IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,505

GEORGE JAMES TREPAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an interlocutory appeal of the circuit court's order granting a discovery motion and compelling Mr. Trepal's counsel to disclose materials pursuant to that discovery motion. The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on instant appeal.

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

REQUEST FOR ORAL ARGUMENT

Mr. Trepal has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture.

STATEMENT OF FONT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE

George James Trepal was convicted and sentenced to death in Polk County, Florida. In a divided panel, this Court affirmed Mr. Trepal's convictions and sentence. Trepal v. State, 621 So. 2d 1361 (Fla. 1993), *cert. denied*, 114 S. Ct. 892 (1994). In dissenting from the affirmance of the first-degree murder conviction and sentence of death, Justices McDonald and Overton wrote that Mr. Trepal's case is "intriguing and frightening," *Trepal*, 621 So. 2d at 1367 (McDonald and Overton, JJ., dissenting), and concluded that "[t]he evidence is insufficient to conclusively find that Trepal had a clear and conscious intent to effect the death of anyone." *Id*. at 1368.

Mr. Trepal filed his initial Rule 3.850 motion on June 16, 1995, and an amendment thereto on March 21, 1996. An evidentiary hearing was conducted on some claims in October, 1996, and an order denying relief was entered on November 6, 1996. Following the denial of rehearing, a timely notice of appeal was taken to this Court.

On April 15, 1997, the Office of the Inspector General of the United States Department of Justice issued publicly a report entitled "**THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES**" [hereinafter OIG Report]. The result of a lengthy and detailed investigation into three sections of the FBI Crime Laboratory in Washington,

D.C (the Explosives Unit, the Materials Analysis Unit, and the Chemistry-Toxicology Unit) the OIG report issued findings regarding various practices at the FBI Crime Laboratory as well as addressed serious deficiencies noted in various cases in which the FBI Crime Laboratory and its scientists were involved. Part of the OIG Report addressed Mr. Trepal's case.

On June 20, 1997, Mr. Trepal sought a relinquishment of jurisdiction by the Court so that he could investigate and file a second Rule 3.850 motion based on the newly discovered information contained in the OIG Report. The State did not oppose the request, and the Court relinquished jurisdiction to the lower court to allow a Rule 3.850 motion to be filed.

On October 18, 1997, Mr. Trepal served his Rule 3.850 motion regarding the FBI Laboratory issues; that motion was incomplete, however, because the federal government was delaying the release of documents necessary to a full investigation of the issue. A final amended Rule 3.850 motion was filed by Mr. Trepal on September 1, 1998 (PC-R. 1-62).

On September 11, 1998, the State filed a motion to compel discovery, seeking the following information:

> 1) During the pendency of his case at trial, Mr. Trepal's trial counsel employed an expert at the Georgia Tech University to examine the scientific evidence in this case. Pursuant to motion by the defendant the Polk County Sheriff's Department transported the requested evidence to Georgia Tech in Atlanta, Georgia, so that testing could be done by the defendant's expert.

2) During the trial phase of this case, no expert was ever listed by the defendant on discovery and no expert was ever called as a witness at trial, to testify regarding the tests done at Georgia Tech.

3) The defendant has now filed an Amended Motion to Vacate Judgments of Convictions and Sentences, dated August 31, 1998, in which the defendant makes allegations of inappropriate behavior on the part of State witnesses who tested these same materials.

4) When the defendant filed his original motion for post-conviction relief in this case, he made allegations of ineffective assistance of counsel. These allegations served to waive any attorney-client privilege which the defendant may have previously enjoyed with his trial counsel. In addition, in his amended Motion the defendant complains that no adversarial testing took place at his capital trial with respect to this evidence due to inappropriate behavior by the State and/or its witnesses. The information now sought by the State will serve to disprove this allegation by the defendant.

5) The State seeks the name and address of any and all experts utilized by the defendant in this case to test the materials he now complains were inappropriately tested by the State.

6) The State further seeks any and all reports, notes or other writings that concern the hiring of such experts, their conversations with counsel for the defendant, their findings or test results, their opinions about the evidence and their conclusions. This should include information on the type of equipment used and the manner in which it was used; why the particular type of equipment was used by the experts was relied upon by them; and, whether they discussed their findings with others.

(PC-R. 64-65) (emphasis added). The State's motion cited no law or other legal authority for its argument.

