criminal acts, the defense called three witnesses -- a clinical psychologist, the resident manager at a recovery center and a substance abuse counselor -- all of whom had contact with Curry during his participation in substance abuse programs while awaiting disposition of the charges against him. These witnesses described Curry as a willing participant in treatment programs for his problems. (R 151-153, 154-155, and 155-156). They all confirmed Curry's intent to overcome his problems and to progress towards successful rehabilitation. (Id). This testimony was corroborated by Curry himself, who testified that he accepted responsibility for his past actions and problems, and that he had taken necessary steps toward rehabilitation. (R 163-165).

In an attempt to place Curry's post-offense activities into context, defense counsel related certain events that occurred while Curry was represented by Levine. These statements indicated that: (1) Curry hired Levine to represent him for a sum between $30,000 and $35,000; (2) Curry indicated Levine told him that the charges were "relatively minor" and that Levine felt "they could be worked out to battery charges;" (3) Levine informed him that he could get Curry into a therapeutic program, which he did; and (4) the time "spent in the program would count against any jail or prison sentence that he got." (R 150). Defense counsel made clear that her point was to explain that even though the charges were not "relatively minor," and that Curry was upset with Levine's representation, that Curry, nevertheless, continued with the rehabilitation initiated and arranged by Levine. (R 150-151).

Following the presentation of the defense witnesses, and prior to the testimony of the witnesses on behalf of the State, Levine interjected himself into the sentencing hearing, and approached the trial court "to address the court as to some allegations that were made about him." (R 166).

Levine proceeded to inform the court that defense counsel and the witnesses for Curry "don't know the Mr. Curry that I know and dealt with." Levine further remarked that "it's a shame that I can't go into the full scenario of items that I would like to talk about." (R 167). Levine then urged Curry to waive his attorney/client privilege "so I can tell the court exactly why I withdrew." (R 167). He expressly acknowledged the privileged nature of the communications he sought to disclose, stating, "I don't want to do it unless he's willing to let me tell the truth." (R 167-168).

Defense counsel objected, asserting Curry's attorney/client privilege. (R 168). Defense counsel further asserted that, if Curry had waived his privilege at all, the waiver was limited to the representations Levine made to Curry at the time he was hired regarding the charges against Curry and the jail credit for the time he spent in rehabilitation programs. Defense counsel acknowledged that she made the decision to make even these limited disclosures and that Curry had no part in that decision. (R 168, 162-163).

Contrary to Levine's prior statement that he did not want to testify unless Curry waived the privilege, Levine persisted, raising "comments" about his decision to withdraw from the case, which Levine claimed defense counsel argued had caused Curry "great stress and discomfort." (R 168). Defense counsel responded that she was not

alleging any impropriety by Levine. (R 168). Again, defense counsel expressly asserted Curry's objection to his former Counsel's incriminating testimony at the sentencing hearing. (R 171).

However, the trial court intervened and indicated a willingness to allow Levine to explain why he withdrew from the case to the extent the trial court had understood defense counsel to argue during the plea and sentencing hearings that Levine withdrew "without notice to your client, without discussion with your client, and done without your client being present, ex parte, without the State being there." (R 171). It was under these explicit circumstances, if they were in fact the case, that the trial court believed that defense counsel had "placed a cloud over Mr. Levine." (Id.)

In response, defense counsel made clear that defendant had received notice of the motion to withdraw (R 172), and did have conversations with Levine prior to the hearing on the motion regarding the reasons for that motion. (R 173). Defense counsel characterized the hearing of Levine's motion to withdraw as an "ex parte" hearing based on her understanding that Curry was not in the hearing room when the motion was heard and thus could not relate to the court what occurred during the hearing. (R 170). At no time during either hearing did the State or Levine contest defense counsel's assertion that Curry was not present during this hearing.

Defense counsel consistently maintained, although not always clearly, that Curry had notice and had discussions with Levine regarding his reasons for withdrawing from the case. (R 172, 173). As defense counsel explained, "if I represented to the court that he didn't know it was going to happen, I didn't mean to. He knew, he just was not

present." (R 172). Defense counsel did not intend to allege any impropriety by Levine. (R 168).

Levine then argued that the reasons he withdrew as Curry's counsel were raised in a Bar grievance proceeding, which Levine said had been dismissed. (R 173, 167). Levine asserted that Curry's privilege was waived because the grievance was a "public record now." (R 173). That "public record" was not presented to the trial court at the sentencing hearing by either Levine or the State and it is not part of this record.

