IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,777

ANTHONY BRYAN,

Appellant,

v.

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

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order denying Mr. Bryan's complaint for disclosure of public records. The complaint was brought pursuant to Chapter 119 of the Florida Statutes. The circuit court denied Mr. Bryan's complaint by entering a Final Order in which the Mr. Bryan was denied the opportunity to inspect numerous public records in the possession of the Attorney General.

The following symbols will be used to designate references to the record in this instant cause: "R" -- record on appeal to this Court. All other citations will be self-explanatory or will be otherwise explained.

The jurisdiction of this Court is invoked pursuant to Article V, § 3(b)(1) and § 3(b)(7) of the Florida Constitution.

REQUEST FOR ORAL ARGUMENT

Mr. Bryan requests oral argument. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case.

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STATEMENT OF THE CASE AND OF THE FACTS

This is an action for disclosure of public records pursuant to Chapter 119 of the Florida Statutes.

Mr. Bryan mailed to the State on September 7, 1994, a formal request for the disclosure of public records, pursuant to Chapter 119 of the Florida Statues, Article I, Section 24 of the Florida Constitution, and Brady v. Maryland, 373 U.S. 83 (1963). The request was for any and all records in the State's custody, care and/or control relating to Anthony Bryan.

On September 22, 1994, this request was denied because the State claimed its entire file as exempt from public records. Mr. Bryan filed a Complaint for Disclosure of Public Records in the Circuit Court of Leon County with a request for in camera inspection of withheld public records on October 19, 1994.

After the civil suit was filed, Mr. Bryan was permitted to inspect the files of the State, but was denied access to some public records. The State provided a written list of exemptions asserting the following exemptions:

> Inventory of Withheld Documents in Bryan case
>
> The following is a list of 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 section 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

section 119.07 (3)(n) (1994) and/or Section 119.07 (3)(1) 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).

The withheld documents comprised 158 pages.

The State failed to fully and completely provide a proper inventory of withheld documents.[1] The State failed to fully describe each document or portion of a document it claimed as exempt. Additionally, the State failed to detail with particularity the agency's claim for withholding information or correlate each asserted exemption with the material for which the agency claimed the exemption applied. In addition to providing a vague and incomplete inventory, the State also withheld documents that were part of the record on appeal and court file or were obtained from Mr. Bryan's defense attorney file. It was Mr. Bryan's counsel who provided the State access to the defense attorney files.

The State withdrew items 4-10 from the inventory of withheld documents. On February 7, 1986, the State provided the court with the remainder of the inventory. The circuit court conducted an in camera inspection of the documents claimed to be exempt by the State. The court reviewed the withheld documents and ruled

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[1] Pursuant to Chapter 119.07 (2)(a) Fla. Stat. (1995), "If the person who has custody of a public record contends that the record or part of it is exempt from inspection and examination, he or she shall state the basis of the exemption which he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute, and, if requested by the person seeking the right under this subsection to inspect, examine or copy the record, he or she shall state in writing and with particularity the reasons for his conclusion that the record is exempt." (emphasis added).

that none were subject to disclosure. The court ruled that the withheld documents were either work product, or not public records, under Chapter 119.07 (3)(1).

The Circuit Court was asked whether any documents could be subject to disclosure under Brady. The Circuit Court said since it did not review the files and records of Mr. Bryan, and did not preside over Mr. Bryan's trial, it "would be very hard-pressed to determine whether any of the withheld documents would be exculpatory and material as required by Brady." (R. 86). In a footnote, the court added: "Although Defendant has a continuing obligation to disclose Brady material, such claims must be brought in a court of competent jurisdiction." Id., n. 2. The court said it appeared that none of the withheld documents were Brady material.

Mr. Bryan filed a notice of appeal to the District Court of Appeal, First District of Florida, Case No. 96-00859. The State filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction or to Transfer to the Supreme Court. On April 18, 1996, the First District Court of Appeal denied the State's motion to dismiss, and transferred the case to the Florida Supreme Court. This appeal ensued.

