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 FLORIDA BOARD OF EXECUTIVE CLEMENCY,

Appellees.

****

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

INITIAL BRIEF OF APPELLANTS

MICHAEL J. MINERVA
Capital Collateral
Representative
Florida Bar No. 092487

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

DAREN L. SHIPPY
Assistant CCR
Florida Bar No. 0508810

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Citations in this brief are as follows: The records on appeal are referred to as (1) in the Asay appeal(case number 82,732) "Asay R. ___" followed by the appropriate page number; (2) in the Agan, et.al. appeal against the Florida Board of Executive Clemency(case number 83,047) "Agan-1 R.___" followed by the appropriate page number; and (3) in the Agan, et.al. appeal against the Florida Parole Commission(case number 83,048) "Agan-2 R.___" followed by the appropriate page number. All other references are self-explanatory or will be otherwise explained.

Plaintiffs below will be referred to as "appellants" unless otherwise indicated. Defendants below will be referred to collectively as "appellees" unless otherwise indicated.

REQUEST FOR ORAL ARGUMENT

Every appellant is under sentence of death. The resolution of the issue in this case may determine if they live or die. An opportunity to argue the issue before this court via oral argument is appropriate in light of the seriousness of the issue and the consequences involved. Appellants request an oral argument.

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STATEMENT OF THE CASE AND OF THE FACTS

1. The Asay Case (Case No. 82,732).

On April 28, 1993 Mark James Asay, a death-sentenced individual, filed in the Circuit Court of Leon County a Complaint for Disclosure of Public Records against the Florida Board of Executive Clemency [hereinafter Clemency Board]. The case was assigned lower court case number 93-1706 (Asay R. 1-7).[1]

Mr. Asay then filed an Amended Complaint for Disclosure of Records on June 17, 1993, against the Clemency Board (Asay R. 13-15). The amended complaint alleged in part:

> 4. Mr. Asay has requested public records, including but not limited to public records which must be disclosed pursuant to the decision of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 87 (1963), from the defendant.
>
> 5. The defendant has refused to provide the plaintiff with any public records, regardless of whether such materials must be disclosed pursuant to Brady and Walton.

(Asay R. 13-14).

The Clemency Board filed a motion to dismiss on July 7, 1993 (Asay R. 16-18). The motion alleged Mr. Asay's amended complaint failed to state a cause of action (Asay R. 16-18). The motion alleged, in relevant part:

> 4. Notwithstanding the issue of access, Plaintiff, by relying upon Brady v. Maryland, 373 U.S. 83, 83 s.Ct.(sic) 1194 (1963), takes creative license by attempting to argue that

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[1]The clerk of court entered a Certificate of Insolvency pursuant to section 57.081 of the Florida Statutes on April 28, 1993.

> the Brady decision is relevant to the instant action.
>
> 5. Brady relates to the prosecutor's failure to provide exculpatory information to the defendant in a criminal prosecution. As stated in Brady at 218, 'We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.' (Emphasis added) However, the Board possesses absolutely no 'prosecutorial' authority relating to any criminal activity. Therefore, there is no basis upon which a claim relating to any Brady violation can be pursued against the Board.

(Asay R. 16-17) (footnote omitted)(emphasis in original). In its motion, the Clemency Board included the following footnote: "It is important to note that Board decisions relating to clemency consideration do not bear upon or implicate in any way due process analysis. Such fall strictly within the unfettered constitutional prerogative of the Executive Branch." (Id.).

On June 7, 1993, Mr. Asay filed his Complaint for Disclosure of Records Containing Brady Material in the same court against the Florida Parole Commission [hereinafter Parole Commission]. The case was assigned lower court case number 93-2278 (Asay R. 23-25).[2] In relevant part the complaint against the Parole Commission alleged:

> 9. The defendant has refused to provide Mr. Hoffman(sic) with any public records, regardless of whether such materials must be disclosed pursuant to Brady and Walton.

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[2]The clerk of court entered a Certificate of Indigency pursuant to section 57.081 of the Florida Statutes on June 7, 1993.

> 10. This Court should perform an in camera inspection of the all(sic) materials held by the defendant to determine whether the sam(sic) contains Brady materials.

(Asay R. 23-25). Mr. Asay specifically asked the trial court to conduct an in camera inspection of the Parole Commission's records for Brady materials and if discovered, to order their disclosure to Mr. Asay (Asay R. 23-25).

The Parole Commission filed a motion to dismiss on July 7, 1993 (Asay R. 32-34). The Parole Commission alleged Mr. Asay's complaint failed to state a cause of action (Asay R. 32-34). In part the Parole Commission alleged:

> 4. The only records the Commission has previously refused to provide to this Plaintiff or to any other person, including all other requesting death row inmates, are clemency files and records produced by the Commission on behalf of the Governor and Cabinet relating to the granting of clemency.
>
> 6. By referencing Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), several times in his Complaint, Plaintiff appears to be attempting to arque that the Brady decision is somehow relevant to the instant action.
>
> 7. The Commission has no criminal prosecution or charges against Plaintiff herein nor does it intend to bring him to trial for any criminal violation.
>
> 8. Brady deals with the prosecution's failure to provide exculpatory information to the defendant in a criminal prosecution.
>
> 9. . . . There is no basis for a claim of any Brady violation against the Commission since no prosecution of Plaintiff is being maintained nor has one ever been maintained by the Commission.

