FILED
SID J. WHITE
MAY 18 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES C. AGAN, et al.,

Appellants,

v. CASE NO. 83,047

FLORIDA BOARD OF EXECUTIVE CLEMENCY,

Appellee.

JAMES C. AGAN, et al.,

Appellants,

v. CASE NO. 83,048

FLORIDA PAROLE COMMISSION,

Appellee.

MARK ASAY,

Appellant,

v. CASE NO. 82,732

FLORIDA PAROLE COMMISSION AND
BOARD OF EXECUTIVE CLEMENCY,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE BOARD OF EXECUTIVE CLEMENCY

MARK SCHLAKMAN
ASSISTANT GENERAL COUNSEL

OFFICE OF THE GOVERNOR
THE CAPITOL, SUITE 209
TALLAHASSEE, FL 32399-0001

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellees adopt the statement of the case and facts presented by Appellants to the extent that they adequately represent the dates documents were filed and the orders which resulted. As to argumentative statements contained therein, Appellees reject same as being improper.

With regard to the facts of each case, the record before this Court is absolutely devoid of any specific factual assertion that a Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), violation has occurred or that the Executive Branch is subject to Brady. If anything, the allegations contained in the complaints filed in the trial courts fail to state a cause of action because the crux of each complaint is that Appellees have "refused to provide the plaintiff with any public records, regardless of whether such materials must be disclosed pursuant to Brady and Walton."

The trial court, in Rose, et al. v. Florida Board of Executive Clemency, Case No. 93-4047, found:

> (1) The Board of Executive Clemency, in reviewing matters involving Executive Clemency, is performing a purely executive branch function.
>
> (2) By virtue of separation of powers principles articulated within the Florida Constitution, this trial court is without any legal basis to encroach upon these executive powers expressly granted by our Constitution to the Governor and the Cabinet.
>
> (3) Because Plaintiffs' amended complaint asks this Court to compel the Board of Executive Clemency to disclose unspecified alleged Brady materials, it fails to state a cause of action as a matter of law and should be, and is hereby, dismissed with prejudice.

(4) The Court certifies the following question to the Florida Supreme Court as a matter of great public importance:

> WHETHER AND TO WHAT EXTENT A FLORIDA STATE COURT MAY COMPEL THE BOARD OF EXECUTIVE CLEMENCY TO DISCLOSE UNSPECIFIED ALLEGED BRADY MATERIALS, OBTAINED BY THE BOARD OF EXECUTIVE CLEMENCY RELATING TO ITS INVESTIGATION OF MATTERS INVOLVING EXECUTIVE CLEMENCY.

(Final Order of Dismissal with Prejudice, dated December 14, 1993). Rose v. Florida Board of Executive Clemency, Case No. 93-4047, et al.).

The record reflects, and Appellants do not otherwise state, that Appellants have failed to provide any basis in law or in fact to demonstrate that Brady v. Maryland, supra, applies to the Executive Clemency Board or the Florida Parole Commission functioning on behalf of the Executive Clemency Board, or that Appellants have been denied access to clemency files by the Office of the Governor based on a general request submitted to the Governor.[1]

Finally, the subject orders of discussion clearly indicate that the parties stipulated that the dismissal of the Appellants' actions in the circuit court would constitute a dismissal with prejudice in order to permit the Appellants to seek further review, at their discretion. The parties did not, pursuant to the plain language of the orders, stipulate to the certified question.

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[1] Appellees reject any contention by Appellants that the Executive maintains either secret files or exculpatory matters which are not subject to Rule 16, Rules of Executive Clemency.

SUMMARY OF ARGUMENT

The Governor and the Florida Cabinet, sitting as the Board of Executive Clemency ("Board"), are performing a purely executive branch function and are not, therefore, subject to judicial encroachment. The Rules of Executive Clemency set forth a manner in which the Board may operate pursuant to the constitutional powers granted by Art. IV, Section 8(a), Fla.Const. Appellants have failed to state a cause of action upon which relief may be granted, since neither constitutional mandate nor case law authorizes judicial intervention upon the executive clemency function based on Appellants unspecified, alleged Brady assertion.

