IN THE SUPREME COURT OF FLORIDA

CASE NOS. *73,981& 74,101*

THOMAS HARRISON PROVENZANO,

Appellant,

v.

STATE OF FLORIDA.

Appellee.

SUPPLEMENTAL BRIEF ON APPEAL

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

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PRELIMINARY STATEMENT

This supplemental brief is being submitted in support of Mr. Provenzano's claim that the Rule 3.850 trial court erred in refusing to direct the Office of the State Attorney to disclose to Mr. Provenzano's current counsel those items included in the State's files which fall within the mandatory disclosure provisions of Fla. Stat. section 119 (Public Records Act). Mr. Provenzano presented his claim in conjunction with a claim under Bradv v. Maryland. Since there was no disclosure, we have no way of knowing if Bradv was violated. However, in order to avoid a procedural bar, the claim had to be raised in this, petitioner's initial action. The "Catch-22" in this case arises because the State has withheld the tools upon which any Brady claim could be based, if the State's files indeed include Brady material. Cf. Amadeo v. Zant, 108 S. Ct. 1771 (1988). The State's refusal to comply with section 119 and the lower court's refusal to direct the State to comply with the statute made Mr. Provenzano's case somewhat unique -- in Florida capital post-conviction actions, the State and the circuit courts almost uniformly comply with the language of section 119 when requests for disclosure are made by post-conviction counsel. The circuit courts have consistently ordered disclosure. The Attorney General has in the past taken the position that compliance with the statute is required in post-conviction cases. The District Courts of Appeal have also found that compliance with section 119 is required in cases such as Mr. Provenzano's. This Court has relied on the evidence obtained through section 119 in capital cases. Indeed, this Court has expressly relied on the availability of State records to collateral counsel in barring the claims of successive post-conviction litigants who did not timely pursue disclosure pursuant to section 119 in their initial post-conviction actions. See Demps v. State, 515 So. 2d 196 (Fla. 1987). Mr. Provenzano appropriately made the request in his initial action. The State violated the statute in refusing to abide by the request. The lower court erred in declining to order disclosure.

Mr. Provenzano continues to assert his previously urged claims for relief,

Upon a proper review of the record, it is apparent that an evidentiary hearing is warranted in this case, and thereafter, that relief would be proper. This Court has not hesitated to order evidentiary hearings in the past. Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987). Mr. Provenzano continues to respectfully submit that the Court should do so in this action for all of the reasons presented in his prior submissions to the Court and herein. This brief does not, however, reiterate what was presented before, but addresses solely the issue upon which the Court directed supplemental briefing.

Citations in this brief shall be as follows: "R. [page number]" shall indicate references to the record on direct appeal. Citations to the record on appeal from the denial of the Motion to Vacate Judgment and Sentence and its appendix shall be cited as: "PC-R. [page number]" or shall be otherwise explained. All other citations shall be self-explanatory or otherwise explained.

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SUPPLEMENTAL STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Mr. Provenzano relies on the Statement of the Case and Procedural History set out in his Summary Initial Brief of Appellant on Appeal of Denial of Motion for Fla. R. Crim. P. 3.850 Relief. Oral argument was held before this Court on June 5, 1989. During that argument, Justice and Grimes inquired of Mr. Provenzano's counsel why Claim XIV of the Rule 3.850 Motion (Claim IX of the Summary Initial Brief) alleging a violation of Brady v. Maryland, 373 U.S. 83 (1967), did not include a factual proffer. Counsel responded that Mr. Provenzano had been denied access to public records, in violation of chapter 119, Fla. Stat., by the state attorney's refusal to comply with the statute and by the circuit court's refusal to direct disclosure, and thus that Mr. Provenzano was unable to plead this claim with particularity. Contrary to the State's assertion in oral argument, Mr. Provenzano's access to files and records withheld by the state attorney is not being litigated in any other court. It is part and parcel of this case and was presented in Mr. Provenzano's appeal to this Court. Indeed, Mr. Provenzano initially sought to supplement the record on appeal with the circuit court's order declining to allow disclosure. (The order was apparently inadvertently omitted from the record by the circuit court clerk.) On June 19, 1989, this Court issued an Order to supplement the record on appeal with Mr. Provenzano's Petition for a Writ of Mandamus/Prohibition (requesting that the circuit court order the State to comply with section 119) and the circuit court's order denying that petition.

Subsequently, on July 28, 1989, this Court issued an Order requesting that Mr. Provenzano and the State provide supplemental briefing on the issue presented in the Petition for a Writ of Mandamus/Prohibition, namely: whether Chapter 119, Florida Statutes, requires the State Attorney for the Ninth Judicial Circuit to provide access to the files and records in that office pertaining to Mr. Provenzano.

ARGUMENT

THE CIRCUIT COURT ERRED IN REFUSING TO ORDER ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. PROVENZANO IN THE POSSESSION OF THE STATE'S ATTORNEY, IN VIOLATION OF CHAPTER 119, FLA. STAT, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

I. INTRODUCTION

The people of Florida have long been committed to open government, and to an open judicial process. "Unlike other states where reform of the judical system has sometimes lagged, Florida has developed a modern court system with procedures for merit apointment of judges and for attorney discipline . . . . We have no need to hide our bench and bar under a bushel. Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." In re Petition of Post-Newsweek Stations, 370 So. 2d 764, 780 (Fla. 1979). Throughout this state's history, Floridians have required that their government function in full view of the citizenry. E.g., Davis v. McMillan, 38 So. 666 (Fla. 1905). Although recognizing that open government may have certain disadvantages, Floridians have consistently determined that the costs are inconsequential compared to the benefits. Open Gov't Law Manual, p. 5 (1984). This determination underlies the Florida Public Records Act which gives effect to the policy that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." Section 119.01, Fla. Stat. (1983).

As a result of this commitment to open government, and as a result of Chapter 119.01, Fla. Stat., the files and records of the state attorney's office have uniformly been made available to counsel for criminal defendants once they have been prosecuted and convicted of an offense and unsuccessfully litigated on direct appeal. See, e.g., Tribune Company v. In re: Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986), rev. denied, 503 So. 2d 337 (Fla. 1987). Here, however, the State Attorney of Orange County has sought to immunize from production the files and

records of Thomas Harrison Provenzano, a death row inmate, who was prosecuted for first degree murder, convicted of first degree murder and unsuccessfully appealed his conviction to the Florida Supreme Court.

The state attorney, in his letter to Mr. Provenzano's counsel refusing access to the files (dated March 6, 1989), asserted various legal arguments that contravene the underlying policy of the Public Records Act. The Act was designed to "insure the people of Florida the right to freely gain access to governmental records. The purpose of such inquiry is immaterial. News-Press Publishing v. Gadd, 388 So. 2d 276 (Fla. 2d DCA 1980); Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976)." Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), rev. denied, 475 So. 2d 695 (Fla. 1985). Mr. Provenzano's counsel and Mr. Provenzano himself are, of course, members of the public. They and the public were entitled to compliance with the statute's strict mandate. The state attorney, however, suggested that his files and records are exempt from disclosure for four reasons, three of which were referenced to Fla. Stat. 119.07. The circuit court's order, dated April 27, 1989, indicates that access to the state attorney's files is denied because the request is not "reasonable" because Mr. Provenzano requested all records, not simply a few. Of course, the Public Records Act requires disclosure of all records that fall within its rubric.

The Public Records Act, Fla. Stat. 119 et. seq., first provides that state, county and municipal records shall at all times be open for personal inspection by anyone. The act then creates clearly delineated provisions for documents that may be withheld from disclosure due to the applicability of a statutory exemption. Fla. Stat. section 119.07(3). The statute has been amended to create statutory exemptions as deemed necessary by the legislature. See Tribune Company v. Cannella, 458 So. 2d 1075, 1078 (Fla. 1984). Rules of statutory construction dictate that when the legislature enumerates specific exemptions, it intends to have all unmentioned items subject to the law. Bludworth v. Palm Beach Newspapers, Inc., 476

So. 2d 775 (Fla. App. 4 Dist. 1985). If an item is not expressly exempted, the statute's provisions are mandatory.

