**IN THE SUPREME COURT OF FLORIDA**

**TERRELL M. JOHNSON,**

**Appellant,**

v.

**CASE NO. 89,022**

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

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

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# ANSWER BRIEF OF APPELLEE

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## TABLE OF CONTENTS

**ITEM** **PAGE(S)**

**ISSUE I**

## TABLE OF AUTHORITIES

**Cases** **Pages**

**Other Authoritv**

## PRELIMINARY STATEMENT

As part of the record on appeal, this Court has in its possession the attorney notes withheld from disclosure. The copies were provided to the trial court for an *in camera* inspection, and sealed by the court. They are shown as the last entry in the record index, and described as "sealed documents." Appellee respectfully requests the notes' confidentiality be maintained pending a decision in this appeal.

## STATEMENT REGARDING ORAL ARGUMENT

Contrary to the requirements of Fla.R.App.P. 9.320, Johnson has incorporated his request for oral argument into his initial brief. Appellee will respond accordingly.

The documents withheld from disclosure are part of the record on appeal, and speak for themselves. They will be examined by this Court under a highly deferential standard of review. See Brvan v. Butterworth, 22 Fla.L. Weekly S 170 (Fla. March 27, 1997) ("we will not second-guess the trial court on this matter"), *citing* Orme v. State, 677 So.2d 258,262 (Fla. 1996).

The legal arguments are straightforward, and are controlled by this Court's recent decisions in Bryan; and Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996). Both of these cases were decided without oral argument. Appellee opposes oral argument, which could unnecessarily delay this case and would not assist the Court in reaching its decision.

## STATEMENT OF THE CASE AND FACTS

The procedural history and facts of this case are well set forth in the order under review. (RI-144 & 145)[1] In contrast, Johnson's statement includes much irrelevant detail. For clarity, the State provides its own statement.

Johnson is a death row inmate represented by the Capital Collateral Representative (CCR). On January 10, 1995, CCR requested access to Defendant's files relating to Johnson. (Rl-62, Exhibit A) On February 9, 1995, Defendant responded, initially denying access to any of the requested records. (Rl-62, Exhibit B)

The instant complaint was filed on or about August 10, 1995, and served on September 15, 1995. On October 6, 1995, Defendant changed its initial position and offered to allow CCR to inspect all the "files" relating to death row inmates, except for documents that were not public records or were exempt from disclosure under ch. 119, Florida Statutes. (R1 -62, exhibits C & D) Pursuant to the parties' agreement, Defendant made Johnson's files available for inspection as of October 25, 1995. (R1-62, exhibit E)

In anticipation of CCR's inspection, Defendant prepared an inventory of the documents which would be withheld. That inventory apparently was provided to

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[1]Cites to the record on appeal will be in the form (R[volume number]-[page number]).

CCR when the files were inspected. It divided the withheld documents into 21 items, and recited the decisional and statutory law upon which exemptions from disclosure were claimed. (Rl-62, exhibit F)

The State moved to dismiss the original complaint to the extent it relied on Brady v. Maryland, 373 U.S. 83 (1963) to state a separate cause of action. (RI-1 9 through **35)** The motion was granted. (RI-50 & 5 1) Later, the court clarified the dismissal order. (App. D hereto.)

Johnson amended his complaint in May, 1996. (RI-102) The final hearing, which included *an in camera* inspection of the disputed documents, was held July 16, 1996. The trial court upheld Appellee's decision not to disclose the "21 items," finding all of them were not public records. The order under review was rendered July 30, 1996. (R1 - 144 & 150) Johnson's motion for rehearing (R1-151) was denied by an order rendered August 19, 1996. (RI-1 66) Notice of appeal was filed September 16, 1996. (Rl-167)

## SUMMARY OF THE ARGUMENT

**Issue I: Constitutionality of §119.07(3)(I), Florida Statutes**

The disputed documents are not "public records," and thus not subject to disclosure under ch. 119. Therefore, the attorney work product exemption for

documents otherwise subject to disclosure is not invoked. Johnson is not affected by § 119.07(3)(l), Florida Statutes, and does not have standing to challenge it.

If the disputed documents are "public records," they are also work product exempt from disclosure under § 119.07(3)(l). This statute may be invoked by the custodian of requested documents, regardless of whether a death-sentenced inmate is represented by public or private counsel. It does not violate equal protection. Roberts, 668 So.2d at 582.

**Issue II: Propriety of Withholding the Disputed Documents**

The lower court correctly determined, as a matter of fact, that the withheld documents were not public records, and thus not subject to disclosure under ch. 119, Florida Statutes. Alternatively, the court correctly found the documents were attorney work product exempt from disclosure under § 119.07(3)(l). This determination is supported by competent, substantial evidence--the documents themselves--and is presumptively correct. Bryan, 22 Fla.L.Weekly at S170 ("we will not second-guess the trial court on this matter"), *citing* Orme v. State, 677 So.2d 258,262 (Fla. 1996).

Johnson does not urge the absence of competent, substantial evidence, but merely disagrees with the trial court's factual findings. The Court should summarily affirm on this issue.

**Issue III: Review of Withheld Documents for *Brady* Material**

The original complaint was dismissed as to Johnson's Brady claim. Johnson does not contest such dismissal. The amended complaint also failed to allege facts which would establish a Brady issue. Brady is not fairly presented by the facts, and need not be reached.