(Asay R. 32-34) (emphasis in original).

In its motion, the Parole Commission admitted its refusal to disclose records to Mr. Asay that may, nonetheless, include documents which constitute Brady material. In support of its position that it did not have to disclose materials to Mr. Asay, the Parole Commission cited this Court's decision in Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993).

On October 5, 1993, the trial court entered an Order of Consolidation in Mr. Asay's cases, nunc pro tunc to September 17, 1993(Asay R. 19-20).[3]

On October 13, 1993 the trial court entered separate, but nearly identical, Final Orders of Dismissal with Prejudice on behalf of each Appellee (Asay R. 21-22; 35-36). In relevant part, both orders of the trial court said:

> 2. This Court is unaware of any controlling legal authority, interpreting either our state or federal constitution, that applies Brady to the production of executive clemency files and records.
>
> 3. Plaintiff's Amended Complaint may be resolved as a matter of law.
>
> Wherefore . . .
>
> 2. By virtue of separation of powers principles articulated within the Florida

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[3]The style of the case in which the order was entered was Asay v. Florida Parole Commission, Case No. 93-2278; however, the order says, "ORDERED AND ADJUDGED that the above-styled case be consolidated with Asay v. Florida Parole Commission, Case No. 93-2278." The two cases consolidated then were the same case. It appears this was an error. If the style of the case to be consolidated was Asay v. Florida Parole Commission, Case No. 93-2278, the case with which it should have been consolidated was Asay v. Florida Board of Clemency, Case No. 93-1706. For purposes of accurate records, this Court should note the discrepancy and order it corrected.

> Constitution, this trial court is without any legal basis to encroach upon these executive powers expressly granted by our constitution to the Governor and Cabinet.
>
> 3 . . . .[The complaint] fails to state a cause of action as a matter of law . . .
>
> [Certified question]
>
> 4. ...WHETHER AND TO WHAT EXTENT A FLORIDA STATE COURT MAY COMPEL [THE FLORIDA PAROLE COMMISSION, ACTING ON BEHALF OF][4] 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.

(Asay R. 21-22; 35-36).

A single notice of appeal was timely filed under both lower court case numbers on November 12, 1993 (Asay R. 37-38). On appeal these consolidated cases have been assigned this Court's case number 82,732.[5]

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[4]The inserted language is included in the Final Order of Dismissal entered on behalf of the Florida Parole Commission(Asay R. 35-36). The certified question then relates to both appellees; the Clemency Board itself and the Parole Commission acting on behalf of the Clemency Board. This Court in Lockett set forth the connection between the two entities. Specifically, the Parole Commission conducts a thorough and detailed investigation into all factors relevant to clemency and delivers that information to the Clemency Board. Thus, both entities could possess Brady materials and both are necessary parties to this action.

[5]This Court indicates in its records that Robert Butterworth, Attorney General, is the attorney of record for all of the appeals. This is in error and should be corrected to reflect proper counsel. Mr. Butterworth's office has not filed a notice of appearance on behalf of either Appellee.

2. **The Agan, et.al. case (Case Numbers 83,047 [Agan-I] and 83,048 [Agan-II].**

On September 24, 1993, James F. Rose, a death-sentenced individual, filed his Complaint for Disclosure of Materials against the Clemency Board in the Circuit Court of Leon County, which was assigned lower court case number 93-4047 (Agan-1 R. 1-7). On the same day, Mr. Rose filed an identical complaint in the same court against the Parole Commission (Agan-2 R. 1-7). The complaints were in substantially the same form as the complaints filed in the Asay case.

On November 3, 1993, the Clemency Board filed a motion to dismiss, substantially in the same form as those filed in the Asay case (Agan-1 R. 8-10). On November 1, 1993, the Parole Commission filed a motion to dismiss in substantially the same form as those filed in the Asay case (Agan-2 R. 8-12).

On November 4, 1993, without objection from either Appellee, a Consolidated Amended Complaint for Disclosure of Materials was filed against each Appellee (Agan-1 R. 11-279; Agan-2 R. 13-281). The reason for the Consolidated Amended Complaints was to add as party plaintiffs eighty-six (86) additional death row inmates.[6]

On November 5, 1993, the Clemency Board filed an amended motion to dismiss, which attempted to add the additional plaintiffs in the caption, but only addressed Mr. Rose in its

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[6]One of the plaintiffs added was James Agan. Because Appellants were listed alphabetically, the plaintiff in the style of the case changed to James Agan, et. al. Additionally, the court entered orders of insolvency for all plaintiffs (Agan-1 R. 289; Agan-2 R. 312).

body (Agan-1 R. 280-282). The motion was nearly identical to the motion to dismiss filed in the Asay case and alleged the Consolidated Amended Complaint failed to state a cause of action.