Mr. Provenzano will first discuss the specific exemptions relied upon by the State and the circuit court. He will then explain why he is entitled to access to the state attorney's files based on the basis of public policy, the case law, equal protection, due process, and the eighth amendment.

The death penalty is the most final and drastic punishment known to man. Under the State's theory, Mr. Provenzano is not entitled to the tools to determine the legality of that punishment in his case until after the punishment has been carried out, i.e., after he has been put to death. This is clearly not the intent of the legislature. Neither public policy, nor the case law, Constitution, or common sense can be squared with the State's position in this case.

II. THE EXEMPTIONS RELIED UPON BY THE STATE ARE NOT APPLICABLE

A. SECTION 119, FLA. STAT. DOES NOT PROVIDE AN EXEMPTION FOR CRIMINAL INVESTIGATIVE INFORMATION ONCE A CRIMINAL CONVICTION HAS BEEN AFFIRMED ON APPEAL

One of the bases upon which the State claimed that its files were exempt was because: "This file contains active criminal investigation information that will be used if Thomas Harrison Provenzano wins a new trial through his planned litigation prior to execution. Fla. Stat. 119.07(3)(d)." Section 119.07(3)(d) provides an exemption to the general rule that records "shall at all items be open for a personal inspection by anyone:" "Active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1)." (emphasis added).

The precedent most directly relevant to this question is Tribune Company v. In re: Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986), rev. denied, 503 So. 2d 327 (Fla. 1987). In that case, several interested parties sought access to the case files held by the Pasco County Sheriff concerning Ernest Lee Miller and William Riley Jent, both of whom had been convicted of murder and sentenced to death. The

question squarely addressed by that case was "whether the records sought were exempt from disclosure to the public as active criminal investigative information pursuant to section 119.07(3)(d), Florida Statutes (1985), and whether Miller's and Jent's actions for post-conviction relief were appeals within the meaning of section 119.011(3)(d)2, Florida Statutes (1985)." Id. at 482.

Tribune Company held that the records sought were not exempt, and that the term "appeal" in section 119.011(3)(d)2 must be given its legal and literal meaning, i.e., direct appeal, and thus does not include actions for post-conviction relief brought after the direct appeal has been decided:

> The criminal investigative information exemption of the Public Records Act and its predecessor, the common law police secrets rule, have "always had a limited purpose--to prevent premature disclosure of information when such disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection." Tribune Co. v. Cannella, 438 So.2d 516, 523 (Fla. 2d DCA 1983), rev'd on other grounds, 458 So.2d 1075 (Fla.1984), appeal dismissed, --- U.S. ---, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985).
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> The circuit court's definition of "appeal" as "generic rather than technical" and "synonymous with 'normal judicial review,'" thus including such post-conviction actions as petitions for habeas corpus, habeas corpus appeals, and petitions for writ or error coram nobis, is much too broad an interpretation. The word "appeals" in the statute does not connote the loose popular sense of the term Cf. Davis v. Stroble, 39 So.2d 468, 471 (Fla.1949)(concurring opinion). Such legal terms in a statute are "to receive their technical meaning, unless the contrary plainly appears to have been the intention of the legislature." Williams v. Dickenson, 28 Fla. 90, 9 So. 847, 849 (Fla. 1891). If the legislature had meant to include post-conviction relief proceedings as a basis for an exemption to the Public Records Act it surely would have said so. And only the legislature can create such an exemption, not the court or custodian. Douglas v. Michel, 410 So.2d 936, 940 (Fla. 5th DCA 1982); Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla.1979). "[I]n ascertaining the intent of the Legislature in this case we look to the general policy behind the Public Records Act ... an open policy with respect to state, county and municipal records." Satz v. Blankenship, 407 So.2d 396, 398 (Fla. 4th DCA 1981). The circuit court exceeded its authority by expanding the definition of appeal.
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> Defining "appeals" to include post-conviction relief proceedings at best makes access to public information unpredictable, and at worst, forecloses it altogether. To extend the active status of criminal investigative information so long as a post-conviction action remains possible might seal the records forever because some post-conviction actions can be brought at any time; for example, a petition for a writ of error coram nobis may be filed even twenty-eight years after a sentence is completed. See ~~Weir v. State~~, 319 So.2d 80, 81 (Fla. 2d DCA 1975). On

the other hand, to say such information is not active (thus disclosable) so long as no such proceedings are pending would make disclosure depend on the vagaries of chance, a result so capricious and illogical as to be absurd. The legislature cannot be deemed to have intended an absurd result where a reasonable interpretation is available. State v. Webb, 398 So.2d 820, 824 (Fla.1981).

If we follow the circuit court's reasoning, in order for Miller and Jent to acquire access to the custodian's secret information they must cease all post-conviction attacks on their convictions. Miller and Jent, however, seek the secret information for the very purpose of determining whether they were fairly treated by the criminal justice process. To require them to cease all efforts to aid themselves by attacking their convictions, in order to find out whether the secret information will help them, puts them between a real-life Scylla and Charybdis. Miller and Jent are faced with an insoluble dilemma: they cannot help .cp3 themselves without the information, yet they must not help themselves in order to obtain it.

On the other hand, to restrict the public's access to the information depending upon whether (or when) Miller and Jent (or others on their behalf, now or even after they are executed, if executed they will be) seek post-conviction relief borders on obfuscation. The limited purpose of the exemption for active criminal investigative information--to protect the apprehension and prosecution of persons accused of crime--has been fully satisfied in this case. Cannella, 438 So.2d at 523. Miller and Jent were long ago arrested, investigated, indicted, tried and convicted. To lockstep the public's right to know depending on what Miller and Jent have done or might do simply goes beyond the bounds of reason. Once public records are open for inspection they cannot be withdrawn by subsequent court challenge. Cannella, 458 So.2d at 1079.

The public policy pervading this case is that public records must be freely accessible unless some overriding public purpose can only be secured by secrecy. Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985). This public policy favoring open records must be given the broadest expression. Id. It is the exception which must be narrowly construed. Bludworth, 476 So.2d at 780, n. 1. The action of the circuit court has reversed these principles by limiting access to the secret information via a broad interpretation of the exception. This does not comport with legislative intent and cannot prevail. Simply put, the term "pending appeals' as used in section 119.011(3)(d)2 of the Florida Statutes, does not include post-conviction proceedings such as petitions for habeas corpus or appeals thereof, petitions for writ of error coram nobis, petitions for certiorari, motions pursuant to Florida Rule of Criminal Procedure 3.850, or any other proceeding other than the first appeal of right.

Id. at 483-84 (emphasis added).

Obviously, the arrest and prosecution of Thomas Provenzano was completed long ago. The focus of inquiry is whether the exemption extends the active status of investigative records through post-conviction writs or petitions filed after a

conviction has been affirmed on direct appeal. Whether one looks to the policy expressed in the Act, rules of statutory interpretation in light of the Act's unambiguous language or statutory and case law that has consistently distinquished between appeals and post-conviction relief, the answer is the same. A post-conviction action is = an appeal, and is not a criminal proceeding. Indeed, such actions have been expressly found to be civil, not criminal proceedings by this Court. See State v. White, 470 So. 2d 1377, 1378 (Fla. 1985). This Court should hold, as was held in Tribune Comuany, that the sought-after records are no longer "active", and thus, no longer exempt from disclosure.

1. Public Policy in Florida Strongly Favors the Construction of the Tribune Co. Court

Florida's courts have repeatedly held that the Public Records Act is to be liberally construed in favor of open government. Bludworth v. Palm Beach Newsuauers. Inc., 476 So. 2d 775 (Fla. App. 4 Dist. 1985). Such open government preserves our freedom by permitting full public participation in the governing process. City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); See Wolfson V. State, 344 So. 2d 611 (Fla. 2d DCA 1977). Thus, every public record is subject to the examination and inspection provisions of the Act unless a specific statutory exemption applies. Shevin v. Bvron, Harless. Schaffer, Reid and Associates. Inc., 379 So. 2d 633 (Fla. 1980).