Johnson has never alleged facts establishing a Brady claim, or facts showing any of the disputed documents would constitute newly discovered evidence. Therefore, any claim based on the withheld documents would give rise to a successive, and procedurally-barred 3.850 motion. Again, there is no need to reach Johnson's Brady issue.

In the absence of sufficient factual allegations, the trial court could have held it lacked jurisdiction to review the withheld documents for Brady material. Indeed, the court looked for obvious exculpatory material, and found none was withheld from disclosure. The disputed documents themselves provide competent, substantial evidence supporting the trial court's finding, which must be affirmed.

## ARGUMENT

### ISSUE

**WHETHER THE ATTORNEY WORK PRODUCT EXEMPTION IN §119.07(3)(l), FLORIDA STATUTES DISTINGUISHES BETWEEN PRIVATE AND PUBLIC COUNSEL**

### A. Standing

This Court need not reach the merits, as Johnson does not have standing to attack § 119.07(3)(l), Florida Statutes (1995). The disputed documents are not public records at all, and are not subject to disclosure under ch. 119. They could have been withheld without reliance on the statute's exemption for attorney work product.

Since Appellee would not be relying on the statute, Johnson would not be affected by it. Therefore, he would not have standing to challenge its constitutionality. See State v. Hagan, 387 So.2d 943,945 (Fla. 1980) ("[a]ppellees may not challenge the constitutionality of a portion of the statute which does not affect them"); Isaac v. State, 626 So.2d 1082, 1083 (Fla. 1 st DCA 1993) ("appellant lacks standing because it is apparent in the record that he has not been adversely affected by the asserted infirmity in the statute").

### B. Response on Merits

Alternatively, the disputed documents--if held to be public records--were exempt from disclosure as attorney work product. Under this alternative, Johnson would be

affected by §119.07(3)(l), and would have standing to attack its constitutionality. His argument, however, is frivolous.

Johnson contends the attorney work product exemption unconstitutionally distinguishes between publicly paid and private counsel for death-sentenced inmates. This Court squarely rejected such an unreasonable reading of the statute in Roberts:

> Roberts also argues that the amended statute is facially unconstitutional because it distinguishes between indigent death-sentenced inmates represented by state-appointed collateral counsel and capital inmates represented by their own counsel. The statute does provide that the work product exemption applies to "capital collateral litigation as set forth in [section] 27.700 1." Sec. 119.07(3)(l )1. Section 27.7001, Florida Statutes (1995), provides that it is the intent of the legislature that all indigent death-sentenced persons be represented by CCR in collateral legal proceedings. Clearly, the legislature's rationale for extending the work product exemption to the Attorney General's files for purposes of capital collateral litigation, applies equally whether a death-sentenced person is represented by private counsel or state-appointed counsel. Thus, we interpret the amended statute as applying to all death-sentenced inmates and find no constitutional violation.

*Id.*, 668 So.2d at 582 [footnote omitted].

Johnson's argument is no more than a tired reprise of the argument rejected by the Roberts court, and presents no reason for this Court to reconsider. The argument represents no more than Johnson's personal disagreement with the Roberts decision. Such disagreement is of no constitutional significance, and provides no ground for relief on appeal.

## ISSUE II

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

### A. Standard Of Review

In Bryan v. Butterworth, , 22 Fla.L. Weekly S 170 (Fla. March 27, 1997), this Court announced a highly deferential standard of review. It declared:

> As is apparent from the trial court's order quoted above, the court's application of the *Shevin* standard to the materials in issue in the present case was largely a factual determination hinging on the court's in-camera review of the documents.
>
> * * *
>
> Our review of the record shows that competent substantial evidence supports the trial court's findings. Accordingly, we will not second-guess the trial court on this matter. See Orme v. State, 677 So.2d 258,262 (Fla. 1996) ("Our duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent substantial evidence."), *cert. denied*, --- U.S. ----, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997).

*Id.*

### B. Response on Merits

Predictably, Johnson ignores the standard of review. He does so, because application of the standard announced in Bryan compels affirmance of the trial court. Even a cursory glance at the disputed documents reveals there was competent, substantial evidence (the documents themselves) to support the trial court's factual and

legal conclusions. The trial court's factual determination was correct, and should not be second guessed. Bryan: Orme.

The trial court upheld Appellee's decision not to disclose the disputed documents, as the "documents were not public records subject to disclosure." (R1 - 150) Below, Appellee will urge the trial court was correct; and, alternatively, that the documents--even if found to be public records--were properly withheld as attorney work product exempt under § 119.07(3)(l), Florida Statutes (1995). This Court must affirm if it agrees with either rationale. 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"). See Coalition for Adeauacv and Fairness in School Funding. Inc.. et al,. v. Chiles. et al., 680 So.2d 400,402 (Fla. 1996) (affirming dismissal of broad challenge to funding of education by Legislature, despite disagreement with some of trial court's reasons).

