IN THE SUPREME COURT OF FLORIDA

PAUL WILLIAM SCOTT,

Appellant,

v. CASE NO. 91,853

ROBERT A. BUTTERWORTH,
Attorney General, State of Florida
Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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Other Authority

PRELIMINARY STATEMENT

As part of the record on appeal, this Court has in its possession the attorney notes withheld from disclosure. The notes were provided to the trial court for an *in camera* inspection, and sealed by that court.[1] Appellee respectfully requests these documents be kept confidential 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. 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. Bryan v. Butterworth, 692 So.2d 878, 881 (Fla. 1997).

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). These cases were decided without oral argument. Oral argument on virtually identical issues was held last November in Johnson v. Butterworth, 23 Fla.L.W. S161 (Fla. March 19, 1998), *rehearing pending*. Appellee opposes oral argument, which could unnecessarily delay this case and would not assist the Court in reaching its decision.

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[1]The notes are shown as the next to last two entries in the original record index and are described as: "supplemental exhibits A, B, and C (sealed documents)" and "documents withheld from disclosure under ch. 119 (sealed documents), respectively.

STATEMENT OF THE CASE AND FACTS

Appellee (the "State") accepts the procedural component of Scott's statement with this clarification: the order granting final summary judgment was rendered October 17, 1997. The notice of appeal was filed November 14, 1997.

The facts of the case are well set forth in the order under review. (R1:160-73)[2] In contrast, Scott's order contains unnecessary detail, yet omits some highly relevant events from the final hearing. For clarity, the State sets forth those facts; adds events from the final hearing; and objects to a representation in Scott's statement.

Facts As Found in the Order Under Review

Scott is a death row inmate represented by the Capital Collateral Representative (CCR).[3] On August 11, 1995, CCR requested access to the State's files relating to Scott. On October 6, 1995, the State responded, and offered to allow inspection of all its files relating to Scott, except for documents that were not public records or were exempt from disclosure under

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

[3]During the pendency of this case, CCR was divided into regional offices. Technically, Scott is now represented by the Capital Collateral Regional Counsel-South. For clarity, the Court will refer to Scott's counsel as "CCR."

ch. 119, Florida Statutes. After correspondence[4] between the parties, the State's files were made available for inspection as of October 25, 1995.

Scott inspected the State's files on or about March 8, 1996. Some documents were withheld from inspection. An inventory of those withheld documents was prepared and supplied to CCR.[5]

The trial court's order of January 7, 1997, authorized Scott to re-inspect the State's files as to documents created or acquired after the original [March 9, 1997] inspection. The State did not withhold any additional documents from this re-inspection, and provided Scott with 27 pages of documents created or acquired since the original inspection. Pursuant to the same order, the State provided Scott with a "statement of particularity" as to why withheld documents were claimed as exempt.[6]

During a deposition held February 26, 1997, CCR requested access to the State's e-mail (electronic mail) relating to Scott.

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[4]CCR's original public records request and the resultant correspondence were attached to the State's answer to the amended complaint as Exhibits A-D. (*See* answer to amended complaint at R1:88-102; exhibits A-D at R1:95-100.)

[5]A copy of this inventory was attached and incorporated as Appendix A to the order under review. To facilitate the *in camera* inspection of the withheld documents, an employee of the Defendant executed an affidavit that the copies of the withheld documents were true and accurate. A copy of that affidavit was attached to the order under review as Appendix B.

[6]A copy of the statement of particularity was attached to the order under review as Appendix C.

Copies of such e-mail were later provided to CCR, except for three documents withheld as exempt from disclosure. These documents were filed with the trial court during the hearing on October 1, 1997, and were marked as Supplemental Exhibits A, B, and C; respectively.[7]

Events from the Final Hearing and Objection to Scott's Factual Representation

The last [October 1, 1997] hearing took up the State's motion for final summary judgment. (R1:106-35) Scott did not file a response to that motion. However, at the hearing on the motion, Scott admitted:

> [MR. HENNIS, counsel for Scott]: So at this point ... based on representations that have been made both in the deposition and filings by the attorney general's office since the time of the deposition, we appear to have, based on their representations, everything that they have with the exception of the material they turned over to you for in camera inspection both before today and today. And based on Porter v. State we'll rely on whatever your findings are vis-a-vis that material as to whether or not there would be any reason for us to oppose the motion for summary judgment.