On November 4, 1993, the trial court entered a Final Order of Dismissal on behalf of the Parole Commission. This order was subsequently set aside by agreement of the parties because it only addressed Mr. Rose's case.

The Parole Commission filed an amended motion to dismiss on November 15, 1993, alleging the Consolidated Amended Complaint failed to state a cause of action (Agan-2 R. 284-287). The motion was in substantially the same form as the motions filed in the Asay case.[7]

A Final Order of Dismissal was entered on behalf of each Appellee on December 14, 1993 (Agan-1 R. 283-284; Agan-2 R. 292-293). The form of the orders was substantially identical to the order entered in the Asay case and included the same certified question. A timely notice of appeal was filed on January 12, 1994, in each case (Agan-1 R. 285-288; Agan-2 R. 294-297).

3. **Consolidation of All the Cases.**

This Court consolidated all of the above-mentioned cases for purposes of briefing since the issue in each case is identical.

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[7]The Parole Commission additionally filed a second amended motion to dismiss, but there is no significant difference between that motion and the amended motion to dismiss.

SUMMARY OF ARGUMENT

I. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), requires the Florida Board of Executive Clemency and Florida Parole Commission to release to Appellants any and all records in their possession which are exculpatory in nature. This Court, through a series of cases, has expressed its grave concern over the application of Brady to materials that otherwise might not be subject to disclosure pursuant to Florida's Public Records Act. The United States Supreme Court, the federal courts, and a court of appeals in this state have all ruled that Brady applies to files and records that might otherwise not be subject to disclosure. The focus is not on the prosecutor's obligation, but rather, the implications of the Due Process Clause of the Fourteenth Amendment. The concern for fundamental fairness embodied in that clause overrides all other concerns. Brady, because of its concern for due process, has been made applicable to records not in the possession of the prosecutor that might otherwise not be subject to disclosure. This principle applies in the cases now before this Court. Brady and the Due Process Clause of the Fourteenth Amendment mandate the records of the Florida Parole Commission and the Florida Board of Executive Clemency be subject to disclosure to the extent they contain material exculpatory information.

ARGUMENT I

BRADY V. MARYLAND, 373 U.S. 83, 83, S. CT. 1194, 10 L.ED.2D 215 (1963), AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, REQUIRE THE FLORIDA BOARD OF EXECUTIVE CLEMENCY AND FLORIDA PAROLE COMMISSION TO RELEASE TO APPELLANTS ALL RECORDS OF AN EXCULPATORY NATURE.

I. INTRODUCTION.

This case involves significant issues of paramount importance to each and every death-sentenced individual in the State of Florida. In its Final Orders of Dismissal with Prejudice, the lower court certified the following question to this Court as one of great public importance:

> 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.

Although each Appellant is a prisoner under sentence of death, this is a consolidated civil action. In Hoffman v. State, 613 So. 2d 405 (Fla. 1992), this Court directed capital postconviction litigants to pursue certain public records in the manner provided for in Chapter 119:

> We agree that with respect to agencies outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney, requests for public records should be pursued under the procedure outlined in Chapter 119, Florida Statutes. Because those requests will be made directly to such agencies, they will be in a position to raise any such defenses to the disclosure which they may deem applicable.

Hoffman, 613 So. 2d at 406. In the instance case, Appellants have complied with Chapter 119 and the directive of Hoffman in seeking disclosure of the Brady material in possession of the Florida Board of Executive Clemency and the Florida Parole Commission. Because the trial court improperly denied the public records sought, they now appeal to this Court.

In order to fully understand the issue before the Court, it is worthwhile to set forth in full the text of the complaints dismissed by the trial court:

> The Plaintiffs by and through their attorneys, the Office of the Capital Collateral Representative, comes(sic) before this Court and as grounds for relief states(sic) and alleges(sic) the following:
>
> 1. Plaintiffs are, and were at all times relevant hereto, indigent persons under sentence of death in the State of Florida.
>
> 2. Defendant is, and was at all times relevant hereto, an agency of State of Florida with its main office located in the City of Tallahassee, County of Leon, State of Florida.
>
> 3. The Capital Collateral Representative seeks disclosure of materials withheld by an agency of the State of Florida.
>
> 4. The Capital Collateral Representative has requested materials from the Defendant, including any public materials **or exempt materials that must be disclosed pursuant to the decision of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 87 (1963).** See Parole Commission v. Lockett, 620 So. 2d 153, 158 n.3 (Fla. 1993).
>
> 5. The Defendant has refused to provide the Plaintiffs with their complete files, regardless of whether such materials must be disclosed pursuant to Brady and

Walton v. Dugger, Walton v. State, 18 Fla. L. Weekly 309 (Fla. May 27, 1993).

