IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,853

PAUL WILLIAM SCOTT,

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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STATEMENT OF THE CASE AND FACTS

The Answer Brief implies that CCRC's request for access to the Attorney General's e-mail (electronic mail) relating to Scott was initiated belatedly during the February 26, 1997 deposition of Assistant Attorney General Celia Terenzio. Actually the request for e-mail was included in the **original** written request of August 11, 1995, as was noted in the hearing of October 1, 1997 by counsel for Mr. Scott:

> MR. HENNIS: Before I forget, just going back to the letter that you mentioned, the initial request, August 11, 1995, which is Exhibit A to your motion for summary judgment, as far as the request for e-mails, I would call your attention, Your Honor, to the second paragraph which says we asked that you provide the office of the CCR with complete, accurate, and legible copy of any and all files involving Paul William Scott, we seek any and all files regardless of form and including photographs, sound, or video recordings, physical evidence, and electronic mail, and/or files. So I would submit that's fairly clearly a request for electronic mail back in August of 1995...

(S. 185).

In the hearing held on December 3, 1996, during which the State's motion for summary judgment was first argued, Assistant Attorney General Charlie McCoy conceded a review of the withheld documents by the Court for Brady material when he acknowledged that the utility of such an inspection would be limited by the fact that Judge Steinmeyer was not the trial court:

> MR. McCOY: I understand, I guess Counsel's conceded even if you saw exculpatory material, that they would still have to take

> that back to the court where Scott was tried in order for him to get any relief. **And I recognize when your Honor goes through presumably these withheld documents, you are going to be looking, to the extent of your ability not being the trial court, if there isn't any exculpatory, you would at least let them know of that.**

(Emphasis added)(R. 206-07).

Finally, it is worth emphasizing that this is an appeal from an order granting summary judgment in favor of the State. There was no trial on the merits; and thus there are no findings of fact after an evidentiary hearing on the merits. This distinction is important in determining the proper standard of review.

ARGUMENT IN REPLY

ARGUMENT I

THE COURT ERRONEOUSLY RULED THAT BASED ON ARGUMENTS OF COUNSEL AND THE COURT'S *IN CAMERA* INSPECTION OF WITHHELD DOCUMENTS THAT SAID DOCUMENTS WOULD NOT BE DISCLOSED TO MR. SCOTT EVEN THOUGH THE TRIAL COURT'S REVIEW FOR BRADY V. MARYLAND MATERIAL WAS INADEQUATE AND AS A CONSEQUENCE MR. SCOTT WAS DENIED A FORUM FOR REVIEW OF THE WITHHELD MATERIAL FOR BRADY.

A. State's Contention That the Brady Claim Was Not Fairly Presented Below, And Was Not Preserved for Review

A hearing was held on December 3, 1996 during which the State's motion for summary judgment was argued. Assistant Attorney General Charlie McCoy acknowledged during the hearing that any review of the withheld documents by the Court for Brady material was limited by the fact that Judge Steinmeyer was not the trial court:

> MR. McCOY: I understand, I guess Counsel's conceded even if you saw exculpatory material, that they would still have to take that back to the court where Scott was tried in order for him to get any relief. And I recognize when your Honor goes through presumably these withheld documents, **you are going to be looking, to the extent of your ability not being the trial court**, if there isn't any exculpatory, you would at least let them know of that.

(Emphasis added)(R. 206-07).

At the final hearing on October 1, 1997, on the State's motion for summary judgment, counsel for Mr. Scott summarized the discovery process that had taken place since the prior hearing (S. 174). Counsel referred specifically to the Court's responsibility to review all the withheld documents for Brady material:

> MR. HENNIS: ... **And all those documents were submitted for an in camera inspection, and one of the things that we ask is that you look for Brady material when you were doing that in camera inspection...**

(Emphasis added)(S. 174-75). Counsel then went on to explain to Judge Steinmeyer several discovery issues that were **unresolved** resulting from the limited discovery deposition of Assistant Attorney General Terenzio that he had allowed. Mr. Scott's adduction of these new facts was raised according to counsel "to try to nail down some of the issues that are outlined in the motion for summary judgment" (R. 178). This action by counsel directly refutes the contention in the Answer Brief that Mr. Scott declined to adduce facts requiring disclosure of any of the withheld documents.