Mr. Trepal, in a written response to the State's motion, argued first that the request was premature, as no evidentiary hearing had yet been granted (PC-R. 74). As to the State's assertion that the filing of an ineffective assistance of counsel claim in Mr. Trepal's *first* Rule 3.850 motion waived any privilege, Mr. Trepal asserted that the argument was waived:

> The State's argument that Mr. Trepal's first 3.850 motion, which raised allegations of, *inter alia*, ineffective assistance of counsel, waived the privilege, is itself waived. The litigation as to that first Rule 3.850 motion is over, and is currently on appeal to the Supreme Court of Florida. At no time during the litigation of the initial postconviction motion did the State request anything from Mr. Trepal. The State's failure to request what it should have requested before constitutes a waiver. Procedural defaults apply to the State as well as to criminal defendants. See, e.g. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

As to the right of the State to discover the information it was seeking, Mr. Trepal further argued that, because no expert was ever listed by the defense at trial, and no expert was called as a witness at trial to testify regarding the putative testing done by Georgia Tech, "the State is absolutely not entitled to the information it seeks at this juncture" (PC-R. 75) (citing

Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994).

At a hearing held pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), the Court first indicated that as to Mr. Trepal's argument regarding the premature nature of the State's request, "there's going to be some type of evidentiary hearing in this case" (PC-R. 83). The lower court inquired of the State as Mr. Trepal's argument that the information sought to be discovered "is a confidential expert" (PC-R. 85). The State responded:

> MR. AGUERO: Well, Judge, that's my argument with regard to work product. It's my understanding of post-conviction relief law, and if I'm in error, then I'll --
>
> THE COURT: Well, let's assume that the attorney/client privilege is waived, does that mean work product rules are waived?
>
> MR. AGUERO: I think that if the attorney/client privilege is waived with regard to an expert, then that waives any privilege you have with regard to that expert. I don't think you can then claim "I learned this as a result of my work product, but I learned it from him, who's an expert, and I'm going to still leave him confidential."
>
> That's a distinction without a difference. You can't learn it without getting the expert hired in order for their expert to tell it to you.

(PC_R. 85-86) (emphasis added).

In response, Mr. Trepal's counsel first argued that "the results, whatever they may be, of the Georgia Tech testing, it's

completely irrelevant to the issue here" (PC-R. 87). The issue in the 3.850 motion involved allegations of Brady and Giglio,[1] and because "there's not been an issue presented at this juncture as to the validity or invalidity of the Georgia Tech testing, that remains confidential" (PC-R. 89-90). Mr. Trepal clarified that he had not raised an ineffective assistance of counsel claim "for failure to present, for example, this Georgia Tech testing"; if such a claim had in fact been alleged, Mr. Trepal acknowledged that "the State might have an argument" (PC-R. 91). However, because no such claim has been alleged, "I don't think under these circumstances that privilege can be pierced" (PC-R. 92).

The lower court orally granted the State's motion, concluding that "it would be a miscarriage of justice not to make this information available" (PC-R. 92). On October 22, 1998, the court granted an evidentiary hearing on the Rule 3.850 motion (PC-R. 143), and later entered a written order compelling Mr. Trepal to disclose the material compelled by the State (PC-R. 145).

Mr. Trepal filed a notice of appeal (PC-R. 147-48), and requested a stay of the order from the lower court pending appeal (PC-R. 149-50). The lower court refused to stay its order pending the appeal (PC-R. 167). On January 11, 1999, this Court

[1] See Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

entered an order staying the lower court's discovery order.

Because neither party sought a continuance of the evidentiary hearing pending the resolution of the discovery appeal, the evidentiary hearing commenced on February 8, 1999. Testimony was taken on February 8, 9, and 10, 1999. On February 10, after Mr. Trepal's counsel announced his intention to call the defense attorneys the following day to question them about whether they had been provided the notes and charts in the possession of the government which formed the basis of the Rule 3.850 allegations, and the significance of the information and what they would have done had they had this information, the Assistant State Attorney told the lower court that, in spite of this Court's order staying the discovery order on the issue of whether the alleged testing sought by the defense prior to trial remained privileged, he nevertheless went to defense counsel and requested that they provide the very information which is the subject of a stay by this Court.[2] The trial attorneys did not answer the prosecutor's questions regarding any alleged testing, as they had been informed by the undersigned that the issue was pending before this Court.

