

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,442

STATE OF FLORIDA,

Appellant,

v.

JUDY BUENOANO,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of the State's Motion for Protective Order. Judy Buenoano, Appellee, files this answer brief pursuant to Fla. R. Jud. Proc. 9.210 (1997).

The following symbols will be used to designate references to the record in this instant cause:

- (1R-) Record on Appeal prepared on January 27, 1998;
- (2R-) Record on Appeal prepared on February 25, 1998;
- (AB-) Initial Brief of Appellant;
- (AC-) Amicus Curiae Brief of United States of America.

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STATEMENT OF THE CASE AND FACTS

Appellant's statement is incomplete and the following additions and clarifications are necessary for this Court's review of the circuit court's ruling.

Appellant's statement of the case and facts is not clear as to when the Department of Justice (DOJ) first contacted Paula Coffman, Office of the State Attorney, Ninth Judicial Circuit (AB 1). The DOJ sent a facsimile of at least five pages on June 5, 1997 to Paula Coffman (2R 788, 796). The DOJ Task Force attorney Amy Jabloner sent a letter dated August 15, 1997 to Mrs. Coffman (2R 788, 797). The letter included enclosures of the DOJ Office of the Inspector General's report' and copies of the lab reports for the Buenoano case in which Roger Martz examined evidence (2R 788, 797).

Appellant filed a Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation via electronic mail transmission on January 8, 1998 (1R 332), the same day Judge Whitehead denied appellees Motion to Compel Public Records (1R 178-186). The circuit court held a hearing on the State's motion on January 12, 1998 and orally granted said request (1R 332) . Immediately after the circuit court granted the State's request, the State produced four large manilla envelopes for review (1R 332). Later that same day, the State delivered two additional large envelopes, which also contained various materials, to the

¹ The FBI Laboratory: An Investisation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases.

circuit court judge's chambers (1R 332). Along with these two previously undisclosed large envelopes, **ASA** Coffman submitted a letter to the circuit court explaining that she had not presented these two envelopes previously because of her own "inadvertence" (R1 333).

Five days after the circuit court entered its order on the State's first Request for Judicial Determination of Prosecutorial Obligation, the State filed a Supplemental Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation (R1 338, 358). A hearing was held on the Supplemental Request on January 23, 1998 (1R 1, Volume 8). **ASA** Coffman represented to the circuit court that the Supplemental Request was necessary because **ASA** Coffman and her office failed to turn over all of the DOJ documents in their possession for the first In Camera Inspection (1R 8, Volume 8). After hearing argument as to why the materials were not provided previously, the circuit court denied the State's Supplemental Request for In Camera Inspection and Judicial Obligation (1R 14, Volume 8). After the circuit court's denial of the State's Supplemental Request, **ASA** Coffman provided the documents to appellee and provided a Notice of Filing in the court file of the documents **ASA** Coffman had failed to provide to the circuit court for its original In Camera Inspection (1R 475).

On February 4, 1998, appellant filed an Emergency Request for Protective Order with this Court. Attach. 1. Appellant's request listed no reasons this relief was sought, the conditions

sought, or the documents at issue. Attach. 1. Appellant listed the conditions it was seeking in a letter filed with this Court on February 5, 1998. Attach. 2. The conditions permitted appellee to continue its possession of the documents with the condition that the contents of the documents not be disclosed publicly or in open court until prior authorization was given. Attach. 2.

