IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,222

GEORGE JAMES TREPAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Mr. Trepal's motion to compel disclosure of records in the possession of the Coca-Cola Company. Mr. Trepal is currently litigating his Rule 3.850 motion before Polk County Circuit Court Judge E. Randolph Bentley.

The following symbols will be used to designate references to the record in this instant cause:

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

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

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

REQUEST FOR ORAL ARGUMENT

In his Initial Brief, Mr. Trepal requested oral argument on his appeal. This Court ordered on July 3, 1996, that this case would be decided on the briefs without oral argument. Mr. Trepal requests that this Court reconsider its decision to forego oral argument in this matter.

Mr. Trepal has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr.

Trepal, through counsel, accordingly urges that the Court permit oral argument.

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ARGUMENT IN RESPONSE AND REBUTTAL TO APPELLEE'S ARGUMENT

Mr. Trepal begins by correcting factual errors in Appellee's Answer Brief. In its Brief, Appellee states, "The officers found a container of thallium and a bottle-capping machine, among other things, in Defendant's garage. Trepal, 621 So. 2d at 1364-65." Answer Brief at 4. This assertion is erroneous, and a misreading of this Court's opinion on direct appeal. As this Court correctly noted, the evidence adduced a trial showed that when Mr. Trepal moved into his Alturas house in 1982 (six years prior to Peggy Carr's poisoning), someone who helped him move claimed to have seen a bottle-capping machine. Id. at 1365; (R. 3628-29, 3631). No bottle-capping machine was found when Polk County Sheriff's deputies and FBI personnel searched Mr. Trepal's house following his arrest (R. 3778).

Appellee contends that:

> Although given an opportunity to introduce evidence supporting his contention the Company is subject to Chapter 119, the CCR instead produced several unauthenticated letters and an excerpt from a book written by the undercover officer who had discovered the thallium in Defendant's garage, all of which lacked the requisites for admissibility.

Answer Brief at 5-6. This is in error. Mr. Trepal was never given an opportunity to introduce evidence. The Court conceded the hearing referred to by Appellee was not an evidentiary hearing:

> COURT: Do you have any evidence that this was done deliberately as we have -- there are cases in the State of Florida, in fact, one in Polk County, where it was clearly very deliberately done by a county commission to

keep the matters out of the public scrutiny, things that would otherwise be public records that the public have an interest in seeing. Do you have any evidence it was done with that intent?[1]

MR. SCHER: To my knowledge, there is nothing in the records. What I would suggest at that point, then, Your Honor, is --

COURT: Okay. Thank you. Any other points?

MR. SCHER: Well, that needs to be -- if Your Honor is concerned about that, then, we're certainly entitled to put on evidence regarding that.

THE COURT: Put on any you have. Call your witnesses.

MR. SCHER: Well, this wasn't an evidentiary hearing, Your Honor. If that's going to be your concern, part of your concern, then, I do think we would need to go ahead and put on evidence in terms of that.

THE COURT: What evidence do you have? If this were an evidentiary hearing, what could you proffer you would have presented to the Court concerning that?

(PC-R. 95-96) (emphasis added). While this excerpt deals with the issue of whether law enforcement used Coca-Cola to evade the Public Records Act (which Mr. Trepal has not alleged), the quoted passage establishes that the hearing on Mr. Trepal's Motion to Compel was not an evidentiary hearing. Mr. Trepal proffered the documents from Appellee that he argued helped establish that Appellee acted as a state agent (PC-R. 98-99), and those

[1]Mr. Trepal has not alleged that Appellee deliberately acted to evade the public records law, as the lower court seemed to suggest. Such is not a factor considered by this Court in Schwab, although such deliberate deception would be a factor to consider in determining whether an entity became a state agency in an appropriate factual scenario.

documents had been attached as exhibits to Mr. Trepal's Motion to Compel (R. 33-34). As such, Mr. Trepal did all he was able to do at the non-evidentiary hearing on his motion to compel: he proffered the evidence which, if proved at an evidentiary hearing, supported his position that Appellee became a state agent through its connections with the Sheriff's Office. The fact that Mr. Trepal was denied an evidentiary hearing, despite his request for such a hearing (PC-R. 96), cannot be held against Mr. Trepal on appeal.