Exemptions to disclosure are construed narrowly and limited to their purposes. Information gathered or held while that purpose is not being served are not exempt. Tribune Company v. Cannella, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), rev'd on other grounds, 458 So. 2d 1075 (1984), app. dismd, 105 s. Ct. 2315 (1985)(criminal investigative information exemption did not prevent disclosure of records); see also State v. Nourse, 340 So. 2d 966 (Fla. 3d DCA 1976)(exceptions to the general law are construed narrowly). Even when it is unclear whether an exemption applies, courts

have decided in favor of the Act's expressed policy of disclosure:

> . . . [W]hen in doubt the courts should find in favor of disclosure rather than secrecy. The legislature can always add to the exemptions, as it has occasionally done, if it feels the courts have misinterpreted the legislative intent.

Bludworth v. Palm Beach Newspapers. Inc., 476 So. 2d 775, 779 n.1 (Fla. 4th DCA 1985). Here, the Leglislature could have amended the statute to exempt "post-conviction proceedings." It did not, even after the issuance of Tribune Co. The Legislature's refusal to do so is quite telling.

The criminal investigation exemptions, like any other exemption, has been narrowly interpreted to serve a specific purpose:

> The criminal investigative exemption . . . is a codification of the common law Police Secrets Rule developed by the Florida courts to exempt police investigatory and intelligence information from public disclosure. The exemption has always had a limited purpose -- to prevent premature disclosure of information when such disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection.

Tribune Company v. Cannella, supra, 438 So. 2d 516. See also Lee v. Beach Publishing Company, 173 So. 440 (Fla. 1937); Rose v. D'Alessandro, 364 So. 2d 763 (Fla. 2d DCA 1978), aff'd in part and rev'd in part, 380 So. 2d 419 (1980); Glow v. State, 319 So. 2d 47, 49 (Fla. 2d DCA 1975). Thomas Provenzano has long since been arrested, investigated, indicted, tried, and convicted. His conviction was affirmed on appeal by this Court. It is difficult to conceive how lifting the veil of secrecy surrounding Mr. Provenzano's files will disrupt any police process. Certainly, there is no danger of allowing a suspect to escape apprehension. Mr. Provenzano has long been behind bars. The state attorney's only argument that release of his records would thwart prosecutorial efforts was that should Mr. Provenzano succeed in having his conviction and sentence set aside, the files would be used to reprosecute him. This argument is clearly an effort to frustrate the public interest in insuring that the present conviction was constitutionally obtained. Mr. Provenzano will be entitled to a new trial if material, exculpatory

information was withheld from him in his trial, **see** Brady v. Maryland, 373 U.S. 83 (1963). for if such evidence was withheld, Mr. Provenzano's conviction would be rendered fundamentally unfair. There is no legitimate state interest or public policy concern in allowing an unfair conviction to stand. To the contrary, public policy is served by disclosure -- if Brady was violated in this case, public policy would counsel disclosure so that the truth may come to light; if Brady was not violated, there is nothing to hide, and the state attorney would benefit from full disclosure. However, the State here would withhold the tools for ascertaining whether in fact a Brady violation has occurred, merely so that it can keep the information forever concealed, even in a retrial. This argument was expressly rejected in Tribune Company,

> To require [Miller and Jent] to cease all efforts to aid themselves by attacking their convictions, in order to find out whether the secret information will help them, puts them between a real-life Scylla and Charybdis. Miller and Jent are faced with an insoluble dilemma: they cannot help themselves without the information, yet they must not help themselves in order to obtain it.

Id. at *484.*

On the contrary, the Act reveals the legislative determination that the purposes of the exemptions are no longer served after the criminal case is terminated, i.e., after direct appeal. **See** Tribune **Co.**, supra; **Downs** v. Austin, 522 **So.** 2d 931 (Fla. 1st DCA 1988)(ordering disclosure of investigative files in clemency proceedings); Seminole County v. Wood, 512 **So.** 2d 1000 (Fla. 5th DCA 1987). **A** prosecution remains pending until disposition of the direct appeal. Heilmann v. State, 310 **So.** 2d 376 (Fla. 2d **DCA** 1975); General Capital Corp. v. Tel Service Co., 183 **So.** 2d 1 (Fla. **2d DCA** 1966). There is then no longer a criminal case -- criminal proceedings are done. White, supra. It was logical for the legislature to determine that the active status ceased at the point at which the appeal concluded. From that point forward, the legislature has ordered disclosure of the records, section 119.011(3)(d), Fla. Stat., because from that point on, there is no criminal

case.

The purpose of public records disclosure is to permit the public to evaluate the performance of its public officials. This case presents a compelling example. The public is concerned in every case with the performance of the prosecutorial and judicial systems, but the public's right to oversee the process is vitally important when, as in this case, that performance may result in state infliction of death. The people of the State of Florida set the societal values by which the appropriateness of capital punishment is constitutionally measured. The judgment of the community through its juries, cf. State v. Neil, 457 So. 2d 481 (Fla. 1984); Caldwell v. Mississippi, 472 U.S. 320 (1985), and through its legislature which enacted the capital statute, State v. Dixon, 283 So. 2d 1 (1973); Proffitt v. Florida, 428 U.S. 242 (1976), is central to the proper functioning of Florida's capital punishment scheme. As a society, the people of Florida are burdened with the responsibility for each state imposed execution. And yet, under the argument asserted by the state's attorney in this case, the people of Florida will be deprived of the opportunity to evaluate the performance of the criminal justice system prior to the execution of Thomas Provenzano.

Unless his post-conviction efforts are successful, Mr. Provenzano like all capital litigants will undoubtedly have writs pending until the moment prior to his execution. Under the state attorney's view of the Act, not until Mr. Provenzano withdraws all efforts at post-conviction relief or until his execution will the public have a right of access to the information contained in the state attorney's files. Of course, at that point it will be too late for the public to have any meaningful participation in the process that led to an irrevocable result.

The Act should not be interpreted to support such a result. Rather, the Act can and should be interpreted to further the interests of disclosure to any extent which does not contravene the purposes underlying investigative secrecy. Bludworth v. Palm Beach Newspapers, Inc., supra, 476 So. 2d 775.

At the conclusion of the "appeal" the need for secrecy was deemed by the legislature to be outweighed by the need for disclosure. Id. The judiciary is without authority to reweigh those values by interpreting the word "appeal" to mean "any judicial review":

> . . . [I]t is up to the legislature, and not this Court, to amend the statute.

Wait v. Florida Power & Light Company, 372 So. 2d 420 (Fla. 1979). See State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1977), cert. denied, 360 So. 2d 1247 (1978); State v. Nourse, 340 So. 2d 966 (Fla. 3d DCA 1966).

2. The Interpretation of Active Prosecution by the State Attorney Leads to Absurd Results That Cannot be Reconciled With the Broad Purposes Behind the Act

The specific meaning of active prosecution as discussed above by Mr. Provenzano lends certainty and consistency to the statute's durational limitation while still serving the purposes of the limited exemption. The state attorney by labelling this case as one actively prosecuted has sought to distinguish this case from the clear holding in Tribune Company v. In re: Public Records. In that case, it was held that the prosecution was no longer active once the defendant had litigated his appeal of right. Criminal defendants must appeal convictions within thirty days following a conviction. Section 924.09, Fla. Stat. (1983); Fla. R. Crim. P. 9.140(b)(2). Once that appeal is unsuccessful, the active status of investigative records would cease on the disposition or expiration of the appeal of right. The time at which the secret status of investigative records ends so that the file of each criminal convict is constructively placed "on the table" would be readily discernible by all citizens.

The state apparently seeks to interpret "active" to include post-conviction proceedings, and in fact any action taken before Mr. Provenzano's execution. This interpretation will result in either unpredictable access to public records or foreclosure of access altogether. If "appeal" or "active prosecution" in a criminal case is defined to encompass post-conviction (i.e., civil) proceedings and the

investigation remains active until all possible **"appeals"** are exhausted, then the availability of post-conviction remedies indefinitely would render meaningless the time limitation of section 119.011(3)(d).