(Supp.R1:179)[8]

At the conclusion of argument on the motion, this exchange

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[7]Supplemental exhibits A, B & C were sealed by the trial court. They are shown as the next-to-last entry in the index to volume II of the record, with a filing date of 10/1/97.

[8]Pursuant to this Court's order of March 2, 1998; the clerk of the circuit court prepared a supplemental volume to the record on appeal. That volume will be cited (Supp.R.1:[page no.]).

occurred:

> THE COURT: Yes, I do recall having gone through the documents. I don't recall at this point the individual documents, but I do recall having gone through them and making the determination at that time they were properly withheld. So I do--do you have anything else?
>
> MR. HENNIS: No, Your Honor.
>
> THE COURT: All right. On that it would seem to me that the defendant's motion for summary judgment should be granted. ...

(Supp.R.1:187-88)

On page 6 of his initial brief, Scott declares that the "parties agree [sic] during the hearing that Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996) requires the Attorney General to turn over Brady material and that Mr. Scott is entitled to an *in camera* inspection." The State objects, as no such agreement was made. To the contrary, the State's motion for summary judgment (R1:106-35) expressly asserted that the complaint, as amended, was only a general reminder to the Attorney General's Office of its duty to disclose exculpatory material. The motion for summary judgment also asserted the State's determination that there was no Brady material to be disclosed was final. (R1:116-118). The State did not, and does not, concede that the trial court--given the lack of specific pleading by Scott--had the jurisdiction to review that determination.

SUMMARY OF THE ARGUMENT

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

The amended complaint failed to allege facts which would establish a Brady claim. Instead, it made conclusory observations that disclosure of exculpatory records was requested and denied. Verbally responding to the State's motion for summary judgment, counsel stated Scott would rely on the trial court's *in camera* review, and did not offer any facts in opposition. Therefore, this issue was not fairly presented below, and is not preserved. The Brady claim need not be reached.

In the absence of sufficient factual allegations, the trial court was not obligated to look for Brady material at all. Nevertheless, the court looked for obvious exculpatory material in the documents withheld from disclosure, and found none. 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.

Issue II: Constitutionality of §119.07(3)(l), Florida Statutes

The disputed documents are not "public records," and thus not subject to disclosure under ch. 119. They could be, and were, withheld from disclosure without reliance on §119.07(3)(l)1., Florida Statutes. Unaffected by the statute, Scott does not have standing to challenge it.

The exemption from disclosure does not depend on the motive (or source) of the request for access to public records. So construed, there are no constitutional problems with the statute.

Issue III: Propriety of Withholding the Disputed Documents

Scott does not urge the absence of competent, substantial evidence. To the contrary, he conceded there were no material facts in dispute, and offered no facts showing the disputed documents were subject to disclosure. Now, he merely disagrees with the trial court's factual findings. The Court should summarily affirm on this issue.

ARGUMENT

ISSUE I

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. The Brady Claim Was Not Fairly Presented Below, And Was Not Preserved for Review

The State moved to dismiss the Brady portion of the original complaint. (R1:10-12) Ultimately, Scott amended that part of the complaint, through the italicized language of the following paragraphs:

> 25. Plaintiff, through his attorney(s), has requested disclosure of records within the possession, custody, care, and/or control of the Defendant and/or his designated agents.
>
> 26. Plaintiff has also requested disclosure of all records exculpatory in nature.
>
> 27. Defendant and/or his designated agents refuse to disclose the requested material. Exculpatory evidence was withheld by the State in this case.

(*See* amended complaint, ¶25-7, R1:86 [e..s]) Other than the underlined language, the amended complaint was identical to the original.

Construed most favorably to Scott, the complaint as amended simply does not allege facts showing exculpatory documents were withheld from disclosure. To the contrary, the phrase "exculpatory evidence was withheld," is a highly conclusory observation with no factual content. The underlined language is of no consequence.