As for Appellee's legal argument, while acknowledging that this Court has said that each question of whether a private entity became a state agent is "unique," Answer Brief at 10 (citing News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029, 1032 (Fla. 1992)), Appellee returns to a mechanical application of the factors enunciated in Schwab to the instant case. Answer Brief at 11-12. This Court should not forget the factual scenarios in Schwab and the case sub iudice.

In Schwab, an architectural firm contracted with a county school board to design school buildings. A reporter wanted information from the firm regarding a number of school board projects. Here, a person sentenced to death is seeking records from an entity whose agents testified for the State in his capital trial, whose agents performed scientific testing, the results of which were used against Mr. Trepal in his capital trial, and whose agents generated documents that were supplied to

the State but not the defense at Mr. Trepal's capital trial. At issue in Schwab was a private company's right to keep its records confidential versus a reporter's right under the Public Records Act to access to those records. At issue here is a private company's right to keep its records confidential when that agency has performed law enforcement duties versus a capital defendant's right under the Public Records Act to access to those records, under the Fifth Amendment right to exculpatory evidence that the State should have disclosed prior to trial; under the Sixth Amendment rights to confront witnesses against him, to cross-examination, and to effective assistance of counsel; under the Eighth Amendment right not to be executed in a manner that violates the Constitution, as when an innocent man is executed for a crime he did not commit; and under the Fourteenth Amendment right to trial and postconviction proceedings that comport with due process. A comparison of the unique facts of the instant case with Schwab reflects that Mr. Trepal has a greater interest in Appellee's records than the Sun-Sentinel had in the architect's records.

Given that Mr. Trepal's interest is far greater than the appellant's interest in Schwab, the factors to be considered in whether Appellee became a state agent in Mr. Trepal's case are, of necessity, different than in Schwab. The trial court found, and Appellee does not dispute, that the testing conducted by Appellee "can be considered to be a traditional governmental function of law enforcement" (PC-R. 152), one of the factors to

be considered in Schwab. The trial court considered the other five factors listed in Schwab, and found that Appellee's involvement did not make it a state agent (PC-R. 152-53). The trial court conceded that "The testing and other activities of The Coca-Cola Company were conducted for the benefit of the Company itself as well as in response to requests from law enforcement authorities" (R. 152). Of the six factors considered in Schwab, the trial court found that Appellee met only one and a half, therefore was not a state agent for public records purposes (PC-R. 153).

Despite being asked to do so (PC-R. 103-05), the trial court did not consider Mr. Trepal's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments in the calculus of whether, in this case, Appellee became a state agent by virtue of its activities in furtherance of convicting and sentencing Mr. Trepal to death. Appellee dismisses Mr. Trepal's constitutional arguments: "It is also not dispositive -- or even "critical", as Defendant insists -- that this issue happens to arise in the context of a criminal prosecution." Answer Brief at 12. As neither the trial court nor Appellee has put forth a persuasive argument of why Appellee's rights under the Public Records Act should trump Mr. Trepal's constitutional rights, this Court should re-examine the factors weighed at the trial level and include an analysis of Mr. Trepal's right to the records under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United

State Constitution. Mr. Trepal's constitutional rights must supersede Appellee's statutory rights.

The idea that constitutional rights must supersede statutory rights is not a new one. In Davis v. Alaska, 415 U.S. 308 (1974), the United States Supreme Court held that Alaska's statute excluding evidence of juvenile adjudications from evidence must give way to a criminal defendant's Sixth Amendment right to confrontation and cross-examination. The Court held:

> In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record -- if the prosecution insisted on using him to make its case -- is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. at 319. Likewise, the United States Supreme Court has held that a defendant's constitutional rights supersede a state's interest in protecting child victims of sexual abuse, when that interest interferes with a criminal defendant's constitutional rights, Coy v. Iowa, 487 U.S. 1012 (1988); that a defendant's constitutional rights may trump state evidentiary rules, Rock v. Arkansas, 483 U.S. 44, 55-56 (1987); and that a criminal defendant's constitutional rights superseded a state statute making confidential social service agency records confidential if those records are material to the defense of the accused, Pennsylvania v. Ritchie, 480 U.S. 39 (1987). Likewise, this Court has held that where application of a statutory rule of

exclusion "interferes with confrontation rights, or otherwise precludes a defendant from presenting a full and fair defense, the rule must give **way** to the defendant's constitutional rights." Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991). Thus, while Appellee would have this Court determine that a defendant's constitutional rights are always trumped by a statute, this Court and the United States Supreme Court have held otherwise.