Post-conviction proceedings are not generally confined to rigid deadlines as are direct appeals. For example, the writ of error coram nobis may be brought at any time, even after a defendant has been punished and set free. Weir v. State, 319 So. 2d 80 (Fla. 2d DCA 1975)(writ of error **coram** nobis could be used to set aside 1943 criminal conviction 28 years after sentence of imprisonment was completed). Successive petitions for error coram nobis may be filed where a new justification is discovered. **See** Ex parte House, 31 So. 2d 633 (Fla. 1947). Post-conviction relief authorized in Rule 3.850, Florida Rules of Criminal Procedure, allows any motion to be filed within two years after a judgment is **"final"**[1] while motions alleging particular defects described in the rule may be brought without time limitation.

Thus, to extend the active status of investigative records **so** long as a post-conviction writ remains possible will be to seal the records forever because a post-conviction writ can be brought at any time. This interpretation would violate two important principles of statutory construction. First, the legislature is not deemed to intend a legal term such as "appeal" or "active prosecution" in a loose popular sense. Davis v. Stroble, 39 So. 2d 468 (Fla. 1949); Tribune Co. v. In re: Public Records. As discussed in the next section below, there are numerous legal distinctions between criminal appeals and other post-conviction civil proceedings. More importantly, however, is the principle that a court may not interpret a statute to render it meaningless if a reasonable construction is available. State v. Webb, 398 So. 2d 820 (Fla. 1981). It is patently unreasonable to interpret a legislatively imposed time limit on secrecy in a way that imposes no limitation.

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[1] A Judgment is **"final"** after disposition of the right of direct appeal. Heilmann v. State, 310 So. 2d 376 (Fla. 2d DCA 1975); General Capital Corp. v. Tel Service Co., 183 So. 2d 1 (Fla. 2d DCA 1966).

The day after the appeal of right was disposed of, and before any writs or collateral actions were filed, Mr. Provenzano, or anyone else (e.g., Mr. Provenzano's counsel, members of the press, interested citizens, indeed any citizen) could have requested and received these records.[2] The state attorney would have been required to provide access because the investigation was no longer "active" and no writs or collateral actions were pending. Under the argument put forward by the state attorney, a post-conviction action filed a year later, or indeed filed 28 years later, would suddenly seal the records which had been "on the table" and long in the public domain. In fact, contemporaneous civil litigation, even when it is between the government and the requesting party, was specifically held to have no effect on the substantive right to public records in Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979). The fact: that the government is in an adversary role with the requesting party does not alter the disclosure required under the Act. As noted, Rule 3.850 actions have been expressly determined by this Court to be civil in nature. White, supra. There is no reason for the state attorney to keep his files secret well after "criminal" proceedings have been completed -- i.e., after direct appeal. There is today no criminal proceeding in this case. Nor could there be: the instant post-conviction action is civil in nature. State v. White, 470 So. 2d 1377 (Fla. 1985).

The state attorney's interpretation flies in the face of this Court's holding that records, once public, cannot be resealed by subsequent events. Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984), am. dismd, 105 S. Ct. 2315 (1985); Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982), pet. for rev. den. sub. nom., Metrouolitan Dade County Transit Agency v. Sanchez, 426 So. 2d 27 (Fla. 1983). In Cannella, an assistant state attorney attempted to assert that previously public personnel files had become exempt from the Act by virtue of later becoming part of

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[2] Interestingly, Mr. Provenzano's section 119 request was made before his Rule 3.850 motion was filed and before the death warrant was signed.

an active criminal investigation. The Supreme Court of Florida disagreed, holding that public disclosure of the records constructively occurred at the moment they became non-exempt public records. To allow them to be withdrawn from the public realm upon a request for access from any member of the public would frustrate the policy of the Act. Once they are constructively "on the table" they remain there despite subsequent events. Tribune Co. v. Cannella, 458 So. 2d at 1079.[3]

Resurrecting the "active" status of investigations with the filing of a writ after the records have been "on the table" would create an arbitrary distinction between cases in which records were available and cases in which they were not. Under one view of the state's position below, a defendant (or any member of the public) sufficiently informed of the interpretation given to the word ''appeal" could gain physical access to the state's files simply by filing the request before filing any post-conviction petition. But the state attorney's position would set a trap for the unwary seeking post-conviction remedies. Unwary defendants who file petitions for extraordinary relief prior to the requests suddenly and without justification discover that their files are sealed unless and until they terminate the writ process -- a classic "Catch 22." Interestingly, Mr. Provenzano's counsel made the request for disclosure well before any Rule 3.850 action was filed. The State nevertheless still refused to comply. Another interpretation of the State's argument could be that no criminal defendant could ever have access to his or her file because of the mere possibility of a retrial should he ever file post-conviction pleadings and be successful. In a non-capital context, the public would not be entitled to a defendant's file in the state attorney's office until after

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[3]The "once public, always public" precept is further demonstrated by reference to section 119.011(3)(c)(5.) of the Act. That section states that criminal intelligence and investigative information shall not include "documents given or required by law or agency rule to be given to the person arrested." For example, any statement made by a witness in a criminal case cannot be investigative information because that statement is required by criminal discovery rules to be given to the defendant upon request. Satz v. Blankenship, 407 So. 2d 396, 398 (Fla. 4th DCA 1981), pet. denied, 413 So. 2d 877 (1982); Fla. R. Crim. P. 3.220.

that defendant had fully served his sentence.

Persons capitally sentenced would be more critically affected since they must be put to death in order to serve their sentence; the added measure of assurance which is desired before imposition of the unique and irretrievable punishment of death would be turned on its head. See Woodson v. North Carolina, *428* U.S. *280,* 305 (1976). In capital convictions, the impending execution creates a deadline for filing post-conviction petitions which is not present in any other case. Thus, after the disposition of the direct appeal, the case quickly regains its "active" status under the position adopted by the state attorney. The records of an unsuccessful petitioner would not be subject to disclosure until after execution. If the records happened to reveal some substantial mistake in the prosecution or sentencing, there would be no petition for relief. Public policy simply cannot countenance disclosure solely at Mr. Provenzano's funeral. That, however, is the effect of the position taken by the State and circuit court in this case.

The effect of the state attorney's position is to provide fewer assurances of accuracy in death penalty cases than those which are provided to assure accuracy of imposition of prison sentences. Under the state attorney's and circuit court's construction, prosecutors could place blinders on the capitally convicted's ability to look beyond the record and avoid untoward executions, while a sufficiently informed prisoner for life, who has not filed for post-conviction relief, has the opportunity to learn all the facts and evidence which may establish that his conviction was erroneous. Such a result is absurd. The legislature could not be deemed to have intended an absurd result where a reasonable interpretation is available. State v. Webb, 398 So. 2d 820 (Fla. 1981); Johnson v. State, 91 So. 2d 59 (Fla. 1956); State Dept. of Public Welfare v. Bland, 66 So. 2d 59 (Fla. 1953); St. Petersburg v. Siebold, *48* So. 2d 291 (Fla. 1950) Miami v. Romf, 63 So. *440* (Fla. 1913); Curry v. Lehman, *47* So. 18 (Fla. 1908).

3. The Legislature Was Well Aware of the Distinctions Between Appeals and Extraordinary Writs

> It is a well-recognized canon of construction that where legal terms are used in a statute they are to receive their technical meaning, unless the contrary plainly appears to have been the intention of the legislature.

Williams v. Dickenson, 9 So. 847, 849 (Fla. 1891). By defining active prosecution to include post-conviction relief, the state attorney has overlooked a history of legislative and judicial distinction between appeals and extraordinary remedies, a history which the Legislature was well aware of, and which the Legislature codified in section 119.

Although post-conviction proceedings are sometimes called "appeals" by lay persons, that is merely an umbrella categorization which is far from accurate. See State v. Lee, 8 So.2d 19 (Fla. 1942); Goldfarb v. Bronston, 17 So.2d 300 (Fla. 1944). Legislators, the courts, and the people through their state constitution have regularly and consistently treated appeals differently than post-conviction remedies.