POINT ON APPEAL

WHETHER AND TO WHAT EXTENT A FLORIDA STATE COURT MAY COMPEL THE FLORIDA PAROLE COMMISSION, ACTING ON BEHALF OF THE BOARD OF EXECUTIVE CLEMENCY, TO DISCLOSE UNSPECIFIED ALLEGED BRADY MATERIALS, OBTAINED BY THE BOARD OF EXECUTIVE CLEMENCY RELATING TO ITS INVESTIGATION OF MATTERS INVOLVING EXECUTIVE CLEMENCY

Appellants argue that the aforecited question presents a matter before this Court of great public importance. Presumably, this issue attempts to address footnote 3 in Parole Commission v. Lockett, 620 So.2d 153, 158 (Fla. 1993), wherein the court declined to address the issue of the Governor's responsibility, acting on behalf of the Florida Board of Executive Clemency, or any other governmental entity, to provide a defendant with exculpatory evidence as constitutionally required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Perhaps the first inquiry that needs to be addressed is whether any controversy currently exists. Appellants are attempting to obtain unspecified information from the Governor and the Florida Cabinet, sitting as the Executive Clemency Board, by asserting that it possesses secret, exculpatory information that has not previously been disclosed. Having failed on an initial attempt to secure the executive clemency files pursuant to Chapter 119, Fla.Stat., Appellants are still attempting to utilize the courts, citing Hoffman v. State, 613 So.2d 405 (Fla. 1992), to secure executive clemency files pursuant to an alleged Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), violation. Interestingly, there is nothing in this record to reflect that had the Appellants simply requested of the

Governor's Office to see the executive clemency files, that those files would not have been generally made available. See Rule 16 of the Rules of Executive Clemency, Confidentiality of Records and Documents, which reads, in material part:

> Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in a clemency process is set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. The Governor has the sole discretion to allow records and documents to be inspected and copied.

(Emphasis added).

In Parole Commission v. Lockett,[2] supra, this Court, faced with the question of whether the judicial branch can interfere with the clemency process by ordering the Parole Commission to comply with a Chapter 119, Fla.Stat., request, concluded that in Sullivan v. Askew, 348 So.2d 312 (Fla. 1977); In Re Advisory Opinion to the Governor, 334 So.2d 561 (Fla. 1976), and Turner v. Wainwright, 379 So.2d 148 (Fla. 1st DCA 1980), the Governor's Executive Clemency powers are independent of both the Legislature and the Judiciary.

The Court further observed:

> We note, however, that, while these rules expressly make this sensitive information confidential, they also give to the Governor the sole authority for making such records public. We are disturbed that no attempt was

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[2] Effective July 1, 1993, s. 14.28, Fla.Stat., codified such case law by providing a specific exemption for "All records developed or received by any state entity relating to a Board of Executive Clemency investigation" from ch. 119, Fla.Stat, disclosure provisions.

> made by the Capital Collateral Representative to request the Governor to exercise his authority either to make the records or to allow the Capital Collateral Representative to examine them in camera with counsel for the State . . .

620 So.2d at 158.

Having no basis to acquire clemency files through a public records demand, Appellants now seek to reinvoke judicial encroachment upon executive clemency via an assertion of "due process", claiming a Brady violation. Without citation to any controlling authority or constitutional mandate, Appellants have merely repeated prior arguments and added constitutional catch-phrases. It is difficult, indeed, almost impossible, to assert any due process violation where neither right nor violation exists.

The trial court initially concluded no relief should be granted because the Executive Clemency Board and the Florida Parole Commission, in reviewing matters involving executive clemency, were performing a purely executive branch function. As detailed in Parole Commission v. Lockett, 620 So.2d at 155, Art. IV, Section 8(a), of the Florida Constitution creates the Clemency Board and provides, in material part:

> Except in cases of treason and in cases where impeachment results in conviction, the Governor may, by Executive Order filed with the Secretary of State, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the Cabinet, grant full or conditional pardons, restore civil rights, commute punishment and remit fines and forfeitures for offenses.

To that end, the Appellants have not challenged the authority of the Executive Clemency Board to perform its task, but rather seek to instigate judicial review to secure unspecified materials collected by the Executive, presumed to be exculpatory. On its face, Appellants have failed to state a cause of action upon which relief may be granted by a trial court. See Sullivan v. Askew, supra.