Nevertheless, the trial court concluded that Levine should be permitted to "give his side of the story" because "a cloud" had been raised concerning his reputation. The trial court reasoned that "in all fairness to" Levine, he should be permitted to testify to give his reasons for withdrawing from the case. (R 173). Additionally, the trial court concluded that "if, in fact, it was a basis for a grievance," then there was a waiver of the attorney/client privilege. (R 173-174). Neither the trial court or Levine ever indicated how his testimony would be relevant to Curry's sentencing hearing. Nevertheless, Levine was permitted to testify against Curry over defense counsel's objection. (R 174).

In explaining why he withdrew from the case, Levine disclosed alleged earlier statements by Curry that were directly contrary to Curry's testimony at the sentencing hearing. These included Curry's statement that "he had no desire to cooperate or to get better because he didn't think there was anything wrong with him." (R 175). Levine also related that Curry had expressed to him that he did not intend to disclose certain assets that were available to him for expenses in his case. (R 175-176). As a

result, Levine said that there was a breakdown in his communications with Curry, which prompted his motion to withdraw. (Id.)

Apart from the explanation regarding why he withdrew, Levine also made impromptu comments regarding Curry's attendance and completion of treatment programs pending his plea and sentencing hearings, noting that "you would need a travel agent to keep track of it." (R 175). He further expressed his opinion that the people testifying on Curry's behalf didn't know "the full story", and that after handling "between 5,000 and 6,000 cases. . . . and representing many thousands of people" that he felt Curry was "extremely manipulative and very clever." (R 177).

The State then proceeded to call its witnesses. (R 177-229). These witnesses were present during Levine's testimony and one incorporated his comments into her own testimony regarding Curry's alleged unwillingness to be "honest." (R 227).

Subsequently, the trial court sentenced Curry to the Department of Corrections for a period of ten years with credit for time served followed by two years community control followed by three years of probation. (R 239).

On April 8, 1993, the trial court entered a judgment which included the assessment of attorney's fees and costs of defense in an unspecified amount. (R 44-49). On the same day, the trial court entered an order of Community Control followed by Probation, which specified the conditions of community control and probation for Curry. (R 50-53). Only one of these conditions was pronounced in open court.

Thereafter, Curry appealed the sentence on the grounds that: (1) the trial court erred in permitting Curry's former counsel to testify against Curry at the sentencing

hearing over defense counsel's objection based on fundamental attorney/client privilege; (2) the trial court erred in imposing certain conditions of community control and probation which were not pronounced in open court; and (3) the trial court erred in assessing an unspecified amount of attorney's fees and costs of defense, reduced to a judgment lien against Curry, without any notice to Curry. On appeal, the Second District Court of Appeal affirmed the sentence but remanded the case for corrections to Curry's Order of Community Control Followed by Probation and to the Judgement for Fine and Costs. The District Court of Appeal concluded that the other points raised on appeal did not constituted reversible error. Curry v. State, 656 So.2d 521 (Fla. 2nd DCA 1995).

On 5/26/95, Curry invoked the discretionary jurisdiction of this Court. On 9/13/95, this Court issued an order staying the case at bar, sua sponte, pending the disposition of State v. Hart, 668 So.2d 589 (Fla. 1996). Thereafter, on 6/25/96, this Court vacated the stay and accepted jurisdiction. Thus, pursuant to the acceptance of jurisdiction by the Court, Curry hereby appeals the Second District Court of Appeal's decision, as reported at Curry v. State, 656 So.2d 521 (Fla. 2nd DCA 1995), and respectfully requests that the Court consider the meritorious issues outlined below.

STATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court erred in permitting Curry's former counsel to testify against Curry at his sentencing hearing over defense counsel's objection based on fundamental attorney/client privilege.

II. Whether the trial court erred in imposing certain conditions of community control and probation which were not pronounced in open court.

III. Whether the trial court erred in assessing an unspecified amount of attorney's fees and costs of defense, reduced to judgment lien against Curry without any notice to Curry.

SUMMARY OF ARGUMENT

I. The attorney/client privilege is an indispensable and fundamental precept of the administration of justice. That privilege allows clients to fully discuss their case with their attorneys without fear that those statements will later be used against them. That fundamental privilege was violated in this case when the trial court permitted Curry's former trial counsel to testify against him at his sentencing hearing over his express objection based on attorney/client privilege.

No exception to the privilege exists in this case. Curry's plea and sentencing hearings did not involve any issues that implicated Curry's former counsel, Levine. Curry and his defense counsel made no allegations of impropriety or wrongdoing against his former counsel. Accordingly, no claim of wrongful conduct necessitated a response by Curry's former counsel, which would operate to waive the privilege.

