IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 92,442

JUDIAS BUENOANO,

Appellee.

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

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

In January of 1997, a public records demand was made upon the Office of the State Attorney, Ninth Judicial Circuit, on behalf of Judy Buenoano (1R 2-4).[1] The Office of the State Attorney, Ninth Judicial Circuit, refused to provide access to its records upon the ground that this demand, which was successive, did not comply with Rule 3.852, Florida Rules of Criminal Procedure (1R 2-4).

Buenoano subsequently initiated a mandamus action (1R 31-70) which was resolved by an Order Transferring Petition for Writ of Mandamus to Petitioner's Criminal Case (1R 128-131). This order specifically determined, inter *alia*, that ". . . the Petition for Writ of Mandamus shall be treated as if it were a motion to compel . . . filed pursuant to Florida Rules of Criminal Procedure 3.852" and that "Florida Rule of Criminal Procedure 3.852 governs the public records requests involved in this matter (1R 131)."

In December of 1997, the Office of the State Attorney, Ninth Judicial Circuit, received two transmittals from the Criminal Division of the United States Department of Justice containing documents which required inspection for a determination of any duty on the part of the prosecution under Brady v. Maryland, 373 U.S. 83

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[1] (1R - ) refers to the Record on Appeal prepared on January 27, 1998. (2R - ) refers to the Record on Appeal prepared on February 25, 1998.

(1963), and its progeny to disclose such documents to the defense. See Transcript of Status Conference held on January 23, 1998 (1R).

On January 6, 1998, the trial court held a hearing on the Defendant's Motions to Compel Production of Public Records (1R 170-171); see also Transcript of Public Records Hearing Proceedings held on January 6, 1998). On January 8, 1998, the trial court entered its Order Denying Motions to Compel Production of Public Records (1R 178-186).

The State's Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation was filed on the same date (1R 187-189). The subject of the State's request was the records received from the Department of Justice. The trial court held a hearing on this motion on January 12, 1998 (see Transcript of Proceedings held on January 12, 1998), and issued an Order Regarding State's Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation on January 15, 1998, determining that none of the inspected materials contained within sealed envelopes "A" through "F" constitute Bradv evidence (1R 332-338).

On January 20, 1998, the State filed the State's Supplemental Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation (1R 357-358). On January 23, 1998, the trial court held a.hearing on this motion. See transcript of Status Conference held on January 23, 1998. At this hearing, the

State explained that it had been in possession of the materials which were the subject of the State's supplemental request for in camera inspection at the time the State's initial request for in camera inspection was granted on January 12, 1998. However, through inadvertence, the additional materials had not been placed under seal in open court at the hearing held on January 12, 1998, as intended. At that time, the prosecutor also explained that, because the materials at issue had been reviewed by another attorney in her office, she was unaware at the time of the hearing on January 12, 1998, that not all of the materials sought to be inspected in camera were being filed under court seal. See transcript of Status Conference held on January 23, 1998. Counsel for Buenoano objected to any further in camera review.

At the conclusion of the hearing, the trial court denied the State's supplemental request for in camera inspection (1R 471). On that same date, the State elected to disclose to the defense the materials which were the subject of the State's supplemental request for in camera inspection, making them part of a Notice of Filing filed on January 26, 1998 (1R 475-673).

On February 3, 1998, the State was apprised through a telephone conversation with the Criminal Division of the United States Department of Justice that a number of documents which were disclosed to the defense on January 23, 1998, and that perhaps a document which was placed under court seal on January 12, 1998,

were in fact under court seal in other state and federal cases throughout the country. The State subsequently filed an Emergency Request for Protective Order in this Court on February 4, 1998.

On February 5, 1998, this Court issued a "stand still" order concerning "the documents already produced, which are contained in Volume 4 of the record in this case," prohibiting the defense from disclosing the subject documents "to anyone, until further order of this Court (2R 339)." On February 6, 1998, this Court issued an order requiring the Office of the State Attorney for the Ninth Judicial Circuit to make available to the Office of the Capital Collateral Regional Counsel - Northern Region 'all documents in their possession which are encompassed by the chapter 119 requests at issue in this case and which have not previously been provided to Buenoano (2R 529). This order was subsequently amended to require certification of a diligent search by the agency (2R 530).

On February 9, 1998, this Court issued an order directing that the sealed documents, which were the subject of the State's Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation, be "immediately returned to the trial court, with direction to make them available to CCRC, on behalf of Judy A. Buenoano." These documents were disclosed to the defense by order of the Court under "the conditions outlined in the court's February 5, 1998 order temporarily limiting access to documents

contained in Volume 4 of the record, pending further order of the trial court (2R 532-533).

