IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,777

ANTHONY BRADEN 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

REPLY BRIEF OF APPELLANT

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RESPONSE TO PRELIMINARY STATEMENT

Mr. Bryan objects to the State's characterizations contained in its Preliminary Statement. The State contends that Mr. Bryan's purpose in this appeal is solely for delay. However, the facts prove the contrary. The only delay in this case has been the one caused by the Office of the Attorney General in withholding public records. Had the State been so concerned with the possibility of delay, it would have claimed no exemptions and disclosed all of the records requested. Further, the Chapter 119 public records suit filed by Mr. Bryan against the Office of the Attorney General has not delayed Mr. Bryan's case. In fact, Mr. Bryan's case is proceeding in federal court.

The State also argues that Mr. Bryan failed to timely file his public records request. However, the State failed to cite case law or statute that requires at a public records request be filed within a certain time limit. Moreover, Hoffman v. State, 613 So. 2d 405 (Fla. 1993), cited by the State, imposes no time limits on when requests for public records must be made. This argument is without support.

Counsel for Mr. Bryan is obligated to review every public record. In Porter v. Singletary, 653 So. 2d 374 (Fla. 1995), post-conviction counsel established that Mr. Porter's trial counsel had a conflict of interest because he had represented Mr. Porter's codefendant. This information was not disclosed to Mr. Porter at trial and was effectively buried because it was in a case completely unrelated to Mr. Porter's. However, this Court

held that because the information was contained in a public record, Mr. Porter's post-conviction counsel had a duty to search there for it but failed to do so. Porter, 653 So. 2d 378-379. Porter held that counsel's failure to review all public records within the State of Florida will procedurally bar any subsequent discovery of claims arising from those unreviewed public records. Mr. Bryan is obliged to follow Porter. The State has not offered to waive any future procedural default argument in regard to its files. Therefore, the substance of this dispute is factually and legally sufficient and proper for appeal to this Court.

REQUEST FOR ORAL ARGUMENT

The State improperly presented argument in its Statement Regarding Oral Argument. The State cannot argue that Mr. Bryan is not entitled to an oral argument. Instead, the State offers its personal opinion as to the merits of Mr. Bryan's argument. Its opinions are irrelevant. Mr. Bryan properly requested oral argument in his initial brief and continues to do so.

The State also cites Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996) as being dispositive in this case. However, the facts of Roberts are distinguishable. In that case, the circuit court dismissed part of the complaint dealing with possible Brady material in the withheld documents because the records dealt with clemency materials. Clemency materials did not arise in Mr. Bryan's case.

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ARGUMENT IN REPLY
THE TRIAL COURT IMPROPERLY WITHHELD DOCUMENTS.

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

The State argues that the records in question are "simply not public records. They are notes by attorneys (or a paralegal) to themselves" (Answer Brief at 14). If they are not public records, then they are attorney work product except from disclosure (Answer brief at 15).

A handwritten note does not disqualify a document as a non-public record. The trial court and the Office of the Attorney General agree that if it is handwritten, it must be "work product" or non-public record. What escapes them is the fact that the question is not whether it is handwritten. In determining whether a record is public, the inquiry is whether the notes are intended for filing or intended as evidence or knowledge. Handwritten notes of agency staff used to communicate and formulate knowledge within the agency are public records and subject to no exemption.

The agency claiming an exemption from disclosure bears the burden of proving the right to the exemption. Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128 (Fla. 1st DCA 1985). Doubt as to the applicability of an exemption should be resolved in favor of disclosure. Tribune Company v. Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986), review denied, 503 So. 2d 327 (Fla. 1987); Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d

775 (Fla. 4th DCA 1985), review denied, 488 So. 2d 67 (Fla. 1986).

The exemptions claimed by the Office of the Attorney General have not provided a sufficient factual basis to support the exemptions claimed. Rather, the exemptions claimed by the State are general and vague.

Every public record is subject to examination and inspection under 119.07(1) unless there is a specific statutory provision. Forsberg v. The Housing Authority of the City of Miami Beach, 455 So. 2d 373 (Fla. 1984); Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980); Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979). Records that are exempt may be ordered disclosed for exceptional circumstances. State, Dept. of Highway Safety and Motor Vehicles v. Krejci Co. Inc., 570 So. 2d 1322 (Fla. 2d DCA 1990), review denied, 576 So. 2d 286 (Fla. 1991); Department of Professional Regulation v. Spiva, 478 So. 2d 382 (Fla. 1st DCA 1985).

In his initial brief, Mr. Bryan suggested to this Court that to determine if the notes and drafts claimed as exempt are compared with the final version, can a court make a determination that they are public records. The State argues that this argument is "flawed" (Answer brief at 19), but fails to offer a solution to how a court can determine a public record. 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). As stated above, the State assumes that handwriting in a note automatically assumes it is non-public record or work product. This assumption is wrong.

