FILED
SID J. WHITE
FEB 19 1996
CLERK, SUPREME COURT
By ____
Chief Deputy Clerk
FILED
SID J. WHITE
FEB 20 1996
CLERK, SUPREME COURT
By ____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RICKEY BERNARD ROBERTS,

Appellant,

v. CASE NO. 87,389

ROBERT A. BUTTERWORTH,
Attorney General of the
State of Florida,

Appellee.

______________________________/

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

# ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WENDY S. MORRIS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0890537

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0333646

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - SUITE PL01
TALLAHASSEE, FL 32399-1050
(904) 488-9935

COUNSEL FOR APPELLEE

## TABLE OF CONTENTS

| | PAGE(S) |
|---|---|
| TABLE OF CONTENTS | i |
| TABLE OF CITATIONS | ii |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT REGARDING ORAL ARGUMENT | 1 |
| STATEMENT OF THE CASE AND FACTS | 2 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 4 |
| ISSUE | |
| WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S COMPLAINT FOR DISCLOSURE OF PUBLIC RECORDS. | 4 |
| CONCLUSION | 24 |
| CERTIFICATE OF SERVICE | 25 |

## TABLE OF CITATIONS


| CASES | PAGE(S) |
|---|---|
| Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981) | 9 |
| Asay v. Florida Parole Commission, 649 So. 2d 859 (Fla. 1994) | 19,20 |
| Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995) | 7 |
| Brady v. Maryland, 373 U.S. 83 (1963) | 17,18,19 |
| Castor v. State, 365 So. 2d 701 (Fla. 1978) | 13,21 |
| City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961) | 9 |
| City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986) | 3,11 |
| Doyle v. State, 526 So.2d 909, 911 (Fla. 1988) | 13,21 |
| Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d274 (1972) | 14 |
| F.C.C. v. Beach, ____ U.S. ____, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993) | 15 |
| Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971) | 14 |
| Hoffman v. State, 613 So. 2d 405 (Fla. 1992) | 19 |
| Orange County v. Florida Land Co., 450 So. 2d 341, 344 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984) | 6 |
| Parole Com'n v. Lockett, 620 So. 2d 153, 154-55 (Fla. 1993) | 20 |
| Roberts v. State, 510 So. 2d 885 (Fla. 1987) | 11 |
| Shevin v. Byron, Harless, Schaffer, Reid & Associates, 379 So.2d 633, 640 (Fla. 1980) | passim |
| State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990) | passim |
| Walton v. Dugger, 634 So.2d 1059, 1062 (Fla. 1993) | 16 |

OTHER AUTHORITIES


| | |
|---|---|
| Florida Rule of Criminal Procedure 3.850 | 11 |
| Florida Rule of Appellate Procedure 9.030 | 22 |
| Section 119.07, Fla. Stat. (1995) | passim |
| Section 119.011, Florida Statutes | 4,5 |
| Section 14.28, Florida Statutes | 20,21 |
| Ch. 95-398, § 16, Laws of Fla. | 9 |
| Ch. 95-398, § 17, Laws of Fla. | 10,14 |
| Ch. 95-398, § 37, Laws of Fla. | 9 |
| Ch. 95-356, § 1, Laws of Fla. | 20 |
| Ch. 93-405, § 6, Laws of Fla. | 20 |
| Art. I, §24, Fla. Const. | 15 |
| Art. IV, § 3 & 8, Fla. Const. | 22 |

## PRELIMINARY STATEMENT

Appellant, RICKEY BERNARD ROBERTS, will be referred to herein as "Roberts" or "Appellant." Appellee, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, will be referred to herein as "the Department" or "Appellee." References to the transcripts of the February 8, 1996 motion hearing will be by the use of the symbol "T" followed by the appropriate page number(s). References to the record will be by the use of the symbol "R" followed by the appropriate page number(s).

## STATEMENT REGARDING ORAL ARGUMENT

Appellee does not desire oral argument in this case. The legal issues are straightforward and soundly addressed by both parties in the briefs. The sealed documents are before the Court for de novo inspection. Therefore, the decisional process would not be significantly aided by oral argument.

## STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statement of the case. Appellee accepts Appellant's statement of the facts with the following clarifications:

Roberts did not make the requests for public records. Rather, CCR made the requests on Roberts' behalf as a part of its representation of Roberts in postconviction proceedings (Stip. Ex. 2 & 3; R 42, 44-5). The requests were two of approximately 100 received in the Summer and early Fall of 1995 (Stip. Ex. 4; R 47, 50). Appellee represented below that the delay in responding to the requests was due to the number of requests and the desire to answer all the requests at once, and thus uniformly (T 32). The trial court concluded that Appellee's response to Roberts' public records request was "reasonable under the circumstances" (R 61).

As found by the trial court, Appellee made its records available for inspection starting on October 25, 1995 (R 58, citing to Stip. Ex. 6). CCR did not inspect the records until January 30, 1996, when the inventory of withheld documents was provided (Id.)

At the outset of the hearing the parties entered the "Joint Stipulation" noted by Appellant. In paragraph 3 of that stipulation, Appellant declared: "Plaintiff withdraws Count III of Plaintiff's complaint as an independent cause of action" (R 35). Count III of the complaint is a broad argument that Appellee's refusal to disclose documents violates due process (R 5).

## SUMMARY OF ARGUMENT

### Issues A and B: Character of Withheld Documents

The trial court properly found that the withheld records were, in large part, handwritten notes made for use in preparing later briefs; or for use in later court proceedings. As such, the documents were not public records subject to disclosure at all. Alternatively, if the documents were public records, they were "work product" exempt from disclosure under §119.07(3)(1), Fla. Stat. (1995).

Section 119.07(3)(1) is a remedial statute that properly applies to documents requested before October 1, 1995. Desjardins, infra. It treats all death-sentenced inmates alike, by applying equally to such inmates represented by private and public-paid counsel. It rationally recognizes the difference between capital and non-capital postconviction litigation, and does not violate equal protection.

### Issue C: Brady Claims

The trial court did not refuse to examine the withheld documents for material required to be disclosed under Brady, infra. It properly concluded that it lacked jurisdiction to grant relief under Brady.

## ARGUMENT

## ISSUE

**THE TRIAL COURT PROPERLY DENIED APPELLANT'S COMPLAINT FOR DISCLOSURE OF PUBLIC RECORDS.**

### A. ITEMS 1(A) THROUGH 1(H) WERE NOT "PUBLIC RECORDS" FOR PURPOSES OF CHAPTER 119, FLORIDA STATUTES.

The trial court properly denied Roberts' complaint for disclosure of public records under Chapter 119, Florida Statutes. Items 1(a) through 1(h) were not subject to disclosure because they were not public records for purposes of Chapter 119. These documents are not memoranda but consist of hand-written notes made by an assistant attorney general. The notes summarize portions of the trial transcript and the briefs, and they discuss the arguments of the parties.

Section 119.011(1), Florida Statutes, defines "public records" as

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

In Shevin v. Byron, Harless, Schaffer, Reid & Associates, 379 So.2d 633, 640 (Fla. 1980), this Court interpreted the above provision, stating:

> That definition limits public information to those materials which constitute records -- that is, materials that have been prepared with the intent of perpetuating or

> formalizing knowledge . . . [W]e hold that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. To be contrasted with "public records" are materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation. Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business. [Emphasis in original; footnote omitted].

The records at issue in Byron were accumulated during a nationwide search for a managing director of the Jacksonville Electric Authority. Id. at 635. They consisted of handwritten notes regarding candidate interviews, travel vouchers, and resumes and letters from potential candidates. Id. at 635 & 640. This Court concluded that the handwritten notes made during or shortly after interviews with candidates were preliminary materials intended to aid in the selection process and were not intended to formalize the knowledge gained during the interviews. Id. at 641. As a result, the notes were not public records. Id.

In State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990), this Court again addressed whether certain documents fell within the term "public records." Kokal was convicted of first-degree murder and sentenced to death. Id. at 325. After affirmance of his conviction and sentence on direct appeal, Kokal filed a motion for post-conviction relief. Id. Pending a hearing on the motion, Kokal moved to compel disclosure of the state attorney's files relating to his prosecution. Id. Citing Byron, supra, this Court held that some of the documents, including certain trial preparation materials, were not public records. Id. at 327. The Court agreed with the Fifth District in Orange County v. Florida Land Co., 450 So. 2d 341, 344 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984), that the following documents are excluded from the definition of "public records":

> Document No. 2 is a list in rough outline form of items of evidence which may be needed for trial. Document No. 9 is a list of questions the county attorney planned to ask a witness. Document No. 10 is a proposed trial outline. Document No. 11 contains handwritten notes regarding the county's sewage system and a meeting with Florida Land's attorneys. Document No. 15 contains notes (in rough form) regarding the deposition of an anticipated witness. These documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. They seem to be simply preliminary guides intended to aid the attorneys when they later formalized the knowledge. We cannot imagine that the Legislature, in enacting the Public Records Act, intended to include within the term "public records" this type of material. See Shevin v. Byron, Harless. [Emphasis added].

