IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

TERRELL M. JOHNSON,

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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ARGUMENT IN REPLY

ARGUMENT I

A. STANDING

Respondent did assert and the court did rely on section 119.07(3)(1), Florida Statute, exemption below. (T. 7/16/96 at 24)1. Moreover, Respondent acknowledged the fact in his answer brief: "[b]elow, 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)(1), Florida Statutes (1995)." Answer Brief at 9. Additionally, Respondent repeatedly invoked the exemption throughout his Answer Brief. See e.g. Answer Brief at 12, 13, 17, 6. Respondent's argument that Mr. Johnson has no standing to challenge section 119.07(3)(1) fails by virtue of the fact that Respondent asserted the exemption below, the Court ruled on its constitutionality and relied on it to justify non-disclosure, and Respondent repeatedly re-asserted the exemption in its Answer Brief.

B. MERITS

Respondent incorrectly states the issue. Mr. Johnson's issue here is not that the attorney work product exemption unconstitutionally distinguishes between publicly paid and private counsel for death-sentenced inmates. Rather, Mr. Johnson's claim, as his Brief makes clear, is that this new section of chapter 119 treats public records requests made by CCR lawyers and investigators on behalf of death sentenced inmates,

for the purpose of capital collateral litigation, differently from requests made by other persons or for other purposes. This question has not been previously determined by this Court.

ARGUMENT II

Respondent argues that the standard of review "announced in Brvan compels affirmance of the trial court," that counsel for Mr. Johnson "ignores" the standard of review, and that "even a cursory glance at the disputed documents reveals there was competent, substantial evidence to support the trial court's factual and legal conclusions." Answer Brief at 8-9. Mr. Johnson replies that the standard of review advanced by Respondent does not and cannot "compel" affirmance. The standard of review argued by Respondent is simply whether the record, upon review, shows that competent, substantial evidence exists to support the trial court's findings. Mr. Johnson's position is that the record below does not contain competent, substantial evidence to support the findings. Respondent failed to meet its burden of proof that the withheld materials were not subject to disclosure.

The burden of establishing a right to withhold a record falls on the agency withholding the record. Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985). The record below fails to prove that the work product exemption is correctly applied or that the withheld materials are non-public records.

Respondent further argues that it is the withheld documents

which are the "competent, substantial evidence" which support the court's conclusions. The documents however, are not part of the record. They are sealed. Counsel for Mr. Johnson is not permitted access to the sealed records. Surely appellate review requires that both parties argue from the same record.

Respondent makes numerous arguments from non-record material. For example, Respondent argues that the individual documents withheld as items (a) through (l), (u) and (v) handwritten notes which 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." Answer Brief at 11. These facts are not of record and are improperly presented in Respondent's Answer Brief.

As to item (a), the court below found that they were "notes that someone would make to handle a hearing" and "used to prepare an "oral argument." (T. 7/16/96 at 19-20). The court found that the oral argument would be the final copy." (T. 7/16/96 at 20). However, in Hillsborough County Aviation Authority v. Azzarrey Construction Company, 436 So. 2d 153 (Fla. 2d DCA 1983),[1] the court rejected this very argument.

Respondent argued below that it made no difference whether a

[1]The court made the same ruling as to items (c), (d) and (e), (T. 7/16/96 at 34). Mr. Johnson would make the same argument regarding items (c), (d) and (e) that he makes to the court's ruling on (a), Moreover, as to item (e), Respondent also argues facts not in evidence.

withheld document was a draft or the final version, if the court found it was not a public record. (T. 7/16/96 at 24). Respondent misstated the **law** below and has failed to correct that representation in this Court, in fact he continues to argue that the point is "irrelevant". Answer Brief at 16. Clearly the law recognizes that whether or not a document is a final version is relevant to the determination of whether a document is public record. 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. Moreover, 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 Publishins 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. Cartwrisht, 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).

As to item (b), the Court stated that "it appears to [the court] to be the same type of notes that were included in the other. And it relates to really a summary of the record from the prior hearings with reference to the page numbers and so forth in the prior hearing. It is obvious to me that this was never intended to be a public record." (T. 7/16/96 at 31). Again, here the record made by the Respondent below fails to prove the existence of a work product exemption or that the withheld materials are non-public records.

As to item (f) which was 14 pages titled "Outline", Mr. Johnson would maintain that as with (b), the record made by the Respondent below fails to prove the existence of a work product exemption or that the withheld materials are non-public records.

As to item (g) which six pages, Mr. Johnson would maintain that as with (b), the record made by the Respondent below fails

to prove the existence of a work product exemption or that the withheld materials are non-public records. Moreover, Respondent argues facts not of record.

As to item (h)-(v), Mr. Johnson would maintain that as with (b), the record made by the Respondent below fails to prove the existence of a work product exemption or that the withheld materials are non-public records.

ARGUMENT III

A. INTRODUCTION

In Respondent's Introduction to its Argument as to Issue III, Respondent raises several red herrings. First, Respondent asserts that Respondent's letter to Judge Steinmeyer is not in the record. But then, in his next sentence notes that it was quoted "incompletely" in Mr. Johnson's motion for rehearing. Obviously then, the letter is in the record and was at issue below. Whether it was quoted completely or not was a matter for Respondent to raise in circuit court in response to the motion for rehearing.

Second, Respondent's complaint that the letter was quoted incompletely is a red herring as well. Respondent contends that what is incomplete is that Mr. Johnson failed to include "the final phrase indicating a copy was sent to 'Plaintiff's counsel."' Answer Brief at 20. According to Respondent: "Thus, Johnson falsely gives the appearance of an ex parte communication." Id.