The State exempted pages "summarizing psychological reports, etc., prepared by AG's paralegal for use by AAG" (R. 90). Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st DCA 1988), holds that interoffice and intra-office memoranda may constitute public records even though encompassing trial preparation materials.

The State also argues that it was not required to segregate what is exempt and what is not, stating that "simple inspection of those documents reveals that any non-exempt portions were de minimis, and would be meaningless if segregated from the exempt portions" (Answer brief at 21). The State failed to realize that Mr. Bryan has not had the opportunity to conduct a "simple inspection" of the documents, which would have revealed "that any non-exempt portions were de minimis, and that they would be meaningless if segregated from the exempt portions" (Answer Brief at 21).

The rule is clear:

> A person who has custody of a public record and who asserts that an exemption provided in subsection (3) or in a general or special law applies to a particular public record or part of such record 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. (emphasis added).

The State argues that Mr. Bryan did not preserve this point, but again, the State is wrong. By filing a Chapter 119 civil action against the State, the State was required to fully and completely provide a proper inventory of withheld documents. The State failed to fully describe each document or portion of a document it claimed it was exempt. Without such a description, Mr. Bryan cannot intelligently argue that its exemptions do not apply. The State is required to follow the law. It has failed to do so.

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

The State argues that Mr. Bryan's reliance on Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 119 (1963) "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" (Answer Brief at 22). Counsel for Mr. Bryan is not clairvoyant and cannot divine what is in the State's file to know whether or not it contains exculpatory materials.

The State attempts to hide this fact by arguing that Mr. Bryan never alleged facts that would "establish a cause of action for relief under Brady" (Answer Brief at 22). The State bears the burden of disclosing "any exculpatory document within its possession or to which it has access even if such document is not

subject to the public records law." Brady. Brady is a continuing obligation.

This Court noted in State v. Kokal, 562 So. 2d 324 (Fla. 1990) that the state attorney is obligated to disclose any document in its files that is exculpatory. In Engle v. Dugger, 576 So. 2d 696 (Fla. 1991), and Mendyk v. State, 592 So. 2d 1076 (1992), this Court extended the duty to disclose public records, including Brady evidence, to all law enforcement agencies.

"One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undercome confidence in the verdict." Kyles v. Whitley, 115 S.Ct. 1555, 1566 (1995).

The State also argues that Mr. Bryan is simply attempting to "piggyback a Brady claim" and that this case has always been limited to a public records' dispute (Answer Brief at 25). The State fails to cite contra authority, Walton v. Dugger, 634 So.2d 1059 (Fla. 1993). In Walton, after ordering the disclosure of state attorney and law enforcement files, the Court noted that, concomitant with its duty to disclose public records pursuant to Chapter 119, "the State must still disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law." Walton, 634 So.2d at 1062 (citing Brady).

The State argued that "had the trial court found exculpatory documents, it certainly would have had authority to notify Bryan" (Answer Brief at 27). This is wrong. The trial court admitted 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). The trial court would be "hard-pressed" in this case precisely because it does not know the facts of Mr. Bryan's case. It admittedly has not read the court records, files or facts of Mr. Bryan's case. It does not know the names of witnesses or "snitches," who could provide exculpatory evidence. The lower court made no effort to familiarize itself with the record because it did not feel compelled to do so under Hoffman. Under Hoffman, Mr. Bryan was required to bring his suit to compel review of the exempt materials in Leon County because the Attorney General's Office was outside the jurisdiction of the of the 3.850 court. The 3.850 court, with the knowledge of the facts of Mr. Bryan's case, could not review the Attorney General's exemption file for Brady or Chapter 119 violations. Thus, Mr. Bryan is caught in a "Catch-22" position. The court that would recognize a Brady violation could not review the exemptions. The court that has jurisdiction to hear the suit refuses to familiarize itself with the facts of Mr. Bryan's case.

Mr. Bryan is without a forum to review the Attorney General's exempt materials. This is at the very heart of the constitutional access to courts violation of Article I, Section

21, Florida Constitution, and a constructive denial of access to the courts.

The State suggests that this Court be placed in the position of a de facto 3.850 court by attempting to place the burden of reviewing Chapter 119 exemptions on it. The States cited no authority for this novel suggestion. This Court cannot be placed in the same position as the 3.850 court. To do so, would remove any ability of this Court to review the decisions on the exemption files. The State makes this argument because it recognizes that Mr. Bryan must have a meaningful review of these exempt materials. It also recognizes that Mr. Bryan has not received a meaningful review at this point. In effect, the State's argument is a concession that error has occurred below and this Court should be required to designate the proper forum to review these issues.

CONCLUSION

On the basis of the arguments presented herein and in his initial brief, Mr. Bryan respectfully submits that he is entitled to the release of the in camera materials and a proper forum in which to review Brady material.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail,

first-class postage prepaid, to all counsel of record on July 29, 1996.

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