Appellee suggests that Mr. Trepal "would have this Court find that every corporate witness in a criminal proceedings automatically becomes a Chapter 119 'agency' simply by virtue of cooperating with authorities or providing testimony deemed helpful to the prosecution." Answer Brief **at** 12. Such a dramatic generalization is not Mr. Trepal's position. Indeed, there were many corporate witnesses who testified at Mr. Trepal's trial from whom Mr. Trepal has not sought public records and who Mr. Trepal has not argued became state agents by virtue of their involvement in the case. See (R. 3295-3310) (testimony of witnesses from various chemical companies). The "corporate" witnesses who testified for the State at Mr. Trepal's trial, with the exception of Appellee, did not perform testing at the request of the Sheriff's Office, the results of which were used to convict Mr. Trepal and sentence him to death. The other "corporate" witnesses did not fly law enforcement officers around the country to facilitate their investigation. The other "corporate" witnesses did not send an employee to the FBI with a machine designed by the corporation to perform a test that only

the corporation, with that machine, could perform, the results of which test were introduced against Mr. Trepal at trial.

Mr. Trepal is not asking for a sweeping rule that "would chill future corporate cooperation with law enforcement." Answer Brief at 13. Mr. Trepal asks only that he, as a criminal defendant at whose trial corporate witnesses testify to scientific testing that was conducted at least in part due to requests by state law enforcement officials, be permitted access to those corporate records relevant to his criminal case.[2]

Next, Appellee contends Mr. Trepal failed to provide the evidentiary basis for concluding that Appellee became a state agent by virtue of its activities in the Trepal case. As stated above, Mr. Trepal never had the opportunity to develop fully the evidentiary basis for his claim (PC-R. 96). Further, until the hearing on his Motion to Compel, Mr. Trepal was not on notice that Appellee disputed that the documents attached to the motion to compel purported to be generated by agents of Appellee were in fact generated by agents of Appellee. Nowhere in Appellee's Response to Defendant's Motion to Compel (PC-R. 68-78) does Appellee dispute the fact that an agent of the Coca-Cola Company

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[2]Appellee's argument that Appellee's interest in its trade secret -- the formula for Coca-Cola -- is jeopardized by this action is also a red herring. Mr. Trepal has no interest in the formula for Coke. If any of the records Mr. Trepal seeks tend to infringe on Appellee's trade secrets, Appellee is free to seek a protective order from the trial court so that Mr. Trepal may not disseminate any trade secret information without prior approval from the court. Mr. Trepal has already entered into such an agreement and complied with such a protective order regarding certain files of the Department of Justice that were released pursuant to Mr. Trepal's Freedom of Information Act requests.

wrote the memo attached to Mr. Trepal's motion (PC-R, 33-34). The only hearing held regarding Appellee's records was not evidentiary, and Mr. Trepal had no notice that Appellee disputed the fact that the attachments to Mr. Trepal's Motion to Compel were generated by Appellee's agents. Even in its Answer Brief Appellee does not dispute that the document attached to Mr. Trepal's motion to compel (PC-R. 33-34) was produced by Appellee's agent. Appellee's argument that the proper evidentiary basis was not established below is an attempt to divert this Court's attention from the real issues, whether Mr. Trepal's right to due process of law before he is executed by the State entitles him to access to Appellee's records.