In response, Mr. Trepal's counsel argued that, in light of

[2]The Assistant State Attorney did not at any time seek to depose trial counsel, despite the entry of a discovery schedule by the lower court. Nor did the State seek to continue the evidentiary hearing when this Court entered its stay of the discovery order.

this Court's stay order and intention to address the issue of whether the documents sought to be discovered remained privileged, the State "cannot elicit information arising out of any of the testing that the defense conducted" (T. 6).[3] The lower court conceded that based on this Court's stay order, "[o]bviously, the defense is not required at this point to furnish names, addresses, or any copies of reports or anything else nor ask these people about their conversations with counsel for the defendant, their findings or test results, their opinions about the evidence and conclusions" (T. 12). The court later emphasized that "I agree with you a hundred percent that [the State] can't go up, they can't find out whether they did the right tests up there or how they did them or the manner" (T. 14). The lower court, however, did not believe that the State could be prevented from asking defense counsel about these very same issues (Id.). In response, Mr. Trepal's counsel argued that "it seems it's a total runaround, because the issue that the Florida Supreme Court's going to be addressing is whether that area is privileged, whether it remains to be privileged" (T. 13). The lower court later stated "I'm not going to play legal games if I can avoid it. ***Now, I may be made to play legal games by the State Supreme Court***, but I don't think they're in the game

[3]The transcript of the proceedings of February 10, 1999, is submitted as an appendix to this Brief.

playing business either" (T. 18). The lower court then stated its intention to permit the State, notwithstanding the stay of the discovery order, to question trial counsel "on the subject matter of what tests did they order and et cetera" (T. 19), and further stated:

> Now, I, understanding CCR's position that that's in violation of the Supreme Court order, will give you a short period of time, and we can talk about how long, to go up to Tallahassee and get something saying that's stayed too.

(T. 19).

Following a brief recess, Mr. Trepal's counsel argued:

> [The] Florida Supreme Court stayed this Court's order regarding the discovery and intends to address the privilege issue. I don't believe at this point the Court can order the attorney or permit the attorneys to be questioned on that issue when that issue is currently under appeal by the Florida Supreme Court.
>
> * * *
>
> And I just don't think -- at this point, I have a valid stay in effect regarding the entire issue regarding the privilege,a nd to in a sense at this point force, you know, by [the] State's calling the shots, forcing me into a corner, when I have prevailed in terms of, at least, getting this issue before the Florida Supreme Court[,] is fair. And I don't think that the Florida Supreme Court is going to look at it that way either. I could be wrong. I don't know.
>
> Obviously, they're taking the matter quite seriously. The State filed a number of pleadings vociferously objecting to this appeal, and informed the Florida Supreme Court that this hearing was set for this

week.

> The State chose not to seek a continuance of this hearing. If they truly wanted that information, I would have thought -- and, frankly, I was also expecting the State to seek a continuance of this hearing, but they chose not to, and I think they have to live with that position at this point.

(T. 28-29).

The lower court expressed that its "construction of it is it forbids discovery as to the experts, taking their depositions, getting their notes, et cetera, et cetera, and I never thought I was saying anything about the lawyers, frankly. . . If the Supreme Court thinks it's to the contrary, well, that's fine, they can say so" (T. 44). Mr. Trepal's counsel responded that the court's position and ruling was essentially "the same order that you entered before" and that order was presently stayed by the Florida Supreme Court (T. 45). Despite the fact that this issue was created by the State and not Mr. Trepal, the lower court ordered Mr. Trepal's counsel to file a motion to clarify this Court's stay order or he would permit the State to examine the attorneys about the work-product issue which was the subject of the discovery order and which is presently stayed by this Court.

On February 12, 1999, Mr. Trepal, through counsel, sought a clarification from this Court as to the scope of the stay order, or in the alternative, a stay of the proceedings pending final

disposition of the instant appeal. On February 15, 1999, the Court stayed the lower court proceedings pending further order from the Court.

