

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

DONNALE C. CLAY,

Movant,

vs.

UNITED STATES OF AMERICA.

No. C11-0121-LRR

No. CR09-0005-LRR

ORDER

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This matter appears before the court on Donnale C. Clay's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (docket no. 1). Donnale C. Clay ("the movant") filed such motion on November 14, 2011.

With respect to the merits of the current motion, the court notes that a cursory review indicates the following: (1) the movant fails to assert any facts in support of his failure to investigate claim, (2) the record, which includes the exhibits that he submitted in support of his motion, contradicts his general assertion that defense counsel did not adequately investigate his case, (3) defense counsel did file a motion to suppress (*see* docket nos. 21, 24, 25 and 28), (4) the record negates the movant's assertion that a Fourth Amendment violation occurred, especially considering that defense counsel acknowledges the existence of a search warrant and defense counsel admits that the government included in its discovery file a copy of such search warrant, (5) the movant's assertion that he did not knowingly and voluntarily plead guilty to a valid plea agreement is belied by his repeated admissions (*see* docket nos. 26, 35, 36, 37, 38, 77 & 79), (6) the movant does not provide any details as to how the government improperly interfered during his sentencing hearing and seems to imply that he is merely dissatisfied with the terms of his plea agreement, (7) the movant is unable to now contest the portions of his pre-sentence investigation report that he did not lodge an objection and (8) the movant makes no attempt

to explain how it is that defense counsel caused him to suffer any prejudice. Despite the fact that the court's preliminary consideration of the movant's § 2255 motion pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings suggests that the movant's ineffective assistance of counsel claims are frivolous, the court directs the government and the movant to respond in the following manner:

1. The government is directed to file a brief in response to the movant's § 2255 motion on or before January 13, 2012. The government may attach relevant exhibits to its brief.
2. If he so chooses, the movant is directed to file a brief in reply to the government's response on or before January 28, 2012.

The movant raises at least one claim of ineffective assistance of counsel. A claim of ineffective assistance of counsel waives the attorney-client privilege as to communications with the attorney that are necessary to prove or disprove the claim. *See Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) ("When a client calls into public question the competence of his attorney, the privilege is waived."); *see also United States v. Pinson*, 584 F.3d 972, 978 (10th Cir. 2009) (citing *Tasby*, 504 F.2d at 336); *United States v. Davis*, 583 F.3d 1081, 1090 (8th Cir. 2009) (making clear that attorney-client privilege cannot be used as both a sword and a shield); *In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005) (citing *Tasby*, 504 F.2d at 336); *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003) (addressing scope of waiver); *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir. 1986) (permitting an attorney to reveal otherwise privileged communications when defending himself against charges of improper conduct); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956) (indicating that waiver may be express or implied). Therefore, counsel whose representation is challenged is directed to file with the court an affidavit that responds only to the movant's specific allegation(s) of ineffective assistance of counsel. Such affidavit must contain all of the information that counsel reasonably believes is necessary to respond to the movant's specific allegation(s). In addition, counsel

is directed to attach to, or include with, his or her affidavit all of the documents that he or she reasonably believes are necessary to respond to the movant's allegation(s). This court-supervised response to the movant's allegation(s) must be filed with the court on or before December 13, 2011. The clerk's office is directed to provide a copy of this order to the movant's former counsel.<sup>1</sup>

Where former counsel cooperates by reviewing his or her files, by providing information and documents, by preparing an affidavit and/or by testifying during an evidentiary hearing, the court deems it appropriate to pay him or her under the Criminal Justice Act, 18 U.S.C. § 3006A. After providing the requisite services, counsel may submit a supplemental CJA 20 voucher. Absent exceptional circumstances or an extraordinary reason for doing so, counsel's claim for services should not exceed 10 hours

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<sup>1</sup> The American Bar Association provides guidance as to when an attorney may reveal information that relates to the representation of a client who alleges ineffective assistance of counsel. Specifically, the ABA, in relevant part, states:

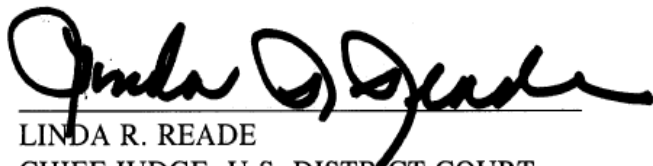
[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary [. . .] to respond to allegations in any proceeding concerning the lawyer's representation of the client [or] to comply with other law or a court order.

ABA Model Rules of Prof'l Conduct R. 1.6(b)(5)-(6); *see also* ABA Model Rules of Prof'l Conduct R. 1.6 cmt. 12-15 (addressing disclosures that are adverse to the client). Concerning Model Rule 1.6, counsel is advised to read ABA Formal Opinion 10-456, Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010). It may be accessed at the following website: [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/ethics\\_opinion\\_10\\_456.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf). Alternatively, such opinion may be accessed by visiting the ABA's website and typing into the search feature "10-456". If counsel concludes that he or she cannot comply with this order without violating an attorney-client privilege or if counsel concludes that he or she cannot reasonably determine the scope of the waiver of the attorney-client privilege, counsel is directed to file a response that specifically states the reasons for his or her conclusion. To comply with this order, counsel must file either an affidavit, a response or, if appropriate, a combination of the two by the required date.

and claim for other expenses should not exceed \$250.00.

**IT IS SO ORDERED.**

**DATED** this 15th day of November, 2011.

A handwritten signature in black ink, appearing to read "Linda R. Reade", written over a horizontal line.

LINDA R. READE  
CHIEF JUDGE, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA