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IN THE SUPREME COURT OF FLORIDA

ANTHONY B. BRYAN,

Appellant,

v. CASE NO. 87,777

ROBERT A. BUTTERWORTH,

Appellee.
_____/

On Direct Appeal from the Second Judicial Circuit
In and For Leon County, Florida

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

As part of the record on appeal, this Court has in its possession about 100 pages of attorney notes withheld from disclosure. The copies were provided to the trial court for an *in camera* inspection, and sealed by that court. Appellee respectfully requests the notes' confidentiality be maintained pending a decision in this appeal.

This case illustrates a growing problem in capital litigation--the use of ch. 119 for delay. Bryan, for example, has been on death row at least since his conviction and sentence were affirmed on direct appeal in 1988. Bryan v. State, 533 So.2d 744 (Fla. 1988). Chapter 119 has been available to him at all times since. Nevertheless, his request for public records was not made until September 1994.

STATEMENT REGARDING ORAL ARGUMENT

Contrary to the requirements of Fla.R.App.P. 9.320, Bryan has incorporated his request for oral argument into his initial brief. Appellee opposes oral argument, which could unnecessarily delay this case. The documents withheld from disclosure are part of the record on appeal, and speak for themselves. They will be examined by this Court. The legal arguments are straightforward, and were largely decided by this Court's recent decision in Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996). Oral argument would not assist the Court in reaching its decision.

STATEMENT OF THE CASE AND FACTS

The State accepts Bryan's statement as to the case, with this addition and correction. On page 3 of his initial brief, Bryan notes that Appellee "withdrew items 4-10 from the inventory of withheld documents." (R 80-3) Actually, Appellee provided copies of items 4-10 directly to Bryan's counsel, rather than just extending an opportunity to inspect those documents. (*See* final order at p. 2 [R 86].) Also on page 3 of his initial brief, Bryan notes that on February 7, *1986*, the State provided the court with copies of the remaining withheld documents. The correct date is February 7, *1996*.

Appellee strongly objects to Bryan's statement of the facts. Fla.R.A.P. 9.210(b)(3) requires the statement of the case and facts to include "[r]eferences to the appropriate pages of the record or transcript." Bryan's statement does not do this. Within a four page statement, Bryan cites to the record only once, when he quotes a terse excerpt from the final order.

Far more objectionable is Bryan's inclusion of argument within the statement of fact. He claims, as a matter of fact, that the "State failed to fully and completely provide a proper inventory of the withheld documents." (IB, p.3) This statement is argument, not fact. It is undisputed that Appellee provided an inventory (R 61-4), and the trial court expressly held "the list of withheld documents provided to

Plaintiff's counsel by Defendant met the requirements of §119.07(2)(a), Fla. Stat." (R 87) Whether the inventory, and the court's ruling, were "proper" is a matter of law which Bryan improperly portrays as fact.

Equally argumentative and objectionable--as well as factually incorrect--is Bryan's observation on page 1 of his initial brief. There, he flatly states his request for public records was "denied because the State claimed its entire file as exempt." He then states he filed suit and was allowed to inspect the files.

In reality, Appellee never refused access to the great bulk of the files. By letter dated September 22, 1994, Bryan was allowed to inspect the overwhelming amount of Defendant's files. As stated in the last paragraph of the letter:

> Nevertheless, despite these major concerns, you may inspect *any* document in my file which is truly a public record.... [e.s.]

(R 10) For its own reasons, CCR did not choose to inspect Appellee's files until after it filed suit. However, it was not the lawsuit--as Bryan insinuates--which motivated Appellee's decision to allow the inspection. By the time the suit was filed, nearly a month had passed since Defendant had agreed to allow CCR to inspect its files.

In this light, Bryan's statement of the facts is inaccurate and misleading. It could be stricken by this Court. Thompson v. State, 588 So.2d 687 (Fla. 1st DCA 1991). It could also be stricken as "unduly argumentative." Williams v. Winn-Dixie

Stores, Inc., 548 So.2d 829 (Fla. 1st DCA 1989). *See* Overfelt v. State, 434 So.2d 945, 949 (Fla. 4th DCA 1983), *disapproved on other grounds*, 457 So.2d 1385 (Fla. 1984) (discussing importance of factual statements in briefs, and declaring that a "slanted or argumentative factual statement is of little or no assistance"). Appellee trusts this Court will ignore the improper portions of Bryan's statement.

On pages 1-3 of his statement, Bryan quotes the inventory of documents withheld from disclosure. For clarification, Appellee adds that only items (1) - (3) of that inventory were still undisclosed by the time of the final hearing. As noted in the final order, the *in camera* review was limited to items (1) through (3). (R 86)

SUMMARY OF THE ARGUMENT

Issue I: The Withheld Documents

The lower court correctly determined, as a matter of fact, that the withheld documents were attorney notes, etc. This determination is supported by competent, substantial evidence (the documents themselves); and is presumptively correct. Bryan does not urge the absence of competent, substantial evidence, but merely argues against the trial court's factual findings. This Court should summarily affirm.

Alternatively, this Court's review of the withheld documents is much like a review *de novo*. If so, simple examination of the documents reveals they were

handwritten notes containing attorneys' mental impressions, etc.; typed summaries of other reports prepared by a paralegal at an attorney's request; or a base map with annotations. The trial court correctly found these documents were not public records, and thus not subject to disclosure under ch 119. Also, the trial court correctly found that the documents, if they were public records, were exempt from disclosure as "work product" under §119.07(3)(l), Florida Statutes (1995).

The inventory of withheld documents met the requirements of §119.07(2)(a). The inventory specifically cited relevant cases and relevant portions of ch. 119. It described the withheld documents with sufficient specificity for Bryan to oppose confidentiality, and for judicial review.

Bryan's claims that Appellee should have provided the trial court with "the final version of the notes" (IB, p.9-12), and that Appellee should have segregated exempt and non-exempt material were not raised below and are thus not preserved. If preserved, the claims are meritless under the facts.