No where in the Initial Brief did Mr. Johnson argue that ex

parte communication had occurred. Nor does the case of Rose v. State, 601 So. 2d 1181 (Fla. 1992), cited by Respondent, appear in Mr. Johnson's Initial Brief. Respondent's assertion that Mr. Johnson raised a claim in bad faith simply must fail; Mr. Johnson did not raise the issue Respondent seeks to attribute to him.

B. DUE PROCESS

Mr. Johnson has asserted, however, that there is a due process violation. The due process violation arose from Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987), not Rose v. State. Mr. Johnson was required by law, no longer in effect, to litigate his claims concerning the Attorney General's files in Tallahassee before a judge admittedly unable to conduct a Bradv review which comports with Pennsylvania v. Ritchie.

Judge Steinmeyer himself recognized this problem saying: "Well, as I have previously stated, I am probably in the worst position to make a determination of what is Bradv material and what is not." (T. of July 16, 1996, at 22). Judge Steinmeyer indicated he reviewed the materials and: "I have stated that if something was obvious to me that it was Brady material, I would certainly make that indication to the defendant." Id. Under the circumstances, Mr. Johnson did not receive adequate review of the materials to determine whether any Bradv materials were being withheld. Neither Judge Steinmeyer nor, for that matter, counsel for Respondent[2] were in "position to conduct an adequate Bradv

[2]Charlie McCoy, Assistant Attorney General, who is representing Respondent before this Court also represented Respondent below. However, he is not and was not counsel in Mr.

review.

C. BRADY CLAIM IS FAIRLY PRESENTED

Respondent argues that Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996), establishes that Mr. Johnson could not seek review of Respondent's decision not to release any documents. Answer Brief at 21. Respondent does properly note that Judge Steinmeyer did not buy Respondent's Argument ("the trial court stood fast with its initial determination that Appellee was obligated to disclose Brady material.") Answer Brief at 22.[3] Moreover, Judge Steinmeyer's ruling is based upon Roberts wherein this Court said "the dismissal of the Brady claims does not diminish the Attorney General's obligation to disclose any Bradv material." 668 so. 2d at 582. See Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997). This Court in a footnote then said "This Court's review of the withheld documents revealed no exculpatory material." Id. at n.7. Clearly, Judge Steinmeyer followed this Court's ruling, held the Attorney General to his obligation and attempted to review the Brady material. However, Judge Steinmeyer was not, as he conceded, in an adequate position

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Johnson's postconviction proceedings. And thus is in virtually identical circumstances to Judge Steinmeyer.

[3]Respondent then triumphantly notes that despite this alleged error "the trial court correctly recognized it lacked jurisdiction to grant relief based on Brady." Answer Brief at 22. Respondent's point misses the fact that Mr. Johnson was seeking access to records. He never asked Judge Steinmeyer "to grant relief" from his conviction or sentence. Clearly, the only proper means of seeking a "grant [of] relief" is through Rule 3.850, state habeas corpus petition, or federal habeas corpus petition. Mr. Johnson sought the records so that any Brady violation could be presented to an appropriate court.

to conduct the Brady review.

Respondent's position that Mr. Johnson failed to adequately plead a Brady violation and thus was not entitled to an in camera review of Bradv arises from his failure to appreciate the difference between a civil suit seeking access to records and a Rule 3.850 motion to vacate relying upon 119 material after it has been disclosed. See Answer Brief at 23. This confusion is best illustrated by the citation to Scott v. State, 657 So. 2d 1129 (Fla. 1995) as demonstrating how to properly plead a Bradv claim. Scott arose on appeal from a Rule 3.850 motion to vacate filed after exculpatory evidence was found in Chapter 119 materials. It is not relevant to what should be done in these circumstances. Moreover, Respondent did not argue below that Mr. Johnson was not entitled to a Bradv review. That argument is not presented.

D. NO PROCEDURAL BAR

Again Respondent confuses 3.850 proceedings with Chapter 119 civil suits. In 3.850 proceedings, a movant must show due diligence. However, access to public records is a constitutional right that all citizens of Florida possess. The procedural bar concept of 3.850 does not apply to civil suits seeking access to records.

Respondent also cites to a new provision in Chapter 119 which indicates that 119 may not be used "as the basis for failing to timely litigate any postconviction action." Answer Brief at 25. However, Respondent fails to acknowledge that Mr.

Johnson's pending 3.850 is moving forward and in no way slowed down by this proceeding.

E. MERITS

Mr. Johnson did not receive an adequate in camera inspection for Brady material as Judge Steinmeyer himself noted. Respondent concedes this, but argues "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." Answer Brief at 26. Mr. Johnson absolutely agrees. Accordingly, this Court should remand this case to the 3.850 court for an adequate in camera inspection.[4]

CONCLUSION

Based upon the foregoing, Mr. Johnson respectfully urges the Court to reverse the lower court, order the release of the in camera materials to Mr. Johnson and a proper in camera inspection of the withheld materials for Brady.

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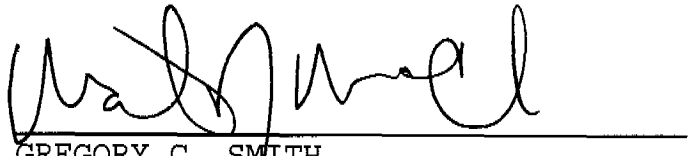
[4] A 3.850 was filed by Mr. Johnson on February 13, 1997. Proceedings on that 3.850 are ongoing.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 18, 1997.



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