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

REPLY BRIEF OF APPELLANTS

MICHAEL J. MINERVA
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Representative
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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.

The logic of appellees' argument is difficult to follow. According to appellees due process does not apply to the executive branch of Florida's government. In other words, appellants are entitled to travel down the road of due process until they reach the roadblock labeled, "Florida Executive Branch - No Admittance." At this point, appellants are forced to turn back and follow the road to whatever destination it may lead them, which may include the electric chair. Neither the Federal nor Florida Constitutions intends for the roadway of due process to be obstructed by the executive branch of the Florida government.

A. Appellees have suggested a controversy does not exist between the parties because appellants have not requested of the Governor the records sought through this action. Appellees' suggestion stretches the imagination. First, appellants alleged in their complaints the records were requested and appellees refused to deliver them. Specifically, in the case of Mr. Asay he alleged,

> 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).

In reviewing whether the trial court erred in granting appellees' motions to dismiss on the basis of a failure to state a cause of action, this Court is bound to accept the allegations in appellants' complaints as true. Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983). Thus, appellants' allegations, in and of themselves, are sufficient to foreclose appellees from arguing to this Court that no controversy exists. Beyond that, the Parole Commission in its Amended Motion to Dismiss admitted it had refused to disclose the requested records. It said,

> 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.

(Asay R. 32-34)

Second, appellees are precluded from raising this argument on appeal because it was not raised in the trial court. This argument was waived for appeal. Ivens Corporation v. Hobe Cie Ltd., 555 So. 2d 425, 426 (Fla. 3d DCA 1989)("...in any event, the defendant did not properly plead the failure to join an indispensable party in either its motion to dismiss the plaintiff's complaint or as an affirmative defense in its answer, and consequently has waived the point for appellate review"); Perkins v. Scott, 554 So. 2d 1220, 1222 (Fla. 2d DCA 1990)("This

argument, however, was not presented as a ground for summary judgment in the trial court, and the plaintiffs were not asked to respond to this issue in that court. Accordingly, we decline to review this issue"); Wagner v. Nottingham Associates, 464 So. 2d 166, 169 (Fla. 3d DCA 1985)("In this case, the only grounds asserted below were those we have already rejected....None concerned the present claims that the cause of action does not lie on these facts....Accordingly, the defendant is precluded from raising them on appeal....[T]he 'statement of one ground precludes a party from claiming later that the motion should have been granted on a different ground'")(Citation omitted).

The only argument raised by appellees in the trial court was Brady had no application to the executive branch of government. For example, the Clemency Board said,

> 3. By relying upon Brady v. Maryland, 373 U.S. 83, 87 (1963), Plaintiffs take creative license by attempting to argue that the Brady decision is relevant to the instant action.
>
> 4. Brady relates to the prosecution's failure to provide exculpatory information to the Defendant in a criminal action....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.

(Agan-1 R. 280-282).

Similarly, the Parole Commission argued,

> 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 argue 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)(Underline in original).

Appellees are not allowed to change horses on appeal; they are bound by their arguments made to the trial court.

Third, by way of example in the case of Mr. Asay, a request was made to both appellees for disclosure of records on January 20, 1993 (Appendix 1 and 2).[1] The following day, January 21, 1993, the Parole Commission rejected the request stating, "Capital Collateral has previously been advised by our General Counsel of the Commission's position in this matter. Therefore, your request for Clemency records is respectfully denied" (Appendix 3).

The Clemency Board delivered minimal records in response to Mr. Asay's request, which amounted to no more than (1) a transcript of the proceeding conducted by the Parole Commission to interview Mr. Asay; (2) correspondence to necessary parties to

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[1]In light of appellees' baseless allegations concerning appellants lack of requesting the subject records, appellants are required to supplement the record on appeal with those documents attached as the Appendix to this Reply Brief. A motion to supplement the record is filed simultaneously with this Reply Brief.

the clemency hearing; (3) a perfunctory case history of Mr. Asay's case; and (4) the mandate in this Court. Importantly, however, was the statement included with the transcript of the proceeding that, "[t]he commissioners present here today will prepare a final report to include a brief summary of the issues presented and our findings and conclusions, which will be proved to the Governor and Cabinet" (Appendix 4). Neither this report nor any other materials other than those listed above have been provided to Mr. Asay.

Furthermore, appellees' position on appeal is at odds with its position before the trial court. At the hearing on the amended motions to dismiss in the Agan case the judge announced,

> THE COURT: However, apparently in both of these cases there have been filed a number of -- there are appendices in both of these cases which list -- well, I'll ask you all, but I guess it's a number of different death row inmates who are all making the same claim. They are clemency claimants, I guess, making the same. And I guess the purpose of this proceeding today would be to administratively put all of these cases in the same posture, so all the issues could be taken up before the Florida Supreme Court, since it's an issue that, you know, has been raised on a number of occasions here recently, and is going to continue to be raised. And I believe it's not only the Capital Collateral Representatives' position, but also Counsel for the two state agencies, to try to get all of these cases consolidated so this issue is, you know, presented and you all don't have to file 47 different briefs before the Supreme Court....
>
> MR. CAMPER: I think so....
>
> THE COURT: It seems that everyone is in agreement that what should occur to ease the administrative burden on everybody, including