Appellee withheld 2 1 items, each comprised of individual documents claimed to be exempt from disclosure. (See Exhibit F of answer to amended complaint [R1-13 7].) These items, and their component documents, were listed on the second page

of the final order (R1- 146):

1. a. Nine (9) stapled yellow legal size pages
   b. Seventeen (17) stapled legal size pages
   c. One (1) yellow legal size page
   d. One (1) yellow legal size page
   e. One (1) yellow legal size page
   f. Fourteen (14) stapled yellow legal size pages
   g. Six (6) stapled yellow legal size pages
   h. Nineteen (19) stapled yellow legal size pages
   i. Twelve (12) stapled yellow legal size pages
   j. One (1) yellow legal size page
   k. Two (2) stapled yellow legal size pages
   1. Four (4) stapled white legal size pages
   m. Nine (9) stapled white standard size pages
   n. One (2) [sic] white standard size page
   o. One (1) white standard size page
      ["p" omitted in original]
   q. Fourteen (14) stapled yellow standard size pages
   r. Sixteen (16) white stapled computer generated pages with annotations.
   s. One (1) white computer generated page with annotations
   t. Pleadings filed in the FSC habeas corpus proceeding containing annotations by AAG.
   u. Twenty (20) stapled white legal size pages
   v. Two (2) stapled yellow size pages.

For convenience, the withheld items are referenced by the letter assigned.

These items were listed in the "inventory" Appellee provided Johnson at the time Appellee's files were inspected. The preamble to the inventory described the withheld documents as containing "mental impressions of the authors." It declared:

> All of the above [documents] contain hand written notes comprising AAG's mental impression and strategy used in

> preparation for direct appeal briefs and arguments, State and Federal Collateral actions, and appeals therefrom.

(R1 - 137) In the opening paragraph, there are citations to ch. **119** and to decisions by this Court, which effectively describe the withheld documents. For example, by citing to a specific page from State v. Kokal, 562 So.2d 324 (Fla. 1990), the inventory effectively described the documents in greater detail. See *id*. 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." *Id*.

Under these facts, the trial court was completely correct in its ruling. Simple inspection reveals the individual documents comprising items (a) through (l), (u) and (v) are handwritten notes. They are cryptic, with no consistent attempt to write in complete sentences. Occasionally, they are lists of points to be raised or citations to case decisions. Often the notes amount to an "index" of transcribed proceedings, with transcript page numbers written in the left margin or on the left side of the page. As

such, these documents do not even constitute rough drafts. They are notes made for preparing later briefs or pleadings, or for later arguments.

For example, item (b) is captioned "Trial/Terrell Johnson"; and includes transcript page numbers in the left margin The single page listed as item (e) has this notation at the top: "Terre11 Johnson OA 11-6-91." Item (g) is captioned: "Loftus' Deposition Personal Notes FSC #59,8 11." Items (m)-(q) ["p" omitted in original] are substantively the same as the earlier items. They differ only in the fact that they are typed notes. Under Kokal and Shevin, they are not public records. They are attorney work product.

Items (r) and (s) are computer printouts of research sessions. They list cases, with handwritten notes between the printed lines. These research sessions must have been conducted by an attorney, or at an attorney's direction. They constitute research notes, and are not public records. Alternatively, they are work product.

Item (t) is comprised of copies of four pleadings filed in Johnson's habeas proceeding before this Court (case no. 85,028). The copies themselves would not be confidential, however, copies of all four pleadings are in Johnson's possession. The confidential portions are the extensive handwritten notes in between lines and in the margins. It would, of course, be impractical and wasteful to redact the notes only to provide Johnson with copies of pleadings he already had. Nevertheless, the notes

themselves are confidential, as they do not constitute public documents. They are precursors to later documents, as contemplated by Kokal; and are not public records. Alternatively, they are work product. The trial court correctly found them exempt from disclosure.

All of the documents, including the typewritten notes and annotated copies of filed pleadings, are simply not public records. They are notes by an attorney or paralegal to themselves. The trial court properly found them to be non-public records. Kokal; Roberts, 668 So.2d at 58 1 (agreeing that withheld "handwritten documents" were either non-public records or exempt work product).

The documents themselves are competent, substantial evidence supporting the decision below. Johnson 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). Again, as part of the inventory, Appellee described the documents listed as items (a) through (v) as materials:

> comprising AAG's mental impressions and strategy used in preparation for direct appeal briefs and arguments, State and Federal Collateral actions, and appeals therefrom.

(Rl-137). Johnson did not dispute the accuracy of this description, and did not seek a more detailed description, as he could have under § 1 19.07(2)(a).[2] The trial court properly found the documents to be exempt from disclosure under § 119.07(3)(l). Roberts.

Johnson's remaining points are trivial. He urges that "any document prepared in connection with official business that is to perpetuate . . . knowledge ... is subject to disclosure." (initial brief, p. 15) He does not attempt to explain how this reading of the law squares with the express language and purpose of §119.07(3)(l). Obviously, if a document is both a public record and work product, it is exempt without regard to whether it perpetuates knowledge.

In fact, the express purpose of § 119.07(3)(l)1 .--to preserve confidentiality of work product until a death sentence is carried out or reduced to a life sentence--would be defeated if attorney notes, etc. were subject to disclosure simply because they were not thrown away upon completion of their immediate use. Death cases are notoriously voluminous and lengthy. The value of such notes is precisely that they can be saved to avoid duplicative work in the distant future, sometimes by new counsel.

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[2] In relevant part, § 119.07(2)(a) provides:

> if requested by the person seeking the right under this subsection to inspect, examine, or copy the record, he or she [custodian of records] shall state in writing and with particularity the reasons for the conclusion that the record is exempt.

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 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.

Johnson'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, 1045 (Fla. 1995) (refusing to construe a statutory term in a manner which would result in unreasonable, harsh, or absurd consequences). Also, the 1995 amendment is remedial and apples to public record requests made before its effective date. Roberts, 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.