Scott's Brady claim was not fairly presented below, or preserved for appellate review. *See* Holcomb v. Department of Corrections, 609 So.2d 751, 754 (Fla. 1st DCA 1992) ("[C]onclusory pleading is not sufficient. Facts must be stated which, if true, would justify relief." [internal quote omitted]). *See also*, Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d 962, 971 (1st Cir. 1993) ("Because only well-pleaded facts are taken as true, we will not accept a complainant's unsupported conclusions or interpretations of law.").

Holcomb is particularly analogous, as it found an inmate's petition was insufficient to justify even a show-cause order, when the only allegation was the conclusory statement that "the petitioner was refused permission to call the witnesses he had previously requested." *Id.* at 755. By comparison, Scott's amended complaint fares no better. The only supporting allegation is the conclusory statement that exculpatory evidence was withheld. It, too, is no more than a general request for exculpatory material.

In Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996), this Court faced a virtually identical case. There, CCR also relied on Brady as part of a request for access to public records. The trial court dismissed the Brady claims. Affirming, this Court said:

> We also find no error in the trial court's dismissal of Roberts' Brady claims. Because Brady has no application to clemency proceedings in Florida, *Asay v. Florida Parole Comm'n*, 649 So.2d 859, 860 (Fla. 1994), *cert. denied*, --- U.S. ---, 116 S.Ct. 591, 133 L.Ed.2d 505 (1995), the court

> properly dismissed the claims relating to the clemency materials. The court also properly dismissed the Brady claims relating to the handwritten notes. Roberts' complaint raised only a general request for exculpatory material under Brady. Under such circumstances, "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).
>
> *Id.* at 582.

Here, the withheld documents were essentially of two types: handwritten notes claimed to be work product, if public records at all; and clemency materials. (R1:129-30 [Ex. E]) As to either type of document, the amended complaint did not allege facts specifically supporting Scott's Brady claim. Consequently, the State's determination that none of the withheld documents were exculpatory was final, and not subject to review.

In contrast to his amended complaint here, Scott made specific factual allegations in a postconviction motion before the trial court in Palm Beach County. Those allegations were described by this Court in its decision to require an evidentiary hearing:

> Principally, he [Scott] contends that the State violated the principles of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by not disclosing: (1) a statement by Dexter Coffin, a cellmate of Scott's codefendant Richard Kondian, in which Coffin states he told a police officer that Kondian admitted killing the victim; (2) a statement by Robert Dixon, in which Dixon states he told a police officer that Kondian was angry with Scott for running out on him at the murder scene; and (3) a medical examiner's photograph

> that suggested that Kondian had struck the fatal blow by hitting Alessi on the head with a champagne bottle.

Scott v. State, 657 So.2d 1129, 1130 (Fla. 1995), *affirmed on appeal after remand*, 23 Fla.L.W. S175 (Fla. March 26, 1998). If Scott could make the above allegations in his postconviction motion, he was perfectly capable of making specific, factual allegations in the amended complaint. His failure strongly indicates there was no factual basis for his Brady claim.

Verbally responding to the State's motion for summary judgment, counsel stated Scott would rely on the trial court's *in camera* review, and did not offer any facts in opposition. (Supp.R. 179, 187-88) Therefore, this issue was not fairly presented below, and is not preserved. The Brady claim need not be reached.

B. The Trial Court Lacked Jurisdiction Over The *Brady* Claim

The trial court, under the allegations of the original and amended complaints, lacked jurisdiction to review the State's conclusion that there was no Brady material. The trial court could not have, for example, compelled the State to produce all its files for a *de novo* inspection for Brady material. Instead, the trial court--to the best of its ability, given that Scott was tried elsewhere--kept an eye out for obvious exculpatory material; thereby affording more process than was due.

It must be remembered that the trial court (Judge Steinmeyer) was no stranger to public records litigation brought against the

Attorney General's Office by CCR. In fact, this Court has recently affirmed Judge Steinmeyer three times as to Brady claims brought within such litigation. *See* Roberts v. Butterworth; Bryan v. Butterworth, 692 So.2d 878, 879 (Fla. 1997) (quoting trial court's finding that "none of the withheld documents are Brady material"); Johnson v. Butterworth, 23 Fla.L.W. S161 (Fla. March 19, 1998), *rehearing pending.*

After being affirmed three times by this Court, the trial court would have no reason to change its practice here. Although it did not make separate findings as to Scott's Brady claim, the trial court clearly was aware of that claim. By holding that the disputed documents were properly withheld from disclosure (R1:162), it necessarily held disclosure was not required by Brady. Having received more process than was due, based on a claim that was not fairly presented, Scott cannot be heard to complain.