The trial court further concluded that it was "without any legal basis to encroach upon these executive powers expressly granted by our Constitution to the Governor and Cabinet." Appellants argue that the decision in Hoffman v. State, 613 So.2d 405 (Fla. 1992); State v. Kokal, 562 So.2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Engle v. Dugger, 576 So.2d 696 (Fla. 1991), and Muehlemann v. Dugger, 624 So.2d 480 (Fla. 1993), mandate that, "these decisions in the public records context . . . [have] already indicated that Appellants are entitled to those portions of Appellee's records that are exculpatory in nature." (Appellant's Brief, page 18). Appellants are incorrect. Albeit, sheriffs offices, police departments, county jails, and medical examiners are subject to the public records law, and are also responsible for disclosure of exculpatory evidence under Brady, each of the aforenoted entities are required to do so because they are governed by Chapter 119, Fla.Stat. For example, the court, in Muehlemann v. Dugger, supra, held that capital post-conviction defendants are entitled to disclosure pursuant to a state public records law demand. In Hoffman v. State, supra, the court acknowledged that

a State Attorney's Office may not have control or possession of records from other agencies, therefore, requests for public records should be pursued pursuant to the procedures in Chapter 119, Fla.Stat. ". . . [A]ll public records in the hands of the prosecuting State Attorney are subject to disclosure by way of motion under Fla.R.Crim.P. 3.850, even if they include the records of outside agencies. Likewise, the public records of the local sheriff and any police department within the circuit that was involved in the investigation of the case may also be obtained in the manner outlined in Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990)." 613 So.2d at 406.[3]

None of the authority cited by Appellants suggests that the Executive Clemency Board, and/or the Florida Parole Commission, acting on behalf of the Executive Clemency Board, subjects itself to judicial encroachment simply because Appellants allege that the Executive has "secret" files.

The trial court also held that Appellants failed to state a cause of action by assereting that the Florida Parole Commission and the Executive Clemency Board had not disclosed unspecified alleged Brady materials. The trial court was absolutely correct on this point and Appellants have pointed to no case authority to suggest the contrary. The holding in Brady v. Maryland, supra,

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[3] See Rule 3.220, Fla.R.Crim.P., which sets forth discovery standards for parties. Currently, the issue is highly contentious as to whether discovery extends to "collateral litigation". Capital defendants have circumvented the issue of discovery for collateral purposes by exercising Chapter 119, Fla.Stat., rights. Interestingly, Appellants now seek to assert some aberrant discovery right where there is absolutely no right to public access. Parole Commission v. Lockett, supra.

requires disclosure of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S. at 87. As explained in United States v. Agurs, 427 U.S. 97 (1976), "a fair analysis of Brady indicates that implicit in the requirements of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."

The investigation and collection of information for purposes of executive clemency consideration is done to facilitate the Executive in ascertaining whether to exercise this completely discretionrary constitutional prerogative. Generally, information is gathered long after all the facts and circumstances of a case have occurred, long after trial, conviction and sentencing, and long after appellate review has been initiated. In the capital arena, clemency consideration occurs at some point subsequent to direct appeal litigation and prior to issuance ot a death warrant. Rule 15, Rules of Executive Clemency, provides:

> . . . the Florida Parole Commission shall conduct a thorough and detailed investigation into all factors relevant to the issue of clemency. The investigation shall include (1) an interview with the inmate (who may have legal counsel present) by at least three members of the Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; and (3) an overview, if possible, with the victim's family. . . .

Appellants have been unable to provide a single case that suggests that Brady extends to the executive clemency function. Moreover, the Appellants' reliance upon Walton v. State, 621

So.2d 1357 (Fla. 1993), is misplaced.[4] Such case merely suggests a duty exists to disclose exculpatory materials possessed by the prosecution at the collateral level of litigation.

The United States Supreme Court in United States v. Bagley, 473 U.S. 662, 675 (1985), held:

> The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to insure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:
>
> > For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose . . . .
> >
> > . . . but to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.
>
> (cite omitted) (emphasis added).

87 L.Ed.2d at 472-473.

Further:

> We find that Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: the evidence is material only if there is a reasonable

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[4] A review of volume 621 So.2d at 1357, reveals that said opinion was withdrawn from the reporter system.

> probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine the confidence in the outcome.