SUMMARY OF ARGUMENT

The lower court's order compelling Mr. Trepal's counsel to disclose to the State the names of experts hired by trial counsel on a confidential basis, as well as any reports, notes, etc., from those experts, should be quashed and/or reversed. The State's request for discovery was untimely. Moveover, the matters sought to be discovered by the State were properly found by the trial judge, in a pre-trial hearing, to be privileged, and there has been no waiver of either the attorney-client privilege or the work-product privilege which warrants overcoming either or both privileges. Nothing that has been alleged in Mr. Trepal's Rule 3.850 motion results in a waiver of either the attorney-client privilege or work product privilege as to the confidential pre-trial testing, and the work product privileged nature of the materials carries over to current collateral counsel. In Reed v. State, the Court only addressed whether conversations between a capital defendant and his trial counsel can be discovered by the State when there has been an allegation of ineffective assistance of counsel, and revelation of such conversations would be necessary for a fair adjudication of the claim. Moreover, Reed only contemplated that the State could gain access to the trial attorney's files in order to refresh trial counsel's recollections about limited matters pertaining to the ineffective assistance of counsel claim. Finally, under State v. Lewis, the

lower court's order must be reversed, as the materials sought to be discovered are neither relevant nor material to the pending Rule 3.850 motion.

ARGUMENT

THE LOWER COURT ERRED IN GRANTING THE STATE'S MOTION FOR DISCOVERY AS THE STATE'S REQUEST FOR DISCOVERY WAS (1) WAIVED; (2) REQUESTED PRIVILEGED INFORMATION, AND (3) THE INFORMATION SOUGHT TO BE DISCOVERED IS AND WAS IRRELEVANT TO ANY PENDING MATTER BELOW.

In the Rule 3.850 motion pending below, Mr. Trepal alleged violations of Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), as well as newly-discovered evidence, with respect to the allegations of misconduct at the FBI Crime Laboratory. After Mr. Trepal filed his motion, the State sought to discover the names of experts employed on a confidential basis by Mr. Trepal's trial counsel, which experts conducted examinations on several pieces of evidence used by the State at trial, as well as any reports, notes, and opinions of those experts. Mr. Trepal objected on various grounds: (1) that the State's request was waived, since it never requested any defense documents during the initial Rule 3.850 proceedings; (2) that the information sought to be discovered was protected under the attorney-client and work product privileges; and (3) the information sought to be discovered was irrelevant to the pending motion for postconviction relief. Without meaningfully addressing any of Mr. Trepal's arguments, the lower court granted the State's motion.

The lower court erred as a matter of law in requiring collateral counsel to provide information to the State which is protected under both the attorney-client and work product privileges. Moreover, even if such information is not protected by these privileges, the information sought is irrelevant to the disposition of the pending motion below, and thus Mr. Trepal should not have been required to disclose it.

A. THE STATE'S REQUEST IS WAIVED.

At no time during Mr. Trepal's initial collateral proceedings did the State seek access to trial counsel's files. Thus, the State's attempt to have access to a portion of counsel's files at this juncture must be deemed to be waived. As Mr. Trepal asserted below, "[t]he State's failure to request what

it should have requested before constitutes a waiver" (PC-R. 75). As this Court has clearly stated, procedural defaults apply equally to the State as well as to criminal defendants. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Moreover, in the context of the lack of diligence on part of a capital defendant from timely seeking his or her entitlement to public records from State agencies, the Court has also held that the failure to diligently seek records will result in a waiver of the issue, Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993), or a procedural bar. Porter v. State, 653 So. 2d 374 (Fla. 1995).

Here, the State's attempt to seek disclosure of portions of trial counsel's files was waived by its failure to do so at the proper time. For that reason, the State's belated request for discovery should have been denied, and the lower court's order should therefore be reversed.

B. THE MATTER SOUGHT TO BE DISCOVERED WERE AND REMAIN PRIVILEGED UNDER THE WORK PRODUCT PRIVILEGE AND/OR THE ATTORNEY CLIENT PRIVILEGE.

Prior to Mr. Trepal's trial, defense counsel retained confidential experts to conduct analysis on several evidentiary items, including samples from three (3) full bottles of Coca-Cola which allegedly contained a form of the poison thallium (known as items Q1, Q2, and Q3), as well as a small bottle allegedly found by law enforcement in a vacated shed on Mr. Trepal's vacated property which allegedly also contained a form of thallium (known as item Q206). The State then sought an order from the lower court compelling the defense to provide the names of the experts who examined the items, as well as any results of scientific testing including "reports or statements of experts made in connection with the case" (R. 5144).