6. In Hoffman v. State, 613 So. 2d 405 (Fla. 1993), the Florida Supreme Court held that indigent defendants seeking to obtain materials in a post-conviction proceedings must do so in a separate civil suit and in the circuit and county where the main office of said agency is located, unless the main office is within the judicial circuit where the case was tried or the main office is connected with the state attorney's office.

7. In Walton v. Dugger, Walton v. State, 18 Fla. L. Weekly 309, 310 (Fla. May 27, 1993), the Florida Supreme Court held that Brady materials should be disclosed regardless of the State's claimed exemption from Chapter 119 of the Florida Statutes. See Parole Commission v. Lockett, 620 So. 2d 153, 158 n.3 (Fla. 1993).

8. Jurisdiction and venue are therefore properly before this Court.

9. This Court shall order the Defendant to produce to the Plaintiffs or, in the least this Court, all materials not disclosed to the Plaintiffs.

10. If the Defendant will only disclose their entire files to this Court, then this Court shall list all materials produced by the Defendant and distribute these lists to the Plaintiffs to allow the Plaintiffs an opportunity to respond.

11. This Court shall perform an in camera inspection of all materials produced to this Court by the Defendant to determine whether their claimed exemption is proper and whether their files contains(sic) Brady materials.

WHEREFORE, Plaintiffs pray as follows:

1. That this Court will order that all materials which the Capital Collateral Representative has requested will be properly preserved;

2. That this Court will order the Defendant to produce to the Plaintiffs, or in the least to this Court, all materials sought by the Plaintiffs;

3. That if their entire files are only produced to this Court, then this Court will list all materials produced by the Defendant and provide these lists to the Plaintiffs;

4. That this Court will allow the Plaintiffs an opportunity to respond;

5. That this Court will perform an in camera inspection of all previously undisclosed material within Defendant's file to determine whether such materials must be produced to the Plaintiffs and if material needs to be disclosed to the Plaintiffs order that all materials be produced to the Plaintiffs; and

6. For such other and further relief as the Court deems just and equitable in the premises.

(Agan-1 R. 1-7) (emphasis in original).

In response, Appellees filed separate, although substantially identical, Amended Motions to Dismiss. In their motions, Appellees alleged that, because they possessed no prosecutorial authority, the exculpatory information contained in their files did not have to be disclosed pursuant to Brady. The trial court followed Appellees' erroneous reasoning, refused to order disclosure, and also refused to conduct an in camera inspection of the disputed documents.

The lower court erred in dismissing Appellants' motion for disclosure of the records of the Board of Executive Clemency and the Florida Parole Commission for failure to state a cause of

action. Appellants' Amended Complaints specifically alleged the existence of Brady materials:

> 4. The Capital Collateral Representative has requested materials from the Defendant, including any public materials **or exempt material that must be disclosed pursuant to the decision of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 87 (1963).** See Parole Commission v. Lockett, 620 So. 2d 153, 158 n.3 (Fla. 1993).

(Agan-1 R. 2) (emphasis added).

In assessing Appellants' arguments, this Court must, for purposes of viewing whether Appellants' Amended Complaints stated a cause of action, assume that Brady materials exist.[8] In Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983), this Court reiterated the standard of review an appellate court must apply in deciding whether a trial court erred in granting a motion to dismiss on the basis the complaint failed to state a cause of action: "For the purposes of a motion to dismiss for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." Id. at 2. This Court's review is limited to looking to the four-corners of Appellants' Amended Complaint, and therefore the Court must assume that Brady materials exist. See McKinney -Green, Inc. v. Davis, 606 So. 2d 393, 394 (Fla. 1st DCA 1992) ("we must determine whether the allegations, from the four corners of the complaint, sufficiently state one or more claims for relief. [citations omitted]. We are

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[8]In fact, Appellees have never contested that their secret files contain exculpatory materials.

obliged to accept all well-pled allegations of the complaint as true"); Aaron v. Allstate Insurance Company, 559 So. 2d 275, 276 (Fla. 4th DCA 1990) ("It is axiomatic that in reviewing an order dismissing a complaint for failure to state a cause of action the appellate court's scope of review is relatively narrow. The court merely looks to the four corners of the complaint to determine whether it states a cause of action. The court takes all well pleaded allegations therein as true"); City of Gainesville Code Enforcement Board v. Lewis, 536 So. 2d 1148, 1150 (Fla. 1st DCA 1988) ("On a motion to dismiss, a trial court is limited to the allegations of the complaint, and must construe those allegations in favor of the non-moving party. [citations omitted]. When a complaint is dismissed for failure to state a cause of action, this court must assume that the allegations of the complaint are true and draw all reasonable inferences arising from the allegations in favor of the plaintiff").