Additionally, Curry did not waive the privilege with respect to the facts relevant to his former counsel's disclosure of the alleged reasons he withdrew from the case. Moreover, there is no waiver evident in the record based on any prior proceeding. Accordingly, since no exception or waiver existed, the trial court was led into error by

Curry's former counsel, Levine, when it permitted him to testify against Curry over Curry's objection based on the attorney/client privilege.

II. Special conditions of community control and probation must be pronounced in open court. This procedure guarantees a defendant notice and an opportunity to contest the conditions. However, in this case, the trial court announced the imposition of only one special condition at the sentencing hearing. The trial court failed to notify Curry of the additional special conditions of community control and probation which were, in fact, imposed on him by the trial court's subsequent order. After appeal to the Second District Court of Appeal, some special conditions were stricken from the Order of Community Control Followed by Probation; however, others were merely modified. Those stricken included Conditions 4, 11 and 15. Those to be modified included Conditions 6, 18 and 19. Curry now appeals the remand for modification of Conditions 6, 18 and 19, which conditions Curry asserts should have been struck because they were special conditions. Additionally, the conflict between Nank v. State, 646 So.2d 762 (Fla. 2nd DCA 1994) and Navarre v. State, 608 So.2d 525 (Fla. 1st DCA 1992) has been resolved. (See State v. Hart, 668 So.2d 589 (Fla. 1996).)[1] Accordingly, the appellate court's holding that all or parts of Conditions 6, 11, 15 and 18 must be struck, should be affirmed. However, the appellate court's decision, with respect to Conditions 6, 18 and 19, should be reversed, and those special conditions

[1]Although the District Court certified only the issue regarding special conditions, Curry hereby seeks review of the trial court's ruling which involved other fundamental errors. See State v. Smith, 573 So.2d 306 (Fla. 1990).

should be entirely stricken from the Order of Community Control Followed by Probation.

III. Finally, a lien for defense fees and costs may be imposed against a defendant only upon notice to the defendant of his right to a hearing to challenge the amount. Curry was not notified of the lien at sentencing, nor was he notified that he had the right to a hearing to challenge the amount of the lien. The Second District Court of Appeal considered Curry's argument against the imposition of defense fees and costs; however, the appellate court merely modified the amount of the costs imposed, instead of striking the lien as the law requires. The lien for defense fees and costs against Curry must be stricken.

ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING DEFENDANT'S FORMER TRIAL COUNSEL TO TESTIFY AGAINST THE DEFENDANT AT HIS SENTENCING HEARING

Curry appeals his sentence because he failed to receive a fair hearing as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Section 90.502, Florida Statutes governing the attorney/client privilege. This issue was raised before the District Court of Appeal on this direct appeal, but was not addressed by the appellate court.

The attorney/client privilege has long been recognized by Florida courts and is in fact, codified in Section 90.502, Florida Statutes, which provides that "a client has a privilege to refuse to disclose, and to prevent any other persons from disclosing, the contents of confidential communications..." § 90.502(2), Fla. Stat. (1993); Seaboard Air

Line Railway Co. v. Timmons, 61 So. 2d. 426, 428 (Fla. 1952); Keir v. State, 11 So. 2d 886, 888 (1943); § 90.502, Fla. Stat. (1993). This privilege, this Court long ago held, "is a sacred one, and one that is indispensable to the administration of justice." Seaboard Air Line Railway Co., 61 So. 2d at 428. Enforcement of the privilege to preserve confidential communications between an attorney and client then, is a fundamental principle of the administration of justice.

Consistent with this principle, the Florida Supreme Court has further held that the privilege promotes the administration of justice by encouraging clients to "lay the facts fully before their counsel." Brookings v. State, 495 So.2d 135, 139 (Fla. 1986). As a practical matter, the court recognized that "by encouraging full disclosure, a client is able to receive fully informed legal advice without the fear that his statements may communications later be used against him." Id. In this regard, the attorney/client privilege is a significant factor in the protection of fundamental personal rights. Id. As this Court previously explained:

> The attorney client privilege arises in the context of a relationship having great significance for the protection of fundamental personal rights. For example, the ability to speak freely to one's attorney helps to preserve rights protected by the fifth amendment privilege against self-incrimination and the sixth amendment right to legal representation.

Id., quoting Mills v. State, 476 So.2d 172, 176 (Fla. 1985), cert. denied, U.S. 106 S.Ct. 1241 (1986).