After this Court's remand, appellant filed a Motion for Protective Order on February 11, 1998 in the circuit court (2R 417-428). Appellant attached a declaration of Lucy L. Thomson, head of the Criminal Division Task Force on the FBI laboratory (AB 5). Appellee cannot agree with Appellant's conclusion as to the thrust of Ms. Thomson's declaration. In paragraph three of her declaration, Ms. Thompson states: "In accordance with established procedures, the Criminal Division instructed the State Attorney to make disclosures pursuant to a protective order which prohibits dissemination of the documents. Many of the documents reveal law enforcement techniques, and/or contain sensitive information about **individuals protected** under the Privacy **Act**" (2R 427). However, paragraph four of the declaration is even more ambiguous than paragraph three:

4. The conditions under which the documents were provided to the State Attorney Lamar Lawson are set forth in a letter dated December 22, 1997 (Attachment I) and are as follows:

"**These** documents are not public and should only be disclosed pursuant to a protective order. This material may contain references to individuals whose identification is

protected by the Privacy Act, and
to other sensitive matters"

(2R 427) (emphasis added).

Appellant made the following arguments in support of its
Motion for Protective Order:

1. Potential for the invasion of personal
privacy of individuals;
2. Potential for the revelation of
information concerning pending investigations
and sensitive law enforcement techniques;
3. Potential for the revelation of certain
classified information;
4. Because the documents at issue were
released due to "error", those documents were
not public; and
5. The documents should be protected as
criminal intelligence and investigative
information obtained from an out-of-state
agency;

(2R 417-419). Absent in the list of reasons supporting the
Motion to for Protective Order is the contention that the
disclosure of the documents at issue injures an innocent third
party, i.e., the federal government (2R 417-419).

The circuit court held a hearing on Appellant's Motion for
Protective Order on February 18, 1998 (2R 19-94). Assistant
State Attorney (ASA) Coffman informed the court that after she
filed the Motion for Protective Order, she was in contact with
the DOJ and they determined that "of those hundreds of pages
contained in the sealed records and the records which were
disclosed in January of this year, FBI and Justice are only
concerned about protecting eleven of those documents" (2R
22) (emphasis added). ASA Coffman continued, stating, "Just so
happens that all of those documents, all of those eleven

documents with the exception of one happen to fall into the stacks that was (sic) distributed to opposing counsel and made part of (sic) for the trial in this case . . . "(2R 22, 23).

According to **ASA** Coffman, ten of the documents she sought to hide from disclosure to the public were contained in the materials she had asked the circuit court to inspect in camera, said request having been denied (2R 40, 41). She further informed the circuit court that it "**has** seen one of those documents which is contained in the documents that were under seal and we are asking for one of those documents to be protected" (2R 41).

During the hearing, **ASA** Coffman asserted the same reasons for a protective order as outlined in her Motion (2R 23, 24). Again, the record on appeal regarding the hearing on appellant's motion is void of any argument that disclosure of the documents would injure the federal government (2R 18-94).

The circuit court issued its order on February 20, 1998 (2R 766-777), The order applied to only ten of the eleven documents the state was seeking to protect (2R 768), because the eleventh document, contrary to the assertions made by **ASA** Coffman at the motion hearing, was not found in either the materials under seal or part of the record. The order applied only to the ten documents that were actually produced (2R 768).

Judge Whitehead began his analysis by:

reiterating the policy of the State of Florida with regard to public records: "It is the policy of this state that all state, county, and municipal records shall be open for personal inspection by an person."
§119.01, Fla. Stat. (1997). All "public

records" are subject to disclosure unless a specific statutory exemption applies. §119.07(2) (a), Fla. Stat. (1997)

(2R 769). He further explained that **because** the documents were voluntarily given to the Defendant, they are specifically excluded from "criminal intelligence information" or "criminal investigative information." (2R 770).

Judge Whitehead proceeded to whether Fla. R. Jud. Admin. 2.051 applied to the documents. He concluded that because the documents were **voluntarily** filed with the Clerk of the Court, they became judicial records, subject to disclosure under Fla. R. Jud. Admin. 2.051 (2R 773) (emphasis added). The final step of his analysis **was** whether any exemptions to Fla. R. Jud. Admin. 2.051 exempted the documents from disclosure. Judge Whitehead concluded that nothing contained within Fla. R. Jud. Admin. 2.051 exempted the documents from disclosure (2R 774-775).

Appellant filed an appeal to the circuit court's ruling on February 23, 1998 (2R 778-779). On that same date, appellant provided appellee a **redacted** version of the elusive eleventh document which was the subject of the State's Motion for Protective Order (2R 784) (**emphasis added**).

ARGUMENT

**THE CIRCUIT COURT CORRECTLY HELD THAT CHAPTER
119, FLORIDA STATUTES, PROVIDES NO AUTHORITY
FOR NON-DISCLOSURE OF THE TEN DOCUMENTS.**

Ms. Buenoano adopts and incorporates **all** facts and arguments presented by intervenors in this cause. Appellee's position has remained unchanged regarding the documents at issue. Appellee objected in the circuit court and renews the objection only to any condition **that impedes appellee's use of the documents in the** postconviction proceedings. However, appellee is no longer confident appellant is merely seeking the imposition of the same conditions previously sought from this Court.

Appellant's Emergency Request for Protective Order, filed with this Court directly before oral arguments were to be heard on appellee's appeal of a prior circuit court ruling, was silent as to any conditions the Appellant was seeking in its protective **order**. During oral argument before this Court, **ASA Coffman outlined the conditions she was seeking in the protective order**. First, that appellee not disclose the contents of the documents that **ASA** Coffman had made part of the circuit court file to anyone outside of the Buenoano litigation team. Second, she asked that appellee be prevented from discussing in open court or in **public the contents of the documents at issue without first** seeking prior authorization from appellant and the court. In response to an order from this Court, **ASA** Coffman reiterated the above conditions via letter sent to appellee on February 5, 1998.

Appellee has become alarmed, however, that appellant is now attempting to demand return of the documents at issue, a position that was not taken before this Court or in the correspondence this Court directed appellant to file. In appellant's Motion for Protective Order, appellant relied solely on section 119.072 Fla. Stat. (1997) to support its motion. Section 119.072 provides that "criminal investigative information held by a non-Florida criminal justice agency . . . may obtain and use such information in accordance with the conditions imposed by the providing agency." §119.072 Fla. Stat. (1997). The DOJ and FBI have been silent as to the conditions they are seeking; therefore, appellee must conclude from appellee's reliance on section 119.072 that appellant is attempting to demand the return of the ten documents at issue. If appellant prevails, these documents would be forever sealed and appellee would be prevented from using these documents in the postconviction proceedings.

The circuit court addressed appellant's contention that section 119.072 dictates the return of the ten documents and correctly concluded that section 119.011(3)(C)5 exempted the ten documents from the dictates of section 119.072. §119.011(3)(C)5, Fla. Stat. (1997). Section 119.011(3)(C)5 states that "criminal intelligence information" and "criminal investigative information" shall not include:

5. Documents given . . . to the person arrested, except as provided in s. 119.07(3)(f), and except that a court in a criminal case may order that certain information required by law or agency rule to be given to the person arrested be maintained

in a confidential manner and exempt from the provisions of **s. 119.07(1)** until released at trial if it is found that the release of such information would :

a. Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and

b. Impair the **ability** of a **state** attorney to locate or prosecute a codefendant.

§119.011(3)(C)5, Fla. Stat. (1997) (emphasis added). The circuit court held that the ten documents are not exempt from disclosure under section 119.072 because they were **voluntarily** given to the defendant and filed in the court file (2R 770). See §119.011(3)(C)5, Fla. Stat. (1997).

Appellant's initial brief attempts to skirt the circuit court's ruling that section 119.011(3)(C)5 exempts the documents from the provisions of section 119.072 by arguing that appellant's disclosure of the documents was not voluntary (AB 14). Appellant attempts to bootstrap the inadvertence of failing on two separate occasions to provide a complete set of documents to the trial court for an in camera inspection into inadvertence of giving the documents to appellee and **making the documents part of the official court file** (AB 14). The documents were filed with the circuit court on January 23, 1998 because a Notice of Appeal had already been filed by appellee. Because the circuit court refused to conduct another in camera inspection, appellant was hoping that this Court would conduct such a review of the documents and thus made the documents part of the record on appeal. Only when it appeared this move might backfire if this Court did not conduct an in camera review of the documents as

requested by the appellant, did appellant begin to characterize the voluntary disclosure of the documents to appellee and the court file as "inadvertent" and "mistaken."