At a hearing before the trial court, Mr. Trepal's defense counsel argued that the names of experts and any alleged conclusions were covered by the work product privilege:

> To begin with, Your Honor, I've got to tell you that we really don't have a report. We have some data that--that's all we have. It's our position, however, that it is work product. The reason is is because the date itself just because it's data that was requested from our expert contains the opinions and conclusions of the lawyer to a certain degree. Who the expert is itself is work product, he's not entitled to know that. We've not listed the expert as a witness.
>
> Case law is clear that statements from a witness the defendant does not intend to call at trial and we've not listed this guy, we

> don't intend to, we haven't conclusively made that decision but if we make it we'll make it within a couple of days. The statements of witnesses that are not intended to be called at trial do not have to be given up. The case is State versus Rabin. And it's our position, therefore, that anything that we got from the expert is clearly work product unless we list him as a witness. Under the rule, the defense does not have to disclose all witnesses, only ones they intend to call at trial. And, therefore, we don't believe we have to give it up.
>
> I don't know what the state could do with it anyway. I mean it's not very interesting. If that weren't true, Your Honor, it would inhibit defendants from hiring experts. It would violate due process, it would violate their right to effective representation of counsel if they knew that every expert they hired, if they get a report from the guy then they have to to--it could end up hurting the client.

(R. 5309-10). Following additional argument, the trial court took the State's motion under advisement, and eventually denied the motion in a written order (R. 5413-14).[4]

As noted above in Section A, supra, the State, upon the filing of Mr. Trepal's first Rule 3.850 motion which alleged, *inter alia*, instances of ineffective assistance of counsel, never sought to gain access to the defense attorney files in this case.[5] It was only after the *second* Rule 3.850 motion that the

[4]The order was an omnibus order on several motions, and did not discuss any reasoning for denying the motion to compel the discovery sought by the State.

[5]The defense attorney files were transmitted to Mr. Trepal's collateral counsel, and of course, the State is not entitled to access to current counsel's files. Kight v. Dugger, 574 So. 2d

State essentially filed the same motion for discovery as it did prior to trial.

As with the situation pre-trial, the names of the confidential experts and any results, opinions, conclusions, etc. emanating from that testing remain privileged under both the work product and attorney-client privileges for the reasons set forth below.

1. The Attorney-Client Privilege.

Assuming *arguendo* that the State's request for information was timely made at this juncture,[6] the fact remains that the names of the confidential expert as well as any results from any testing conducted by that expert remains privileged under the attorney-client privilege. "The attorney-client privilege is one of the oldest recognized privileges for confidential communications." Swidler & Berlin et. al. v. United States, 118 S. Ct. 2081, 2084 (1998).

In Reed v. State, 640 So. 2d 1094 (Fla. 1994), this Court carved out a narrow exception to the attorney-client privilege such that "conversations between the defendant and his or her trial lawyer relevant to ineffective assistance of counsel are not protected by the attorney-client privilege." Id. at 1097. The Court then concluded that the waiver extended to trial

(..continued)
1066 (Fla. 1990).

[6] But see Section A, supra.

counsel's files because "[t]he passage of time often dims the recollection of a defendant's original trial counsel with respect to client conversations and trial strategies. At the least, it is only fair that the State should have a right to refresh counsel's recollection concerning these matters by reference to the attorney's files." Id. (emphasis added). Accord LeCroy v. State, 641 So. 2d 853 (Fla. 1994) (quashing order compelling trial counsel to peruse files and provide State with materials relevant to defendant's ineffective assistance of counsel claim and remanding with directions to comply with Reed).

The instant situation is goverened neither by Reed nor LeCroy. Rather, as discussed below, Mr. Trepal asserts that Lovette v. State, 636 So. 2d 1304 (Fla. 1994), is the case most on point. Unlike the situation addressed in Reed and LeCroy, the State here has made no contention that there were any conversations between defense counsel and Mr. Trepal that it wished to discover, nor that defense counsel failed to recollect such discussions, regarding the FBI Lab issue. The lower court acknowledged that "the core and root of this thing is the FBI tests," and the State has conceded that Mr. Trepal's trial attorneys did not have the disputed information. Moreover, and most significantly, there has been no allegation that defense counsel failed to present the information gleaned from the

Georgia Tech testing.[7] Such was the case in Reed, where the defendant had alleged that trial counsel's files contained "critical but ignored evidence." Reed, 640 So. 2d at 1097 n.3. Under those circumstances, the Court held that the collateral litigant would be required to disclose information "ordinarily protected under the work-product doctrine." Id. at 1097.