These principles are equally applicable to Curry's sentencing hearing. Levine's testimony at Curry's sentencing hearing contrary to Curry's assertion of the attorney/client privilege violated Curry's right to a fair hearing. See Gardner v.

Florida, 430 U.S. 349, 358 (1977) ("the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause," and a defendant has a "legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.") (plurality opinion). Curry was denied the right granted to him under Section 90.502, Florida Statutes to prevent Levine from disclosing confidential communications. These statements were used against him at the sentencing hearing. As a result, their disclosure did not promote the "administration of justice" in Curry's case, thus violating that fundamental precept behind the privilege. Seaboard Air Line Railway Co., 61 So. 2d at 428; Brooking, 495 So. 2d at 139.

The communications revealed by Levine at Curry's sentencing hearing were clearly privileged. These were direct statements made by Curry to Levine at a time when Levine was representing Curry. Levine acknowledged that these communications were privileged when he first requested that Curry waive the privilege before discussing these statements. (R 167-168). Therefore, these communications were subject to the attorney/client privilege. § 90.502(1)(c) (1993); Hoyas v. State, 456 So.2d 1225, 1228 (Fla. 3d DCA 1984) (privilege obtains when a person consults an attorney for the purpose of obtaining legal advice and extends even after the attorney/client relationship terminates).

The attorney/client privilege should have prevented Levine from disclosing these communications over Curry's objection, absent an exception or Curry's express waiver,

which was not the case here. As a result, the trial court allowed itself to be led into error by Levine, who insisted on testifying regarding those communications.

A. No Exception to the Attorney/Client Privilege Warranted Disclosure of the Privileged Communications in This Case

The trial court erroneously concluded that Levine's disclosure of his privileged communications with Curry was warranted, over defense counsel's protest to the contrary, because of a "cloud" placed over Mr. Levine. (R 171). For the following reasons, this conclusion was not justified under the particular circumstances present in this case.

No privilege attaches when "the 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." § 90.502(4)(c) Fla. Stat. (1993). This exception applies when an attorney is charged with wrongful conduct by his client and the disclosure of privileged communications is **necessary** to determine if his conduct was in fact improper. Turner v. State, 530 So.2d 45, 46 (Fla. 1987), cert. denied, 489 U.S. 1040 (1989). As this Court ruled,

> [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.

Id., quoting Wilson v. Wainwright, 248 So.2d 249, 259 (Fla. 1st DCA 1971).[2]

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[2]This Court recognized that the rules regulating the Florida Bar were in accord, specifically citing Rule 4-1.6(c), "allowing the lawyer to reveal privileged communications when necessary to respond to allegations in any proceeding concerning his representation of the client." Turner, 530 So.2d at 46-47. This Court implicitly

Turner v. State, 530 So.2d 45 (Fla. 1987), is instructive. There, following the defendant's sentence to life imprisonment for murder, the defendant claimed that he was denied a fair trial as a result of his involuntary absence from crucial stages of the trial. The defendant's claim was based on specific breaches of his former counsel's duty to advise him of his right to participate as well as an implication that counsel waived his right without his consent when the defendant denied that he authorized his counsel to waive his right to be present. During defendant's testimony and the testimony of his former trial counsel to determine if the defendant waived his right to be present at the contested stages, defendant's counsel asserted the attorney/client privilege as a bar to this testimony.

The Turner court concluded on appeal that the defendant no longer had a privilege as to communications concerning his presence at certain stages of the proceedings based on his direct claim of impropriety against his former counsel. Id., at 46-47; See also Wilson, 248 So.2d, at 249-250 (rejecting claim of privilege regarding communication between defendant and counsel as to defendant's desire to appeal when defendant claimed that counsel refused to perfect appeal and then asserted the privilege to prevent the disclosure of their discussions regarding the appeal).

As the courts have made clear, the privilege may be used as a shield to guard against the disclosure of confidential information and not as a sword to be used by the client against the attorney. Id. In these cases, defendants initiated proceedings to

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recognized in Turner, as is evident in the reference to Rule 4-1.6, that even under this Bar Rule there must be some allegation of impropriety which **necessitates** a response. No such necessity existed at the sentencing hearing in the case at bar.

obtain relief allegedly denied them as a result of their counsel's wrongful conduct. However, the defendants attempted to use the privilege as a bar to full disclosure of the facts surrounding their direct allegations of impropriety by their former counsel. That, one clearly cannot do.