Johnson concludes his second issue with two narrow 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.” (initial brief, p. 20-23) 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.” (initial brief, p. 23)

Both points are meritless. The 1995 amendment to the attorney work product exemption expressly allows the Attorney General’s office to keep certain documents 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 instances, 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. Also, CCR's propensity for raising procedurally-barred issues--as illustrated by this Court’s decision denying Johnson’s habeas petition-

-often makes work done for an earlier postconviction motion equally useful for a successive motion.

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. Johnson advances an unreasonable interpretation of the attorney work product exemption, which would defeat the public policy underlying the 1995 amendment.

Johnson's last point contends the "State failed to segregate what is exempt and what is not." (initial brief, p. 23) This point is not preserved, as it was not raised in any of the written pleadings below, or specifically urged at the final hearing. See Roberts, 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."). Moreover, Appellee claimed all portions of the withheld documents were exempt. Simple inspection of those documents (particularly item [t]) reveals that any non-exempt portions were de *minimis*, and that they would be meaningless if segregated from the exempt portions.

To reiterate, Johnson does not urge the absence of competent, substantial evidence. He merely disagrees with the trial court's factual findings. The Court should summarily affirm on this issue.

## ISSUE III

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

### A. Introduction

Initially, Appellee will respond to the troublesome manner in which Johnson's argument begins. It quotes most--but omits a significant part--of the transmittal letter[3] for the proposed final order Appellee submitted to the trial court.

On its face, the letter explained that the proposed order was Appellee's version, and that it reflected the undersigned's understanding of the trial court's ruling. The letter noted opposing counsel would be submitting a proposed order, which Johnson did. (See initial brief at p. 24, noting that "both parties submitted proposed orders.")

The letter itself never appears in the record. Instead, it is incompletely quoted in Johnson's Aug. 8, 1996, "Motion for Rehearing/Motion to Alter or Amend." (R1-15 l-l 56). Johnson's reliance on the letter is improper because it is not record material. See Altchiler v. State. Dept. of Professional Regulation, 442 So.2d 349,350

[3]A a complete copy of the letter is attached to this brief as Appendix C.

(Fla. 1 st DCA 1983) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.").

Simple comparison of the letter as quoted in Johnson's initial brief with the letter itself reveals Johnson does not quote the letter in its entirety, but omits the final phrase indicating a copy was sent to "plaintiffs counsel." Thus, Johnson falsely gives the appearance of an *exparte* communication.

The letter was indeed received by Johnson's counsel, as it was incompletely quoted in his motion for rehearing. (Rl-152) As noted above, the letter clearly indicated Johnson would be submitting his version of a proposed order, etc. Therefore, this Court need not entertain the concerns it expressed in Rose v. State, 60 1 So.2d 118 1, 1182 (Fla. 1992) (appearance of impropriety arose when old, but not new, counsel was served with proposed order differing materially from the State's earlier position as to the need for a postconviction evidentiary hearing).

The final order, as entered by the trial court, came after an evidentiary hearing which included *an in camera* inspection of the withheld documents. Johnson had the opportunity to argue all of the points he raises now. He cannot claim any due process violation through the lower court's adoption of Appellee's proposed order. See Groover v. State 640 So.2d 1077, 1078 (Fla. 1994) (although defendant did not have

chance to prepare an alternative order, there was no due process violation when counsel had an opportunity to argue all issues in a brief responding to the State's motion to dismiss and in a hearing before the trial court signed the order).; Hardwick v. Dugger, 648 So.2d 100, 104 (Fla. 1994) ("this case is unlike Rose where the trial court adopted the State's proposed order denying postconviction relief without providing the defendant's counsel notice").

**B. No *Brady* Claim is Fairly Presented by this Appeal**

Appellee will contend the trial court responded to Johnson's Brady claim reasonably under the circumstances, and that the trial court gave Johnson more process than he was due. This Court need not, however, reach the merits; as Johnson did not fairly present a Brady claim below.

In the original complaint, Johnson's reliance on Brady v. Maryland was never more than a simple citation to that decision. (See complaint, R1-2, ¶8) He never alleged that specific exculpatory material existed, much less that such material was being withheld. At most, the original 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. See *id*. at 582:

> it is the State that decides which information must be disclosed" and unless defense counsel brings to the court's attention that

> exculpatory evidence was withheld, "the prosecutor's decision on disclosure is final." *Pennsylvania v. Ritchie, 480* U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987).

In fact, Appellee moved to dismiss the complaint to the extent it relied on Brady to state a separate cause of action. (R1-2 1-22) Dismissal was granted, albeit with the trial court's instruction that Appellee was still "obligated to disclose Brady material." (Rl-50) Later, the order of dismissal was clarified. The trial court stood fast with its initial determination that Appellee was obligated to disclose Brady material. However, the trial court correctly recognized it lacked jurisdiction to grant relief based on Brady. (See the May 2 1, 1996 "Order Clarifying the Order of October 30, 1995" attached hereto as Appendix D.)