> the Supreme Court, would be to grant the motion to consolidate these two cases....I will enter a new order, basically, along the same lines as I did in the Asay case, and then, again, request that the Supreme Court take jurisdiction as a issue of great public importance....
>
> MR. SHIPPY: Anything with the order, Your Honor, though, would include each of the named defendants that have been set forth in our consolidated amended complaint, and then certifying the question that was originally certified by this court.
>
> THE COURT: Yes, that's fine. So who wants to do this order? I don't care.
>
> MR. SCHLAKMAN: Judge, we can essentially reproduce the Asay order with these modifications, and we can, again, consult CCR and the Parole Commission, and submit to you a consensus order.

(Agan-1 R. 290-299).

Thus, not only were all the parties in agreement as to how these cases should proceed procedurally in the most efficient manner, but the parties also agreed to the certified question pending before this Court. Accordingly, this Court should reject appellees' suggestion of a lack of controversy between the parties.

B. Appellees' reliance on Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993), is in error. Lockett specifically left open the question to be decided in this action. This Court said in Lockett, "We do not address the responsibility of the Governor or any governmental entity to provide a defendant with exculpatory evidence constitutionally required under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)."

Id. at 158, n.3. The question left open in Lockett is now before this Court.

C. Appellees note clemency occurs after the trial and direct appeal, but offer no rationale as to why this fact is significant. Akin to their suggestion that the road of due process ends at the Governor's door, appellees apparently suggest the right to Brady material ends with the direct appeal. If so, appellees are mistaken. Generally, Brady material will be discovered after the trial and direct appeal are concluded. That is the nature of such material, i.e., that it was material and exculpatory and not timely disclosed to the defense.

The response to appellees' suggestion was best stated by the court in Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992). The court in Thomas described the catch-22 similarly-situated defendants seeking the disclosure of evidence are in and offered the appropriate solution. In the context of a defendant trying to obtain semen samples alleged to be in the possession of a governmental agency, the court 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.

at 749-750 (Emphasis added).

The analogous situation applies to appellants. They are unable to show what Brady material exists in the files of appellees until such files are reviewed for the existence of such materials. The fact that clemency and its investigation occur after the direct appeal is concluded is insignificant. Material exculpatory evidence is relevant any time it is discovered. This Court, therefore, should follow the precedent of the Thomas court.

The importance of requiring appellees to disclose Brady material cannot be understated. The case of Abron Scott stands as the shining example of how important the materials in the possession of appellees can be and why appellants should prevail on this issue. Mr. Scott was sentenced to death following his murder conviction. An appeal was taken to this Court, which upheld his judgment and sentence. Scott v. State, 494 So. 2d 1134 (Fla. 1986). Thereafter, clemency proceedings were conducted during which the judge who originally sentenced Mr. Scott to death wrote a letter stating Mr. Scott and his

codefendant, who later received a life sentence, were equally culpable and Mr. Scott should also receive a life sentence. Scott v. Dugger, 604 So. 2d 465, 468-469 (Fla. 1992). This letter showed the codefendant's life sentence would probably have produced a life sentence for Mr. Scott at the time of the original sentencing. Therefore, this Court granted Mr. Scott relief and he is now serving a life sentence. Id.

D. Appellees argued below and emphasize to this Court the Governor is not a prosecutor. This argument misses the point. The issue is whether appellants' right to due process requires the governor, as a state official, to disclose material and exculpatory evidence. Does the road of due process stop at the Governor's door although appellees concede the purpose of clemency is to obtain favorable evidence?[2]

In support of their argument appellees suggest no case law permits the relief sought by appellants; however, in United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992), cited in appellants' Initial Brief, the court specifically framed the issue as whether the obligation of Brady "...extends to files in the possession of agencies other than the prosecutor's office." Id. at 1502. That court then found Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987), extended the obligation to other agencies. The Brooks court said,

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[2]In their Answer Brief appellees state, "Indeed, if anything, the Executive is seeking information in order to determine whether clemency is appropriate." at page 11.

> 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.

966 F.2d at 1502 (Emphasis added).

The relief sought by appellants is supported by the caselaw, including that of the United States Supreme Court. A ruling from this Court that appellees must search for, and thereafter disclose, Brady material would be in accordance with the case law and would have minimum impact on appellees.

E.

> It is true that clemency falls peculiarly within the perogative of the executive branch (citation omitted). Neither the courts nor the legislature can encroach upon that power. However, even the executive must exercise that power in a manner that comports [with due process].

Dugger v. Williams, 593 So. 2d 180, 183 (Fla. 1991)(Kogan concurring)(Emphasis added).

Due process requires appellees to disclose any Brady material within its files and records, or if appellees assert no such materials exist, the files and records should be turned over to the judge for an in camera inspection. A list of the files and records should be given to the requesting party with an opportunity to argue why the files and records may include Brady materials, to be followed by the right of appeal in the event of an unsatisfactory 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 June 13, 1994.