Issue II: The Brady Claims

Below, Bryan's reliance on Brady v. Maryland, 373 U.S. 83 (1963), was never more than a simple citation to that decision. His complaint "raised only a general request for exculpatory material under *Brady*." Roberts v. Butterworth, 668 So.2d

580, 582 (Fla. 1996). Therefore, Appellee's decision not to release any documents as Brady material was final. *Id.*

Bryan was tried in Santa Rosa County. Under Hoffman v. State, 613 So.2d 405 (Fla. 1992), the Leon County circuit court had jurisdiction to entertain his action to enforce ch. 119. Nevertheless, nothing in Hoffman or in ch. 119 gave that court jurisdiction to grant relief upon Brady claims brought by an inmate tried elsewhere. The trial court properly ruled that it could not resolve a Brady claim. It must be affirmed on this point as well.

ARGUMENT

ISSUE I

WHETHER HANDWRITTEN ATTORNEY NOTES WERE PROPERLY WITHHELD FROM DISCLOSURE UNDER CH. 119, FLORIDA STATUTES

A. Standard Of Review

Appellee respectfully requests the Court to announce the standard of review, when a trial court upholds an agency's decision not to disclose documents sought under ch. 119, Florida Statutes; *and* the trial court's ruling is based solely on written evidence. There are two possibilities. First, that the trial court's decision, to the extent it is factual, is presumptively correct and will not be reversed as long as it is supported by competent, substantial evidence. Second, when the trial court's decision is based solely on written evidence, less deference to factual findings will be given; and appellate review approaches a review *de novo.*

The order below is quite capable and well-reasoned. This Court should not lightly disregard the trial court's perspective; which, presumably, reflects the experience gained from resolving public records disputes involving a wide variety of requests and agencies.

The trial court made several factual findings, to the effect the withheld documents were handwritten attorney notes, a paralegal's synopses of reports

prepared at an attorney's request, and annotations upon a highway map. Moreover, all were prepared for later use in litigation. (R 87-88) These were factual findings, and a reasonable inference therefrom. The findings and inference are supported by competent, substantial evidence (the documents themselves); and are presumptively correct. Marsh v. Marsh, 419 So.2d 629, 630 (Fla. 1982) (trial court's factual findings, when based on resolution of conflicting testimony, are presumptively correct). *See* Florida East Coast Railway Co. v. Dept. of Revenue, 620 So.2d 1051, 1061-2 (Fla. 1st DCA 1993), *rev. den.*, 629 So.2d 132 (Fla. 1993) (on review, trial court's findings of fact and conclusions of law are presumptively correct and will not be overturned unless clearly erroneous). *See also* Florida Bar v. Canto, 668 So.2d 583, 584 (Fla. 1996) (in attorney discipline proceedings, referee's findings of fact presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support); DeClements v. DeClements, 662 So.2d 1276, 1282 (Fla.3d DCA 1995) (*en banc*) (in dissolution proceeding, master's findings of fact and conclusions of law presumptively correct, and may be rejected by trial court only if clearly erroneous or if master has misconceived legal effect of evidence).

In contrast, there is caselaw indicating this Court's treatment of the disputed documents approaches *de novo* review, despite the factual nature of the trial court's

decision.[1] *See* Wells v. Sarasota Herald Tribune Co., 546 So.2d 1105 (Fla. 2d DCA 1989) (appellate court, without addressing the standard of review, conducted an *in camera* inspection of documents withheld from disclosure under ch. 119).

The copies of disputed documents were *not* challenged as to authenticity or any other ground upon which live testimony was required. Instead, the copies were viewed directly by the trial court, which effectively decided the matter upon a written record. Viewed narrowly, the trial court was not acting from a perspective superior to this Court. Dukes v. Dukes, 346 So.2d 544, 545 (Fla. 1st DCA 1976), *cert. dism.*, 351 So.2d 1021 (Fla. 1977) (appellate and trial court are "on a par" with each other when each has used its written record to decide).

Consequently, the presumption of correctness attending the trial court's factual findings is reduced. *See* Florida Bar v. Marable, 645 So.2d 438, 443 (Fla.1994) ("[d]eference to the trier of fact's direct observation of a witness's demeanor is less compelling when a tape-recorded voice is being judged rather than live testimony"); Terrance Bank of Florida v. Brady, 598 So.2d 225, 227 (Fla. 2d DCA 1992) (because appellate court can review the exact evidence which the trial court used, the

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[1]The lower court itself reviewed the withheld documents *de novo;* without deference to Appellee's factual determination that the disputed documents were not public records. *See* §119.07(2)(b), Florida Statutes (1995) (requiring *in camera* inspection of certain records claimed to be exempt).

presumption of correctness is slight); Walton v. Estate of Walton, 601 So.2d 1266, 1268 (Fla. 3d DCA 1992), *rev. den.*, 617 So.2d 319 (Fla. 1993) (same).

Appellee acknowledges the above cases lean toward a *de novo* review.[2] However, this Court should not disregard the benefit of the trial court's perspective. Since Bryan is a death-sentenced inmate, this Court has exercised jurisdiction over his direct appeal in a ch. 119 action. It is very unlikely that any other type of public records case could be brought directly to this Court from a circuit court decision. While this Court has greater familiarity with Bryan's death case than did the court below, Appellee respectfully suggests this Court has not had the trial court's wider experience with public records disputes generally. For example, the trial court would be familiar with the variety of notes, etc. that agencies characterize as attorney work product.

This case did not include live testimony; something which could occur, for example, when there is a dispute over whether an agency has withheld requested documents without declaring them. In such instance, factual findings by the trial court should enjoy the well established presumption of correctness.

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[2]As a practical matter, the two standards of review will tend to merge when this Court is reviewing a trial court decision based solely on written evidence. In order to determine whether there is competent, substantial evidence for the decision below, this Court will have to examine the withheld documents; just as it would if review were *de novo*.

The standard of review has other important repercussions. CCR now represents over 100 death row inmates. Unfortunately for future victims, that client base will continue to increase. On one hand, this Court should not obligate itself to a *de novo* review in so many public records cases. On the other hand, *de novo* review eliminates the need for remand--when only written evidence is involved--should a lower court have erred.[3]

Given that this is a direct appeal from a circuit court decision, and the lower court's presumably wider experience in resolving public records disputes; the presumption of correctness should attach to the trial court's factual findings. If this Court is inclined toward *de novo* review of withheld documents, it should limit such review to cases when no live testimony is presented below.

Appellee will respond on the merits under both possible standards of review. Even under the *de novo* review standard, however, the trial court's decision must be upheld.