Id. See also Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995) (notes of state attorney's investigations and annotated photocopies of decisional law are not "public records").

In the present case, items 1(a) through 1(h) were not subject to disclosure because they were not "records" within the meaning of Chapter 119, Florida Statutes. Rather, "[t]hese documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things." Kokal, supra, at 327. They were "materials prepared as drafts or notes, which constitute mere precursors of governmental 'records'." Byron, supra, at 640. Such rough drafts constitute matters which "obviously would not be public records." Id. Just as the personal trial preparation notes of the assistant state attorney in Kokal did not rise to the level of "records," notes by an assistant attorney general in preparation for the filing of an answer brief also are not "records." These notes rise to the level of records only when they are formalized into a memorandum, motion or brief. Kokal, supra, at 327. Therefore, the Department properly declined to disclose items 1(a) through 1(h).

**B. EVEN IF THE DOCUMENTS ARE PUBLIC RECORDS, THEY FALL WITHIN THE ATTORNEY WORK PRODUCT EXEMPTION TO DISCLOSURE.**

Even if this Court finds that some of the notes were public records, the trial court properly denied the

complaint for a second reason. Section 119.07, Florida Statutes, enumerates several exemptions to disclosure including an attorney work product exemption. Above-described Items 1(a) through 1(h) are covered by this exemption. Item 1(i) also falls within the exemption. The document is a hand-written faxed memorandum from an assistant attorney general to Thomas Scott, Esq. with the attached affidavit of Ken Lange, Esq., Roberts' trial counsel.

The 1995 Legislature amended the work product exemption to add the following underlined text:

> A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation

> after direct appeal until execution of sentence or imposition of a life sentence. [Emphasis in original].

Ch. 95-398, § 16, at 3265, Laws of Fla.; §119.07(3)(1)1., Fla. Stat. (1995). The amendment became effective October 1, 1995. Ch. 95-398, § 37, Laws of Fla. In the absence of the amendment, the attorney work product exemption expired after direct appeal. In the presence of the amendment, the attorney work product exemption in capital cases expires only upon execution or reduction of sentence to life.

**1. Section 119.07(3)(1), Fla. Stat. (1995), applies retroactively to Roberts.**

Although Roberts made his public records request before the effective date of the amendment, the amended provision applies retroactively to him as a remedial statute. In City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961), this Court observed:

> Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.

In Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981), this Court defined remedial statutes as follows:

> A remedial statute is "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." It is also defined as "[a] statute giving a party a mode of remedy for a wrong, where he had none, or a

different one, before." Black's Law Dictionary, 5th Ed., 1979.

In the present case, the legislature amended Section 119.07(3)(l)1., Florida Statutes, to extend the exemption for the Attorney General's capital litigation records for a remedial purpose.

As enunciated by the Department at the hearing below, the legislature made the following finding in support of the amendment:

> The Legislature finds that it is a public necessity to exempt certain attorney records as described in s. 119.07(3)(l)1., Florida Statutes, in order to ensure that the work product developed by the attorneys of the Attorney General's Office during direct appeal remains confidential through the post-conviction proceedings. The premature disclosure of this information could be detrimental to the Attorney General's legal representation in these proceedings if the material were disclosed prior to final disposition of the postconviction proceedings. Such a result could interfere with the effective and efficient administration of government by hampering the Attorney General's ability to rely on the materials prepared by the attorneys for direct appeal when such materials reflect the attorney's mental impression, conclusion, litigation strategy, or legal theory. Thus, the Legislature determines that the public harm in disclosing this work product significantly outweighs any public benefit derived from disclosure. Furthermore, a capital defendant's ability to secure other public records is not diminished by nondisclosure of these attorney work products. [Emphasis removed].

Ch. 95-398, § 17, Laws of Fla.