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

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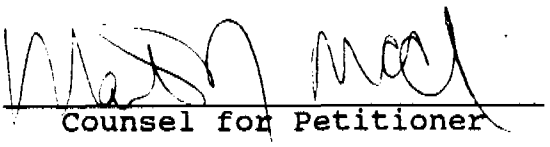
By: 
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APPENDIX 1

CCR

State of Florida

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Larry Helm Spalding
Capital Collateral Representative

January 20, 1993

Ms. Carolyn Tibbets
Capital Punishment Research Specialist
Clemency Department
Florida Parole Commission
1309 Winewood Boulevard
Building 6 - Third Floor
Tallahassee, Florida 32399-2450

RE: MARK JAMES ASAY

Dear Ms. Tibbets:

The Office of the Capital Collateral Representative currently represents Mr. Asay in post-conviction matters. By this letter we request access to all Parole Commission records (specifically including clemency records) relating to Mr. Asay. This request is made pursuant to Florida Statute 119.01, et. seq., and Mendyk v. State Nos. 77,865 and 76,906 (Fla. Jan. 2, 1992).

We ask that you provide a representative or representatives of our office access to inspect and copy any and all files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) relating to Mr. Asay.

Our interest is in, but not limited to, the following:

1. Case reports.

2. Investigation reports, including any and all memoranda prepared during the course of the investigation of these matters.

3. All handwritten and typed notes of investigators, and other personnel.

4. Any and all statements made and given to the Commission.

5. All correspondence relating to Mr. Asay.

Please note also that this request specifically includes the files and notes of any Parole Commission personnel who participated in the investigation of these matters.

The Florida Supreme Court in State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), determined that a post-conviction proceeding does not constitute a

"pending appeal" for purposes of exempting criminal investigative files from public disclosure pursuant to the provisions of Florida Statute 119.01(3)(d)2 and 119.07(3)(d), Fla. Stat.

Due to the exigencies of capital litigation, we are laboring under severe time restrictions and would therefore appreciate your prompt attention to these matters. Please contact me upon receipt of this request so that appropriate arrangements can be made for our review of the records.

Thank you for your attention and assistance in this matter.

Sincerely,

Suzy Espinosa
CCR Investigator

APPENDIX 2

CCR

State of Florida

1533 South Monroe Street
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(904) 487-4376
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Larry Helm Spalding
Capital Collateral Representative

January 20, 1993

Ms. Stephanie Holton
Room 209 The Capitol
Tallahassee, FL 32399-0001

RE: MARK JAMES ASAY

Dear Ms. Holton:

The Office of the Capital Collateral Representative (CCR) currently represents Mark James Asay, an indigent death row inmate, in post-conviction litigation.

This is a formal request for copies of files and records regarding Mr. Asay's Clemency hearings pursuant to chapter 119.01 and 945.10, et seq., Florida Statutes and 33-6.006 F.A.C.. Mr. Asay's date of birth is 3-12-64, his social security number is 267-31-1535, and his DOC # is 078387.

Due to the nature of capital litigation, a prompt response would be greatly appreciated. If you have any concerns or questions regarding this request, please feel free to call me at 487-4376.

Thank you for your kind assistance in this matter.

Sincerely,

Suzy Espinosa
CCR Investigator

APPENDIX 3

FLORIDA PAROLE COMMISSION

1309 WINEWOOD BOULEVARD, BUILDING 6, THIRD FLOOR, TALLAHASSEE, FLORIDA 32399-2450 • (904) 488-1653

January 21, 1993

Ms. Susan Espinosa
Investigator
Capital Collateral Representative
1533 South Monroe Street
Tallahassee, FL 32301

RE: Clemency Records Request
Mark James Asay, PR#078387

Dear Ms. Espinosa:

This acknowledges your letter of January 20, 1993 requesting access to our clemency files in the case of Mark James Asay.

Capital Collateral has previously been advised by our General Counsel of the Commission's position in this matter. Therefore, your request for Clemency records is respectfully denied.

Very truly yours,

Carolyn W. Tibbetts

Carolyn W. Tibbetts
Capital Punishment Research Specialist

CWT/mls
Attachment: Ltr., 1/29/92 from FPC General Counsel to Mr. Spalding

cc: Mr. Mark Schlakman, Governor's Office, w/copy of attachment
Mr. William L. Camper, FPC General Counsel

FLORIDA PAROLE COMMISSION

1309 WINEWOOD BOULEVARD, BUILDING 6, THIRD FLOOR, TALLAHASSEE, FLORIDA 32399-2450 • (904) 488-1653

June 24, 1992

M E M O R A N D U M

TO: Mrs. Janet Keels, Coordinator
Office of Executive Clemency

FROM: Carolyn W. Tibbetts
Capital Punishment Research Specialist
Clemency Department

RE: ASAY, Mark J. PR#078387 EC#200243

Pursuant to Rule 15, Rules of Executive Clemency, copies of the Statement of Mark J. Asay PR#078387, EC#200243 have been appended and delivered hereto, so that this statement shall be distributed to the Governor and Cabinet for their review and consideration.

CWT/mls

cc: Governor
Cabinet Members
State Attorney
Attorney