Post-conviction remedies are original proceedings governed by rules of civil procedure even where the judgment under review resulted from a criminal proceeding. ~~See White~~, supra (post-conviction relief under Rule 3.850); Chambers v. State, 158 So. 153 (Fla. 1934)(writ of error coram nobis); Crownover v. Shannon, 170 So.2d 299 (Fla. 1964)(habeas corpus); Green v. State, 280 So.2d 701 (Fla. 4th DCA 1973)(post-conviction relief under Rule 3.850); Dykes v. State, 162 So.2d 675 (Fla. 1st DCA 1964)(same); Horner v. State, 158 So.2d 789 (Fla. 3d DCA 1963), cert. denied, 162 So.2d 904 (1963). Collateral proceedings (e.g., Rule 3.850 actions) are discretionary. Except for certiorari, writs are collateral, civil attacks on the judgment of a tribunal. Crownover v. Shannon, 170 So.2d 299 (Fla. 1964)(habeas corpus); State v. Weeks, 166 So.2d 892 (Fla. 1962)(habeas corpus and post-conviction relief under Rule 3.850); White, supra (Rule 3.850); Green, supra (same); Washington v. State, 110 So. 259 (Fla. 1926)(writ of error coram nobis). Far from being .cp3

"normal judicial review," they are extraordinary remedies tailored by the common law and rules of court to ensure the propriety of the judiciary's own functioning.

Appeals, on the other hand, are an integral part of the criminal case itself. Burnett v. State, 198 So. 500 (Fla. 1940). They are legislatively created and are a right of criminal defendants in Florida. Id.; section 924.05, Fla. Stat. (1983). A criminal action is deemed to be pending (i.e., "active") until disposition of appeal or until the deadline for appeal expires. Wilson v. Clark, 414 So.2d 526, 530 (Fla. 1st DCA 1982); Heilmann v. State, 310 So.2d 376 (Fla. 2d DCA 1975); Southern Title Research Co. v. King, 186 So.2d 539, 544 (Fla. 4th DCA 1966). Post-conviction proceedings are deemed to be civil challenges to final appellate decisions. See Burnettv. State, 198 So. 500 (1940); State v. Smith, 118 So.2d 792, 793 (Fla. 1st DCA 1960).

Other examples of consistently applied distinctions between appeals and post-conviction proceedings include the federal constitutional right to counsel during trial and on direct appeal, but not in post-conviction proceedings, Ross v. Moffit, 417 U.S. 600, 610 (1974); Cox v. State 320 So.2d 449, 450 (Fla. 5th DCA 1975); the fact that juries are empowered to hear criminal trials pursuant to the sixth amendment, while, obviously, no sixth amendment jury trial right exists in Rule 3.850 actions and juries do not hear such proceedings; and the fact that the State may not appeal acquittals in criminal cases while in Rule 3.850 actions the State may appeal rulings in the petitioner's favor, see State v. White, 470 So. 2d at 1378. In State v. Weeks, 166 So.2d 892 (Fla. 1964), this Court recognized direct appeal as a "critical step in criminal prosecution" which called for availability of court-appointed counsel. Id. at 894. That reasoning has not been extended to discretionary proceedings after direct appeal as a matter of constitutional law. See Cox v. State, 320 So.2d 449 (Fla. 4th DCA 1975). As this Court has put it: "[P]ost-conviction collateral remedies are not steps in a criminal prosecution but are in the nature of independent collateral civil actions governed by the practice

of appeals in civil actions . . ." White, 470 So. 2d at 1378.

Fundamental distinctions between appeals and extraordinary writs are also found in the Florida Constitution's jurisdictional authorization. The Supreme Court of Florida is granted nine categories of jurisdictional authority. The first is mandatory jurisdiction over certain appeals. Art. V, section 3(b)(1), Fla. Const. The second is mandatory over certain appeals which are legislatively authorized. Art. V, section 3(b)(2), Fla. Const. The remainder are all discretionary and include issuing writs of prohibition, mandamus, quo warranto, habeas corpus, and all other writs necessary in aid of the court's jurisdiction. District Courts of Appeal are given jurisdiction to hear those appeals which are not directly appealable to the Supreme Court. Art. V, section 4(b)(1), Fla. Const. They are given separate discretionary jurisdiction to issue writs. Art. V, section 4(b)(3), Fla. Const.

Pursuant to that constitutional authority, the Florida judiciary enacted Rule 9.030, Florida Rules of Appellate Procedure. In that rule, jurisdiction of the Supreme Court is divided into (1) appeal jurisdiction; (2) discretionary jurisdiction; and (3) original jurisdiction, which includes writs. Fla. R. App. P. 9.030(a)(1), (2) and (3). Jurisdiction of the District Courts of Appeal and the Circuit Courts are divided into the same categories with additional certiorari jurisdiction. Fla. R. App. P. 9.030(b)(2), (c)(2).

Florida rules of court maintain the distinctions between appeals and writs.[4] For example, special rules of procedure apply to petitions for extraordinary remedies. Rule 1.630, Florida Rules of Civil Procedure, specifies pleading, process, and response for original proceedings by writ filed in trial courts. That rule supplements Rule 9.100 which guides original proceedings by writ which are filed in appellate courts. Court Commentary, Fla. R. Civ. P. 1.630.

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[4] As this Court recently held, Rule 3.850 has supplanted the writ of error coram nobis and certain petitions for writ of habeas corpus. Richardson v. State, 14 FLW 318 (Fla. June 29, 1989).

Thus, the distinctions between appeals and writs has affected federal constitutional rights and Florida jurisdictional authority. It has appeared in numerous judicial opinions delineating the rights of petitioners. It has been recognized in numerous rules of judicial procedure, directing the courts to distinguish appeals from extraordinary or post-conviction remedies and to treat them accordingly. The legislative authorization for criminal appeals as a matter of right has not been held to include all forms of post-conviction proceedings and other extraordinary remedies. Given all this, it goes beyond the credible to say that the Legislature was unaware of the significant legal distinctions between post-conviction proceedings and appeals when it enacted section 119.011(3)(d)(2). Where such legal differences exist, statutory language is to be given its technical and legal meaning. Williams v. Dickenson, 9 So. 847, 849 (Fla. 1891).

The absence of an express exemption for these records during post-conviction proceedings leaves no room for judicial speculation of what the Legislature meant to exempt. Failure to order disclosure here is creating a judicial exemption for the records, inconsistent with the Act and with judicial interpretation of it. See Tribune Co. v. Public Records, supra; Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984); Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979); Bludworth v. Palm Beach Newspapers. Inc., 476 So. 2d 775 (Fla. 4th DCA 1985).

4. Regardless of the "Active" Status of Any Investigation, Immediate Disclosure of Records and Reports For Which There is No Compelling Governmental Interest in Secrecy is Required

Disclosure of exempt public records is a matter of executive discretion which must be exercised consistent with first amendment and common law principles which favor open government. Palm Beach Newspapers v. Terlizzese, 10 Med.L.Rptr. 1767 (Fla. 15th Cir. Ct. 1984); Palm Beach Newspapers v. Terlizzese, 10 Med.L.Rptr. 1769 (Fla. 15th Cir. Ct. 1984), cited with approval, Bludworth v. Palm Beach Newspapers, supra, 476 So. 2d 775.

> It is clear that government may restrict access to information. . . only if it has a compelling interest in doing so. . . The mere existence of a

> criminal investigation will not in every case establish that there is a compelling interest in withholding information from the public.

Palm Beach Newspapers v. Terlizzese, 10 Med.L.Rptr. at 1768.

These cases reveal that analysis would not end even if there was a finding that the investigation continued to be "active". The state's "investigation" in Mr. Provenzano's case is, of course, far from "active" under the terms of the statute. Investigative records should be withheld only if there is a compelling need supporting their secrecy. In Terlizzese, petitioner sought an autopsy report. Once two suspects were arrested for the victim's murder, the court held that no compelling need could be demonstrated to restrict the public's right to the report. The report was ordered released notwithstanding its status as active criminal investigative information.