Although not a state postconviction action, Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992), by analogy, is persuasive on this point. The defendant in Thomas was convicted of burglary and sexual assault. In federal court he alleged (1) the state suppressed a semen sample that would have cleared him of the charges; and (2) his counsel was ineffective for failing to make the state produce it. The Ninth Circuit Court of Appeals ordered a remand to the federal district court and said,

> A semen sample, or tests thereof, might enable him to make such a showing. However, if Thomas must make a colorable showing of innocence before the district court may order

> a full evidentiary hearing on his defaulted claims, Thomas is in something of a Catch-22. The sample, if it exists, is under the control of the state, and Thomas would appear to have no way to have it tested unless the federal courts intervene. But in order to make the showing which would justify federal court intervention, Thomas needs the semen sample.
>
> We do not believe that Thomas' claim is defeated by this conundrum. Rather, we believe the state is under an obligation to come forward with any exculpatory semen evidence in its possession. [citations omitted] We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding. Thomas has alleged that the state possesses evidence which would demonstrate his innocence and revive an otherwise defaulted ground for issuing a writ. Under the circumstances, fairness requires on remand the state come forward with any exculpatory evidence it possesses.

Thomas, 979 F.2d at 749-750 (emphasis added).

Appellants are in the same catch-22 as the defendant in Thomas. Appellants have alleged that Brady materials exist. Appellees do not dispute that their secret files contain exculpatory information. Therefore, in evaluating then whether Appellants' Amended Complaints state a cause of action, this Court must infer the existence of Brady materials.[9]

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[9]As a practical matter, documents in possession of the Parole Commission and Clemency Board have proven critical to the proper resolution of postconviction claims. In Mendyk v. State, the Honorable Richard Tombrink, Jr., had written a letter to the clemency board indicating his opinion that Mr. Mendyk was "an animal" and should be executed. As administrative judge, Judge Tombrink assigned himself to Mr. Mendyk's postconviction case, but later recused himself when the letter was discovered and presented in a motion to disqualify. In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court granted postconviction relief based in part on information contained in the files of the

II. THE GOVERNMENT, INCLUDING THE FLORIDA BOARD OF EXECUTIVE CLEMENCY AND THE FLORIDA PAROLE COMMISSION, HAS A DUTY TO DISCLOSE BRADY MATERIAL.

This case presents the issue that the Court explicitly declined to resolve in Parole Commission v. Lockett: whether the Governor or any governmental entity has the duty to disclose exculatory evidence as constitutionally required by Brady. Lockett, 620 So. 2d at 158 n.3. In the instant case, Appellees do not contest the fact that their files contain information which would constitute Brady material; rather, their position is that, because due process concerns are not implicated in the clemency process and because the Governor is not a prosecutor, the Clemency Board and the Parole Commission are exempt from the constitutional mandate outlined by the Supreme Court in Brady. As discussed below, the position of the Appellees is erroneous.

In the context of capital postconviction litigants seeking the disclosure of public records in the possession of state agencies, this Court has repeatedly determined that the government's obligation to disclose exculpatory information pursuant to Brady does not end after trial, but rather continues throughout the postconviction process. Moreover, as explained

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Florida Parole Commission. At issue in Scott was a letter the Honorable Susan Schaeffer had written to the members of the clemency board regarding the culpability of Mr. Scott's co-defendants. Based upon this information, the Court held that it "probably would have found Scott's death sentence inappropriate," and granted relief. Id. In Jones v. State, 591 So. 2d 911 (Fla. 1991), during a pending death warrant, Mr. Jones presented a Rule 3.850 motion alleging newly discovered evidence of innocence. While the case was pending before this Court, the Governor's Office disclosed additional evidence relevant to Mr. Jones' claims.

below, the Court has already extended the obligation to disclose exculpatory evidence to all governmental agencies, even those with no prosecutorial function. Therefore, to the extent that Appellees argue that Brady does not apply to the Clemency Board and the Parole Commission because they do not prosecute, the Court must reject this position.

The seminal case addressing the disclosure of public records in the setting of postconviction litigation involving capital defendants is State v. Kokal, 562 So. 2d 324 (Fla. 1990). In Kokal, this Court held that "that portion of the state attorney's files which fall within the provisions of the Public Records Act are not exempt from disclosure because Kokal's conviction and sentence have become final." Kokal, 562 So. 2d at 327. This Court specifically noted in an asterisk to its opinion that "[o]f course, the state attorney is obligated to disclose any document in his files which is exculpatory." Kokal, 562 So. 2d at 327 (citing Brady v. Maryland). One week after its decision in Kokal, the Court decided Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). In Provenzano, the Court noted that Mr. Provenzano had made no factual allegations in support of his Brady claim because the State Attorney's Office had refused to disclose its files. In establishing that a violation of Chapter 119 could be raised in a defendant's postconviction motion, this Court went on to hold that, "[i]n the event a disclosure is ordered, the defendant will then have an opportunity to amend his motion to

allege any Brady claims which might be exposed." Provenzano, 561 So. 2d at 547.