In sharp contrast, Levine disclosed his privileged communications with Curry specifically "so I can tell the court exactly why I withdrew," (R 167-168); yet no allegation of wrongdoing had been made by Curry or his counsel concerning Levine's withdrawal from the case. Clearly, Curry made no such allegations during the plea and sentencing hearings. (R 111-138, 140-241). In addition, the impromptu statements made by Curry's defense counsel, when taken in context, reflect only an attempt to explain, the procedural history of his case and his continued participation in rehabilitation despite frustrations caused by delays in his case. (R 144-151, 162-163, 168-173).

Indeed, when the question regarding whether she was making any allegations of impropriety against Levine first arose, defense counsel explained that no such allegations were intended to be made. (R 168). This is evident by defense counsel's responses to the trial court's inquiries to determine if defense counsel was claiming that Levine improperly withdrew as Curry's counsel. Defense counsel explained that she did not intend to convey that Curry did not receive notice of the motion to withdraw and did not know the reasons for Levine's withdrawal prior to the hearing on that motion. (R 172-173). Levine's subsequent disclosure of the reasons for withdrawing as trial

counsel for Curry did not, as a result, respond to any allegation of wrongdoing by Curry or his defense counsel.

Nor can any implication of wrongdoing be drawn from defense counsel's impromptu remarks to the court during the hearings since defense counsel directly disputed the implication that she had suggested any such wrongdoing by Levine. (R 168). Certainly no implication of such wrongdoing can arise from defense counsels characterization of the hearing as "ex parte" because of her understanding that Curry was not present during the hearing on Levine's motion to withdraw. (R 170). Neither the State nor Levine contested defense counsel's assertion that Curry was not present during that hearing. Accordingly, no implication of impropriety can be made with respect to defense counsel's statements.

Moreover, unlike Turner and Wilson, these hearings were held solely to determine Curry's plea and sentence. No issue of Levine's conduct as Curry's former trial counsel was involved in these hearings and no such issue was made by defense counsel. In accordance with Turner and Wilson, the disclosure of the confidential information that Levine revealed at Curry's sentencing hearing was **not necessary** to any issue raised at the sentencing hearing. However, Levine clearly led the trial court into error and Levine's disclosure of this information should not have been permitted.

For the foregoing reasons, the trial court should have sustained defense counsel's objection to Levine's disclosure of information protected by the attorney/client privilege, and the Second District Court of Appeal should have remanded the case to the trial court for a new, untainted sentencing hearing.

B. There Was No Waiver of the Privilege With Respect to Communications Regarding the Reasons for Levine's Withdrawal as Defense Counsel.

The trial court concluded, at Levine's insistence, that the privilege had been waived, not as a result of Curry's action in the sentencing proceeding, but as a result of a separate and distinct proceeding which was not part of the record. (R 173-74). This finding was unsupported and, therefore, erroneous.

It is true, of course, that the attorney/client privilege may be waived by the client. See In re Grand Jury Proceedings, 73 F.R.D. 647, 651 (M.D. Fla. 1977) ("the privilege, however, belongs to the client, not the attorney; and an attorney can neither invoke nor waive the privilege if his client desires the contrary."); Hoyas, 456 So.2d at 1228 ("[t]he client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney **on the same matter**."), quoting 8 Wigmore, Evidence, § 2327 at 637 (McNaughton rev. 1961). In such instances, however, the waiver is limited to the communications in question and to communications relevant to the communications already disclosed. Eastern Air Lines, Inc. v. Gellert, 431 So.2d 329, 332 (Fla. 3rd DCA 1983) (noting that even if attorney/client privilege was waived, it extended to "other unrevealed communications only to the extent that they are relevant to the communication already disclosed"); Procacci v. Seitlin, 497 So.2d 969 (Fla. 3rd DCA 1986) (finding no legal basis for order which held privilege had been waived as to communications made during aspects of attorney/client relationship distinct from the

waiver resulting from the client's action against attorney for malpractice in the conduct of a particular transaction).

Hoyas v. State, 456 So.2d 1225 (Fla. 3d DCA 1984) illustrates this distinction. There, the defendant claimed his right to a fair trial had been denied when his former attorney was compelled to testify as a state witness to rebut defendant's testimony. The court determined that defendant's contention "is not substantiated by the particular facts of this case." Id, at 1226. In that case, the defendant disclosed a self-serving statement to his former attorney in explaining on direct examination his efforts to turn himself in to the police. When the State called the former attorney as a rebuttal witness the trial court allowed the State to question the former attorney regarding the defendant's statements at that time over defendant's objection based on the attorney/client privilege. On appeal, the court affirmed, reasoning that:

> Having testified on direct examination to part of the privileged communication, [defendant] was not entitled to object to disclosure of the remainder of his conversation with his attorney on the subject of what he told him about the crime and his role in it.