In accordance with a time table established in the Court's February 9, 1998 order, the State, on February 11, 1998, filed a consolidated response to pending motions to intervene filed by the media, as well as the State's Motion for Protective Order (2R 415-416, 417-428). In the Motion for Protective Order, the State asserted that the FBI documents were exempt from disclosure under §119.072, Fla.Stat. (1997) (2R 418). Attached to the State's motion were declarations of two federal officials - one with the Department of Justice and one with the Federal Bureau of Investigation, to the effect that public disclosure of the documents at issue would "reveal information concerning a pending investigation or would reveal a sensitive law enforcement method or technique;" the declaration of the former official stated that the documents contained 'sensitive information about individuals protected under the Privacy Act", and pointed out that the documents had only been furnished to the State Attorney's Office under the condition that such were "not public and should be disclosed pursuant to a protective order." (2R 421-8). The trial court granted the motions to intervene in an order dated February 12, 1998 (2R 457-460).

On February 18, 1998, the trial court held a hearing on the State's Motion for Protective Order (2R 18-94). At that time, the

State identified eleven documents sought to be protected, ten of which had been disclosed to the defense on January 23, 1998, and one of which was believed to be part of the documents filed under court seal on January 12, 1998 (2R 593). On February 19, 1998, the trial court issued an Order Unsealing the Documents that the State Does Not Want Protected by a Protective Order (2R 757-761). Also on that date, the State filed its Provisional Motion for Stay of Effect of Order (2R 755-756).

On February 20, 1998, the trial court issued its Order Denying State's Motion for Protective Order and Order Staying the Provisions of this Order that Unseal the Ten Documents at Issue Through Monday, February 23, 1998 (2R 766-777). In denying the protective order, the circuit court found that the State had waived any statutory exemption to Chapter 119 by "voluntarily,,, albeit inadvertently, turning the records over to the defendant, and that, because the records were presently in the court file, the Rules of Judicial Administration controlled, and that none of the criteria set forth in Rule 2.051(c)(9), Fla.R.Jud.Admin. applied (2R 766-777). On February 23, 1998, the State filed a timely Notice of Appeal in this cause (2R 778-779). Also on that date, the State disclosed to the defense the eleventh document which was the subject of the State's Motion for Protective Order (2R 780-784).

## INTRODUCTION/SUMMARY OF ARGUMENT

This cause is before the Court, following remand, on the State's appeal of the circuit court's denial of its Motion for Protective Order; to the extent necessary, this pleading should be considered as a petition seeking to invoke this Court's All Writs Jurisdiction pursuant to Article V, Section 3(b)(1) & (7), of the Florida Constitution. The State respectfully contends that the lower court erred in a number of respects, most particularly in failing to fully weigh or consider the harm which disclosure of the documents in question would cause to a third party, *i.e.,* the federal government, the true custodian of the records. The documents at issue relate to confidential criminal investigatory matters and are subject to statutory exemption from disclosure. Any inadvertent disclosure was short lived, and a balancing of the equities dictates that the order on appeal must be reversed and disclosure or release of the documents prohibited.

## ARGUMENT

### Point on Appeal

> THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION FOR PROTECTIVE ORDER, IN THAT DISCLOSURE OF THE DOCUMENTS AT ISSUE INJURES AN INNOCENT THIRD PARTY, i.e., THE FEDERAL GOVERNMENT, AND IS CONTRARY TO 5119.072.

The highly unusual facts of this **case** are as follows. In December of 1997, the Justice Department transmitted to the Office of the State Attorney for the Ninth Judicial Circuit documents pertaining to FBI laboratory examiner Roger Martz; the transmittal letter contained the following language:

> 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. Prior to disclosing any of this material, please consult with me so that we can be sure that your impending disclosure does not adversely impact on other matters. At the conclusion of your case or at such earlier time as you determine that you no longer have a need for this material, please return all copies to me. A sample protective order is enclosed for your use.

(2R 428).

Counsel for Buenoano made a number of requests for public records access pursuant to Chapter 119 and Brady v. Maryland, 373 U.S. 83 (1963), and the Office of the State Attorney took the position that such requests were improper under Fla.R.Crim.P. 3.852. In light of these requests, however, the State Attorney's Office, on January 8, 1998, moved the trial court to conduct an in camera inspection of

the records pursuant to Brady, and tendered to the court what it believed to be all of the documents lent by the FBI (1R 187-189). Such in camera inspection was conducted, and, on January 15, 1998, the trial court found that none of the documents, then under seal, were required to be disclosed (1R 332-338).