SUMMARY OF ARGUMENT

The trial court erroneously held that items withheld by the State were not public records. Notes, preliminary drafts, working drafts, or any document prepared in connection with the official business of an agency that is to perpetuate, communicate

or formalize knowledge are subject to disclosure under Chapter 119. Notes that are intended as evidence of knowledge obtained in the transaction of agency business are public records. Further, the State failed to establish that the withheld materials are not public records.

The trial court erred in holding that it was unable to examine the withheld documents for Brady material, even though the court ruled that the State was obligated to disclose Brady material. The court's ruling leaves Mr. Bryan without a forum in which he can litigate the State's obligation under Brady.

ARGUMENT

THE TRIAL COURT ERRED IN HOLDING THAT ALL OF THE WITHHELD DOCUMENTS WERE NOT SUBJECT TO DISCLOSURE.

A. THE STATE FAILED TO ESTABLISH THAT THE WITHHELD DOCUMENTS WERE NOT PUBLIC RECORDS.

Public records are "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court identified materials that are not public records:

> 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 the 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.

Id. All such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted by the Legislature. Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979). Notes, preliminary drafts, working drafts, or any document prepared in connection with the official business of an agency that is to perpetuate, communicate, or formalize knowledge regardless of whether it is in final form or the ultimate product of an agency, are subject to disclosure under Chapter 119. Shevin, 379 So. 2d 633; Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990); Hillsborough Co. Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983); State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1977, cert. denied, 360 So. 2d 1247 (Fla. 1978); Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976); and Copeland v. Cartwright, 38 Fla. Supp. 6 (Fla. 17th Cir. Ct. 1972), affirmed, 282 So. 2d 45 (Fla. 4th DCA 1973); Op. Att'y Gen. Fla. 85-79 (1985).

That a document is considered a personal note or is handwritten is immaterial. Notes that are prepared for filing or are intended as evidence of knowledge obtained in the transaction of agency business are public records. Handwritten notes of agency staff used to communicate and formulate knowledge within

the agency are public records and subject to no exemption, Florida Sugar Cane League v. Florida Department of Environmental Regulation, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992).

In this case, the State exempted various pages "summarizing psychological reports, etc., prepared by AG's paralegal for use by AAG." (R. 90). However, "interoffice and intra-office memoranda may constitute public records even though encompassing trial preparation materials." Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st DCA 1988). See Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA 1984), review denied, 458 So. 2d 273 (Fla. 1984); Hillsborough Co. Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983).

Furthermore, in State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1977, cert. denied, 360 So. 2d 1247 (Fla. 1978), a report prepared by an assistant city attorney at the direction of the city council, and which concerned suspected irregularities in the city's building department, was not confidential and subject to public record disclosure. Thus, there is no reason why a paralegal's summary of psychological reports for use by an assistant attorney general should be considered exempt in this case. The decisive factor is whether the document was intended to perpetuate, communicate or formalize knowledge of some type. Shevin.

Kokal v. State, 562 So. 2d 324 (Fla. 1990), addressed the distinction between records that are public and records that are not. The documents at issue in Kokal were a list of items of

evidence that may be needed for trial, a list of questions the attorney planned to ask a witness, a proposed trial outline, handwritten notes regarding a meeting with the other party's attorneys, and notes "in rough form" regarding the deposition of an anticipated witness. The Court held:

> 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.

Kokal, 562 So. 2d at 327 (emphasis in original). In Mr. Bryan's case, the State improperly asserted that items (1), (2) and (3) were non-public records. The State provided these records to the court for an in camera inspection. After such inspection, the court concluded the records were non-public records. The court's conclusion was erroneous. Kokal; Tribune Company v. Public Records, 493 So. 2d 480, review denied, 503 So. 2d 327 (Fla. 1987). The records at issue are public records.