Thus, in determining whether disclosure is appropriate, the Court must examine the purposes forwarded by secrecy and determine whether these purposes are served. Here, secrecy is being maintained for no useful purpose. Indeed many of the items requested by Mr. Provenzano would not have been protected from disclosure at common law. Where the "police secrets" doctrine did not cover particular types of information, that information was public regardless of the status of a relevant investigation. See Tribune Co. v. Cannella, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), aff'd in Dart and rev'd in par, 458 So. 2d 1075 (1984). These items should have been made available upon request. The failure to disclosure violates the common law principles favoring public disclosure over secrecy embodied in the Act itself. See Bludworth v. Palm Beach Newspapers, supra, 476 So. 2d at 779 n.1.

B. SECTION 119, FLA. STAT. DOES NOT PROVIDE AN EXEMPTION FOR ATTORNEY "WORK PRODUCT'' ONCE CRIMINAL LITIGATION HAS BEEN CONCLUDED

Another basis upon which the state attorney claimed exemption from the Public Records Act was as follows:

> This file contains the direct or directed product of an agency attorney reflecting "a mental impression, conclusion, litigation strategy or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation which has not concluded". F.S.

119.07(3)(0). This case has been involved in other post-conviction litigation.

Section 119.07(3)(o) provides as follows:

> (o) A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from the provisions of subsection (1) until the conclusion of the litieation or adversarial administrative proceedings. When asserting the right to withhold a public record pursuant to this paragraph, the agency shall identify the potential parties to any such criminal or civil litigation or adversarial administrative proceedings. If a court finds that the document or other record has been improperly withheld under this paragraph, the party seeking access to such document or record shall be awarded reasonable attorney's fees and costs in addition to any other remedy ordered by the court.

Id. (emphasis added).

The State's unfounded interpretation of this statutory exemption creates an anomaly that clearly contravenes the meaning of the Public Records Act. The exemption cited by the state attorney protects materials labeled attorney work product from disclosure only "until the conclusion of the litigation." Fla. Stat. section 119.07(3)(o). The State believes that the pendency of Mr. Provenzano's motion for post-conviction relief reactivates the litigation between the parties and immunizes its file from disclosure. The state attorney's position flies in the face of the statute's express language.

The exemption relied on by the state attorney was in fact addressed in a recent amendment to the statute formulated to address the problem raised in Orange County v. Florida Land Company, 450 So. 2d 341 (Fla. 5th DCA 1984), rev. denied, 458 So. 2d 273 (Fla. 1984). That case was based on a request under the Public Records Act for documents sought during pretrial discovery in a civil proceeding. The exemption now prevents a state agency from facing an undue disclosure burden during pretrial

discovery. Contrary to the state's position, this exemption was not created to forever exempt from disclosure materials purportedly classified as attorney work product.

The state attorney has successfully prosecuted its case against Mr. Provenzano. Mr. Provenzano sought appellate review of his conviction and was denied relief. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). Once he was denied relief from the Florida Supreme Court the criminal litigation between the State and Mr. Provenzano terminated. Carrying the state attorney's argument to its logical conclusion, Mr. Provenzano was entitled to attorney work product contained in the state attorney's files after his appeal was terminated but before the governor signed a warrant scheduling his execution.[5] The state attorney's theory suggests that the signing of the warrant reactivated the litigation in this case. Under this interpretation Mr. Provenzano will not be allowed access to the state attorney's file until after he is executed. The policy of free and open government underlying the Public Records Act did not intend this onerous result. See Tribune Company v. In re: Public Records; Tribune Company v. Canella, supra, 458 So. 2d 1075.

The exemption from disclosure in section 119.07(3)(o) is a temporary exemption for attorney work product materials. The exemption only applies during the pendency of litigation. See City of North Miami Herald Publishing Co., 4668 So. 2d 218, 219 (Fla. 1985). The attorney work product exemption is a qualified privilege and does not shield from disclosure the files of the state attorney in perpetuity. Seminole County v. Wood, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987). Just as significantly, the records sought by Mr. Provenzano did not involve any materials prepared or produced by the State in the litigation of the Rule 3.850 action. Cf. Orange County v. Florida Land Co., supra, 450 So. 2d 341 Rather the materials sought involved

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[5]It is again worth noting that Mr. Provenzano sought disclosure of the records at issue before a death warrant was signed and before his Rule 3.850 motion was filed.

matters relating to the original prosecution in the criminal action, a proceeding which ended at the conclusion of direct appeal. See section 119.07(3)(o)(Work product exemption applies only "until the conclusion of the litigation . . ."). The exemption cited by the State was simply inapplicable to Mr. Provenzano's request.

The Court in Seminole County explained the limits of attorney work product privilege contained in section 119.07(3)(o), stating:

> Petitioner's argument that the exemption controlling production until the conclusion of the litigation should be construed to mean until all litigation regarding the specific [state attorney file] is concluded is without merit. The statutory language in the Public Records Act is clearly to the contrary and only the legislature could create such an extended exemption.

Seminole County, 512 So. 2d at 1002.

The state attorney has declined to recognize the limits of the attorney work product privilege contained in the Public Records Act. His reading of the statute is overbroad and yields an incongruous result. The state attorney is obligated to disclose attorney work product materials contained in his file regarding the original, criminal prosecution.[6]

C. SECTION 119, FLA. STAT. DOES NOT CONTAIN *AN* EXEMPTION FOR "HANDWRITTEN NOTES, DRAFTS, AND OTHER DOCUMENTS," AND THUS THE MATERIAL IS SUBJECT TO PUBLIC ACCESSIBILITY

The state attorney, without citing a statutory exemption to section 119, also claimed that his files well exempt because:

> This file contains handwritten notes, drafts, and other documents that are not public records. See Shevin v. Bryon, Harless. Schaeffer. Reid and Associates, 379 So. 2d 633 (Fla. 1980); Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA 1984).
>
> By definition it is clear that this type of information is not exempt:
>
> 119.011 Definitions. -- For the purpose of this chapter:
>
> (1) "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless

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[6] Indeed, it is in such purported "work product" materials that proof of a petitioner's claim that the prosecutor knowingly used perjured testimony, see Richardson, 14 F.L.W. at 319; Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986), will often be based.

of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

(emphasis added).

These "handwritten notes, drafts, and other documents" may well be attorney work product. Trial preparation material regardless of whether it is handwritten or typed is clearly not exempt, however, irrespective of whether it may be attorney work product or not. Hillsborough County Aviation Authority v. Azzarelli Construction Company, 436 So. 2d 153 (Fla. 2d DCA 1983). Attorney work product, such as trial preparation notes, mental impressions, legal theories and notes about the strength or weakness of a juror or witness contained in the state attorney's files must be produced under the Public Records Act, as discussed in section C, supra. Hillsborough, County Aviation Authority, supra; Edelstein v. Donner, 450 So. 2d 562, approved, 471 So. 2d 26 (Fla. 1985).[7]

The state attorney has cited no exemption, and clearly none applies. This basis for refusing access is clearly erroneous.

D. MR. PROVENZANO'S REQUEST WAS REASONABLE UNDER SECTION 119

The final basis for the state attorney's refusal to provide access was stated as follows: "This request is not being made under reasonable conditions, F.S. 119.07(1)(a)." The state attorney provided nothing which would explain what this statement meant. The statute provides:

119.07. Inspection and examination of records; exemptions

(1)(a) Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision of the custodian of the public record or his designee. The custodian shall furnish a copy or a certified copy of the record upon payment of the

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[7]As noted, work product is subject to disclosure once the litigation terminates. The litigation terminated in this regard when this Court affirmed Mr. Provenzano's conviction on direct appeal. Mr. Provenzano's counsel were not interested in any work product involving the post-conviction action. The work product exemption had, however, long been inapplicable to materials produced in the original criminal proceedings, since those proceedings terminated at the conclusion of direct appeal. See section C, supra.