C Miscellaneous Points

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 trial court reviewed the withheld documents for facially exculpatory material. Notably, even Scott does not suggest how a Leon County judge would be able to tell if a facially exculpatory document was material and not previously disclosed. *See* Asay v. Florida Parole Comm., 649 So.2d 859, 861 (Fla. 1994) (addressing policy concerns for not allowing

all inmate Brady claims to be brought in the Second Judicial Circuit) (Kogan, J., concurring), *cert. den.*, 116 S.Ct. 591 (1995).

Most damaging, Scott ignores the obvious: he chose to bring a free-standing ch. 119 claim before the Leon County Court, and to oppose transfer to his trial court under Rule 3.852(i)(2). Moreover, this Court has recently determined CCR does not have statutory authority to bring separate ch. 119 actions, which are civil actions not testing the legality of a conviction or sentence. *See* State of Florida ex rel Butterworth v. Kenny, 23 Fla.L.W. S229 (Fla. April 23, 1998) ("[W]e find that CCRC's representation is limited by statute to actions challenging the validity of a defendant's conviction and sentence such as habeas corpus, coram nobis, and actions established by this Court in Florida Rules of Criminal Procedure 3.850, 3.851, and 3.852.").

Scott cannot have it both ways. He cannot choose to bring a free-standing ch. 119 action in Leon County; oppose transfer under Rule 3.852; and enjoy public-paid counsel; only to claim it violates due process for the judge in his chosen forum not to be as knowledgeable as the judge (in Palm Beach County) who presided over his trial for murder. For Scott to do so is not only frivolous, but beyond the statutory authority of his counsel.

Finally, the withheld documents themselves provide undisputed, competent and substantial evidence supporting the trial court's

implicit finding that no Brady material was withheld. That finding must be affirmed.

ISSUE II

WHETHER THE ATTORNEY WORK PRODUCT EXEMPTION IN §119.07(3)(l)1., FLORIDA STATUTES, IS CONSTITUTIONAL

A. Standing

This Court need not reach the merits, as Scott does not have standing to attack §119.07(3)(l)1., Florida Statutes (1995). The trial court's primary conclusion was that the disputed documents were not public records at all, and were not subject to disclosure under ch. 119.[9] *See* Johnson v. Butterworth, 23 Fla.L.W. at S161 (concluding that attorney strategy notes, etc. "are not and never will be considered public records, and are never subject to public record disclosure.").

Therefore, the documents were properly withheld without reliance on §119.07(3)(l), Florida Statutes. Scott is not affected by that statute, and does 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. 1st DCA 1993) ("appellant lacks

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[9]In Issue III, the State notes Scott's failure to adduce any facts contravening the trial court's determination that the non-clemency documents were attorney notes, etc.; which never became public records. Consequently, the character of the withheld documents is not at issue before this Court.

standing because it is apparent in the record that he has not been adversely affected by the asserted infirmity in the statute").

B. Preservation

Scott begins his second issue by urging that §119.07(3)(l)1. facially and as applied violates due process and equal protection. The "as-applied" component of his argument is not preserved, as it was not raised below.

On March 8, 1996, the State provided an inventory of the documents withheld from disclosure. (R1:165 [App. A to final order]). The inventory expressly relied on §119.07(3)(l)1. as a ground for not disclosing the listed documents. On August 2, 1996, CCR served the amended complaint (R1:82-87), which never mentioned §119.07(3)(l)1. at all; and certainly did not allege it was unconstitutional.

On October 4, 1996, the State moved for summary judgment, again expressly relying on §119.07(3)(l). (R1:110-114) Scott did not file a written response to this motion.

Despite repeated notice of the Sate's reliance on the challenged statute, Scott did not even mention it at the final hearing, much less argue it was unconstitutional as applied. (Supp.R1:173-188). By failing to attack the constitutionality of the statute as applied below, Scott has failed to preserve that point. *See* Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1982) ("The constitutional application of a statute to a particular set

of facts is another matter and must be raised at the trial level.").