Unfortunately, the State Attorney had inadvertently failed to provide all of the FBI documents, and, upon learning of such omission, requested an additional in camera inspection of the remainder on January 20, 1998 (1R 357-358). This matter was taken up at a hearing on January 23, 1998, and following objection by Buenoano's counsel, the State's request was denied (1R 471). The Assistant State Attorney then provided the materials to Buenoano and formally filed them in the court file. Upon being reminded of the terms of the transmittal, the Assistant State Attorney then sought a protective order from this Court on February 4, 1998, and this Court subsequently transferred the matter to the circuit court. The State formally refiled this request for protective order on February 11, 1998, specifically asserting that the documents at issue were exempt from disclosure under §119.072, Fla.Stat. (1997), and attaching affidavits from two federal officials to the effect that disclosure of the documents would reveal information concerning pending investigations, reveal sensitive law enforcement methods or techniques and would reveal information about individuals protected under the Privacy Act (2R

421-8). Despite these representations, the circuit court denied the State's Motion for Protective Order.

It is important to immediately recognize what matters are, and what matters are not, presented in this appeal. This case does not involve any issue pertaining to a Florida citizen's right to discover the actions of his government or a citizen's right to inspect state, county or municipal public records. Cf. City of Riviera Beach v. Barfield, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994), cert. denied, 651 So.2d 1192 (Fla. 1995). Rather, this case simply presents the narrow issue of whether a state agency's inadvertent, unauthorized and short-lived disclosure of records, belonging to another agency, constitutes a waiver of confidentiality for all purposes and as to all parties. The answer to this question must be in the negative, and the order on appeal reversed, in that the court below failed to fully consider the interests of the third party effected by disclosure (and the true custodian of the records), the federal government.

In denying the Motion for Protective Order, the circuit court made three distinct legal conclusions - (1) that the State had waived any claim of statutory exemption from disclosure relating to criminal investigative matters by voluntarily albeit inadvertently turning the records over the Buenoano; (2) that the Rules of Judicial Administration controlled and that such contained no exemption for criminal investigatory matters, and (3) that no basis

for protection or confidentiality of the documents existed under Fla.R.Jud.Admin. 2.051(c)(9). These conclusions will be addressed in inverse order.

First of all, Fla.R.Jud.Admin. 2.051(c)(9)(A)(v), expressly provides that a court record may be determined to be confidential when confidentiality is required to avoid substantial injury to innocent third parties. The State presented declarations from two federal officials to the effect that disclosure of the documents at issue would entail disclosure of classified information concerning pending investigations, sensitive law enforcement methods and techniques, and sensitive information about individuals protected under the Privacy Act. Although the district court, after in camera review of these documents, apparently discounted such assertions, the State respectfully suggests that the federal authorities are in the best position to determine the harm which would result from disclosure of these documents, given their knowledge of other pending federal prosecutions, etc. The prevention of harm to third parties is a well-recognized basis for closure of procedures or records, see Barron v. Florida Freedom Newspapers, 531 So.2d 113, 118 (Fla. 1988); Post-Newsweek Stations v. Doe, 612 So.2d 549, 551-3 (Fla. 1992) (holding that test announced in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), is not applicable when balancing the interests of third parties). At minimum, the documents at issue should not be

subject to unlimited public disclosure unless and/or until the federal government has been afforded a fair opportunity to be heard.

Secondly, the circuit court's conclusion that only those exemptions or criteria expressly set forth in the Rules of Judicial Administration could apply to a motion for protective order would seem to be incorrect. Thus, in Florida Publishina Company v. State of Florida, 23 Fla.L.Weekly D346 (Fla. 1st DCA January 27, 1998), the First District expressly held that Fla.R.Jud.Admin. 2.051(c)(8), had expressly adopted all of the items "made exempt by the Florida Statutes," including that exemption pertaining to "criminal investigative material;" it would not appear that any of the parties brought this precedent to the attention of the court below. Because, as will be demonstrated below, the documents at issue do in fact constitute criminal investigative material, which had only been lent to a Florida agency on a confidential basis, statutory exemptions do properly apply which preclude public disclosure.

The documents at issue were lent to the Office of the State Attorney for the Ninth Judicial Circuit by the Department of Justice on a limited and confidential basis, the transmittal letter expressly stating that such documents were "not public" and "should only be disclosed pursuant to a Protective Order." As such, the documents fully satisfy the statutory exemption asserted by the

State in its Motion for Protective Order, §119.072, Fla.Stat. (1997); such provision provides:

> **119.072 Criminal intelligence or investigative information obtained from out-of-state agencies. -** Whenever criminal intelligence information or criminal investigative information held by a non-Florida criminal justice agency is available to a Florida criminal justice agency only on a confidential or similarly restricted basis, the Florida criminal justice agency may obtain and use such information in accordance with the conditions imposed by the providing agency.