In Engle v. Dugger, 576 So. 2d 696 (Fla. 1991), and Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), the Court extended the duty to disclose public records, including exempt Brady evidence, to all law enforcement agencies. This position was re-affirmed in Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993). In Walton, after ordering the disclosure of state attorney and law enforcement files, the Court noted that, concomitant with its duty to disclose public records pursuant to Chapter 119, "the State must still disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law." Walton, 621 So. 2d at 1360 (citing Brady). Likewise, in Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993), the Court specifically approved of its decision in Walton, and ordered the Pinellas County Sheriff's Office to disclose its files pursuant to Chapter 119, including any Brady evidence otherwise exempt. Id. at 481.

It is apparent from these decisions in the public records context that the Court has already indicated that Appellants are entitled to those portions of Appellees records that are exculpatory in nature. Appellees complain that they are not prosecutors, so therefore Brady does not apply to them. However, as explained above, this Court has extended the duty to disclose withheld Brady evidence to all governmental agencies, regardless of whether they maintain a prosecutorial function. Clearly,

sheriff's offices, police departments, county jails, and medical examiners do not engage in criminal prosecutions, yet this Court has held that any Brady material in possession of governmental agencies must be disclosed to capital postconviction litigants upon request. Appellees are entitled to no different or preferential treatment simply because they do not prosecute.

In assessing Appellants' claim, it is important to recognize the basis upon which the Supreme Court obligated the disclosure of exculpatory evidence. In Brady, the Supreme Court specifically held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 83 S.Ct. at 1196-1197. Brady's meaning on the surface is obvious -- the prosecution has an obligation to disclose favorable evidence to the defendant if requested.[10] The true significance of Brady, however, is found outside the literal statement of the prosecutor's obligation. As indicated by the Supreme Court, the requirement that the government disclose exculpatory evidence is grounded in notions of due process, and is imposed on all state entities, not just the prosecutor:

> The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when

[10]The discovery provisions found in the Florida Rules of Criminal Procedure spell out this obligation in detail with respect to Brady's applicability in Florida. See generally Fla. R. Crim. P. 3.220.

> the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'

Brady, 83 S. Ct. at 1197 (emphasis added). The Supreme Court went on to note that the government's withholding of exculpatory evidence "does not comport with standards of justice." Id. The Supreme Court underscored this principle in United States v. Bagley, 105 S. Ct. 3375 (1985), in which it emphasized that "[t]he 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 ensure that a miscarriage of justice does not occur." Bagley, 105 S. Ct. at 3379-3380 (footnote omitted).

It is clear that, under Brady, the avoidance of an unfair trial to the accused is the pursuit of due process. If the trial is unfair, the accused has not received due process. The accused does not receive a fair trial, nor due process, if material exculpatory evidence is withheld, regardless of where the evidence is located.[11] The focus then is the defendant's right to a fair trial, both at the guilt/innocence and penalty phases. The existence of Brady material, by its very definition, means

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[11] See U.S. v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992) ("this court has declined to draw a distinction between different agencies under the same government"); Martinez v. Wainwright, 621 F.2d 184, 186-88 (5th Cir. 1980) (different "arms" of the governement are not "severable entities").

the defendant did not receive a fair trial, regardless of where the evidence is located. In extending the duty to disclose exculatory evidence to all governmental agencies, and by recognizing that capital postconviction litigants are entitled to such evidence, this Court has in effect already adopted these principles.

This Court has also recognized that Florida's postconviction process must comport with due process principles. Huff v. State, 622 So. 2d 982 (Fla. 1993). This Court has further indicated that due process includes principles of fairness and equal application of the law. See Lopez v. Singletary, 18 Fla. L. Weekly S634 (Fla. 1993). Moreover, to the extent that Appellees have attempted to hide behind the cloak of sacristy in the clemency process, this Court has also indicated that Florida's clemency process must comport with constitutional concerns. See Dugger v. Williams, 593 So. 2d 180 (Fla. 1991); see also id. at 183 (Kogan, J., specially concurring) (while "clemency falls peculiarly within the prerogative of the executive branch, . . . even the executive must exercise that power in a manner that comports with Florida's Declaration of Rights").

The lower court's refusal to order disclosure of the secret files in possession of Appellees violates all notions of due process, equal protection, and fairness, all concerns which are implicated in Florida's postconviction process. The policy underlying Brady itself stems from due process concerns, which, as applied to appellants' cases, means the right to a fair trial

and sentencing proceeding "The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.'" Duncan v. Louisiana, 88 S. Ct. 1444, 1446 (1968). The Florida Constitution similarly provides that "[n]o person shall be deprived of life...without due process of law" Article 1, Section 9, Fla. Const. (1968).

This Court has said about due process:

> Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights. Substantive due process may implicate, among other things . . . the right to a fair trial, see Kritzman v. State, 520 So. 2d 568 (Fla. 1988).

Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991). Moreover, the Court has found a due process violation even though no particular rule of procedure offered explicit guidance on the subject. In Kritzman v. State, 520 So. 2d 568 (Fla. 1988), the Court acknowledged:

> Due process consists of more than the procedural rules we use to safeguard a fair trial. While there may not be a rule of criminal procedure which covers this exact situation (probably because this exact situation has never arisen before), due process requires that a defendant be given a fair trial in the substantive sense.

Kritzman, 520 So. 2d at 570.

Appellants are entitled to due process beyond the parameters of their trial. As this Court has already recognized, due process is not a curtain drawn to a close at the trial's end. Due process follows Appellants in their pursuit of postconviction relief, and in their attempt to obtain records that contain Brady material, wherever located. Nor is the reach of the Due Process Clause limited to the narrow confines of the prosecutor's office. Due process is what the state, not just the prosecutor, is constitutionally required to extend to its citizens. The Fourteenth Amendment provides that no state shall deprive any person of life without due process of law. The Constitution does not say, "The prosecutor shall not deprive any person of life without due process of law." Both appellees are state entities; thus, both are required by the Due Process Clause of the Fourteenth Amendment to release to Appellants material exculpatory evidence. Neither can raise a shield bearing the inscription, "Not a prosecutor."

As explained earlier, this Court has extended the duty to disclose exculpatory evidence to agencies that do not have a prosecutorial function. The notion that disclosure obligations extend beyond the actual prosector was also addressed by the United States Supreme Court in Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987). In Ritchie, the Supreme Court framed the issue as follows:

> The question presented in this case is whether and to what extent a State's interest

> in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence.

Id. at 993-994.

At issue in Ritchie were the files of the Children and Youth Services [hereinafter CYS], a protective service agency established to investigate cases of suspected child mistreatment and neglect. CYS, an agency created by the state, was an unrelated third party to the criminal action, as are the Florida Parole Commission and Board of Executive Clemency in the case at bar. CYS did not have any prosecutorial function. In fact, the Supreme Court specifically noted that "[t]here is no suggestion that the Commonwealth's prosecutor was given access to the file at any point in the proceedings, or that he was aware of its contents." Ritchie, 107 S. Ct. at 994 n.4.

In Ritchie, the Supreme Court was faced with CYS's failure to comply with the defendant's subpoena requesting exculpatory information contained in its files, because it claimed its records were privileged and confidential under a state statute.[12] After recognizing that it traditionally evaluated claims such as those raised by Ritchie under the broader

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[12]In addition to this Court's holding in Parole Commission v. Lockett, the Florida Legislature recently enacted Section 14.28, Fla. Stat. (1993), which similarly indicates all records developed in anticipation of clemency review are exempt. In light of the Supreme Court's holding in Ritchie, and the Due Process Clause of the Fourteenth Amendment, this Court's holding in Lockett and the enactment of Section 14.28 are of no benefit to Appellees. The United States Constitution and the Supreme Court's interpretation of it reign supreme.

protections of the Due Process Clause of the Fourteenth Amendment," Ritchie, 107 S. Ct. at 1001, the Court acknowledged that "[i]t is wellsettled [sic] that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt and punishment." Id. at 1001 (emphasis added). The Court went on to note that "[m]oreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial." Id. at 1003 (emphasis added).

Clearly the Ritchie Court affirmed that the Brady obligation is on the government, not just the prosecutor. The Court then addressed the specific argument before it:

> At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file. The Commonwealth, however, argues that no materiality inquiry is required, because a statute renders the contents of the file privileged. Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file 'might' have been useful to the defense.
>
> Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances.

Id. at 1001 (emphasis added). After balancing the interests of confidentiality against the requirements of due process, the

Supreme Court concluded that "Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." Id. at 1002.

The Ritchie Court is not alone in extending the duty to disclose exculpatory evidence to include non-prosecutorial agencies. In United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992), the court addressed the issue of a local police department's obligation to disclose what the defendant had alleged to be exculpatory evidence. The district court in Brooks defined the threshold issues as follows:

> first, whether the prosecution's Brady obligations include not only a duty to disclose exculpatory information, but also a duty to search possible sources for such information; second, if the duty exists, whether it extends to files in the possession of agencies other than the prosecutor's office.

Id. at 1502 (emphasis added).

The district court noted first that "the [Brady] test is an objective one, not dependent in any way on prosecutorial bad faith, . . . so the rule is framed in a way that permits its application to facts of which the prosecutors are ignorant." Id. (emphasis added). The court then recognized that, under Ritchie, it was compelled to extend the Brady obligation to non-prosecutorial agencies:

> In one case, the Supreme Court appears to have assumed extension of the rule to unsearched files outside of the prosecutor's office. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L.Ed.2d 40

> (1987). We conclude that that assumption is the law and join the three circuits that addressed the matter, the 3rd, 5th, and 7th, in answering both questions affirmatively.

Id. (emphasis added).