The specific areas of concern outlined in argument to the trial court included: the continuing flow of additional documents being provided to Mr. Scott by the Attorney General; the failure by the Attorney General to search for records based on Mr. Scott's aliases; the existence of a **photograph** in one of the withheld clemency files that deponent Terenzio revealed for the first time was included in a file **prepared and provided to the Attorney General by assistant state attorney Ken Selvig**, not by the clemency authority; and, finally, a report about the failure by the Attorney General to search for travel records (S. 178-79).

The issue of the clemency files and their discoverability was never abandoned. The State never responded to Mr. Scott's argument about the photo or the file that it was in. The new information about the content and source of one of the clemency files was specifically reported to the court (S. 179).

After argument by the State, the Court very briefly reviewed the new documents (the withheld e-mails) and then ruled on them:

> THE COURT: ...All of these are obviously drafts of pleadings, and I think we'll go ahead and put those in the Manila envelope and keep those together with the other.
>
> MR. McCOY: Your Honor, could we just hand label those maybe supplemental Exhibits A, B, and C, if you would, so if there is any need to refer to them later, we'll all know which ones are which? You don't have any objection?
>
> MR. HENNIS: I think that's fine.
>
> THE COURT: Okay.
>
> MR. McCOY: Do you recall the earlier submitted documents well enough to rule on

> those at this time?
>
> 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 that 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. And I will -- I'll do that, if you all can get together on an order.
>
> MR. McCOY: All right sir. I'll prepare an order we'll go back and forth and get one to you.

(Emphasis added)(S. 187-88). Despite this ruling, both counsel for the Attorney General and the Court had already stated on the record during prior hearings that the Court was **not in a position** to make a determination about Brady content of any of the materials that the defendant had withheld and the Court inspected.

> MR. McCOY: I understand, I guess Counsel's conceded even if you saw exculpatory material, that they would still have to take that back to the court where Scott was tried in order for him to get any relief. And I recognize when your Honor goes through presumably these withheld documents, you are going to be looking, to the extent of your ability not being the trial court, if there isn't any exculpatory, you would at least let them know of that.

(R. 206-07). And later in the same hearing, the Court acknowledged the Attorney General's point, admitting, "**Well, I don't know what the facts are about the case that's on appeal.**"

(Emphasis added)(R. 259). Judge Steinmeyer never reviewed the documents at issue after the hearing in December 1996, as is clear from this discussion during the final minutes of the final hearing in October 1997:

> MR. McCOY: ...There should be, in your court file, a Manila envelope, sealed envelope, of all the documents that we had withheld earlier in this case, and --
>
> THE COURT: Let me check with Judy, because she didn't give that to me and she normally does when we have those.
>
> (Discussion off the record)
>
> MR. McCOY: I remember distinctly because when I spoke to Judy on the phone, she said we got this envelope of stuff, and I said no it's got to stay with the case file.
>
> THE COURT: I know that we had done that in a couple of instances.
>
> Mr. McCOY: And you had signed the envelope saying leave this sealed.
>
> THE COURT: Right.
>
> MR. McCOY: In fact, what happened was you had gone through them in anticipation of the hearing in December, and when you said the summary judgment was premature, you just kept them, said, well, I've already gone through them, let's leave them sealed and left them.
>
> THE COURT: Okay.

(S. 172-73). Judge Steinmeyer did not read the trial court records or files in Mr. Scott's case or familiarize himself adequately with the facts in the case. It was impossible for the judge to make a determination of whether Brady material existed when he did not know the facts of the criminal case or what materials had been provided to trial counsel. Nevertheless, Mr.

Scott specifically asked for a review of the materials for a Brady determination.

B. State's Contention that the Trial Court Lacked Jurisdiction Over the Brady Claim

The State contends that Judge Steinmeyer lacked jurisdiction and authority to review the State's conclusion that there was no Brady material, and that to whatever degree he did so, he provided Mr. Scott with more process than was due. This was not the State's position below. Moreover, it was not the conclusion this Court reached in Johnson v. Butterworth, 23 Fla.L.W. S161 (Fla. March 19, 1998), *rehearing pending*, 1998 WL 378355 (Fla. July 9, 1998), *rehearing denied*. There, this Court found no jurisdictional impediment to the presentation of a Brady claim.