On appeal, Johnson does not seek review of the order dismissing his first complaint. His real barrier to relief, however, is the parallel failure of the amended complaint to allege facts which would give rise to a Brady claim. In relevant part, the amended complaint alleged only:

> 5. Mr. Johnson seeks disclosure of material withheld by an agency of the State of Florida, the Office of the Attorney General.
>
> * * *
>
> 7. Plaintiff mailed to the Defendant a formal request for the disclosure of public records, pursuant to chapter 119 of the Florida Statutes, and Bradv v. Maryland, 373 U.S. 83 (1963). [Johnson's attachment omitted]

(RI-103)

Even when construed liberally, the quoted language does not allege any facts which would establish a Brady claim. It does not describe any particular documents; claim the documents were exculpatory and material to the outcome of trial; or contend the State had not disclosed such documents earlier and the documents could not have been discovered with due diligence. This is not an unreasonable burden, at least for purposes of pleading. See e.g., Scott v. State, 657 So.2d 1129, 1130 (Fla. 1995) (describing in detail allegations as to two statements and a medical examiner's photograph urged to constitute "newly discovered evidence"). Had Johnson met this burden of pleading, the trial court's *in camera* review would have resolved any dispute as to the existence of facially exculpatory material.

However, as his Brady claim was never more than a lone citation, Johnson's amended complaint cannot be construed as an alleging that Appellee was withholding exculpatory material which constituted newly discovered evidence. Therefore, the trial court was never placed on notice as to any specific Brady claim. Johnson's amended complaint was at most a reminder of the Attorney General's continuing obligation to disclose Brady material.

Thus, the trial court, under the allegations of the original and amended complaints, lacked jurisdiction even to review the withheld documents for Brady material. The trial court could not have, for example, compelled Appellee to produce

all relevant files for a de *novo* inspection for Brady material by the court. The trial court--to the best of its ability, given that Johnson was tried elsewhere--kept an eye out for obvious exculpatory material; thereby affording more process than was due. In the process, the court made this candid observation:

> The Court reiterates that it is very difficult to determine if any individual document is exculpatory, given that Johnson was tried elsewhere and this Court cannot be expected to have the trial court's familiarity wit the entire record.

(R1 -147) Having received more process than was due, based on a claim that was not fairly presented, Johnson cannot be heard to complain.

### *C.* Any *Bradv* Claim is Procedurally Barred

If deemed fairly presented through sufficient factual allegations, Johnson's Brady claim is procedurally barred by this Court's decision in Johnson v. Sinaletary, 22 Fla.L.Weekly S3 **1 (Fla. Dec. 19, 1997)** revised 22 Fla.L.Weekly S339. In Johnson, this Court denied habeas relief. In doing so, it recounted 18 years of litigation, including the 1992 denial of postconviction relief; and rejected twenty-three issues as procedurally barred or meritless. Notably, the plethora of issues did not include a single Brady claim, or claim for relief based on newly discovered evidence.

Again, Johnson's original complaint was dismissed to the extent it relied on Brady as a separate cause of action. His complaint (R1 - 102 through

122); but, with regard to Brady, alleged only:

> Plaintiff mailed to the Defendant a formal request for the disclosure of public records, pursuant to chapter 119 of the Florida Statutes, and Brady v. Maryland, 373 U.S. 83 (1963). [plaintiffs attachment omitted]

(R1-103, ¶7)

This conclusory observation does not set forth facts which would establish a Brady violation. It does not allege the state withheld exculpatory evidence; that the evidence was material; that it would have affected the outcome of trial or sentencing; and that it could not have been discovered with due diligence. Most important, it does not allege any of the withheld documents would constitute "newly discovered evidence." Absent such allegations, this Court's recent decision in Johnson--if not its earlier decision affirming denial of postconviction relief--would procedurally bar any future attempt by him to obtain postconviction relief in the court where he was tried.

A second procedural bar arises through the express language of § 119.07(9), Florida Statutes (Supp. 1996):

> [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, Johnson directly contravenes §119.07(9). Given the two procedural bars, Johnson's bare reference to Brady in the amended complaint presents no ground for relief and is moot.

**D. Resaonse on Merits**

In the absence of sufficient factual allegations, the trial court could have held it lacked jurisdiction to review the withheld documents for Brady material. Instead, the court looked for obvious exculpatory material and declared:

> Although the Court has not read each word of the withheld documents, the Court is satisfied no Brady materials were withheld from disclosure.

(Rl-147) The trial court then acknowledged the practical difficulties it faced. (R1-147) Notably, even Johnson does not suggest how a Leon County judge would be able to tell if a facially exculpatory 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 to the same extent as the trial and sentencing court, 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 disputed documents themselves, provide competent, substantial evidence supporting the trial court's finding that no Brady material was withheld. That finding must be affirmed.

**E. Miscellaneous Points**

Johnson erects a straw man and tears it down without consequence. He relies on this Court's decision in Hoffman v. State, 613 So.2d 405 (Fla. 1992), for the

undisputed proposition that the Leon County Circuit Court had jurisdiction over his chanter 119 action against Appellee. (initial brief, p. 27) However, nothing in Hoffman did, or could, confer jurisdiction on the Leon County Circuit Court to grant Brady relief to Asay murderer. tried Fin a different circuit. a . & - o l e Commission, 649 So.2d 859 (Fla. 1994):

> By its own terms, ***Ho&an*** 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).

If Hoffman did not establish mere venue, it certainly could not establish subject matter jurisdiction. The reason is obvious: to grant Brady relief, the Leon County Circuit Court would have to vacate a judgment and sentence imposed by another circuit court. One circuit court cannot sit in review of final judgments entered by different circuit courts. See State v. Gary, 609 So.2d 129 1, 1294 (Fla. 1992) (order by successor judge in one circuit inappropriate because it amounted to appellate review of the legality of venue order by predecessor judge from another circuit; despite successor's lack of appellate jurisdiction). See ***also*** Art. V, §4(b)(1), Fla. Const. (generally, district courts of appeal have jurisdiction to hear appeals of right from final judgments or orders of "trial courts").