> fee prescribed by law or, if a fee is not prescribed by law, upon payment of the actual cost of duplication of the record. The phrase "actual cost of duplication" means the cost of the material and suplies used to duplicate the record, but it does not include the labor cost or overhead cost associated with such duplication. However, the charge for copies of county maps or aerial photographs supplied by county constitutional officers may also include a reasonable charge for the labor and overhead associated with its duplication. Unless otherwise provided by law, the fees to be charged for duplication of public records shall be collected, deposited, and accounted for in the manner prescribed for other operating funds of the agency.

Section 119.07, Fla. Stat. (emphasis added).

It is difficult to understand what the state attorney contended was "unreasonable" since he refused Mr. Provenzano's request for access prior to discussing any specific arrangements as outlined in the statute. Mr. Provenzano's request asked for "immediate access" and closed by stating:

> We are laboring under severe time restrictions and would appreciate your prompt attention to this records request. Thank you for your attention and assistance in this matter.

To the extent that counsel for Mr. Provenzano were operating under "severe time restrictions," clearly Mr. Provenzano cannot be held to blame. Pursuant to Rule 3.850, Mr. Provenzano had until April 20, 1989, to file a petition for post-conviction relief. However, prior to that time, the Governor of the State of Florida, a party opponent, signed a death warrant setting Mr. Provenzano's execution before that two-year deadline. All action on behalf of Mr. Provenzano was, of necessity, speeded up. Despite that, the state attorney refused access to his file without even discussing with counsel the terms of access.[8]

In its order, the circuit court ruled that the record request was not "reasonable" because it was a

> blanket request. Defendant is not entitled to all records relating to the prosecution in State v. Provenzano held by the State Attorney. Should

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[8]The section 119 request was made in January, 1989. The state attorney sent his letter of refusal out on March 6, 1989. Telephone calls regarding the request went unanswered prior to the issuance of the refusal. No effort was made to explain what it was that made Mr. Provenzano's request one "not . . . made under reasonable conditions." This is not surprising: no such explanation was availing because there was nothing unreasonable about Mr. Provenzano's request.

> Defendant choose to specify which records he seeks, and those to which he believes he is legally entitled, this Court would consider such petition.

This clearly flies in the face of section 119. Nowhere in the Public Records Act is it written that requests must be particularized with a specific legal entitlement. To the converse, the act itself is legal entitlement for access to the entire file.

> 119.01 General State policy on public records
>
> (1) It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person. (Emphasis added)

Section 119.07(1)(a) provides for cost of duplication, supervision during inspection by the custodian, while (1)(b) provides for additional charges "[i]f the nature or volume of public records requested to be inspected, examined, or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved. , , ."

Further, the circuit court clearly applied an incorrect standard. When applying the Public Records Act, the individual making the request is not required to make a showing of entitlement to access, but rather the state agency must prove that the material requested is subject to one of the express exemptions to the statute.

> The Public Records Act is to be liberally construed in favor of "open government to the extent possible in order to preserve our basic freedom, without undermining significant governmental functions such as crime detection and prosecution...." Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 779 (Fla. 4th DCA 1985). Exemptions from disclosure are to be construed narrowly and limited to their stated purposes. Miami Herald Publishing Co. v. City of North Miami, 452 So.2d 572, 573 (Fla. 3d DCA 1984); Cf. State v. Nourse, 340 So.2d 966, 969 (Fla. 3d DCA 1976)("unless the right to the exception is clearly apparent in the statute, no benefits thereunder will be permitted"). "[W]hen in doubt the courts should find in favor of disclosure rather than secrecy." Bludworth at 780, n. 1.

Tribune Co. v. In Re: Public Records, 493 So. 2d 480, 483 (Fla. App. 2nd Dist. 1986). In any event, as the letter of request forwarded to the State by Mr. Provenzano's counsel demonstrates, the request was made with as much specifity as

was possible -- indeed, the request specifically cited sixteen (16) categories of information regarding which disclosure was sought. No more particularity could have been mustered: since the State was keeping its files secret, Mr. Provenzano's counsel did not know what the files contained, and accordingly could particularize the request no further.

Neither the state attorney nor the circuit court have specified wherein the request in this case was "unreasonable". No such showing can be made. Mr. Provenzano and his counsel, along with every other citizen of Florida, are absolutely entitled to access to the public records of the State, which include the state attorney's file. None of the enumerated exemptions apply, and thus the circuit court erred in refusing to order access.

III. MR. PROVENZANO IS ENTITLED TO THE SAME TREATMENT AS OTHER DEATH SENTENCED INMATES

The Office of the Capital Collateral Representative (CCR) is statutorily mandated to represent persons sentenced to death in post-conviction proceedings both in state and federal courts. Section 27.702, Fla. Stat.; Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). In the course of such representation, CCR routinely requests access to numerous public records pursuant to section 119, including the state attorneys' files and records. Such a request was routinely made, but unroutinely denied in Mr. Provenzano's case.

In the vast majority of cases investigated by CCR, the state attorneys have willingly and cooperatively complied with requests identical to that made in this case. One of the more recent responses to a "119 request" is attached hereto as Appendix A. This reply, by the State Attorney for the Third Judicial Circuit of Florida, stated: "Please be assured that our office stands ready to assist immediately with your records request. It is our view that Mr. Williamson fully deserves the death penalty and our office does not want to be a part of any delay in carrying our [sic] this lawful sentence of the court." (App. A). We obviously

disagree with the state attorneys' perceptions of our clients; however, CCR and most Florida state attorneys are in agreement that everyone's interests -- the courts, the parties, counsel, the citizenry -- are best served by full disclosure.

In another case, State v. Kine;, the State Attorney for the Sixth Judicial Circuit relied on two valid exemptions to the Public Records Act (sec. 119.07(3)(h) information which reveals the identity of the victim of sexual battery or child abuse, or other delineated statutes); sec. 119.07 (3)(j)(criminal intelligence received prior to January 25, 1979)), and copied the other 1698 pages of his file for CCR's inspection (App. B).

In the typical case, after sending out a request for public records access, CCR receives no written response, but merely makes arrangements with the state attorney's office for inspection. Access to and copying of these files then proceeds in a manner convenient to both parties.

There have been only a handful of cases where a state attorney's office has refused access to its files when a proper section 119 request is made. In every one of those cases except this one, the circuit court has ordered access. For example, in State v. Kokal, Case No. 83-8975-CFA (Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Fla.), Judge Wiggins granted CCR's Motion to Compel Disclosure of Public Records Pursuant to Florida Statute section 119.01, et. seq., (App. C). Likewise, in State v. Jones, Case No. 88-17101-CA (Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Fla.), Judge Soud also ordered compliance with section 119 but excluded certain documents which he had examined in camera and determined to be exempt from disclosure (App. D). Other cases in which access was ordered by the circuit court after a state attorney's refusal to comply with section 119 include State v. Deaton, (Case No. 83-10366-CFA (Judge Moe, Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County); State v. Phillips, Case No. 83-435 (Judge Snyder, Circuit Court of the Eleventh Judicial Circuit, in and for Dade County); State v. Hooper, Case No. 82-155-CF (Judge Adams,

Circuit Court of the Fourth Judicial Circuit, in and for Nassau County); State v. Lara, Case No. 81-26182 (Judge Smith, Circuit Court of the Eleventh Judicial Circuit, in and for Dade County).

Finally, it should be noted that even the Attorney General's office agrees, when it suits its purposes, that the Public Records Act applies to state attorney's files. Thus in State v. Lightbourne, Case No. 81-170-CF (Circuit Court of the Fifth Judicial Circuit, in and for Marion County), the State, in its Response to Mr. Lightbourne's Motion to Vacate Judgment and Sentence, expressly relied on the Public Records Act to argue that a particular claim should have been raised in a prior motion to vacate:

> [A]lthough Lightbourne has alleged that he should be excused for his failure to raise his present claims on appeal or in his first post-conviction motion in 1985 (Emergency Motion at 6, 45), HE HAS NEVER ALLEGED ANY CAUSE WHY THESE CLAIMS WERE NOT RAISED PRIOR TO JANUARY 1, 1987. . . .
>
> To the extent that Lightbourne seeks to argue that he "needed" the Public Records Act of 1985 to raise the instant claims, the Florida Supreme Court expressly rejected this argument in the Demps [v. State, 515 So. 2d 196 (Fla. 1987)] case cited above. (Emphasis and capitalization in original)

Demps, which will be discussed more fully below, held that the Florida Public Records Act was equally available to Mr. Demps prior to the cut off date for post-conviction relief in that case.