Furthermore, appellant asserts that when the documents were provided to appellee and made part of the official court file, appellant imposed conditions upon the disclosure of those documents (AB 14). This assertion is blatantly misleading in that appellant released the documents to the court file and to appellee on January 23, 1998 and did not seek any conditions until February 4, 1998. See Attach. 1.

Appellant repeatedly asserts in its initial brief that the circuit court failed to "fully consider the interests of the third party effected by disclosure, the federal government" (AB 10-16). It is absolutely clear from the record on appeal that the federal government was fully apprised during every stage of the proceedings that appellant disclosed the documents to appellee and the court file². Lucy Thomson, the head of the FBI Task Force, submitted a declaration that was signed on February 11, 1998, the same day appellant submitted its Motion for Protective Order (2R 427). Bobbie Olivarri, an employee of the FBI and member of the FOIPA Section also submitted a declaration

² Appellee even went so far as to contact a representative from the FBI Task Force to inquire whether anyone from the federal government was planning to appear at the hearing on appellant's Motion for Protective Order in the circuit court. Appellee was informed that a decision had not yet been made as to whether a representative would appear. Appellee was also informed that the federal government had been apprised of the hearing date by the State Attorney's Office.

signed on February 11, 1998 (2R 421-422). These declarations faxed to **ASA** Coffman exemplify the fact that the federal government was aware of the circuit court proceedings and chose not to present argument on its own behalf, Instead, the federal government allowed **ASA** Coffman to argue one point: Section 119.072 precludes disclosure of the ten documents to the public.

Appellant failed to argue any legal reasoning in support of its Motion for Protective Order in the circuit court besides Florida Statutes Chapter 119. Appellant and the federal government as amicus curiae are procedurally barred from raising any other issues not presented to the circuit court. See *Ansora Enterprises, Inc. v. Cole*, 439 So. 2d 832 (Fla. 1983), cert. denied, 466 U.S. 927 (1989). Therefore, appellant is precluded from arguing 1) the federal government was not given a full opportunity to be heard; 2) a balancing of equities favors the federal government; 3) any reference to United States Codes; 4) the supremacy clause trumps Florida law; and 5) any federal law.

CONCLUSION

For the reasons set forth in the answer brief of appellee, the circuit court's ruling was correct and should not be disturbed on appeal.

I HEREBY CERTIFY that a true copy of the foregoing answer brief has been furnished by United States Mail, first class postage prepaid and facsimile to all counsel of record on March 4, 1998.

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ATTACHMENT 1

IN THE SUPREME COURT OF FLORIDA

JUDY A. BUENOANO,

Appellant,

vs.

CASE NUMBER: 92,233

STATE OF FLORIDA,

Appellee.

EMERGENCY
REQUEST FOR PROTECTIVE ORDER

COMES NOW the STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, and moves this Honorable court to enter a protective order in the above-captioned case based upon the following grounds:

1. This Court has determined that it has exclusive jurisdiction over the above-captioned cause. See Order in Judy A. Buenoano, Case No. 92,233 dated January 25, 1998.

2. The STATE OF FLORIDA is in need of emergency relief in this case. Because the delayed granting of relief would be tantamount to no relief being granted at all, the instant request is being filed at this time in this forum.

3. The nature of the relief sought is a protective order. Because of the nature of the relief sought and due to the emergent circumstance of the need for such relief, the STATE OF FLORIDA requests the opportunity to state the grounds for such relief in camera before this Court at the oral argument which is presently scheduled for Thursday, February 5, 1998, Furthermore, for the reasons already

stated, the STATE OF FLORIDA requests that this motion be resolved by this Court immediately.