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[3]Here, Bryan asks for a "forum" (apparently remand) for a determination of his Brady claim. (IB, p. 18) If the trial court were wrong as to the absence of potential Brady material, there is still no need for a remand. This Court is familiar with Bryan's case and will be examining the withheld documents. If so, it can revisit the trial court's determination that "none of the withheld documents are Brady material." (R 86) *See* Roberts v. Butterworth, 668 So.2d at 582, n.7 ("This Court's review of the withheld documents revealed no exculpatory material."). However, the presence of Brady material would, at most, afford Bryan the opportunity to take such claims to the court where he was tried. It would not confer jurisdiction on the Leon County circuit court.

B. Response on Merits

Appellee withheld three "items," each comprised of individual documents claimed to be exempt from disclosure. (R 87-8) These items, and their component documents, were listed in the inventory filed by Appellee (R 90-1; attached to final order as Ex. A):

> 1) Two yellow pads and one white legal pad setting forth AAG's mental impressions and strategy (used in preparation for state evidentiary hearing/ collateral appeals therefrom and pending federal habeas corpus action).
>
> (2) Four stapled yellow sheets, five stapled typed sheets and six loose typed sheets summarizing psychological reports etc., prepared by AG's paralegal for use by AAG.
>
> (3) Three copies of map, one with colored annotations, prepared by AAG handling direct appeal.

In addition, the preamble to the inventory described the withheld documents as containing "mental impressions" and a "mental note." The references to statutory exemptions further describe the documents. By citing to a specific page from State v. Kokal, 562 So.2d 324, 327 (Fla. 1990), the inventory effectively described the documents even more. *See id.*, 562 So.2d at 327:

> 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.

Implicitly, the citation to Kokal described the withheld documents as rough drafts or, more accurately here, "notes to be used in preparing some other documentary material."

Under these facts, the trial court was completely correct in its ruling. Simple inspection reveals the individual documents comprising item (1) are handwritten notes. They are cryptic, with no attempt to write in complete sentences. Occasionally, they are lists of points to be raised or citations to case decisions. Often the notes are an expansive "index" to transcribed proceedings, with transcript page numbers written in the left margin. As such, these documents do not even constitute rough drafts. They are notes made for preparing later briefs or pleadings, or for later arguments.

The documents in item (2) are described in the inventory as summaries of psychological reports, etc. prepared by a paralegal for Appellee's use.[4] Bryan did not dispute this description, nor the explanation of why the documents were prepared.

The five and six-page typed summaries recount the substance of neuropsychological and competency evaluations performed by persons who had been,

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[4]In actuality, the first four pages of item (2) are handwritten indexes to transcripts, with references to page numbers in the left margin.

or could be witnesses. The obvious use for the summaries was for later hearings, pleadings and briefs, or oral arguments. They reflect the paralegal's reading of the reports, and are obviously not the reports themselves. They, too, are precursors to later documents, as contemplated by Kokal; and are not public records. Again, the trial court correctly found them exempt from disclosure.

The third item was three copies of a "common highway map of the Gulf Coast states, Georgia" (R 88), upon which were drawn "colored annotations." Appellee does not contend the base map alone was exempt from disclosure. However, it would be impossible to remove the "annotations"--lines depicting the routes of Bryan's travel--without revealing the preparer's mental impression of the location of those routes. Consequently, the base map itself became exempt from disclosure under the Kokal rationale.

In sum, all of the documents, including the typewritten summaries and annotated map, are simply not public records. They are notes by attorneys (or a paralegal) to themselves. The trial court properly found them to be non-public records. Kokal; Roberts v. Butterworth, 668 So.2d at 581 (agreeing that withheld "handwritten documents" were either non-public records or exempt work product).

Thus, the documents themselves are competent, substantial evidence supporting the decision below. Bryan does not urge the absence of such evidence,

but merely disagrees with the trial court's factual findings. This Court should summarily affirm.

The alternative basis for the trial court's holding was that all the disputed documents were attorney work product exempt from disclosure under §119.07(3)(l), Florida Statutes (1995). As part of the inventory, Appellee described the documents in items (1) through (3) as materials:

> used in preparation for state evidentiary hearing/collateral appeals therefrom and pending habeas corpus action[;] ... prepared by AG's paralegal for use by AAG[; and] ... prepared by AAG handling direct appeal

(R 90).

Bryan does not dispute the accuracy of these representations. He cannot reasonably maintain the documents are anything other than "attorney work product" exempt from disclosure under §119.07(3)(l), Florida Statutes (1995). The trial court properly found the documents, if they were public records, to be exempt under this statute. Roberts v. Butterworth.

Against this backdrop, Bryan's points fade to obscurity. He claims the withheld documents are not exempt because they perpetuate knowledge; that is, the attorney's mental impressions, strategy, etc. for later use.

Bryan's argument would reach the absurd result of leaving the work product exemption meaningless; something this Court cannot do. State v. Hamilton, 660 So.2d 1038 (Fla. 1995):

> Moreover, to construe this term ["curtilage"] in any other fashion would run afoul of another basic tenet of statutory construction that compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences. *E.g., City of St. Petersburg v. Siebold*, 48 So.2d 291, 294 (Fla.1950).

Id. at 1045.

No attorney working on a long-lived and complex death case is going to destroy detailed notes soon after they are made. To the contrary, the need to preserve such notes for the duration of the death sentence is exactly why the Legislature amended the work product exemption in 1995:

> Section 17. 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 postconviction 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 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.

Ch. 95-398, Laws of Fla. at §17 (not codified).

Section 17 immediately follows the operative language amending the attorney work product exemption, and clearly explains Legislative intent. That intent was to overrule all prior case law--as applied to the Attorney General's death case files--which would require disclosure of direct appeal attorney work product simply because the direct appeal was over. The 1995 amendment applies regardless of whether the work product is a preliminary or final version. Whether a particular document has the effect of perpetuating "knowledge" is irrelevant.

Moreover, the 1995 amendment is remedial and apples to public record requests made before its effective date. Roberts v. Butterworth, 668 So.2d at 581-2 & n. 5 (quoting §17 of ch. 95-398 as legislative history indicating statute's remedial nature). The fact that the statute applies retroactively, plus its narrow and specific mention of the Attorney General's office, strengthens the conclusion that work product such as the disputed documents is to be protected from disclosure regardless of whether the documents perpetuate knowledge and thus are "final" versions.