On the other hand, in Mr. Trepal's case, the State has simply asserted its entitlement to this information based on the filing of the initial 3.850 motion alleging ineffective assistance of counsel. Reed is therefore totally inapposite, and should not be extended to the instant situation where the State seeks access to information gleaned during the course of pretrial preparation which in no way is at issue in the present proceedings, and is entirely irrelevant. See Section C, infra.[8] See Shafnaker v. Clayton, 680 So. 2d 1109, 1111 (Fla. 1st DCA

[7]Mr. Trepal acknowledges that if he had claimed, for example, that trial counsel unreasonably failed to present the Georgia Tech information at trial, such an allegation could open the door and provide a basis, under Reed, to disclose any such information to the State upon request. However, as indicated above, no such allegation has been made in the instant proceedings, and would only have been proper in Mr. Trepal's first 3.850 anyway. As also noted above, the State never sought access to any defense files during the litigation of the first 3.850 motion.

[8]Again, this is not like Reed, where the defendant had claimed that information in the trial attorney's files was not presented by defense counsel, or that the file did not contain the deposition of a witness. Reed, 640 So. 2d at 1097 n.3.

1996) (quashing discovery order in legal malpractice action because waiver of attorney-client privilege is "very limited, applying only to the particular transaction which resulted in the malpractice action, and not to any other aspects of the relationship between client and attorney").

The issue in Mr. Trepal's current Rule 3.850 motion is whether there was a Brady and/or Giglio violation with respect to the government's failure to disclose the information that has come to light following the issuance of the Inspector General's Report.[9] The inquiry of defense counsel, thus, would entail whether they in fact did not have the information,[10] the significance of that information in terms of the State's case, and what they would have done had they had the information. This inquiry has nothing to do with the Georgia Tech testing, nor

[9]In his Rule 3.850 motion, Mr. Trepal did allege that, *to the extent that the State would argue that trial counsel could have discovered the evidence with due diligence*, then trial counsel performed deficiently (PC-R. 49-50) ("to the extent that the State may argue, contrary to the findings of the federal government and the Department of Justice, that counsel should have known, counsel rendered ineffective assistance of counsel"). To be sure, however, the State's concession below in these proceedings conclusively establishes that trial counsel could not have discovered this information. The prosecutor argued below that "I will stipulate that [the defense] did not, in fact have [the FBI's notes and charts regarding all of the scientific testing conducted in Mr. Trepal's case]," that he "would have opposed" any request made for the information, that "[t]hey, in fact, did not have those, because they certainly didn't get them from me," and that "I know of no other way they could have gotten them out of the FBI" (T. 25-26)(Appendix).

[10]An issue conceded by the State below. See supra n.9.

would this inquiry in any way open the door to a waiver of the privilege with respect to the Georgia Tech testing.[11]

An analogy perhaps best demonstrates the fallacy of the lower court's and the State's arguments. Assume that a defendant, in a Rule 3.850 motion, has alleged that the State unlawfully withheld information that an individual who is not the defendant committed the crime. Moreover, assume that the defendant had provided a confession to the crime that was either

[11]The State's mere assertion that the information sought is allegedly "relevant" to the issues in Mr. Trepal's Rule 3.850 is not sufficient to pierce the privilege. In Coyne v. Schwartz, Gold, Cohen, Zakarin, & Kotler, 715 So. 2d 1021 (Fla. 4th DCA 1998), the Fourth District Court of Appeals addressed an analogous situation. There, the petitioners, who were plaintiffs in a lawsuit for legal malpractice against the defendant law firm, sought review of a lower court order granting defendant's discovery notwithstanding claims of attorney-client and work product privilege. Petitioners had claimed that certain information sought to be discovered by the defendant were privileged, but the defendant argued that "any such privileges were waived when petitioners sued the attorneys representing them." Id. at 1022. On appeal, the Fourth DCA reversed the discovery order on attorney-client privilege grounds, noting, in a passage especially relevant to Mr. Trepal's situation:

> We recognize that the fact that respondents have pointed to the negligence of the successor [law] firm as a defense to the malpractice suit may make the requested documents relevant. Nevertheless, here, [ ] the mere relevance of those documents does not override the privilege. Thus, we grant the petition for certiorari as to the claim of attorney-client privilege.