473 U.S. at 682 (emphasis added).

What is contemplated by Brady and subsequent cases is that the State, in prosecuting an individual, should not take unfair advantage of a defendant by withholding knowledge that might otherwise be of assistance in the development of his defense. Appellants have not, and are unable to identify any circumstance where, sitting as the Board of Executive Clemency, the Governor and the Florida Cabinet serve in any prosecutorial capacity. Indeed, if anything, the Executive is seeking information in order to determine whether clemency may be appropriate. As recognized in Herrera v. Collins, 506 U.S. ___, 122 L.Ed.2d 203, 113 S.Ct. ___ (1993), the clemency process is an extrajudicial alternative to litigation that, historically, exists to provide a "fail safe" for our criminal justice system. See K. Moore, Pardons: Justice, Mercy and the Public Interest, 131 (1989), and Kobil, The Quality of Mercy Strained: Wresting the Pardoning Power from the King, 69 Texas Law Review 569 (1991). (Clemency is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted).

Appellants' reliance on Pennsylvania v. Ritchie, 107 S.Ct. 989 (1987), and United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992), is misplaced in the context of whether Brady applies to the extrajudicial clemency process. In Ritchie, the duty to disclose was found to be ongoing because disclosure of

information concerning files of Children and Youth Services was germane to Ritchie's attempts to defend himself in a criminal prosecution. Likewise, Brooks, dealt with a prosecutor's continuing responsibility to disclose in a criminal proceeding. Moreover, Appellants' reliance on Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992), is similarly misplaced with regard to the applicability of Brady to clemency proceedings. In Thomas v. Goldsmith, supra, the Ninth Circuit held that information suppressed by the prosecution was discoverable even where an evidentiary hearing was ordered in federal court regarding possible exculpatory evidence that existed at the time of trial.

Finally, the Executive Clemency Board would submit that this very issue was decided adversely to Appellants interests in Roy Allen Stewart v. Harry K. Singletary, Case No. 94-0754-Civ-Ryskamp, United States District Court, Southern District of Florida, earlier this year. In an order dated April 19, 1994, Judge Ryskamp concluded as to Stewart's Claim IV, that, "the petitioner claims that the Florida Parole Commission and the Board of Executive Clemency have withheld documents that are potentially exculpatory. The Court finds that this claim is meritless under Brady."

CONCLUSION

The Circuit Court properly held that it was without jurisdiction or authority to order either the Parole Commission, acting on behalf of the Executive Clemency Board, or the Executive Clemency Board itself, in performing this purely executive function, to turn over clemency files or permit the

trial court to inspect such files based upon unspecific Brady assertions made by Appellants. Implicit within the trial court's ruling was that the Executive Clemency Board neither prosecutes nor acts in any such adversarial capacity. Therefore, there is neither case authority nor constituitional mandate that would support a conclusion that Brady applies to the executive clemency function. As noted in Herrera v. Collins, 122 L.Ed.2d at 227:[5]

> As the foregoing discussion illustrates, in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant. Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of underlying state criminal proceedings. Our federal habeas cases have treated claims of 'actual innocence,' not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been Executive Clemency.

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[5] Albeit, Herrera was ultimately decided on whether a claim of "actual innocence" is cognizable in federal habeas corpus litigation, the initial litigation in federal court raised a Brady claim on "newly discovered evidence". The Court of Appeals . . . "agreed with the District Court's initial conclusion that there was no evidentiary basis for petitioner's Brady claim, and found disingenuous petitioner's attempt to couch his claim of actual innocence in Brady terms. . . ." 122 L.Ed.2d at 215.

Based on the foregoing, the trial court's order denying Appellants' relief should be affirmed.

Respectfully submitted,

MARK R. SCHLAKMAN
Assistant General Counsel
Florida Bar No. 0843067

OFFICE OF THE GOVERNOR
The Capitol, Suite 209
Tallahassee, FL 32399-0001
(904) 488-3494

COUNSEL FOR APPELLEE

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Daren L. Shippy, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301; to Mr. William Camper, General Counsel, Florida Parole Commission, 1309 Winewood Boulevard, Building 6, Tallahassee, Florida 32399-2450, and to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 17th day of May, 1994.

MARK SCHLAKMAN
Assistant General Counsel