Section 119.07(3)(l) also exempts postconviction work product as long as a case is active. This Court has so held. *See* Kokal, 562 So.2d at 327 ("Of course, the state attorney was not required to disclose his current file relating to the motion for postconviction relief because there is ongoing litigation with respect to those documents."). Whether a particular work product perpetuates knowledge, or is a final version of something, is irrelevant; so long as it is part of an active file.

One fine point remains. In item (1) of the inventory, Appellee claimed certain documents were exempt as they were used in "preparation for state evidentiary hearing/collateral appeals therefrom and pending federal habeas corpus action." (R 90) Although legislative intent, as expressed in §17 of ch. 95-398, speaks in terms of "postconviction" proceedings, the operative statutory language (§16 of same act) clearly declares that the Attorney General may claim "this exemption ... until execution of sentence or imposition of a life sentence." The Legislature certainly knew that no death sentence is carried out before federal habeas proceedings are exhausted. Therefore, the Legislature unavoidably authorized the Attorney General to claim the work product exemption throughout federal habeas proceedings as well.

Bryan's argument rests on case law that predates the 1995 amendment and this Court's decision in Roberts v. Butterworth. Even if the disputed documents were

public records, they are exempt under §119.07(3)(l) as it existed upon amendment in 1995.

Bryan concludes his first issue with two narrower points. He urges that Appellee should have provided not only the "preliminary" document but also the "final version" for comparison. He then proposes a "two-step analysis." (IB, p. 9-11) He concludes that if a disputed record is public and "does not relate to a current motion for post-conviction relief, the record must be disclosed." (IB, p. 12)

This "preliminary versus final" argument is twice flawed. First, it is not preserved. It was not raised in any of the written pleadings below. Also, Bryan has not brought forward a transcript of the final hearing, during which the trial court conducted an *in camera* inspection of the withheld documents. Therefore, Bryan cannot show he timely and specifically raised this point before the trial court. Roberts v. Butterworth, 668 So. 2d at 582 (argument that confidentiality of clemency materials was waived through their release by Governor's Office not preserved when argument not made below), *quoting* Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). *See*, Crusaw v. Crusaw, 637 So.2d 949, 950 (Fla. 1st DCA 1994) (appellate court must assume lower court correctly decided the factual issues when record on

appeal did not include trial transcript or stipulated statement), *citing* Larjim Management Corp. v. Capital Bank, 554 So.2d 587 (Fla. 3d DCA 1989) and Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla.1979). *See also* Applegate, at 1152 (when appellant failed to bring forward a record of trial court proceedings, the "trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error").

Second, and if preserved, Bryan's point is meritless. The 1995 amendment to the attorney work product exemption expressly allows the Attorney General's office to keep documents--assuming they are public records--from *direct* appeal confidential until a death sentence is imposed or reduced to life. There is no requirement that the documents pertain to a current motion for postconviction relief, or that the documents be a preliminary version. Also, in many cases, an attorney's personal notes will never be compiled into a "final version," such as when the notes are an outline for a hearing. There would be no final version for comparison.

All work product within an active postconviction file is exempt, regardless of whether it is a preliminary or final version. Also, the fact that a postconviction file is active is sufficient to keep work product confidential. Kokal. There is no requirement that the confidential material relate to a current--as opposed to a previously denied--motion for postconviction relief.

Finally, it would be absurd to conclude that material relating to an inmate's past efforts at postconviction relief would be subject to disclosure, when older material from direct appeal would not be. Bryan advances a narrow reading of the attorney work product exemption, which would defeat the public policy underlying the 1995 amendment.

Bryan's next point contends the "State failed to segregate what is exempt and what is not." (IB, p. 12) This point is not preserved, for the reasons noted above. Moreover, Appellee claimed all portions of the withheld documents were exempt. Simple inspection of those documents reveals that any non-exempt portions were *de minimis*, and that they would be meaningless if segregated from the exempt portions. Finally, Appellee assumes Bryan is *not* contending he was entitled to a redacted copy of the "common highway map" (R 88) which comprised the base for the withheld documents in item (3) of the inventory. The law is not concerned with trifles.

ISSUE II

WHETHER THE TRIAL COURT, BY EXAMINING THE WITHHELD DOCUMENTS FOR EXCULPATORY MATTER, PROPERLY RESPONDED TO APPELLANT'S NON-SPECIFIC REFERENCE TO BRADY v. MARYLAND

Below, Bryan's reliance on Brady v. Maryland was never more than a simple citation to that decision. He never alleged that specific exculpatory material existed, much less that such material was being withheld. At most, his complaint "raised only a general request for exculpatory material under *Brady*." Roberts v. Butterworth, 668 So.2d 580, 582 (Fla. 1996). Therefore, Appellee's decision not to release any documents as Brady material was final. *Id.*

Since his Brady claim was never more than a lone citation, Bryan's complaint cannot be construed as an alleging that Appellee was withholding exculpatory material which constituted newly discovered evidence, regardless of when the material was originally obtained by the State. Therefore, the trial court was never placed on notice as to any specific Brady claim. Bryan's citation to that case in his public records request (R 7) and in his complaint (R 2) were no more than reminders of the Attorney General's continuing obligation to disclose Brady material.

Restated, Bryan's complaint never alleged facts which, taken as true, would establish a cause of action for relief under Brady. Even if the trial court had

jurisdiction to grant such relief, it could not have done so based on Bryan's insufficient allegations. *See* Roberts v. Butterworth, 688 So.2d at 582 (upholding dismissal of Brady claims as to "handwritten notes," when the complaint raised only a "general request for exculpatory material").

Even more telling is the fact that Bryan did not raise Brady on direct appeal or in postconviction proceedings.[5] Absent allegations of newly discovered evidence, any Brady claim--regardless of forum--would be procedurally barred. *See e.g.*, Atkins v. State, 663 So.2d 624, 625-6 (Fla. 1995) (Brady claim that photographs of murder victim should have been disclosed procedurally barred through failure to raise issue in prior collateral proceedings).

Given Bryan's failure to allege newly discovered evidence, one of the trial court's observations looms large:

> Second, it appears that none of the withheld documents are Brady material. The withheld documents all appear to be "work product" prepared from pre-existing papers such as transcripts of proceedings or depositions. *The pre-existing papers would have already been available to Bryan.* [e.s.]