Id. at 1023 (emphasis added).

orally communicated to trial counsel or put it in writing, and such a document is contained in the defense files. Certainly, under the law, the fact that the defendant had confessed to the crime to his counsel would remain privileged and would have nothing to do with a proper resolution of the Brady claim. Under Brady, materiality is not determined by a sufficiency-of-the-evidence analysis. Kyles v. Whitley, 514 U.S. 419, 434-35 & n.8 (1995). Rather, the test is whether "the favorable [withheld] evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. Thus, under the hypothetical, the fact that a defendant confessed to his lawyer in no way precludes a finding of a material Brady violation. Such a conclusion would mean, for example, that a defendant who pled guilty could never receive a new trial based on a Brady violation or, for that matter, ineffective assistance of counsel. Such is not the law.

In Mr. Trepal's case, the fact that the defense conducted independent testing of the evidence in no way impacts on the proper legal analysis for the issues in the case, that is, whether the defense knew of the withheld FBI information, and whether that information was material for Brady purposes. Therefore, the privilege must remain intact, even under the Reed interpretation.

As noted above, Mr. Trepal asserts that Lovette v. State,

636 So. 2d 1304 (Fla. 1994), is the most analogous case and should control the analysis. In Lovette, the defense had obtained a confidential mental health examination of the defendant. A defense discovery response listed the expert as a witness with the words "penalty phase only" next to his name, but the defense later decided not to call the expert at all. Id. at 1307. During trial, the State announced its intention to call the expert, and the defense objected on numerous grounds, including attorney-client privilege. Id. at 1308. In reversing for a resentencing, this Court first observed that "the state failed to show a valid waiver of the attorney/client privilege regarding the mental health examination." Id. The Court thus held that "the state cannot elicit specific facts about a crime learned by a confidential expert through an examination of a defendant unless that defendant waives the attorney/client privilege by calling the expert to testify and opens the inquiry to collateral issues." Id. Accord Sanders v. State, 707 So. 2d 664 (Fla. 1998); Pouncy v. State, 353 So. 2d 640 (Fla. 3d DCA 1977).

As in Lovette, the State in Mr. Trepal's case is seeking to discover information learned through a confidential examination conducted by an expert. Mr. Trepal's situation is even more compelling than in Lovette, for Mr. Trepal never even listed any Georgia Tech witnesses on a witness list, much less removed them

later on, like in Lovette. Just as the State could not elicit information from the expert in Lovette due to the attorney-client privilege, the same result should obtain in Mr. Trepal's case. Again, there is no evidence whatsoever that Mr. Trepal has waived his privilege as to this issue, and neither Reed nor LeCroy stand for the proposition that the filing of a 3.850 motion results in a *carte blanche* waiver.

2. The Work Product Privilege.

As noted above, prior to Mr. Trepal's trial, the State attempted to elicit discovery of the Georgia Tech testing, and defense counsel argued that such information was privileged under the work product doctrine; the trial court denied the State's motion. Because there is no justification for a waiver of that privilege at this time, Mr. Trepal asserts that the privileged nature of the materials remained in place when collateral counsel were provided with Mr. Trepal's trial attorney files. Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990). This situation is no different from when a State agency receives confidential materials from another agency and claims that said materials retained their exempt status even though custody of the materials has been transferred. Ragsdale v. State, 720 So. 2d 203, 206 (Fla. 1998) ("if the State has access to information that is exempt from public records disclosure due to confidentiality of other public policy concerns, that information does not lose its

exempt status simply because it was provided to the State during the course of its criminal investigation"). This situation is also analogous to the fundamental principle that "clients and their respective attorneys sharing common litigation interests may exchange information freely among themselves without fear that by their exchange they will forfeit the protection of the privilege." Visual Scene, Inc. v. Pilkington Brothers, 508 So. 2d 437, 440 (Fla. 3d DCA 1987).

The documents sought to be discovered by the State are privileged under the work product doctrine. "[T]he work product privilege is designed to promote the adversary system by protecting an attorney's trial preparations, not necessarily from the rest of the world, but from an opposing party in litigation." Id. at 442. Even if the lower court was correct, and this Court agrees, that the attorney-client privilege has been waived, "[w]aiver of the attorney-client privilege does not automatically result in a waiver of the work product privilege." Ehrhardt, FLORIDA EVIDENCE, ¶ 502.9. Accord Visual Scene, 508 So. 2d at 442 ("Because the purposes of the two privileges are different, a waiver of the attorney-client privilege, designed to protect client confidentiality, does not in itself constitute a waiver of the work product privilege, designed `to protect the legal craftsman in the product of his labors'"). The lower court's and the State's assertions below that a waiver of the attorney-client

privilege automatically resulted in a waiver of the work product privilege is thus erroneous.