In its "Order Clarifying the Order of October 30, 1995," the trial specifically and correctly held it did "not have subject matter jurisdiction to consider Brady claims as part of a ch. 119 proceeding." (App. D hereto, at p. 1) Under Art. V, Fla. Const.; Asay; and State v. Gary; the trial court was correct. Apparently, Johnson cannot understand the significant difference between the Leon County Circuit Court's undisputed jurisdiction to hear and grant relief upon a ch. 119 action, and its total lack of jurisdiction to hear and grant relief upon a Brady claim brought by an inmate tried elsewhere. This Court should find no difficulty in discerning the difference, and disregard Johnson's hyperbole that he was placed in an "impossible situation." (initial brief, p. 3 1)

Johnson concludes Issue II by arguing, for the first time, that the lower court's Brady ruling deprived him of access to courts. He then claims the same ruling deprived him of effective assistance ofpostconviction counsel. (initial brief, p. 29-3 1) These two points are not preserved,[4] due to Johnson's failure to raise them below. Roberts, Steinhorst, *supra*.

Johnson has been litigating his conviction and sentence for 18 years, ample opportunity to bring a Brady claim in the court where he was tried. s l y

[4]At page 22 of the final hearing transcript, Johnson's counsel urged Johnson was "sort of stuck without a forum . . . to make sure that there is no Brady materials." This terse and conclusory observation did not preserve the access to courts argument Johnson now advances.

enjoyed a forum for his ch. 119 claims. Below, if the trial court's inspection of withheld documents had revealed exculpatory material, Johnson could have returned to the court where he was tried; and urged the exculpatory material constituted newly discovered evidence. Hoffman does not forbid such. The access to courts argument is frivolous to the point of bad faith.

As to denial of effective postconviction counsel, Johnson has no such right. Spalding v. Dugger, 526 So.2d 71 (Fla. 1986)--the only case Johnson cites--does not establish such right. There, this Court relied on a Fourth Circuit decision holding the states were "absolutely obligated" to provide collateral counsel to death-sentenced inmates. ***Id.*** at 72, ***citing*** Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988).

In actuality, the Giarratano 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, 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).

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

> While chapter 85-332 [creating the office of Capital Collateral Representative] 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.

Nothing on the face of $27.702, or any other part of CCR's enabling statute, mentions "effective" counsel. Also, the amendment of $27.7001 by the 1996 Legislature strongly implies that the statutory right to counsel created by $27.702 is not concerned with effectiveness:

> 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.

§2, ch. 96-290, Laws of Fla.. The Legislature, were it intent on creating or maintaining a statutory right to counsel that was "effective," would not have limited the range of CCR's authority.

Given the lack of preservation, Johnson's cursory argument about access to courts and a right to effective collateral counsel is not the basis upon which to decide these issues. They should wait another day.

## CONCLUSION

The trial court correctly concluded the disputed documents were properly withheld from disclosure under chapter 119, Florida Statutes; and properly responded--

within the limits of its jurisdiction--to the claim for release of documents under Brady v. Maryland. The final order below must be affirmed.

Respectfully submitted,

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**

**CHARLIE MCCOY**
Assistant Attorney General
Florida Bar No. 333646

Office of The Attorney General
The Capitol--PLO 1
Tallahassee, FL 32399-1050
(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 **MARTIN J. MCCLAIN,** Litigation Director, and **SYLVIA SMITH,** Asst. CCR, P. 0. Drawer 5498, Tallahassee, Florida 323 14-5498; this 22nd day of July, 1997.

**CHARLIE MCCOY**
Assistant Attorney General

*<charles>pdox\johnson\ab-fsc*

## TABLE OF APPENDICES

INTHECIRCUITCOURTFORTHESECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY

TERRELL M. JOHNSON,

Plaintiff,

vs. CASE NO. 95-3894

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

Defendant.
_____/

## FINAL ORDER

This matter came before the court upon Johnson's "Complaint for Disclosure of Public Records" under ch. 119, Florida Statutes. The final hearing, which included an *in camera* inspection of the documents withheld from disclosure, was held July 16, 1996.

## Facts

Johnson is a death row inmate represented by the Capital Collateral Representative (CCR). On January 10, 1995, CCR requested access to Defendant's files relating to Johnson. On February 9, i995, Defendant responded, initially denying access to any of the requested records.

The instant complaint was filed on or about August 10, 1995, and served on September 15, 1995. On October 6, 1995, Defendant changed its initial position and offered to allow CCR to inspect all the "files" relating to death row inmates, except for documents that were not public records or were exempt from disclosure under ch. 119, Florida Statutes.

Pursuant to the parties' agreement, Defendant made Johnson's files available for inspection as of October 25, 1996.