(R 86-7) Although Bryan later urges the lower court had "full" jurisdiction over Brady claims (IB, p. 14), he never disputes the court's conclusion that the "pre-

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[5]*See* Bryan v. State, 533 So.2d 744 (Fla. 1988) (Brady claim not raised on direct appeal); and Bryan v. Dugger, 641 So.2d 61, 62-3 & n. 2 (Fla. 1994) (listing 12 issues raised on appeal from denial of postconviction relief, none of which mention Brady).

existing papers would have already been available." Therefore, even if the withheld documents were indeed Brady material, they would have been derived from pre-existing papers already disclosed. Bryan would not be entitled to relief based on the State's failure to disclose exculpatory documents derived from primary sources already in his possession. *See* Atkins, 663 So.2d at 626 (denying Brady claim in part because disputed photographs were provided to trial counsel at "proper times").

Bryan has never described the nature of so-called Brady material he speculates is among the withheld documents. His argument is grounded on conjecture, which is not a proper basis for relief on appeal. Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984). It is also an attempt to circumvent a procedural bar through a ch. 119 action brought later.

In §4 of ch. 96-290, Laws of Fla. [effective May 30, 1996], the 1996 Legislature clarified §119.07(9), Fla. Stat., by declaring:

> [t]his section may not be used by any inmate as the basis for failing to timely litigate any postconviction action.

By raising Brady through a very belated public records request, Bryan directly contravenes §119.07(9).

Not speaking with clarity, Bryan urges that the "Leon County Circuit Court had *full* jurisdiction to consider Mr. Bryan's claim for disclosure." [e.s.] (IB, p. 13) He contends the trial court should have considered his vague Brady reference as a claim for release of exculpatory material and appropriate relief. Appellee has already noted the total insufficiency of Bryan's allegations in this regard.

Nothing in ch. 119 or Hoffman posits venue--much less jurisdiction--in the Second Judicial Circuit to grant relief upon Brady claims by an inmate tried elsewhere. *See* Asay v. Florida Parole Commission, 649 So.2d 859 (Fla. 1994):

> By its own terms, *Hoffman* only addressed chapter 119 issues and did not establish venue in the Second Judicial Circuit for a *Brady* records request made to the Clemency Board.

Id. at 861 (Kogan, J., concurring).

Here, Bryan's complaint merely cited to Brady. It never alleged a claim under that decision. In reality, this case has always been limited to a ch. 119 dispute, despite Bryan's attempts to piggyback a Brady claim. Nevertheless, just as Hoffman did not establish venue in the Second Judicial Circuit for a Brady claim against the Clemency Board (of which Appellee is a member), it did not establish venue for a Brady claim against the Department of Legal Affairs or the Attorney General's Office.

Here, the trial court ruled on jurisdictional grounds. Given that Brady claims must be based on exculpatory material, and that such material would go the propriety

of a murder trial or death sentence; such claims must be brought through postconviction motions. These motions are cognizable only in the court where an inmate was tried. Rules 3.850 and 3.851. *See* Asay, 613 So.2d at 861 (Kogan, J., concurring):

> *Brady* claims usually are brought via Rule 3.850 in the sentencing court. I believe sound policy dictates the same conclusion for *Brady* records requests, should they be allowed in the future. Any *Brady* issue essentially is a species of collateral challenge. Here, the act of requesting *Brady* materials is only a prelude to a possible *Brady* hearing, which unquestionably would be heard in the sentencing court. I see no reason why the same court should not resolve all issues. Accordingly, the proper venue for such a claim is in the court that sentenced the inmate, pursuant to Rule 3.850, with appeals in death cases then going to this Court.

If there is any problem with the order below, it is one of rationale, not results. The trial court spoke in terms of "competent jurisdiction." It could have reached the same result had it spoken in terms of "proper venue." Bryan's choice of venue was improper for a Brady claim. The trial court's refusal to consider the claim must be affirmed. Vandergriff v. Vandergriff, 456 So.2d 464, 466 (Fla. 1984) ("trial court decisions are presumptively valid and should be affirmed, if correct, regardless of whether the reasons advanced are erroneous".).

Despite its lack of familiarity with the case files and the vagueness of Bryan's bare citation to Brady, the trial court properly recognized Appellee's continuing duty

to disclose Brady material. (R 86, n. 2) Roberts v. Butterworth, 668 So. 2d at 582. Had the trial court here found exculpatory documents, it certainly would have had authority to notify Bryan. Armed with such notification, Bryan would be able to seek relief in the court where he was tried..

The trial court quite reasonably acknowledged the practical difficulties it faced. (R 86) Notably, even Bryan does not suggest how a Leon County judge would be able to tell if a particular document was material and not previously disclosed. It would be totally absurd to require the court below, while resolving a public records dispute, to become familiar with a death case record when the Santa Rosa County circuit court had already done so. *See* Asay, 613 So.2d at 861 (addressing policy concerns for not allowing all inmate Brady claims to be brought in the Second Judicial Circuit) (Kogan, J., concurring).

The lower court's concern is echoed by this Court's proposed rule 3.852, which would require *all* pending and future public records complaints by death-sentenced inmates to be brought in the court where the inmate was tried. *See* proposed Rule 3.852(c) and (f), 21 Fla.L.W. at S 187-8. Moreover, Bryan--by electing to proceed in the Leon County circuit court--accepted the obvious fact that no judge would have the same familiarity with the case as the judge where he was tried.

As he did in Issue I, Bryan concludes Issue II by raising two unpreserved points. He argues, for the first time, that the lower court's Brady ruling deprived him of access to courts. (IB, p. 16-17) He then claims the same ruling deprived him of effective assistance of postconviction counsel. (IB, p.17) These two points are not preserved, due to Bryan's failure to raise them below and his failure to bring forward a transcript of the final hearing. Roberts v. Butterworth, Steinhorst, Applegate; *supra.*

As to access to courts, Bryan obviously had a forum for his ch. 119 claims. Had the trial court's inspection of withheld documents revealed exculpatory material, Bryan could have returned to the court where he was tried. Hoffman does not forbid such.