Id, at 1229. The court concluded that the defendant had waived the privilege to the extent necessary to address the issue the defendant raised. See also, Adelman v. Adelman, 561 So.2d 671, 673 (Fla. 3d DCA 1990) (waiver of attorney/client privilege in suit against ex-lawyer for legal malpractice was not "as to the entire world" but was limited solely to the legal malpractice action to the extent necessary for the attorney to defend himself); Procacci v. Seitlin, 497 So.2d at 969-70.

In this case, Levine's reasons for withdrawing as Curry's counsel had nothing to do with the statements disclosed by defense counsel at the sentencing hearing. Defense counsel's disclosures were limited to communications between Levine and Curry at the time Levine was retained. (R 150). They in fact, preceded Levine's subsequent motion to withdraw as Curry's counsel by almost one year. (R 4-5, 22-23). Moreover, Levine did not even contest these disclosures made by defense counsel. Instead, he focused on his reasons for withdrawing as Curry's counsel when no disclosure had been made regarding that particular event. (R 167-168).

Moreover, defense counsel acknowledged that she alone had decided to discuss events in Curry's representation by Levine and certain communications Curry had with Levine at the sentencing hearing. (R 162-163). Curry did not request defense counsel to do so. (Id.) Because the client did not decide to reveal the communications that were disclosed there was no waiver of the privilege. In re Grand Jury Proceedings, 73 F.R.D. at 651; Hoyas, 456 So. 2d at 1228.

The trial court also ignored defense counsel's disclosures when it determined that there had been a waiver of the privilege with respect to Levine's reasons for withdrawing as Curry's trial counsel. (R 173-174). Instead, the trial court relied on Levine's unsubstantiated statement that there had been a prior waiver on this issue in a grievance proceeding. (Id.) No proffer of the record of this proceeding was made to the trial court. There was nothing in the record then, regarding the nature and extent of the waiver of the attorney/client privilege in that proceeding.

When the existence of the privilege is contested as the result of an alleged waiver, as in the case, the trial court must examine the disputed communications to determine if the privilege exists. Vann v. State, 85 So. 2d 133, 137 (Fla. 1956) ("[i]t is the task of the trial judge to examine the documents and to determine whether...they fall within or without this privilege.") This examination is an essential prerequisite to satisfying the burden of overcoming the attorney/client privilege. Roberts v. Jardine, 366 So. 2d 124, 126 (Fla. 2d DCA 1979); citing, International Telephone and Telegraph Corp. v. United Telephone Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973); see also Eastern Air Lines, 431 So.2d at 332 (trial court must make determination of existence of attorney/client privilege after examination of "the documents or the equivalent."); Brookings, 495 So.2d at 139 (trial court correctly restricted examination of witness regarding communications with her attorney because "[i]t is obvious from the record that [the client] fully intended that her communications with her attorney be kept confidential. . . . "); State v. Schmidt, 474 So.2d 899, 902, n.1 (Fla. 5th DCA 1985) (reversing order of contempt against client's attorney who refused to disclose client communications because "there is no evidence of record that [the client] is attempting to use the privilege as a sword rather than a shield.")

In this case, the trial court determined that the privilege had been waived over defense counsel's express objection without conducting any in camera investigation of the nature and extent of any waiver in the previous proceeding. (R 173-174). Indeed, no record of the prior proceeding was ever presented to the court. Yet the trial court recognized that there would be a waiver of the privilege only "if, in fact, it was a basis

for a grievance." (R 173-174). As a result, the trial court erred in concluding, based on the record before it and contrary to defense counsel's express assertion of the privilege, that there had been a waiver as a result of a prior proceeding which was not made part of the record at the sentencing hearing.

C. Curry was Prejudiced By the Trial Court's Erroneous Determination that the Attorney/Client Privilege Either Did Not Exist or Had Been Waived.

Levine's testimony explaining his reasons for withdrawing as counsel for Curry unquestionably tainted the sentencing proceeding. Curry was seeking the court's consideration of mitigation of his sentence based on his successful completion of several rehabilitation programs and expressed intent to continue seeking help through rehabilitation. (R 144-147, 163-165). In direct contradiction of this testimony, Levine testified that Curry had earlier expressed that he "had no desire to cooperate or to get better because he didn't think there was anything wrong with him." (R 175). These comments, and others purportedly made by Curry to Levine resulted in the trial court receiving contradictory mitigation evidence from Curry himself. This was fundamentally unfair.