In Toward v. Cooper, 634 So. 2d 760 (Fla. 4th DCA 1994), the Fourth Circuit addressed a situation where plaintiffs instituted a lawsuit alleging that students at a day care facility were sexually molested by Toward. Toward, who had previously been prosecuted criminally, had hired and consulted with Dr. Harry Krop during Toward's criminal prosecution. The plaintiffs sought Krop's materials in discovery during the civil litigation, and Toward's assertions of work product were overruled. On review by the Fourth DCA, the Court addressed the contention that "any work product created by Dr. Krop in the criminal case does not retain its status as work product in the present civil suits." Id. at 761. The Court rejected this contention, holding that "work product retains its qualified immunity after the original litigation terminates, regardless of whether or not the subsequent litigation is related." Id.

Mr. Trepal's case is not different. Here, the defense hired an expert and never named the expert as a witness nor called him as a witness. Prior to trial, the State's attempt to secure this information was rejected based on work product. In postconviction, the State has made the identical request, yet there is nothing that has changed with respect to the work product privileged information. Mr. Trepal has not alleged

anything with respect to the privileged information. Just because the State may desire to know the contents of the information, or believes it is somehow relevant, does not overcome the privileged nature of the information. "[T]he mere relevance of those documents does not override the privilege." Coyne, 715 So. 2d at 1023. The lower court's order should be quashed and/or reversed.

C. THE MATTERS SOUGHT TO BE DISCOVERED WERE AND ARE IRRELEVANT TO THE PENDING PROCEEDINGS.

In addition to being privileged under both the attorney-client and work product privileges, the information sought to be discovered by the State in these proceedings is also irrelevant, and thus improperly the subject of an order compelling discovery. In State v. Lewis, 656 So. 2d 1248 (Fla. 1995), this Court held that under certain exceptional circumstances, discovery in Rule 3.850 proceedings could be granted, noting, however that it was a "limited form of discovery." Id. at 1250. A party in Rule 3.850 proceedings is only allowed "limited discovery into matters which are relevant and material" and on a showing of "good reason." Id. (quoting Davis v. State, 624 So. 2d 282 (Fla. 3d DCA 1993).

Here, the matters sought to be discovered are neither relevant nor material to the issues presented in Mr. Trepal's Rule 3.850 motion. As noted elsewhere in this brief, Mr. Trepal alleged violations of Brady and Giglio regarding the FBI laboratory's scientific work in Mr. Trepal's case, as well as newly discovered evidence contained in the Inspector General's Report. The lower court, however, found that the pre-trial testing of some of the evidentiary items used by the State at trial would be relevant simply because "it would be a miscarriage of justice not to make this information available" (PC-R. 92). Nowhere in the lower court's ruling is the required showing under Lewis made.[12] The pretrial scientific testing has nothing to do

[12]The materials are not relevant simply because the State asserts they are.

with whether a Brady or Giglio violation occurred when the government failed to disclose to the defense the testing and notes of Roger Martz, nor does it have anything to do with Martz's untruthful testimony at trial.

Not only are the materials not relevant, the lower court was laboring under a misperception of a defense attorney's role in defending a criminal client which tainted his ruling on the discovery issue. For example, the lower court judge believed that a defense attorney was ethically precluded from challenging the conclusions of a state expert, even if the defense had a confidential expert which essentially agreed with the State's expert (PC-R. 87-89). In fact, the lower court believed that if counsel had "information that contradicted what you were asserting to the Court, . . . as an officer of the Court, you couldn't do it" (PC-R. 88). This is the antithesis of legal advocacy. This is not to say that an attorney, defense or otherwise, can provide false information to a court. However, that is not the issue. The issue is whether an advocate can challenge the conclusions of a state witness even if that lawyer has information that does not contradict the State's expert. Under the lower court's view, a defense attorney could not ethically challenge a State expert's finding that a client was competent to proceed if the defense's own expert also found the client competent to proceed. While a defense attorney may not choose to challenge the State's expert, the attorney is absolutely not ethically precluded from doing so.

Thus, Mr. Trepal submits that the documents sought to be discovered by the State are not relevant and not material to any pending issue, and should not have been disclosed under Lewis.

Mr. Trepal submits that the Court reverse and/or quash the order of the circuit court compelling collateral counsel to disclose materials which are protected by the attorney-client privilege, the work product privilege, and are irrelevant and immaterial to any pending matter.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 24, 1999.

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