As to denial of effective postconviction counsel, Appellee notes that Bryan has no such right. Spalding v. Dugger, 526 So.2d 71 (Fla. 1986)--the only case Bryan cites--does not establish a right to *effective* postconviction counsel. There, the Court observed[6]--without discussion of the statute's language or its history--that under

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[6]The discussion of the right to postconviction counsel notes that a then-recent Fourth Circuit decision held the states were "absolutely obligated" to provide collateral counsel to death-sentenced inmates. 526 So.2d at 72, *citing* Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988). The Fourth Circuit's decision was not so broad, as it affirmed denial of appointed counsel for *federal* habeas corpus and certiorari proceedings. *Id.* at 1122. Also, about a year after this Court's decision in Spalding v. Dugger, the U.S. Supreme Court reversed the Fourth Circuit, holding that collateral counsel was not required for state proceedings. Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 2770-1 106 L.Ed. 2d 1 (1989).

§27.702, Florida Statutes, each death row inmate is "entitled, as a statutory right, to effective legal representation." *Id.* at 72, *citing as in accord*, Graham v. State, 372 So.2d 1363 (Fla. 1979).. Nevertheless, the *holding* in Spalding v. Dugger had nothing to do with an indigent, death-sentenced inmate's right to counsel. Instead, this Court reached the rather mundane conclusion that broad mandamus relief was not available. *Id.* at 73.

Inexplicably, the Spalding Court did not mention Troedel v. State, 479 So.2d 736 (Fla. 1985); which declared:

> It is suggested that the enactment of chapter 85-332, Laws of Florida, creating the office of Capital Collateral Representative, conferred upon appellant a right to collateral representation that will be denied without a stay of execution to allow more time to prepare for the filing of collateral challenges to the judgments and sentences. While chapter 85-332 represents a state policy of providing legal assistance for collateral representation on behalf of indigent persons under sentence of death, it did not add anything to the substantive state-law or constitutional rights of such persons.

Id. at 737, *also citing* Graham v. State, 372 So.2d 1363 (Fla.1979). Spalding did not address the fact that nothing on the face of §27.702, or any other part of CCR's enabling statute, mentions "effective" counsel.

Bryan has chosen a very slender thread upon which to hang his argument. Moreover, the most recent session of the Legislature strongly implied that the

statutory right to counsel created by §27.702 is not concerned with effectiveness. In §2, ch. 96-290, Laws of Fla., the Legislature amended §27.7001 and declared:

> It is the further intent of the Legislature that collateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation.

The Legislature, were it intent on creating or maintaining a statutory right to counsel that was "effective," would not have so clearly limited the range of CCR's authority. Rather, the 1996 Legislature implicitly affirmed the Troedel court's conclusion that CCR's enabling statute represents "a state policy of providing legal assistance" rather than an addition to substantive rights.

Given its lack of preservation, Bryan's cursory argument is not the basis upon which to decide this issue. It should wait another day.

Whether resolved as a matter of subject matter jurisdiction, procedural bar, or venue; the trial court's ruling that it did not have jurisdiction over a Brady claim reached the right result. It must be affirmed. Vandergriff.

CONCLUSION

The trial court correctly concluded the disputed documents were properly withheld from disclosure under chapter 119, Florida Statutes. At least as a matter of venue, it also properly concluded that any Brady claim must be brought in the court in which Bryan was tried and sentenced. The final order below must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARLIE MCCOY
Assistant Attorney General
Florida Bar No. 333646

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The Capitol--PL01
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(904) 488-9935

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **PAMELA H. ISAKOWITZ**, Asst. CCR, P. O. Drawer 5498, Tallahassee, Florida 32314-5498; this 3d day of July, 1996.

CHARLIE MCCOY
Assistant Attorney General

APPENDIX

A. The Order Under Review (02/08/96)

B. Chapter 96-290, Laws of Fla.

A. The Order Under Review (02/08/96)

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

ANTHONY BRYAN,

Plaintiff,

vs. CASE NO. 94-5009

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

Defendant.
_____/

FINAL ORDER

This matter came before the Court upon Plaintiff's "Complaint for Disclosure of Public Records" under ch. 119, Florida Statutes; and Defendant's "Renewed Motion for In Camera Proceeding." A final hearing, which included an *in camera* inspection of documents withheld from disclosure, was held on February 7, 1996.

Facts

The Court finds that Bryan is an inmate under a death sentence. By letter dated September 7, 1994, a Capital Collateral Representative (CCR) investigator requested access to Defendant's files relating to Bryan. By letter dated September 22, 1994, Defendant allowed CCR to inspect the files.

Upon CCR's inspection of Defendant's files, some documents were withheld from disclosure. CCR filed the instant complaint.

(1)

Pursuant to this Court's order, Defendant filed a list[1] of the withheld documents. That list arranged the withheld documents into ten items, generally described the documents, and set forth the exemptions claimed. CCR objected to the specificity of the list and the propriety of withholding the documents under the exemptions claimed.

After CCR's objection, Defendant provided copies of the documents originally withheld as items (4) through (10) on Exhibit A. Therefore, the hearing on February 7, 1996, was limited to *in camera* review of items (1) through (3), which will be addressed separately below.

Conclusions of Law

Jurisdiction Over *Brady* Claims

Upon conclusion of the Court's review of the withheld documents, Defendant asked if the Court observed any documents that could be subject to disclosure under Brady v. Maryland, 373 U.S. 83 (1963). In response the Court makes two observations. First, this Court--which did not preside over Bryan's trial--would be very hard-pressed to determine whether any of the withheld documents would be exculpatory and material as required by Brady.[2] Second, it appears that none of the withheld documents are Brady material. The withheld documents all appear

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[1] The list is attached to this order as Exhibit A.

[2] Although Defendant has a continuing obligation to disclose Brady material, such claims must be brought in a court of competent jurisdiction.

to be "work product" prepared from pre-existing papers such as transcripts of proceedings or depositions. The pre-existing papers would have already been available to Bryan.

Propriety of Withholding Documents From Disclosure

Preliminarily, the Court holds that the list of withheld documents provided to Plaintiff's counsel by Defendant met the requirements of §119.07(2)(a), Fla. Stat.

The first item of withheld documents was described as:

> (1) Two yellow pads and one white legal pad setting forth AAG's mental impressions and strategy (used in preparation for state evidentiary hearing/ collateral appeals therefrom and pending federal habeas corpus action).