Appellee concludes that "Neither the Constitution Nor Some Notion of Fairness Requires a Contrary Result." Answer Brief at 15. Appellee notes that there was no evidence that Mr. Trepal was unable to cross-examine Appellee's agent-witnesses at trial. Answer Brief at 15. Appellee misses the point of postconviction investigation, which this Court has recognized many times. Often it is only through the postconviction investigation process, which includes gathering public records, that exculpatory and impeachment information that **was** withheld from the defense at trial is discovered. Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993) (postconviction defendant entitled to disclosure of exculpatory material, even if such is not subject to the public records law). Likewise in State v. Gunsby, 21 Fla. L. Weekly S20 (Fla. Jan. 11, 1996), revised in, 21 Fla. L. Weekly S152 (Fla.

March 28, 1996), Gunsby won a new trial based on evidence disclosed by the State Attorney's Office to postconviction counsel, evidence that had not been disclosed to trial counsel. Similarly in Roman v. State, 528 So. 2d 1169 (Fla. 1988), this Court granted Roman **a** new trial based on exculpatory evidence found in **State** files that was withheld from trial counsel but disclosed to postconviction counsel. Likewise, in Agan v. Dugger, Case No. 87-489-Civ-J-16 (M.D. Fla. March 17, 1992), aff'd sub nom, Agan v. Sinsletary, 12 F.3d 1012 (11th Cir. 1994), the federal district court granted Agan's petition for writ of habeas corpus based on his claim of ineffective assistance of counsel, the basis of which were documents found in the Department of Corrections' files of which were not disclosed to trial counsel. Postconviction counsel obtained the withheld records through Chapter 119. The district court found that the State's withholding of this exculpatory material rendered trial counsel ineffective.

Mr. Trepal cannot, at this stage, establish how Appellee's records give rise to a claim for postconviction relief, as Appellee suggests he must do. Answer Brief at 15. It is not until Mr. Trepal and his counsel examine Appellee's records regarding Appellee's efforts in the investigation and trial that led to his conviction and sentence of death will Mr. Trepal be able to plead what, if any, records give rise to claims for postconviction relief.

Mr. Trepal has, as Appellee alleges, submitted public records requests to other law enforcement agencies involved in the investigation and trial of Mr. Trepal. Answer Brief at 15. Mr. Trepal's utilization of the public records law in this way does not obviate his need for Appellee's records. If Appellee has records it did not disclose to the State Attorney, the Attorney General or the Sheriff, then those agencies cannot provide those records to Mr. Trepal. Those records, even if they were never provided to the prosecutor, are Brady material nonetheless if they are exculpatory and material. Kyles v. Whitley, 115 S. Ct. 1555 (1995); Gunsby. Appellee is thus the only entity that can provide Mr. Trepal with its complete records of its involvement in his prosecution and trial. It is only after Mr. Trepal examines Appellee's records will he be in a position to argue that his right to cross examine was infringed, his opportunity to present evidence abrogated, Answer Brief at 15, or any other constitutional violation occurred at trial and became apparent only after examining Appellee's records.

Appellee asserts that "The criminal discovery rules are also open to Defendant if he chooses to employ them." Answer Brief at 15. This is inaccurate. This Court has made it clear that the criminal discovery rules, Fla. R. Crim. P. 3.220, do not apply in postconviction litigation. State v. Lewis, 656 So. 2d 1248 (Fla. 1994). Contrary to Appellee's assertion, Appellee is the only source of the information Mr. Trepal seeks regarding Appellee's involvement in his prosecution and trial.

Appellee's brief contains nothing more than a restatement of the trial court's findings below. Those findings are in error, for the reasons stated herein and in Mr. Trepal's Initial Brief. This Court should reverse the trial court's order denying Mr. Trepal's motion to compel regarding Appellee. In the alternative, this Court should remand to the trial court for further fact-finding, as Appellee contends the proceedings below failed to establish necessary factual development. The court below, despite Mr. Trepal's request, failed to allow further factual development. If further fact-finding is needed, then Mr. Trepal is entitled to the evidentiary hearing he requested below to establish the necessary facts.

CONCLUSION

For the reasons discussed herein and in his Initial Brief, Mr. Trepal respectfully requests that this Court reverse the order of the lower court, or in the alternative, remand this matter to the lower court for further evidentiary development.

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 15, 1996.

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