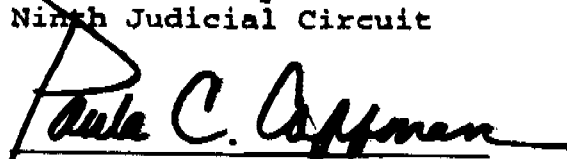
4. Without the aforementioned precautions, there exists a serious likelihood that the STATE OF FLORIDA would forfeit the benefit of any relief which may ultimately be granted by this Court.

WHEREFORE, for the foregoing reasons, the STATE OF FLORIDA respectfully requests that the emergency relief requested by the STATE OF FLORIDA be granted by this Court.

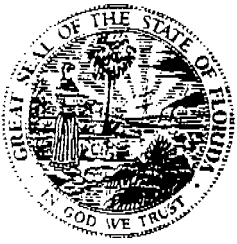
I HEREBY CERTIFY that a true and correct copy of the foregoing Emergency Motion for Protective Order has been furnished to: Sylvia W. Smith, CCRC, by facsimile transmission, with the original being filed by facsimile transmission in the Office of the Clerk, Supreme Court of Florida, this 9th day of February, 1998.

Respectfully submitted,

LAWSON LAMAR
State Attorney
Ninth Judicial Circuit


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ATTACHMENT 2



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February 5, 1998

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Dr. Mel Jones
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VIA FACSIMILE TRANSMISSION

Sylvia W. Smith
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RE: Order in Buenoano v. State, Case No. 92,233
Dated **February 5, 1998**

Dear Ms. Smith:

I am in receipt of the Order- entered **in** the above-captioned case by the Supreme Court **of** Florida this afternoon. In accordance with the requirement that the State Attorney's Office provide to you in writing by 9:00 a.m., February 6, 1998, "the conditions for turning over the **sealed** documents at issue in this **case** (my emphasis)," and confirming the substance of our telephone conversation, my advise is as follows:

First of all, I will reiterate that **the Office of the State Attorney is not presently in possession of those documents which are currently under court seal.** Those documents were filed in open court at the hearing held on January 12. No copies of the documents were maintained by **my** office.

Secondly, **it is not my intention to voluntarily turn over any of the documents which are currently under court seal, even if those documents were in our possession (which they are not).** The sealed documents were referenced in this morning's argument because they would require a protective order, like the documents contained in Volume 4 of the record on appeal, absent the confidentiality provided by the sealing. **My concern was that an adverse ruling by the Supreme Court of Florida on the in camera inspection issue could expose the sealed documents to disclosure absent a protective order.** Therefore, a necessary condition of our "turning over" documents which **are not even in our possession would be a court order unsealing those records.** a court order which I would oppose.

Sylvia W. Smith
February 5, 1998
Page 2

The terms and conditions of the protective order which we are seeking are **as** follows:

1) access to the information disclosed will only be provided to those attorneys, investigators, and support staff **directly** involved in Ms. Buenoano's post-conviction proceeding.

2) if Ms. Buenoano chooses to share materials with outside experts in connection with her post-conviction proceeding, such experts **shall** read the protective order, agree to be bound by the terms and conditions of the order and, upon completion of their work, return to defense counsel all documents and copies thereof which were received pursuant to the protective order;

3) the information will **only** be used in the preparation and presentation of Ms. Buenoano's post-conviction proceeding;

4) subject to the final condition **below**, the allegations will not be referred to publicly or in open court until such time that it is necessary to do so in order to prosecute the post-conviction proceeding;

5) if there is a perceived need to publicly reveal the allegations prior to the time set forth in the condition immediately above, Ms. Buenoano will make an application to the Court upon notice to the State, requesting authorization to make such public disclosure.

Please call me if you have any **questions** regarding the substance of this correspondence. Thank you for your prompt attention: to this matter.

Sincerely,



Paula C. Coffman
Assistant State Attorney