C. Facial Constitutionality Of §119.07(3)(l)1.

Two reasons weigh strongly against reaching this issue. First, as noted above, the State properly withheld the documents without reliance on §119.07(3)(l)1. It is not necessary to reach the constitutional issue; this Court should not do so. *See* House v. State, 696 So.2d 515, 519 n.3 (Fla. 4th DCA 1997) ("Because courts will avoid reaching the constitutional issue when the decision can be made on other grounds, ... it is not unusual for our supreme court to decide an issue on non-constitutional grounds, even if the constitutional challenge would have independent merit."); Martinez v. Heinrich, 521 So.2d 167, 168 (Fla. 2d DCA 1988) (declining to reach First Amendment argument on ground that "courts should not decide constitutional issues unnecessarily"), *quoting* Jean v. Nelson, 472 U.S. 846, 105 S.Ct. 2992, 2998, 86 L.Ed.2d 664 (1985).

Second, this issue has been foreclosed by Johnson v. Butterworth. There, this Court faced equal protection and due process challenges to §119.07(3)(l). Alluding to the possibility of such "problems," the Court construed the statute as "just a codification of our decisions in *Kokal* and *Shevin*." Thus construed, the statue presented "no constitutional infirmity." *Id.* Now that the statute has been definitively construed in a manner

avoiding constitutional problems, no equal protection or due process arguments are available to Scott.

Nevertheless, the State is troubled by the allusion to constitutional problems and infirmities in Johnson. It will respond to Scott's unreasonable reading of the statute.[10]

The heart of Scott's argument is his statement that "any person requesting chapter 119 materials from the Office of the Attorney General may be denied access to some materials if their [sic] purpose is 'capital collateral litigation.' " (initial brief, p. 22) This strained reading of the statute confounds established case law as to public records; contradicts legislative history; and renders the statute easily evaded. In contrast, the correct reading of the statute, as construed in Johnson, avoids these problems and cures any constitutional defect.

The work product exemption in §119.07(3)(l)1. does not depend on the motive or purpose of the entity requesting access to the Attorney General's capital collateral litigation files. For example, should a newspaper or activist group request the same files, the request would be denied.

This Court has rejected CCR's earlier attempt to read a non-existent distinction into the statutory language. *See* Roberts v.

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[10]Scott candidly acknowledges that Johnson resulted in an "adverse ruling," to his position, pending rehearing. (initial brief, p. 18, n.3). However, in the remainder of his argument herein, he attacks the Johnson opinion.

Butterworth, 668 So.2d 580, 582 (Fla. 1996) ("[T]he work product exemption ... 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.").

CCR's latest attempt fares no better. The critical language is found in the last sentence of §119.07(3)(l)1.:

> A public record which was prepared by an agency attorney ... which reflects a mental impression, conclusion, litigation strategy, or legal theory ... is exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence. [e.s.]

Defying all common sense, Scott claims the phrase "[f]or purposes of capital collateral litigation" goes to the motive of the requestor of public records, rather than the legislative purpose for which the statute was enacted.

The motive or purpose underlying a public records request is irrelevant to whether a given record must be disclosed. *See* News-Press Pub. Co., Inc. v. Gadd, 388 So.2d 276, 278 (Fla. 2d DCA 1980) ("The Public Records Act does not direct itself to the motivation of the person who seeks the records."). If the Legislature had intended the motive of the requestor to be relevant

to disclosure, it would have said so far more clearly than through the contorted reading of §119.07(3)(l)1. suggested by Scott.

Scott's reading is also refuted by legislative history. In the bill adopting the statute, the Legislature set forth the law's purpose:

> 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. [e.s.]

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

Section 17 immediately follows the operative statutory language, and explains legislative intent. That intent was to overrule 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 the motive or purpose of the entity making the request for access to public records.

Scott's interpretation would allow anyone other than the inmate to obtain confidential records simply by declaring the records were not sought for the purpose of capital collateral litigation. This Court must not so construe the statute, thereby making it simple to evade. *See* 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 the source or motive of the request for access.