The instant case demonstrates the necessity for the amendment. Roberts' direct appeal was affirmed by this Court on July 2, 1987. Roberts v. State, 510 So. 2d 885 (Fla. 1987). Almost ten years later, he filed this public records request in preparation for a possible motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Because death case litigation does not conclude with resolution of the direct appeal but in most cases continues until the execution, attorney work product in such cases must be protected until the litigation ends. In contrast, litigation in civil cases and in most non-capital criminal cases ends with the direct appeal. Clearly, the trial court properly concluded that the instant amendment is remedial and therefore retroactive.

In City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986), this Court held that the then newly exemption for attorney work product applied retroactively to causes of action arising before the effective date of the exemption. When the legislature initially enacted Chapter 119, it did so without creating an exemption for attorney records relating to anticipated or pending litigation. Id. The 1984 Legislature rectified the situation by creating the exemption. Id. This Court held that such exemption applied retroactively to causes of action accruing prior to the effective date of the statute, stating:

> If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes . . . The

> statutory exemption, according temporary protection from the disclosure of sensitive documents, is addressed to precisely the type of "[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights," . . . which is allowed retroactive application. A contextual examination of the exemption leaves little doubt as to its salutary and protective purpose of mitigating the harsh provisions of the Florida Public Records Act as applied to public entities' litigation files in ongoing litigation.

This Court further noted that, prior to enactment of the exemption, public entities suffered a disadvantaged status vis-a-vis private opponents in litigation. Id. at 1029. The Court found that the exemption well accommodated the competing interests in the confidentiality of the attorney-client relationship and the government in the sunshine. Id. Similarly, in the present case, the 1995 Amendment takes account of the difference between capital litigation and other kinds of litigation and balances the right to disclosure with the need for an attorney-client privilege between the Attorney General's Office and the State of Florida. Because of the amendment, the State of Florida is no longer in a disadvantaged status vis-a-vis in litigation.

**2. Section 119.07(3)(l), Fla. Stat. (1995), does not violate the Equal Protection Clause.**

Appellant contends that the amendment violates the Equal Protection Clause. However, this argument is not preserved for appellate review. Below, CCR contended that §119.07(3)(l) violated equal protection because it treats

death-sentenced inmates, as a class, differently from inmates not sentenced to death (T 28-9). For the first time before this Court, CCR draws a new distinction: that the statute treats death-sentenced inmates represented by "state paid counsel" differently from such inmates represented by private counsel. Since this point was not raised below, it is not preserved for review. See Castor v. State, 365 So. 2d 701 (Fla. 1978); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988) (refusing to consider certain claims by death-sentenced inmate, when the claims were not presented to circuit court).

Even if the argument is preserved, Roberts' equal protection claim has no merit. He contends that §119.07(3)(l) violates equal protection because it "applies to indigent capital defendants who are represented by state paid counsel" (IB, p. 16). He first notes the statute's express cross-reference to §27.7001, Florida Statutes. To make this point, Roberts misleadingly quotes only a portion of that cross-reference, which reads:

> For purposes of capital collateral litigation as set forth in §27.7001, the Attorney General's office is entitled to claim this exemption... .

Nothing in the cross-reference limits the exemption to public records requests made on behalf of death-sentenced inmates represented by state paid counsel. The obvious purpose of the cross-reference is to make it clear the

exemption applies only to postconviction litigation for death cases.[1]

The Department's reading of §119.07(3)(l) is reinforced by the legislative findings set forth in Ch. 95-398, §17, Laws of Fla., which were quoted earlier in this brief. The quoted language does not distinguish between death-sentenced inmates represented by private versus public-paid counsel. As with the operative statute, all death sentenced inmates are treated alike. It was for this reason the trial court rejected Roberts' equal protection claim (R 59-60).

The real issue, and the one which was argued below, is whether the statute properly exempts certain records from disclosure in capital postconviction litigation only.[2] Preliminarily, the standard of review is the rational basis, not strict scrutiny, test. Strict scrutiny applies in only two situations. First, it applies to classifications based on race, alienage, or national origin. Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). Second, it applies to classifications infringing on fundamental rights. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d274 (1972).

---

[1] For purpose of this appeal, Appellee will assume that CCR has statutory authority to bring a Ch. 119 lawsuit on behalf of a death-sentenced inmate.