Importantly, in ruling in favor of disclosure, the Brooks court mentioned that it was "highly relevant that defense counsel pinpointed files that can be searched without difficulty." Id. at 1503 (emphasis added). In that regard the court wrote:

> As has proved true of the other aspects of Brady jurisprudence, no formula defining the scope of the duty to search can be expected to yield easily predicted results. Where, as here, however, there is an explicit request for an apparently very easy examination, and a non-trivial prospect that the examination might yield material exculpatory information, we think the prosecutors should make the inquiry.

Id. at 1504 (emphasis added).

In addition to the error in denying Appellants' complaint for disclosure, the trial court also erred in failing to conduct an in camera inspection of Appellees' files in order to ascertain whether the information contained in their secret files should be disclosed. As noted in Ritchie and Brooks, this is the appropriate remedy when disclosure has been denied. This procedure has also been approved by the Eleventh Circuit. In Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987),[13]

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[13] Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987), derives from Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1986), in which the United States Supreme Court granted a writ of certiorari, vacated that judgment, and remand for further consideration in light of Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987). See 480 U.S. 901, 107 S. Ct. 1341, 94 L.Ed.2d 513 (1987).

the Eleventh Circuit Court recognized:

> The Supreme Court's reasoning and decision in Ritchie is an endorsement of the procedures this Court recommended and the holding we reached in Miller. Both Courts, based on facts presented, determined that due process required some court to review the confidential material to determine if the appropriate file 'contained information that may have changed the outcome of his trial had it been disclosed.' Ritchie, ___ U.S. ___, 107 S. Ct. at 1004, 94 L.Ed.2d at 60.

Miller, 820 F.2d at 1137. Of course, the remedy of in camera inspection has long been the policy of this Court when questions arise concerning the propriety of disclosure of materials allegedly exempt from Chapter 119. Walton v. Dugger; Lopez v. Singletary.

Based on the foregoing discussion, it is clear that the lower court erred in dismissing Appellants' complaint and in refusing to conduct an in camera inspection of the secret files maintained by the Florida Parole Commission and the Clemency Board. Brady clearly establishes that a defendant does not receive a fair trial under the Due Process Clause if material exculpatory evidence is withheld. Ritchie and subsequent cases, including this Court's lengthy and well-settled jurisprudence regarding public records disclosure, extend this holding to third parties not directly involved in the criminal prosecution. In other words, the obligation to disclose under Brady applies not only to prosecutors, but to the government in general, up until the time a person is deprived, in this instance, of his life.

The stage has been set for this Court to address the issue unanswered in Parole Commission v. Lockett. The concern for a fair trial and the disclosure of all exculpatory evidence wherever located is of paramount importance in the case of each appellant, each a death-sentenced individual. "Death is different,"[14] even in the context of civil litigation relating to the disclosure of exculpatory evidence harbored in public records. "The Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed." Herrera v. Collins, 113 S. Ct. 853, 863 (1993). "The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." Herrera, 113 S. Ct. at ___ (Brennan, J. dissenting) (emphasis added). In fact, "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." Herrera, 113 S. Ct. at 869.

By refusing to disclose the contents of their secret files, when they have an obligation to do so, the Florida Parole Commission and the Clemency Board are denying Appellants' their right to investigate claims of actual innocence, either in the guilt/innocence or penalty phase. Due process, equal protection, and ordinary notions of fairness dictate that these secret files

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[14]"'[D]eath is a different kind of punishment from any other which may be imposed in this country....From the point of view of the defendant, it is different in both its severity and its finality.'" Beck v. Alabama, 100 S. Ct. 2389-2390, quoting Gardner v. Florida, 97 S. Ct. 1197, 1204 (1977) (opinion of Stevens, J.).

be disclosed. The Parole Commission and the Clemency Board should not be permitted to hide behind the cloak of executive clemency. Disclosure of exculpatory evidence located in secret files maintained by the Parole Commission and the Clemency Board in no way encroaches on the Governor's executive clemency power.

CONCLUSION

Due process and Brady govern this case. The issue is not whether appellees are prosecutors. Brady is not limited to prosecutors, nor is the concern with due process. The duty of Brady is ongoing, continuing after a judgment and sentence become final; otherwise, postconviction remedies are rendered useless.

The Parole Commission and Clemency Board have a duty to review their records for the existence of Brady materials. If Brady materials exist, they are required to release them. If they allege no Brady materials exist, their files should be turned over to the judge for an in camera inspection. If the judge agrees with them, a list of the records should be provided to the requesting party with the opportunity to argue why the records may include Brady materials. If the judge remains unpersuaded, the requesting party should have the right to appeal the adverse ruling.

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 11, 1994.

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

DAREN L. SHIPPY
Assistant CCR
Florida Bar No. 0508810

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Counsel for Petitioner

Copies furnished to:

William L. Camper
General Counsel
Florida Parole Commission
1309 Winewood Blvd., Bldg. 6
Tallahassee, Florida 32399-2450

Mark Schlakman
Assistant General Counsel
Office of the Governor
The Capitol, Suite 209
Tallahassee, Florida 32301