These items all contain "notes," mostly handwritten. The essential requirements of Chapter 119 apply, nonetheless. If the State's "note to himself," summaries of psychological reports or maps with "colored annotations" are intended as "final evidence of the knowledge to be recorded," Kokal, at 327, then the notes are public records. If the records "supply the final evidence of knowledge obtained in connection with the transaction of official business," id., then the notes are public records. A record

"used in preparation for state evidentiary hearing/collateral appeals" is nonetheless a public record because it "suppl[lies] the final evidence of knowledge obtained in connection with the transaction of official business." Orange County v. Florida Land Co., 450 So. 2d 341, 343 (Fla. 5th DCA 1984)(citing Shevin). The notes at issue here may fall into this category; even if never circulated as inter-office memoranda, the notes at issue were made part of the State's file on Mr. Bryan's case. Further, the inclusion of these notes into the State's files evinces the intent of the attorney preparing them to perpetuate their existence.

If the notes are "mere precursors of governmental records" and are not, in themselves, intended as final evidence of the knowledge to be recorded," or "rough drafts," or "notes to be used in preparing some other documentary material," then the notes are not public records. Shevin; Kokal. However, the determination of whether a record is a public record is a factual determination that can be made only when the party claiming the exemption provides the court with the document claimed to be merely preliminary, and thus not a public record, and the document supplying the final evidence of the knowledge contained in the notes or draft, thus a public record. Only by comparing the draft/notes with the final version can the court make the determination that the draft or notes are not public records.

In this case, the State did not provide the Court with the final version of these notes in order to make the comparison and

determine whether the notes were indeed simply "preliminary guides intended to aid the attorneys when they later formalized the knowledge." Shevin; Kokal. Without such final document(s) or at least testimony regarding such document(s), the court is, by definition, unable to make the determination of whether the notes are public records.

If the pages of notes were never formalized into a final version, then the notes themselves are "the final evidence of knowledge obtained in connection with the transaction of official business." Shevin at 640; Kokal at 327. A party's handwritten notes made during or shortly after interviews were not public records because the party later formalized the knowledge gained during the interview. Shevin at 641. Here, if the State never formalized the notes into a final form, the notes themselves are the final form, and are public records. If the notes were formalized into some final document, the State must provide that document to the court so that it may conduct an adequate in camera inspection to determine whether the notes claimed exempt are public records.

Further, this Court should reject any contention by the State that the pleadings and evidence it presented in court constitutes the formal agency statement on the subject matter and all else is merely preliminary or preparatory and, therefore, not a public record. Hillsborough Co. Aviation Authority v. Azzarelli Construction Company, 436 So. 2d 153 (Fla. 2d DCA 1983); See also Bay County School Board v. Public Employees Relations Commission,

382 So. 2d 747 (Fla. 1st DCA 1980)(concluding that school board budget work sheets were materials prepared in connection with official agency business and tended to perpetuate, communicate, or formalize knowledge of some type and thus were public records); Op. Att'y Gen. Fla. 85-79 (1985)(concluding that interoffice memorandum, correspondence, inspection reports, and other documents maintained by county public health units are public records).

To determine whether the notes are public records, the court must be provided with both the notes and the final document that formalized the knowledge contained in the notes. The court then has a two-step analysis to conduct: is the record a public record, and if so, is it part of the State's current file relating to any pending motion for post-conviction relief? This determination may be made after an evidentiary hearing. Walton v. Dugger, 634 So. 2d at 1059. If the State provides both the draft and final form of the record, and testimony is not needed to establish that a document was later formalized, then the Court may conduct an in camera inspection of both documents to determine whether the draft or notes are public records. Kokal, 562 So. 2d at 327; Mendyk v. State, 592 So. 2d 1976, 1081 (Fla. 1992); Walton, 634 So. 2d at 1062; Shevin, 379 So. 2d at 640-41; Fritz v. Norflor Construction Co., 386 So. 2d 899, 901 (Fla. 5th DCA 1980); Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487, 491 (Fla. 2d DCA 1990); Tribune Company, 493 So. 2d at 484. Likewise, if the State claims a document is work product