[2] Appellee notes that this Court's rules treat death case litigation differently. Rule 3.851 is limited to collateral relief "after death sentence." Rule 3.851(b) imposes shorter time limits than those in Rule 3.850.

Here, the distinction is between death and non-death postconviction litigation. Certain documents are exempt from disclosure under Ch. 119, when they are part of the Attorney General's files for capital collateral proceedings. Section 119.07(3)(l) cannot be read to involve race, alienage, or national origin.

Roberts has no right, recognized as "fundamental" under the U.S. Constitution, to obtain attorney work product. His right is under Art. I, §24 of the Florida Constitution, and Ch. 119. Art. I, §24(c) provides that the Legislature may establish exemptions from disclosure; the Legislature adopted the challenged exemption upon making the findings required by Art. I, §24(c). Fundamental rights are not at stake.

Consequently, the proper standard of review is the highly deferential, rational basis test. <u>See</u> <u>F.C.C. v. Beach</u>, ____ U.S. ____, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993):

> [e]qual protection is not a license for the courts to judge the wisdom, fairness, or logic of legislative choices. In areas of <u>social and economic policy</u>, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is <u>any reasonably conceivable state of facts that could provide a rational basis</u> for the classification. [e.s.] [citations omitted]

The statute draws a reasonable distinction. As noted in the language quoted above, the 1995 Legislature found that

"certain attorney records" needed to remain confidential during capital collateral proceedings. Disclosure could

> be detrimental to the Attorney General's legal representation... [and] could interfere with effective and efficient administration of government by hampering the Attorney General's ability to rely on the materials prepared by the attorneys for direct appeal.

Roberts does not dispute the Legislature's findings. Thus, there is an unchallenged, rational basis for §119.07(3)(l). The statute does not violate equal protection.

Finally, Appellee notes that §119.07(3)(l) merely amends existing law. Before the 1995 change, all attorney work product was exempt, at least until a direct appeal was over, under §119.07(3)(n) (1993). Additionally, attorney work product relating to active capital collateral proceedings was exempt by virtue of this Court's decisions in State v. Kokal, 562 So.2d 324 (Fla. 1990); and Walton v. Dugger, 634 So.2d 1059, 1062 (Fla. 1993). The only effect of the 1995 amendment was to continue the exemption of direct appeal work product until a death sentence was executed or reduced to life imprisonment. Under these circumstances, Roberts' equal protection argument evaporates.

## C. THE TRIAL COURT CORRECTLY HELD THAT IT LACKED JURISDICTION TO GRANT RELIEF BASED ON BRADY v. MARYLAND, 373 U.S. 83 (1963).

Oblivious to the entire record, Roberts claims the trial court refused to consider whether any withheld documents should have been disclosed under Brady v. Maryland, 373 U.S. 83 (1963). The trial court made no such ruling. Instead, the trial court recognized its legal and practical inability to grant relief compelled by a Brady violation.

At the outset of the hearing below, the parties stipulated to an order addressing the applicability of Brady to public records exempt from disclosure under Ch. 119. In that order,[3] the trial court declared that Chapter 119 did not give it jurisdiction to hear Brady claims, and that such claims must be brought in a court of competent jurisdiction. Nevertheless, the court, in the same order, declared that the Attorney General was "obligated to disclose Brady material."

More important, the trial court clarified its ruling during the hearing:

> THE COURT: Well, with the caveat of my prior ruling that--
>
> MR. COUTURE: Exactly.
>
> THE COURT: Yes, Certainly if I see anything here that obviously to me

---

[3] This order was omitted from the record on appeal, but is attached as Appendix A.

> is Brady material, I would certainly be willing to say to you that I have found something that's Brady material, for whatever that's worth.

(T 61). Later, the trial court explained:

> I think if something is so obviously Brady material that I would recognize it, not knowing anything about the case, I would want CCR to know. . . .

(T 64). The quoted passages are legally and practically sound. As a practical matter, it would be extremely difficult for any court, not familiar with Roberts' case, to recognize a document as material and exculpatory. It would be impossible for such court to know whether the document had been disclosed earlier, presumably at the time of trial or sentencing.

As a legal matter, even CCR does not suggest how a circuit court in Leon County -- presiding over a Ch. 119 lawsuit -- would have jurisdiction to grant Brady relief in a death case before another circuit court or this Court. CCR also refuses to acknowledge the obvious: that only the court which tried and sentenced Roberts, or this Court, would have jurisdiction even to stay proceedings pending resolution of a Brady claim.