Upon the Court's inspection, this type of documents included notes made from a review of transcripts, a list of issues to be argued, etc.; all apparently for later use in litigation. These documents do not constitute public records, and are not subject to disclosure under ch. 119. Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc., 379 So.2d 633, 640 (Fla. 1980) ("Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material...."). Alternatively, to the extent any of these documents are "work product" constituting public records, they are exempt from disclosure under §119.07(3)(l), Fla. Stat. (1995).

The second item of withheld documents was described as:

> (2) Four stapled yellow sheets, five stapled typed sheets and six loose typed sheets summarizing psychological reports etc., prepared by AG's paralegal for use by AAG.

The "four stapled yellow sheets" (handwritten notes from the penalty phase transcript) are exempt from disclosure for the reasons given as to item (1).

The "five stapled typed sheets" are synopses of neuropsychological and competency evaluations performed by persons who had been, or would be, witnesses. The synopses, with cross-references to appendices and pages of other documents, apparently were prepared for later use at trial. The synopses are exempt for the reasons given as to item (1). The "six loose typed sheets" are a summary of a competency hearing held December 31, 1985, and a synopsis of another psychological evaluation. These are exempt for the reasons given as to item (1).

The third item of withheld documents was described as:

> (3) Three copies of map, one with colored annotations, prepared by AAG handling direct appeal.

These documents are comprised of a common highway map of the Gulf Coast states, Georgia and Alabama; upon which someone has drawn lines depicting the route of another person's travels. While the base map itself is not exempt, the annotations thereon are exempt for the reasons given as to item (1).

Based on arguments of counsel at the noted hearing, and the Court's inspection of the withheld documents, it is ORDERED and ADJUDGED:

The documents described above were properly withheld from Plaintiff's inspection. To the extent Plaintiff's complaint seeks disclosure of those documents, the complaint is denied.

All other relief sought by Plaintiff is denied.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida this 2nd day of February 1996.

F. E. STEINMEYER, III
Circuit Judge

Conformed copies to counsel

<c4>bry-ford

EXHIBIT A

INVENTORY OF WITHHELD DOCUMENTS IN BRYAN CASE

The following is a list of the items withheld from the Bryan files, a case in active litigation in the federal courts. The basis for withholding is the undersigned's belief that items (1)-(2) do not constitute "public records" under §119.011, as construed by State v. Kokal, 562 So.2d 324, 327 (Fla. 1990), as they simply contain the mental impressions of the authors. Likewise item (3) was only intended by its author to constitute a mental note to himself, similarly exempt under Section 119.011 and Kokal. Items (4)-(10), and to the extent necessary Items (1)-(3), are exempt under §119.07(3)(n) (1994) and/or §119.07(3)(l) (1995).

(1) Two yellow pads and one white legal pad setting forth AAG's mental impressions and strategy (used in preparation for state evidentiary hearing/ collateral appeals therefrom and pending federal habeas corpus action).

(2) Four stapled yellow sheets, five stapled typed sheets and six loose typed sheets summarizing psychological reports etc., prepared by AG's paralegal for use by AAG.

(3) Three copies of map, one with colored annotations, prepared by AAG handling direct appeal.

(4) Copy of five page memorandum prepared by defense investigator, obtained from defense attorney files (potential exhibit at state evidentiary hearing; not offered into evidence).

(5) Copy of deposition of James Duck, obtained from defense attorney files (potential exhibit at state evidentiary hearing; not offered into evidence).

(6) Copy of eleven page statement of Scott and Jo Johns, obtained from defense attorney files (potential exhibit at state evidentiary hearing; not offered into evidence).

(7) Copy of two page statement of Chris Golfers, obtained from defense attorney files (potential exhibit at state evidentiary hearing; not offered into evidence).

(8) Copies of twenty-three pages (stapled) of notes by Bryan's former defense counsel, obtained from defense attorney files (potential exhibit at state evidentiary hearing; not offered into evidence).

(9) Copies of two loose pages of notes by Bryan's former defense counsel, obtained from defense attorney files (potential exhibit at state evidentiary hearing; not offered into evidence).

(10) Three page copy of letter from Bryan, obtained from defense attorney files (potential exhibit at state evidentiary hearing; not offered into evidence).

TOTAL PAGES WITHHELD: Approx. 158

B. Chapter 96-290, Laws of Fla.

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CHAPTER 96-290

Committee Substitute for House Bill No. 385

An act relating to capital felonies; amending s. 27.7001, F.S.; providing legislative intent to restrict scope of collateral representation provided in capital cases; amending s. 27.702, F.S.; deleting provisions limiting capital collateral representation to indigent persons; providing requirements for the capital collateral representative with respect to filing notices and securing files; authorizing the court to appoint or permit counsel other than the capital collateral representative to appear as counsel of record; amending s. 27.703, F.S.; providing for substitute counsel to be paid from funds appropriated to the Justice Administrative Commission; amending s. 119.07, F.S., relating to public records; providing legislative intent with respect to discovery in collateral postconviction proceedings; amending s. 921.141, F.S.; providing a 30-day time limit upon the making of findings in support of a death sentence; making the death sentence subject to automatic review and disposition rendered within 2 years after the filing of a notice of appeal; providing as an aggravating circumstance for sentencing purposes that the capital felony was committed by a person placed on probation; providing as an aggravating circumstance for sentencing purposes that the capital felony was committed by a criminal street gang member; providing as an aggravating circumstance that the victim of the capital felony was particularly vulnerable due to advanced age or disability or because of the defendant's familial or custodial authority over the victim; requiring consideration of any factors in the defendant's background mitigating against imposition of the death penalty; amending s. 921.142, F.S.; providing a 30-day time limit upon the making of findings in support of a death sentence; making the death sentence subject to automatic review and disposition rendered within 2 years after the filing of a notice of appeal; creating s. 922.095, F.S.; providing that failure to pursue collateral relief within a specified period is grounds for issuance of a death warrant; creating 924.055, F.S.; providing legislative intent with respect to the timely progress of postconviction proceedings in capital cases; providing certain time limitations for postconviction motions, petitions, and proceedings in capital cases; amending s. 940.03, F.S.; requiring that an application for executive clemency for a person sentenced to death be filed within a specified period; providing for severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 27.7001, Florida Statutes, is amended to read:

27.7001 Legislative intent.—It is the intent of the Legislature to create part IV of this chapter, consisting of ss. 27.7001-27.708, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state ~~who is unable to secure counsel due to indigency~~, so that collateral

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legal proceedings to challenge any Florida capital ~~such~~ conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice. It is the further intent of the Legislature that collateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation.