relating to current post-conviction litigation and not the trial and appeal, the State must provide that record for an in camera inspection. Walton, 634 So. 2d at 1062; Lopez v. Singletary, 634 So. 2d 1054, 1057-58 (Fla. 1993); Tribune Company, 493 So. 2d at 484. If the record is a public record, and does not relate to a current motion for post-conviction relief, the record must be disclosed.

The burden of establishing a right to withhold a record falls on the agency. Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985). At this time, the State has failed to prove the existence of a work product exemption or that the withheld materials are non-public records. Simply stated, the record in this case is completely devoid of the factual predicates that would permit this Court or the trial court to withhold these materials as non-public records.

A person who has custody of a public record and who asserts an exemption or a special law applies to a particular public record, then that person "shall delete or excise from the record only that portion of the record with respect to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and examination." Section 119.07(2)(a), Fla. Stat. The State failed to segregate what is exempt and what is not. The Circuit Court also failed to segregate what it considered mental impressions and work product from the materials submitted by the State.

Therefore, this Court should vacate the trial court's Final Order and order the immediate release of withheld documents because the documents are public record. Kokal; Walton. Alternatively, this Court should remand this case for an evidentiary hearing in this matter to allow Mr. Bryan an opportunity to investigate the factual predicates necessary to support the exemptions claimed by the State.

B. THE LOWER COURT'S INABILITY TO EXAMINE THE WITHHELD DOCUMENTS FOR BRADY MATERIAL LEAVES MR. BRYAN WITHOUT A FORUM WHICH WILL CONDUCT SUCH AN EXAMINATION.

Mr. Bryan properly filed a civil Complaint for Disclosure of Public Records against the State in the Circuit Court of the Second Judicial Circuit, in and for Leon County. The Leon County Circuit Court had full jurisdiction to consider Mr. Bryan's claim for disclosure.

This Court has held:

> We agree that with respect to agencies outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney, requests for public records should be pursued under the procedure outlined in chapter 119, Florida Statutes.

Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992). Jurisdiction was proper in Leon County, where the Office of the Attorney General was found. This Court's ruling in Hoffman was a determination that full jurisdiction to decide Mr. Bryan's civil case against the State, brought under Chapter 119, rested with the Leon County Circuit Court.

In Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996), the circuit court dismissed part of the complaint dealing with possible Brady material in the withheld records because the records dealt with clemency materials. Clemency material did not arise in Mr. Bryan's case.

In Mr. Bryan's case, Judge Steinmeyer said he "would be very hard-pressed to determine whether any of the withheld documents would be exculpatory and material as required by Brady (R. 86). The Court added in a footnote that "Although Defendant has a continuing obligation to disclose Brady material, such claims must be brought in a court of competent jurisdiction." Id. at n. 2.

Judge Steinmeyer had not read the trial court records, files or facts of Mr. Bryan's case. It is impossible for the judge to make a determination of whether Brady material existed when he did not know the facts of the case or what materials had been provided to trial counsel. Because he had not read the record and was unfamiliar with the case, Judge Steinmeyer was unable to conduct a proper in camera review under Brady and Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987). This Court should reject Judge Steinmeyer's conclusion that it "appears that none of the withheld documents are Brady material."