At the least, the trial court did not refuse to examine the withheld documents for Brady material. To the contrary, the court expressly declared it would want CCR to know if such material existed. By not requiring the Attorney General to release any withheld documents as Brady material,

the trial court implicitly found no such material was present.

Hoffman v. State, 613 So. 2d 405 (Fla. 1992), does not compel the reversal and remand sought by Roberts. In relevant part, Hoffman stands for the proposition that Ch. 119 must be followed by an inmate seeking public records "with respect to agencies outside the judicial circuit in which the case was tried." Id. at 406. Nevertheless, Hoffman is totally silent as to Brady claims. It does not expand or contract a circuit court's jurisdiction to hear actions brought under Ch. 119. Appellee does not, in this appeal, contest the trial court's ability to look for Brady material, and inform CCR of its existence.

Whether Brady requires disclosure despite a Ch. 119 exemption is an issue that is not ripe for review, as resolution of the issue would depend on facts not before this Court. For example, another trial court in another case might discern Brady material among clemency documents. However, this Court has held Brady does not apply to clemency proceedings. Asay v. Florida Parole Commission, 649 So. 2d 859 (Fla. 1994).

In short, this Court should recognize the trial court's willingness to look for Brady material, and reject Roberts' argument. Whether Brady supersedes a Ch. 119 exemption is an issue not ripe for review.

### D. ITEMS 2(A)-(C) ARE EXEMPT FROM DISCLOSURE AS CLEMENCY RECORDS UNDER SECTION 14.28, FLORIDA STATUTES.

The trial court properly denied the complaint with respect to Items 2(a)-(c), the clemency materials because clemency records are exempt from Chapter 119, Florida Statutes. In Parole Com'n v. Lockett, 620 So. 2d 153, 154-55 (Fla. 1993), this Court held that article IV, section 8, of the Florida Constitution, vests the clemency process solely in the executive branch, and therefore the legislature may not preempt or overrule clemency rules without violating the separation of powers doctrine. The Rules of Executive Clemency provide for the confidentiality of the Florida Parole Commission's clemency records until the Governor determines otherwise. Id. at 156. Therefore, this Court held that the clemency investigative files and reports relating to a prisoner under sentence of death were not public records for purposes of Chapter 119. Id. at 158.

Subsequent to the Lockett decision, the 1993 Legislature enacted Section 14.28, Florida Statutes, which presently provides in relevant part:

> **Executive clemency.** -- All records developed or received by any state entity pursuant to a Board of Executive Clemency investigation shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. However, such records may be released upon the approval of the Governor.

See Ch. 95-356, § 1, Laws of Fla.; Ch. 93-405, § 6, Laws of Fla. In Asay v. Florida Parole Com'n, 649 So. 2d 859, 860

(Fla. 1994), this Court again acknowledged that Florida constitutional law exempts clemency records from any disclosure not authorized by the Governor. In the present case, the Department properly withheld items 2(a)-(c) because they are exempt from disclosure as clemency records.

Roberts contends that the above provisions were waived because the clemency materials were given to the Attorney General's Office. This argument is without merit. First, the argument is not preserved for appellate review because it was not made below. Doyle v. State, 526 So. 2d 909 (Fla. 1988); Castor v. State, 365 So. 2d 701 (Fla. 1978). Roberts made only the following argument with respect to the clemency records at the hearing:

> Your Honor, for the record, I would claim that to the extent there is any segrable [sic] material that does not qualify for an exemption, either in the parole files materials or in the other materials that we're looking at today, that to the extent that there's any material which can be segregated out from these files and does not otherwise qualify for an exemption, I would expect that material would be released to the plaintiff.
>
> As far as the parole commission files in particular, I would just assert that Brady does apply to it and not withstanding Asay, that the Supreme Court's decision in Pennsylvania versus Ritchie would also apply; and otherwise I have no further argument to make about the parole commission.

(T 50). Later in the hearing, Roberts agreed with the trial court's characterization of Roberts' argument as conceding that the clemency materials should not be released except as Brady material (T 60).