In anticipation of CCR's inspection, Defendant prepared an inventory of the documents which would be withheld. That inventory, dated March 11, 1996 (copy attached as Exhibit A), apparently was provided to CCR when the files were inspected. It divided the withheld documents into 2 1 items:

1. a. Nine (9) stapled yellow legal size pages
   b. Seventeen (17) stapled legal size pages
   c. One (1) yellow legal size page
   d. One (1) yellow legal size page
   e. One (1) yellow legal size page
   f. Fourteen (14) stapled yellow legal size pages
   g. Six (6) stapled yellow legal size pages
   h. Nineteen (19) stapled yellow legal size pages
   I. Twelve (12) stapled yellow legal size pages
   j. One (1) yellow legal size page
   k. Two (2) stapled yellow legal size pages
   1. Four (4) stapled white legal size pages
   m. Nine (9) stapled white standard size pages
   n. One (2) [sic] white standard size page
   o. One (1) white standard size page
   ["p" omitted in original]
   q. Fourteen (14) stapled yellow standard size pages
   r. Sixteen (16) white stapled computer generated pages with annotations.
   s. One (1) white computer generated page with annotations
   t. Pleadings filed in the FSC habeas corpus proceeding containing annotations by AAG.
   u. Twenty (20) stapled white legal size pages
   v. Two (2) stapled yellow size pages.

(Ex. A) For convcnicncc, the withheld items are referenced by the letter assigned in the inventory.

## D' ussion

Challenges to § 119.07(3)(l), Fla. Stat. (1995)

As part of his argument that the withheld documents were not exempt from disclosure, Johnson urged that § I 19.07(3)(l) violates equal protection and substantive due process, by denying disclosure of work product only when requested by a death-sentenced inmate or CCR. Defendant objected, on the ground Johnson's statement of the issues' did not give notice of the new attack on the statute. The Court disagrees and rules the point is properly before it.

In relevant part, § 119.07(3)(l) exempts from disclosure:

> A public record which was prepared by an agency attorney . . . which reflects a mental impression, conclusion, litigation strategy, or legal theory.... *For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption . until execution of sentence or imposition of a life sentence. [es ]*

Since the statute cites $27.7001, Johnson maintains that the Attorney General can claim the cxcmption only when public records requests are made by a death row inmate or CCR. Thus, Johnson reasons, the statute discriminates against him, thereby violating equal protection and due process.

Nothing on the face of the statute so limits the Attorney General's ability to claim the exemption. Johnson's reading would render the cxcmption meaningless, by making the

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[1]On or about May 3 1, 1996, Johnson filed a "Case Management Conference Statement" pursuant to an earlier court order. Part 3 of that statement lists two pending issues of law.

statute simple to evade. This Court cannot so interpret the challenged statute, The exemption is available to the Attorney General's office regardless of the source of the public records request. Therefore, the statute does not violate equal protection or due process.

Johnson also contends the 1995 amendment to the work product exemption, now codified within §119.07(3)(l), cannot be applied retroactively to public records requests made before its effective date. The Florida Supreme Court has recently said otherwise. Roberts v. Butterworth, 668 So.2d 580,582 (Fla. 1996). The 1995 amendment applies to Krawczuk's request for access to public records.

Johnson's Reliance on *Brady v. Maryland*

Johnson's complaint cites to Brady v. Maryland, 373 U.S. 83 (1963). The Court has reviewed the withheld documents for Brady material; by determining the nature of the withheld document, and by spot-checking to verify the Court's initial impression. Although the Court has not read each word of the withheld documents, the Court is satisfied no Brady materials were withheld from disclosure. The Court reiterates that it is very difficult to determine if any individual document is exculpatory, given that Johnson was tried elsewhere and this Court cannot be expected to have the trial court's familiarity with the entire record.

Propriety of Withholding Documents

All of the disputed documents were withheld based on the belief that they--as attorney notes--were not public records at all; or, if the documents were public records, that they were attorney work product exempt from disclosure. The Court reviewed each of the withheld

documents, and agrees they were properly withheld from disclosure for the reasons noted in the inventory.

Item (a) is comprised of handwritten notes, with references to a transcript. The notes appear to have been prepared for a postconviction hearing. They are not public records, and thus not subject to disclosure under ch. 119. Item (b) is also comprised of handwritten notes, with references to the transcript of the trial. They, too, are not public records.

Item (c) is a single page of handwritten attorney notes, out of context. It refers to an earlier hearing. This page is not a public record. Items (d) and (e) are notes prepared for hearings, and also are not public records subject to disclosure.

Item (f) is marked "outline" at the top. It consists of handwritten notes made from prior record with references to page numbers of a transcript. It is not public record. Item (g) is not subject to disclosure for the same reason.

Item (h) is research notes with references to transcript page numbers. It is not a public record, Items (I) and (j) are also handwritten notes as to aggravating and mitigating circumstances, and as to prior hearings. Item (k) is handwritten, and labeled "pertinent chronology." Thcsc items are not public records.

Item (I) is four pages of typewritten notes, with additional pencil notes in the margin. They appear to relatc to reconstruction of the transcript and testimony of witnesses. This item is not a public record.

Item (m) is nine typed pages labeled "Terrell Johnson Outline." It is a review of witnesses, etc. It contains abbreviations and incomplete sentences, indicating it is not a final version of anything. It is not a public record. Item (n) is a copy of the first page from item (m), with handwritten notes throughout. It also is not a public record.

Item (o) is a typed outline, labeled "Terre11 Johnson 3.850 Outline," with handwritten notations. It is not a public record. Item (q) is also a typed outline, labeled "Johnson 3.850 Appeal," with handwritten notations. It was apparently used in connection with an argument, and is not a public record.

Items (r) and (s) are documents produced through computer research, with citations and handwritten notes. Such research is not a public record.