Section 119.07(3)(l)1., Florida Statutes, simply does not make the distinction Scott contends. Therefore, his argument against the constitutionality of the statute must fail.

ISSUE III

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

Concluding the final hearing, the trial court simply granted the State's motion for summary judgment. (Supp.R.1:188) The written order granting final summary judgment was far more explicit. It concluded, the non-clemency documents were properly withheld from disclosure, as the documents were not public records; or, alternatively, were exempt from disclosure under §119.07(3)(1), Florida Statutes. The court also concluded the clemency materials were exempt from disclosure under §14.28, Florida Statutes, and Rule 16 of the Clemency Board. (R1:162)

Preliminarily, Scott does not distinguish between the non-clemency documents and the clemency material. To the contrary, his argument does not address the clemency materials at all. Apparently, he has abandoned any claim that the clemency material should have been disclosed.

As set forth in the State's statement of the facts, Scott's counsel declined to adduce facts requiring disclosure of any of the withheld documents. (Supp.R.1:187-88) Consequently, it is undisputed that the documents withheld as clemency material were indeed such. As to those documents, there is no basis for relief by this Court. It is well-established that clemency materials are not subject to disclosure under ch. 119. *See* Parole Com'n v. Lockett, 620 So.2d 153, 158 (Fla. 1993) ("[C]lemency investigative

files and reports produced by the Parole Commission on behalf of the Governor and Cabinet relating to the granting of clemency are subject solely to the Rules of Executive Clemency."). Moreover, Scott did not offer any facts showing the clemency materials were subject to disclosure under Brady. *See* Asay v. Florida Parole Com'n., 649 So.2d 859, 860 (Fla. 1994):

> Moreover, the federal Brady issue, and it alone, is dispositive of this case because Florida constitutional law exempts clemency records from any disclosure not authorized by the Governor. [cite omitted] Absent contrary federal law applicable to Florida via the Fourteenth Amendment, petitioners clearly are entitled to no relief.

Scott fares no better as to the non-clemency documents. He offered no facts opposing the trial court's determination that the withheld documents were of the type which never became public records; or, alternatively, that the documents were exempt from disclosure under §119.07(3)(l). The documents themselves provide competent, substantial evidence supporting the determination. Since Scott offered no evidence to the contrary, his argument on appeal is foreclosed by Bryan v. Butterworth, 692 So.2d 878, 881 (Fla. 1997) ("[C]ompetent substantial evidence supports the trial court's findings. Accordingly, we will not second-guess the trial court on this matter."), *citing* Orme v. State, 677 So.2d 258, 262 (Fla. 1996), *cert. denied*, 117 S.Ct. 742 (1997). *See* Johnson v. Butterworth, 23 Fla.L.W. at S161 (holding that documents which are

work product under the Kokal and Shevin decisions, as codified by §119.07(3)(l), are "never subject to public record disclosure").

Scott's last point contends the "State failed to segregate what was exempt and what was not." (initial brief, p. 26) 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 reveals that any non-exempt portions were *de minimis*, and that they would be meaningless if segregated from the exempt portions.

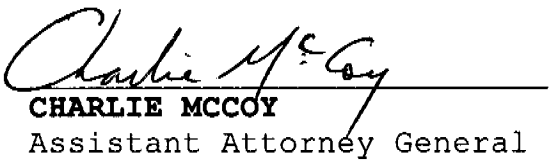
To reiterate, Scott does not urge the absence of competent, substantial evidence supporting the order under review. He merely disagrees with the trial court's factual findings. The Court should summarily affirm on this issue.

CONCLUSION

The trial court correctly concluded the disputed documents were properly withheld from disclosure. The final order below must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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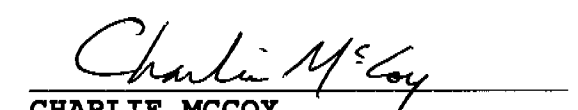
CERTIFICATE OF SERVICE

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 **WILLIAM M. HENNIS**, Staff Attorney, Office of the Capital Collateral Regional Counsel (South), 1444 Biscayne Blvd., Suite 202, Miami, Florida 32132; this 1st day of July, 1998.



CHARLIE MCCOY
Assistant Attorney General

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