This unfairness was accentuated when Levine strayed from the court's limited direction that the privilege had been waived only as to the reasons for his decision to withdraw as Curry's counsel and his communications with Curry regarding that decision. (R 174). In this regard, Levine related to the court that defense counsel and defendant's witnesses "don't know the Mr. Curry that I know and dealt with." (R 167).

He denigrated Curry's completion of treatment programs noting that "you would need a travel agent to keep track of it." (R 175). And, Levine further implied that there were additional "skeletons in Curry's closet" by remarking that "it's a shame that I can't go into the full scenario of items that I would like to talk about." (R 167). Each of these statements were detrimental to Curry's opportunity to fully and fairly present his case to the trial court at the sentencing hearing. This is especially true given the confidential relationship that existed between Curry and Levine.

Additionally, Levine concluded by generally commenting on Curry's motivation, which statements implied Levine had special knowledge of Curry based on his relationship with him. Levine testified that:

> ...I've handled between 5,000 and 6,000 cases since 1980 and represented many thousands of people. And I can tell you that Mr. Curry, based on discussions that were just made here, is extremely manipulative and very clever. Unfortunately, it's my feeling that the people here, although intending to do their best, don't know the full story about Mr. Curry.

(R 177). These statements necessarily imply that Levine obtained information through his communications with Curry that, if revealed, would lead one to share his conclusion. This testimony was fundamentally unfair to Curry. Cf. Estelle v. Smith, 451 U.S. 454, 461-462 (1981) (noting that psychiatrist testimony at sentencing phase in capital case violated defendant's fifth amendment right against self-incrimination when psychiatrist's conclusions could only have been based on statements made by the defendant himself).

Moreover, these statements by Levine clearly exceeded the scope of the waiver recognized by the trial court. (R 174). Therefore, under controlling law, these

statements were improper. Procacci v. Seitlin , 497 So.2d at 969-70; Hoyas, 456 So.2d at 1228; Adelman, 561 So.2d at 673. For this reason as well, the trial court erred by allowing Levine to testify against Curry at his sentencing hearing as to privileged communications over Curry's objection.

II. THE TRIAL COURT ERRED IN IMPOSING SPECIAL CONDITIONS OF PROBATION AND COMMUNITY CONTROL WHICH WERE NOT PRONOUNCED IN OPEN COURT

In its Order of Community Control Followed by Probation the trial court imposed certain conditions of community control and probation on Curry which were not pronounced in open court. (R 50-53). In fact, the trial court announced only one condition of community control and probation at sentencing: that Curry obtain treatment. (R 239). The trial court failed to inform Curry of any other condition.

The current case law requires special conditions of community control and probation to be "pronounced in open court." Tillman v. State, 592 So. 2d 767, 768 (Fla. 2d DCA 1992); George v. State, 624 So. 2d 824 (Fla. 2d DCA 1993); Olvey v. State, 609 So. 2d 640, 642 (Fla. 2d DCA 1992). As the appellate court has explained, "[w]hen the trial court does not pronounce a special condition in open court, the defendant has no meaningful opportunity to object to the condition at sentencing." Olvey, 609 So. 2d at 643. As a result, conditions which are not pronounced orally at sentencing must be stricken. Id.; George, 624 So. 2d at 824.

Of the 20 conditions of community control and probation imposed against Curry only one, condition number 20, was orally pronounced at Curry's sentencing hearing. (R 239). Many of the other conditions, however, are also special conditions which

should have been orally pronounced at sentencing. These include conditions 4, 5, 6, 8, 11, 15, 18 and 19. (R 50-53). None of these conditions are statutory conditions of community control or probation of which Curry was deemed to have constructive knowledge at the time of his sentencing hearing. § 948.03, Fla. Stat. (Supp. 1992); Tillman, 592 So. 2d at 768. As a result, Conditions 4, 5, 6, 8, 11, 18 and 19, should have been stricken from the Order of Community Control Followed by Probation. Id.; George v. State, 624 So. 2d 824 (Fla. 2d DCA 1993); Olvey v. State, 609 So. 2d 640, 642 (Fla. 2d DCA 1992). Curry argued this point to the Second District Court of Appeal. The District Court agreed with the general proposition that special conditions must be stricken, and accordingly held that Conditions 4, 11 and 15 be stricken. The District Court further determined that special conditions 6, 18 and 19 could be rectified through modification by the trial court. It is Curry's position, however, that all of the special conditions should have been stricken from the Order of Community Control Followed by Probation in their entirety.