It is well established that transmission of records pertaining to criminal investigative matters between agencies, including between federal and state agencies, does not cause such documents to lose their confidential status. See, e.a., Barfield, 642 So.2d at 1137; Morris v. Whitehead, 588 So.2d 1023 (Fla. 2d DCA 1991). The court below did not conclude that, as a matter of fact, the documents at issue did not fall within the above provision, but rather concluded that the State had voluntarily albeit inadvertently waived this claim of statutory exemption, by providing the documents to Buenoano. The State respectfully contends that any finding of voluntary waiver is contradicted by the record, and that, further, it is impossible to find on this record that the right of confidentiality held by the true custodian of these records, i.e., the federal government, has been waived.

First of all, it is highly questionable the extent to which any disclosure to Buenoano was "voluntary", in that the State's

clear intent was for all of the FBI documents to be sealed and submitted to the court for in camera inspection. It was only through inadvertence that the documents now at issue were not part of the original submission to the court, and the State's request for further in camera inspection of these matters was denied by the court below. It was only at that juncture that the documents were disclosed to the defendant, but, most importantly, it must be remembered that such disclosure was not unlimited, in that the State sought to impose conditions upon Buenoano's use thereof (2R 602-03). While it certainly can be said that the State should have been more diligent in its assertion of claims of statutory exemption prior to February 11, 1998 (just as it should have been more diligent in providing all of the documents to the circuit court for one complete in camera inspection), it must be noted that the position of the State Attorney's Office was that Chapter 119 was not applicable to these records, and the office was not expressly directed to assert any applicable statutory exemptions until this Court's order of February 6, 1998, which provided ten (10) days for doing so.

In Catanese v. Ceros-Livingston, 599 So.2d 1021 (Fla. 4th DCA), review denied, 613 So.2d 2 (Fla. 1992), the court expressly held that the inadvertent, mistaken and unauthorized disclosure of certain confidential documents did not irrevocably waive confidentiality for all records involved. Such a holding should

clearly apply here, especially given the fact that the right of confidentiality is held by an agency (and sovereign) other than the one which may have made a negligent but limited disclosure. Simply put, the Office of the State Attorney could not waive what it did not possess, i.e., an unlimited right to the documents at issue. The State Attorney's Office below had only temporary and limited custody of the documents, and no statute or precedent can equitably stand for the proposition that all claims of confidentiality have been lost.

In conclusion, this case begins and ends with the interests of the federal government. As the court held in Barfield, there is a strong legislative intent to protect confidential information concerning criminal investigative information,* and the focus of any inquiry is upon the nature of the documents, rather than upon in whose hands the information rests, Here, the information was (and is) confidential, and while there was an inadvertent, mistaken and unauthorized disclosure for a period of approximately one week, it must be noted that efforts were made with due dispatch to preserve the confidentiality of the documents. In seeking a protective order, the State was essentially seeking only to preserve the status quo, in that the documents had not yet been

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[2] Any finding that the documents have now inadvertently entered the public domain would certainly chill further cooperation between state and federal law enforcement agencies and would be contrary to such statutes as §943.053(2), Fla.Stat. (1997), and 943.054; Fla.Stat. (1997).

fully publicly disseminated, despite their presence, through inadvertence, in the court file. A balancing of the equities in this cause clearly indicates that the district court erred in denying the State's Motion for Protective Order. Cf. Abamar Housing v. Lisa Dailey Lady Decor, Inc., 698 So.2d 276, 278-9 (Fla. 3d DCA 1997) (no voluntary waiver of attorney/client privilege as to documents where a limited number of documents were inadvertently disclosed, given, *inter alia,* fact that petitioners promptly sought return of documents and prevention of further dissemination of contents; overriding interests of justice would be served by relieving party of its error). For all of the above reasons, the order on appeal should be reversed.

## CONCLUSION

For all of the above reasons, the order denying the State's Motion for Protective Order should be reversed and this Court should prohibit public disclosure of the documents at issue and afford such other relief as it deems appropriate.

Respectfully submitted,

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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 David Bralow and Jennifer Herndon McCrae, Holland & Knight, Post Office Box 1526, Orlando, Florida 32802; Gregg Thomas and Kimberly Stott, Holland & Knight, Post Office Box 1288, Tampa, Florida 33601; George Gabel and Brooks Rathet, Holland & Knight, 76 S. Laura Street, Suite 1600, Jacksonville, Florida 32202; Adam Liptak, The New York Times Company, Legal Department, 229 West 43rd Street, New York, NY 10036, and to Sylvia Smith and Robert Friedman, Office of the Capital Collateral Regional Counsel-Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 2nd day of March, 1998.

RICHARD B. MARTELL
Chief, Capital Appeals