Second, Section 14.28, Florida Statutes, states that only the Governor may release the records to the public, not that the parole commission may make such determination. Third, the Attorney General is a member of the cabinet and therefore a member of the clemency board. See Art. IV, § 3 & 8, Fla. Const. To fulfill his constitutional duty with respect to the clemency board, the Attorney General would have to review the clemency investigative files and memoranda to make reasoned decisions on whether to grant reprieves and pardons. Under Roberts' argument, clemency files would never be confidential because the Attorney General and other members of the cabinet always have access to the files.

In conclusion, the Department points out that this case is a civil case and Appellant has taken a direct appeal from the trial court to this Court, thereby bypassing the district court of appeal. Florida Rule of Appellate Procedure 9.030(a)(1)(A)(i) gives this Court jurisdiction over the direct appeal from a final order of a courts imposing a death sentence. See also Art. V, §3(b)(1), Fla. Const. The present order is a final order denying Roberts' complaint for disclosure of public records and is in the nature of a final order granting summary judgment. The complaint was not filed in conjunction with a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The Department questions whether this Court has appellate jurisdiction over the instant order as

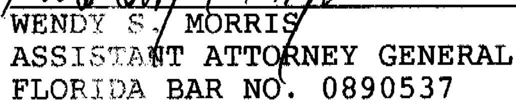
well as the orders which will be rendered in the other twenty capital Collateral public records cases now pending in the Second Judicial Circuit or the roughly one hundred requests which have not yet resulted in lawsuits.

CONCLUSION

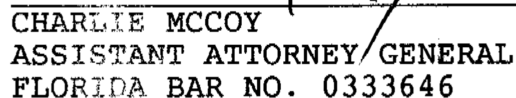
Based on the foregoing legal authorities and arguments, Appellee requests that this Honorable Court affirm the order of the trial court rendered in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



WENDY S. MORRIS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0890537



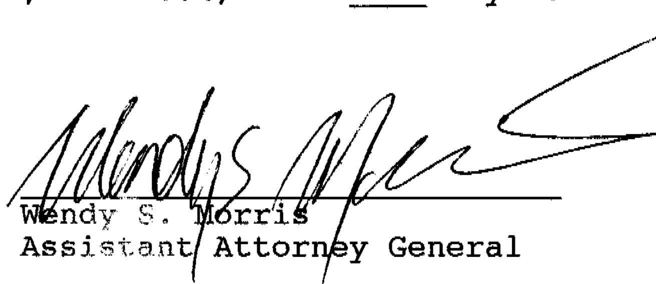
CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0333646

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - SUITE PL01
TALLAHASSEE, FL 32399-1050
(904) 488-9935

COUNSEL FOR APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery to Jennifer M. Corey, Assistant Capital Collateral Representative, 1533-C South Monroe Street, Tallahassee, FL 32301, this 20th day of February, 1996.



Wendy S. Morris
Assistant Attorney General

# Appendix A

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

RICKEY BERNARD ROBERTS,
DOC # 100866

Plaintiff,

v.

ROBERT A. BUTTERWORTH,
ATTORNEY GENERAL, STATE
OF FLORIDA,

Defendant.

EMERGENCY FILING: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION SCHEDULED FOR 7:00 A.M., FEBRUARY 23, 1996.

Case No. 95-4802

## ORDER

This matter came before the Court upon hearing February 8, 1996. Upon consideration of the plaintiff's and defendant's Joint Stipulation, it is ORDERED:

To the extent Plaintiff's complaint relies upon Brady v. Maryland, 373 U.S. 83 (1963) and Hoffman v. State, 613 So. 2d 405 (Fla. 1992) as a basis for a separate cause of action; the complaint is dismissed for failure to state a cause of action.

However, the Attorney General's office is obligated to disclose Brady material. Therefore, Plaintiff is not precluded from claiming that Brady requires disclosure of materials by defendant, even if such materials would be exempt from disclosure under Chapter 119, Florida Statutes. ~~Should Plaintiff claim that documents withheld from disclosure under Chapter 119, Florida Statutes, must be nevertheless disclosed by Defendant pursuant to Brady v. Maryland, 373 U.S. 83 (1963)~~. Chapter 119 of the Florida Statutes does not give this Court jurisdiction to hear Brady claims. Claims based upon Brady must be brought in a court of

competent jurisdiction.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida this 8th day of February, 1996.

F. E. STEINMEYER, III
Circuit Judge

Conformed copies to counsel