The lower court's conclusion places Mr. Bryan in an impossible position. Pursuant to Hoffman, Mr. Bryan properly pursued his public records issue in Leon County, where the Attorney General is located. However, despite ruling that the

Attorney General is obligated to disclose exculpatory evidence under Brady, the Circuit Court ruled it lacked jurisdiction to examine withheld documents for Brady material. Mr. Bryan has no forum in which to litigate this issue. This violates due process. Pennsylvania v. Ritchie.[2]

Judge Steinmeyer's failure to properly review the undisclosed records for Brady material denied Mr. Bryan the rights guaranteed by Brady. Further, in Kyles v. Whitley, 115 S. Ct. 1555 (1995), the United States Supreme Court held that in determining whether evidence not disclosed by the State is "material" in violation of Brady, the defendant is entitled to a determination of the cumulative effect of all suppressed evidence favorable to the defendant rather than consideration of each item of evidence individually. Mr. Bryan was denied that determination by the only court with proper jurisdiction over the Office of the Attorney General. See Hoffman.

Judge Steinmeyer determined that the Attorney General has an obligation to disclose exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963), but refused to hold the State to that obligation. As the only court with proper jurisdiction over the Attorney General, Judge Steinmeyer removed the checks and

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[2] This Court has proposed Fla. R. Crim. P. 3.852, which enacted, would require all Chapter 119 issues be litigated in the Rule 3.850 proceedings. See In Re Amendment to Florida Rules of Criminal Procedures--Capital Postconviction Public Records Production, No. 87,688 (Fla. April 25, 1996). As proposed in the new rule, "All requests for production of public records and all objections to production of public records shall be filed in the trial court on or before the expiration of the time required by this rule. Id. at (c)(1).

balances that it has to impose over the Attorney General. Mr. Bryan has been denied any protection against Brady violations by Judge Steinmeyer.

The circuit court's ruling also denied Mr. Bryan access to courts as guaranteed by Article I, Section 21, Florida Constitution:

> **Access to courts.** - The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

By determining that it was not the court of competent jurisdiction to review the withheld material in camera to determine if any materials constituted Brady, Judge Steinmeyer, in effect, decided that the proper court to make that determination was the trial court where Mr. Bryan was convicted and sentenced. Yet, the Circuit Court in Santa Rosa County is without jurisdiction over the Attorney General. Mr. Bryan cannot seek redress in any other court. This a denial of access to courts.

The State is in possession of material that has not been disclosed to Mr. Bryan. No court has accepted the responsibility to determine whether any of that undisclosed material is exculpatory. Mr. Bryan is caught in a "Catch 22" situation, created by the Circuit Court. This Court has told Mr. Bryan that he must bring any Chapter 119 lawsuits against the Attorney General in the circuit court where the Attorney General is found, Hoffman, but that the circuit court has ruled that while it will decide to sustain the withholding of material by the Attorney

General, it will not determine whether those materials constitute Brady. Judge Steinmeyer decided that the 3.850 court was the proper court to perform Brady. However, this Court has held that jurisdiction over agencies outside the judicial circuit in which the sentence was imposed rests only where that agency is found. Hoffman. In the case of the Attorney General, jurisdiction lies in Leon County.

The Constitution of this State guarantees that all persons shall have the courts of this state available for redress of injuries. The lower court should have reviewed the withheld material for Brady, yet refused to conduct the review mandated by Kyles, Brady, and Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993).

The Circuit Court's refusal to make the determination whether the material withheld by the State constituted Brady also denied the Mr. Bryan's the effective assistance of post-conviction counsel. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1986). Post-conviction counsel sought the disclosure of records in order to pursue claims on behalf of Mr. Bryan. Yet, post-conviction counsel has been foreclosed from pursuing claims based on Brady because the Circuit Court refused to review withheld material for exculpatory evidence and no court has reviewed that withheld material for Brady material. By placing Mr. Bryan in this impossible situation, the lower court denied Mr. Bryan due process guaranteed by the Fourteenth Amendment and the Florida Constitution.

CONCLUSION

Based upon the foregoing, Mr. Bryan respectfully urges the Court to reverse the lower court, order the release of the in camera materials to Mr. Bryan and provide a forum for a proper review of Brady material.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on June 10, 1996.

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