Item (t) consists of copies of four pleadings, all filed in Johnson's habeas corpus action before the Florida Supreme Court. All have highlighted areas and handwritten notations, apparently made as part of preparation for successive pleadings or an argument. As notated, these pleadings are not public records.

Item (u) is handwritten notes from an argument. It is not a public record. Similarly, item (v) is handwritten notes form the "Defendant's [Johnson's] Argument." It is not a public record.

The Court concludes that none of the withheld documents were intended to be public records, as contemplated by ch. 119. The Court is not basing its decision on the intent of the drafter of the withheld documents.

## Conclusion

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

All documents were properly withheld from Johnson's public records request, as the documents were not public records subject to disclosure. All relief sought by Johnson is denied.

DONE and ORDERED in Chambers, at Tallahassee, Leon County, Florida, this 29th day of July, 1996.

F. E. STEINMEYER, III
Circuit Judge

conformed copies to counsel

March 11, 1996

INVENTORY OF DOCUMENTS WITHHELD IN THE TERRELL JOHNSON CASE:

Enclosed is a list of items withheld from the Terre11 Johnson file. The basis for withholding these documents is the belief of the undersigned that these items do not constitute "public records" under § 119.011, as construed by *State v. Kokal, 562 So.* 2d 324, 237 (Fla. 1990), as they contain merely the mental impressions of the authors. Further, these items are exempt under § 119.07(3)(1) (1995), and as interpreted in *Roberts v. State, 21* Fla. L. Weekly S89 (Fla., Feb. 21, 1996).

1. a. Nine (9) stapled yellow legal size pages
   b. *Seventeen* (17) stapled legal size pages
   c. One (1) yellow legal size page
   d. One (1) yellow legal size page
   e. One (1) yellow **legal** size page
   f. Fourteen (14) stapled yellow legal size pages
   g. Six (6) stapled yellow legal size pages
   h. Nineteen (19) stapled yellow legal size pages
   I Twelve (12) stapled yellow legal size pages
   j. One (1) yellow legal size page
   k. Two (2) stapled yellow legal size pages
   1. Four (4) stapled white legal size pages
   m. Nine (9) stapled white standard size pages
   n. One (2) blue standard size page
   o. One (1) white standard size page
   q. Fourteen (14) stapled yellow standard size pages
   r. Sixteen (16) white stapled computer generated pages with annotations
   s. One (1) white computer generated page with annotations
   t. Pleadings filed in the FSC habeas corpus proceeding containing annotations by AAG.
   u. Twenty (20) stapled white legal size pages
   v. Two (2) stapled yellow legal size pages.

All of the above contain hand written notes comprising AAG's mental impressions and strategy used in preparation for direct appeal briefs and arguments, State and Federal Collateral actions, and appeals therefrom.

Kenneth S. Nunnelley

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-1050

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

July 22, 1996 .

Hon. F. E. Steinmeyer, III
Circuit Judge
Second Judicial Circuit
Leon County Courthouse
Tallahassee, Florida 3230 1

HAND DELIVERY

RE: Johnson v. Butterworth, Case No. 95-3894

Dear Judge Steinmeyer:

During the hearing on July 16, you upheld the Attorney General's decision to withhold certain documents from disclosure. As counsel for the prevailing party, I drafted a final order. Counsel for CCR and myself cannot agree on the language, and are thus submitting our respective versions for the court's consideration.

The Brady section on page 4 differs in how it treats the Court's determination that no ~~Brady~~ material was withheld.

Throughout the hearing, the Court used the phrase that a given document was "not intended to be a public record." However, at the end of the hearing--at my request--the Court clarified its ruling, to state the use of the word "intended" did not reflect the intent of the person withholding the documents; but the intent of ch. 119, Florida Statutes.

Consequently, I did not include the "intent language" in my version of the final order. CCR's version does *so, but deletes the Court's final clarification of its ruling.*

Sincerely,

Charlie McCoy
Assistant Attorney General
(904) 488-9935

cc: Plaintiffs counsel

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

TERRELL M. JOHNSON,

Plaintiff,

vs. CASE NO. 94-3894

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

Dcfcndant.

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**ORDE LARIFYING THE ORDER OF OCTOBER 30, 1995**

This matter came before the Court upon Defendent's "Motion to Reconsider" the Court's verbal order of October 17, and the corresponding written order of October 30. The motion to reconsider was heard on November 9.

Upon consideration of Defendant's motion and arguments of counsel, it is ORDERED:

Defendant's October 26, 1995, "Motion to Reconsider" is DENIED, but with this clarification: Should Plaintiff claim that documents withheld from disclosure (under ch. 119, Fla. Stat.) must nevertheless be disclosed by Defendant pursuant to Brady v. Maryland, 373 U.S. 83 (1963); such claim must be presented to the court which sentenced Plaintiff. See Asay v. Florida Parole Commission, 649 So.2d 859, 86 1 (Fla. 1994) (act of requesting Brady maaterials a prelude to Brady hearing, "which unquestionably would be heard in the sentencing court") (Kogan, J., concurring). Moreover, this Court does not have subject matter jurisdiction to consider Brady claims as part of a ch. 119 proceeeding.

In all other respects, the Court's order of October 30 is incorporated by reference as if set

forth in full herein.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida this 21st day of May, 1996.

F. E. STEINMEYER, III
Circuit Judge

Conformed copies to counsel

*<c4>jsn-ord22*