Section 2. Section 27.702, Florida Statutes, is amended to read:

27.702 Duties of the capital collateral representative.—

(1) The capital collateral representative shall represent, without additional compensation, each ~~any~~ person convicted and sentenced to death in this state ~~who is without counsel and who is unable to secure counsel due to indigency or determined by a state court of competent jurisdiction to be indigent~~ for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court. ~~A determination of indigency by any trial court of this state for purposes of representation by the public defender shall be prima facie evidence of indigency for purposes of representation by the capital collateral representative.~~ Representation by the capital collateral representative shall commence automatically upon termination of direct appellate proceedings in state or federal courts~~, notice of which shall be effected as provided by s. 27.51~~. Within 91 days after the date the Supreme Court issues a mandate on a direct appeal or the United States Supreme Court denies a petition for certiorari, whichever is later, the capital collateral representative shall file a notice of appearance in the trial court in which the judgment and sentence were entered and shall secure all direct-appeal files for collateral representation. Upon receipt of files from the public defender or other counsel, the capital collateral representative shall assign each such case to personnel in his or her office for investigation, client contact, and such further action as the circumstances may warrant.

(2) The capital collateral representative shall represent each person convicted and sentenced to death in this state in collateral postconviction proceedings, unless a court appoints or permits other counsel to appear as counsel of record.

(3)~~(2)~~ The capital collateral representative shall file motions seeking compensation for representation and reimbursement for expenses pursuant to 18 U.S.C. s. 3006A when providing representation to indigent persons in the federal courts, and shall deposit all such payments received into the Capital Collateral Trust Fund~~, which is hereby~~ established for such purpose.

Section 3. Section 27.703, Florida Statutes, is amended to read:

27.703 Conflict of interest and substitute counsel.—If at any time during the representation of two or more ~~indigent~~ persons, the capital collateral representative determines ~~shall determine~~ that the interests of those persons are so adverse or hostile that they cannot all be counseled by the capital collateral representative or his or her staff without conflict of interest, the

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sentencing court shall upon application therefor by the capital collateral representative appoint one or more members of The Florida Bar to represent one or more of such persons. Appointed counsel shall be paid from funds ~~dollars~~ appropriated to the Justice Administrative Commission ~~Office of the Capital Collateral Representative~~.

Section 4. Subsection (9) of section 119.07, Florida Statutes, is amended to read:

119.07 Inspection, examination, and duplication of records; exemptions.—

(9) The provisions of this section are not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution or in collateral postconviction proceedings. This section may not be used by any inmate as the basis for failing to timely litigate any postconviction action.

Section 5. Subsections (3), (4), (5), and (6) of section 921.141, Florida Statutes, are amended to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years ~~60 days~~ after the filing of a notice of appeal ~~certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown~~. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

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(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control or on probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in s. 874.03.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Section 6. Subsections (4) and (5) of section 921.142, Florida Statutes, are amended to read:

921.142 Sentence of death or life imprisonment for capital drug trafficking felonies; further proceedings to determine sentence.—

(4) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082, and that person shall be ineligible for parole.

(5) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review and disposition rendered by the Supreme Court of Florida within 2 years ~~60 days~~ after the filing of a notice of appeal ~~certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown~~. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

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Section 7. Section 922.095, Florida Statutes, is created to read:

922.095 Grounds for death warrant.—A person who is convicted and sentenced to death must pursue all possible collateral remedies in state and federal court in a timely manner. If any court refuses to grant relief in a collateral postconviction proceeding, the convicted person has 90 days in which to seek further collateral review. Failure to seek further collateral review within the 90-day period constitutes grounds for issuance of a death warrant under s. 922.09 or s. 922.14.

Section 8. Section 924.055, Florida Statutes, is created to read:

924.055 Time limitations for postconviction proceedings in capital cases.—

(1) The Legislature recognizes that unjustified delay in postconviction proceedings in capital cases frustrates justice and diminishes public confidence in the criminal justice system. It is the intent of the Legislature that postconviction proceedings in capital cases progress in a fair but timely fashion and that, absent extreme circumstances, the participants in such proceedings abide by the time limitations set forth in this section.

(2) Within 1 year after the date the Supreme Court issues a mandate on a direct appeal or the United States Supreme Court denies a petition for certiorari, whichever is later, all postconviction motions and petitions that challenge the judgment, sentence, or appellate decision must be filed in the appropriate court.

(3) Within 90 days after the date the state files a response to a postconviction motion that challenges the judgment or sentence, the circuit court shall conduct all necessary hearings and render a decision.

(4) Within 200 days after the date a notice is filed appealing an order of the trial court or an extraordinary writ is filed in a postconviction proceeding, the Supreme Court shall render a decision.

(5) A convicted person must file any petition for habeas corpus in the district court of the United States within 90 days after the date the Supreme Court issues a mandate in a postconviction proceeding.

Section 9. Section 940.03, Florida Statutes, is amended to read:

940.03 Application for executive clemency.—When any person intends to apply for remission of any fine or forfeiture or the commutation of any punishment, or for pardon or restoration of civil rights, he shall request an application form from the Parole Commission in compliance with such rules regarding application for executive clemency as are adopted by the Governor with the approval of three members of the Cabinet. Such application may require the submission of a certified copy of the applicant's indictment or information, the judgment adjudicating the applicant to be guilty, and the sentence, if sentence has been imposed, and may also require the applicant to send a copy of the application to the judge and prosecuting attorney of the court in which the applicant was convicted, notifying them of the applicant's intent to apply for executive clemency. An application for executive clemency for a person who

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is sentenced to death must be filed within 1 year after the date the Supreme Court issues a mandate on a direct appeal or the United States Supreme Court denies a petition for certiorari, whichever is later.

Section 10. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 11. This act shall take effect upon becoming a law.

Became a law without the Governor's approval May 30, 1996.

Filed in Office Secretary of State May 29, 1996.

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