This Court has recently spoken on this issue in State v. Hart, 668 So.2d 589 (Fla. 1996). In Hart, this Court reasoned that usual "general conditions" of probation that are contained within the statutes need not be pronounced in open court. "The legal underpinning of this rationale is that the statute provides constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process." Hart, at 592; (quoting Tillman v. State, 592 So. 2d 767, 768 (Fla. 2d DCA 1992)). However, "[w]ith regard to a special condition not statutorily authorized, however, the law

requires that it be pronounced orally at sentencing before it can be included in the written probation order." Id. Consequently, when a trial court sufficiently apprises the defendant of the "substance of each special condition" so that the defendant has the opportunity to object "to any condition which the defendant believes is inappropriate" the minimum requirements of due process are satisfied. Olvey, 609 So. 2d at 643.

Thus, the holding of Hart is clear: "special" conditions of probation not set out in the general conditions portion of the rules need be specifically pronounced at sentencing. Hart, at 592. Accordingly, Curry respectfully requests that the Court reverse his sentence with respect to the specific conditions 6, 18 and 19, from the Order of Community Control Followed by Probation. Curry further requests that this Court instruct the trial court to strike the special conditions and not reimpose them on resentencing. Justice v. State, 634 So.2d 123 (Fla. 1996).

III. THE TRIAL COURT ERRED IN IMPOSING A LIEN FOR AN UNSPECIFIED AMOUNT OF ATTORNEY'S FEES AND COSTS WITHOUT NOTICE TO THE DEFENDANT.

In its judgment on Count I, the trial court imposed an unspecified amount of attorneys fees and costs of defense against Curry. (R 44-49). However, at no time during the sentencing hearing had Curry received any notice that the fees and costs of his defense were going to be imposed against him.

The assessment of fees and costs of defense is specifically authorized by Florida Statute. § 27.56, Fla. Stat. (1991). Yet, pursuant to Florida Rule of Criminal Procedure 3.720(d)(1) and Section 27.56, Florida Statutes, notice of the defendant's right to a hearing to contest the amount of a lien for defense fees and costs must be

given no later than the sentencing hearing. Fla. R. Crim. Pro. 3.720(d)(1) (1993); § 27.56(7), Fla. Stat. (1991); see also Smith v. State, 622 So. 2d 638 (Fla. 5th DCA 1993) (striking public defender's lien because defendant was not advised of his right to a hearing to contest the lien). The defendant must "be afforded the right to notice as well as the opportunity to object, to be represented by counsel, and to exercise rights provided in the laws and court rules pertaining to civil cases." Bull v. State, 548 So. 2d 1103, 1104 (Fla. 1989) (affirming imposition of lien against defendant for defense costs when defendant was given notice at the time of sentencing of the right to a hearing for the purpose of challenging the amount of the lien).

In the instant case, there was no motion at the time of sentencing by any party, including the trial court, sua sponte, to assess defense fees and costs against Curry. Hence, Curry received no notice at the time of sentencing that such fees and costs would be assessed as a lien against him. Curry also received no notice of his right to a hearing to challenge the amount of the lien. As a result, Curry appealed the imposition of the lien to the Second District Court of Appeal, requesting that the appellate court strike the imposition of a lien against Curry for an unspecified amount of fees and costs for his defense. In response, the District Court struck some of the costs imposed against Curry. Curry, 656 So.2d at 523. However, Curry now contends that the appellate court did not adequately address this issue. Because of the notice flaw, the entire lien should have been stricken pursuant to Smith, supra.

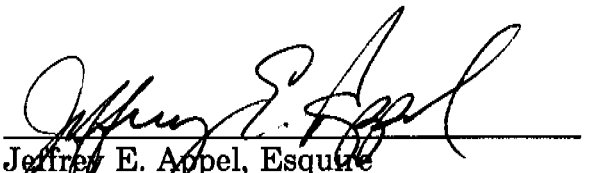
CONCLUSION

For the foregoing reasons, the trial court erred in permitting Levine to testify against Curry at his sentencing hearing over Curry's objection based on the attorney/client privilege. This issue was not addressed by the Second District Court of Appeal. Nevertheless, this court should reverse the sentence and remand for a new sentencing hearing. Alteratively, if this court determines that an issue exists regarding the potential waiver in the proceeding which was not made part of the record below, the court should remand to the trial court for an in camera determination of the existence of the privilege.

Additionally, the trial court erred with regard to imposition of "special conditions," which must now be stricken.

Finally, the lien entered by the trial court for attorney's fees and costs should be stricken.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail this 24th day of July, 1996, to Michele Taylor, Esquire, Assistant Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, FL 33607-2366, Attorney for Respondent.

Attorney

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