Further as explained supra there were specific requests and allegations made for Brady material. This is different than in the cases the State relies upon.

And finally, the distinction between a general and a specific Brady request was pointedly discarded by the United States Supreme Court in Kyles v. Whitley, 115 S.Ct. 1555 (1995), as Mr. Scott explained in his Initial Brief. Interestingly, the State in its Answer Brief never once mentions Kyles or addresses Mr. Scott's citation to it. To the extent that this Court has continued to make such a distinction, the analysis is contrary to the United States Supreme Court's pronouncement in Kyles.

C. Miscellaneous Points

The State contends that this appeal is frivolous and also

beyond the statutory authority of Mr. Scott's counsel based on State of Florida ex rel Butterworth v. Kenny, 23 Fla.L.W. S229 (Fla. April 23, 1998). The State's position is ridiculous in light of this Court's decision in Johnson v. Butterworth. The circumstances of counsel filing a suit in Leon County were exactly the same in Johnson and this Court found no impediment to collateral counsel's representation of Mr. Johnson in such a proceeding, nor did the Court find the appeal frivolous. In fact, oral argument was granted.

ARGUMENT II

ON ITS FACE AND AS APPLIED TO THIS CASE, SECTION 119.07(3)(l), FLORIDA STATUTES, VIOLATES DUE PROCESS AND EQUAL PROTECTION BY DENYING MR. SCOTT ACCESS TO THE REQUESTED MATERIALS REQUESTED "FOR PURPOSES OF CAPITAL COLLATERAL LITIGATION." BASED ON THE PLAIN LANGUAGE OF THE STATUTE, IF AN INDIVIDUAL REQUESTED THE SAME MATERIALS, ACCESS COULD NOT BE DENIED ON THE BASIS OF 119.07(3)(l) IF THE REQUEST WAS NOT "FOR PURPOSES OF CAPITAL COLLATERAL LITIGATION."

In regard to the State's argument that Mr. Scott does not have standing to attack the constitutionality of Section 119.07(3)(l), based on Johnson v. Butterworth (concluding that attorney strategy notes, etc., "are not and never will be considered public records, and are never subject to public records disclosure."), Mr. Scott notes that a revised opinion in that case was issued on July 9, 1998, See Johnson v. Butterworth, 1998 WL 378355, *1 (Fla.). The language quoted in the Answer Brief from the original Johnson opinion is absent in the final opinion. The new language is a significant retreat

from the language of the original opinion. In revising its opinion in the fashion that was done, this Court impliedly agreed with Mr. Scott's arguments in his Initial Brief.

ARGUMENT III

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

The Answer Brief assumes that the order granting summary judgment is subject to the same standard of review as a judgment entered after a trial. The State is sadly mistaken. And as a result, its entire analysis on this argument is premised upon an erroneous standard of review.

After a trial on the merits, this Court's review is whether there is competent, substantial evidence supporting the factfinders's conclusion. However, here, the State did not want a trial, and instead filed a motion for summary judgment, and the circuit court, as the State acknowledges, granted a summary judgment in the state's favor. As a result, the review by this Court is *de novo*, with any factual disputes viewed in the light most favorable to Mr. Scott, the losing party below.

The State in its Answer Brief concedes that some of the claimed exempted material was in fact not 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" Answer Brief at 23. Obviously, in such circumstances the grant of a summary judgment was in error.

Further, the Attorney General's Office received a copy of the clemency pleadings filed by Assistant State Attorney Ken Selvig. This was not pursuant to the clemency process. These pleadings were thus disclosed to the Attorney General's Office in a fashion that waived any exemption. Again, summary judgment was improper.

The State's argument that Mr. Scott failed to preserve his challenge to the propriety of summary judgment is not well taken. Mr. Scott opposed the motion for summary judgment. It was thus incumbent upon the State to establish that no material issue of fact existed and that as a matter of law, summary judgment was proper. The State's concessions in its Answer Brief establish summary judgment was improperly granted.

CONCLUSION

For the reasons stated herein and in the Initial Brief, this matter must be reversed and remanded for trial on the merits.

I HEREBY CERTIFY that a true copy of the foregoing reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 6, 1998.

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