In all of these cases, access to state attorney's files has been given voluntarily or compelled by the circuit court. Justice requires the same for Mr. Provenzano.

IV. THE ENDS OF JUSTICE REQUIRE THAT A CAPITAL POST-CONVICTION LITIGANT HAVE ACCESS TO THE STATE'S PROSECUTORIAL FILES

In determining whether access to the state attorney's files is appropriate, this Court should consider the purposes served by disclosure as apposed to secrecy. Disclosure furthers numerous goals, including the avoidance of piecemeal litigation, as well as meeting society's need for and the eighth amendment's requirement of

reliability in the imposition of its most final punishment. It should not be forgotten that there is a "qualitative difference" between death and imprisonment, and "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-46 (1957)(Frankfurter, Jr., concurring); id. at 77 (Harlan J., concurring). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, Beck v. Alabama, 447 U.S. 625, 637-38 (1980); sentence, Lockett v. Ohio, 438 U.S. 586, 604 (1978); appeal, Gardner v. Florida, 430 U.S. 349, 360-61 (1977); and post-conviction proceedings. See Zeigler v. Wainwright, 805 F.2d 1422 (11th Cir. 1986); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair state and federal post-conviction proceedings. Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980)(Phillips, J.); Evans v. Bennett, 440 U.S. 1301, 1303 (1979)(Rehnquist, Circuit Justice).

Information obtained pursuant to section 119 frequently reveals meritorious claims under Bradv v. Maryland, 373 U.S. 83 (1963). At a minimum, the ends of justice dictate that a capital defendant not be executed on the basis of a wrongful or unreliable capital conviction and/or sentence of death when the evidence demonstrating that the conviction or sentence is "wrongful" was withheld by the State at trial. Such conduct "preclude[s] the development of true facts [and] result[s] in the admission of false ones," and "pervert[s] the [sentencer's] deliberations concerning the ultimate question whether in fact [the defendant deserves to die]." Smith v. Murray, 106 S.Ct. 2639, 2668 (1986).

Florida cases in which material was wrongfully withheld under Brady and in which the truth came to light because of section 119 are too numerous to cite. They include Roman v. State, 528 So. 2d 1169 (Fla. 1988), wherein this Honorable Court ordered a new trial on the basis of information uncovered pursuant to a section 119 request. Information disclosed pursuant to section 119 was what "saved" the two wrongfully convicted men personally involved in the Tribune Co. case: William Riley Jent and Ernest Lee Miller. Both those men faced execution by electrocution until public access into the prosecutor's files revealed that they were prosecuted for the murder of a victim whose identity was in serious dispute. See Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1986). Those men are not on death row today.

Other illustrative cases include State v. Routly, Case No. 79-1270-CF-A-01 (Circuit Court of the Fifth Judicial Circuit, in and for Marion County). As a result of a 119 request for inspection of the State Attorney's files in that case an immunity agreement was uncovered between the State and a key prosecution witness. This agreement had not been provided to defense counsel at trial. Regardless of the eventual outcome of this claim[9], this is precisely the type of claim which should be settled in post-conviction litigation, and at the earliest possible opportunity. The legitimate need for secrecy in a prosecutor's file prior to conviction dissolves once a criminal defendant stands convicted. Thereafter, particularly in a death penalty case, society's need for reassurance that the conviction was lawfully obtained becomes paramount. If the State has fulfilled its ethical duty to abide by the Constitution, then there will be no need for or possibility of a reversal and a retrial. On the other hand, if the State has not played by the rules, that should not be kept a secret until after an execution. Messrs. Jent and Miller are living examples. See also Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986)(granting federal habeas corpus relief because a Florida prosecutor knowingly presented

[9]Mr. Routly's case has not been briefed for this Court, but will be in the near future.

perjured testimony); Troedelv. Dunner, 828 F.2d 670 (11th Cir. 1987)(same, intentional use of misleading testimony); Arango v. State, 497 So. 2d 1191 (Fla. 1986)(new trial ordered because evidence withheld in violation of Brady v. Maryland and United States v. Baaley); Roman, supra.

The list of examples is quite convincing with regard to the efficacy of section 119 as a tool for the ascertainment of truth. It is clear, however, that when material wrongfully withheld by the state attorney under Brady, or its progeny of cases, is finally brought to light, the courts are quick to order relief. Mr. Provenzano is no less entitled to know if there was Bradv error in his trial than any other post-conviction litigant.

The District Courts of Appeal, like the circuit courts, have consistently found that section 119 disclosure is more than proper in capital post-conviction actions. While this Court has not had to directly rule on the issue, it has indicated that it also believes section 119 has long provided access to state attorneys' files. In Demps v. State, 515 So. 2d 196 (Fla. 1987), this Court ruled that information obtained by means of section 119 in a successive capital post-conviction action would not excuse an untimely petition for post-conviction relief because such information was available to the defendant in earlier proceedings under the Public Records Act:

> Demps next alleges that, after repeated requests, the state withheld evidence impeaching witness Hathaway's credibility. He claims that he only recently obtained the information after invoking the Florida Public Records Act, Chapter 119, Florida Statutes (1985). The act was equally available to Demps prior to January 1, 1987, the cut off date for post-conviction relief in the instant case. Rule 3.850 bars an untimely petition based on information previously ascertainable through the exercise of due diligence. . . . These issues are now barred.

Id. at 197-98(emphasis added). If the Court did not believe that disclosure under section 119 was available to the defendant, it would not have barred Mr. Demps' claim and denied a stay of execution. It was because of the availability of section 119 disclosure well-before the successive Rule 3.850 was filed that the Court found

the claim to be procedurally barred.

Mr. Provenzano requests only that he be treated equally with other persons similarly situated; that section 119 be applied fairly to his case; that he be given the same opportunity as virtually every other capital post-conviction litigant to test the legality of the criminal process which resulted in his sentence of death. As was stated during the oral argument held in Mr. Provenzano's case, he has pled a violation of Brady, but because of the state attorney's refusal to treat Mr. Provenzano equally with virtually every other person in like circumstances, Mr. Provenzano is unable to develop, present, or even plead that claim.'' When he has been able to fully investigate that claim, when the State finally complies with the statute, Mr. Provenzano will have the requisite tools: if Brady was violated, he will then be able to develop, plead and present his claim; if after disclosure it is discovered that there was no Brady violation, Mr. Provenzano will withdraw his claim. In the meantime, Mr. Provenzano is being denied the equal protection of law and the due process provided to others.

V. DIRECTING THE STATE TO COMPLY WITH THE STATUTE WILL AVOID PIECEMEAL LITIGATION, AND FURTHER THE EXPEDITIOUS LITIGATION OF PETITIONER'S CLAIMS FOR RELIEF

Mr. Provenzano has a right to have his claims litigated and ruled upon by Florida's courts in a timely fashion. Likewise, the state and the courts have an interest in avoiding piecemeal litigation that can drag on for years. To further those interests, courts have developed procedural bars to claims raised in subsequent proceedings when they should have been raised earlier.

As this Court is very well aware, Florida's post-conviction statute provides a

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''However, if he did not plead it, he would be later barred. Given the State's refusal to comply with the statute, and this Court's procedural rules, Mr. Provenzano has done all he could: he presented a Brady claim and asked the lower court to order the state attorney to disclose his files under 119 in order to ascertain whether Brady was violated. The lower court refused. Mr. Provenzano thereafter presented his claim to this Court and requested that the Court reverse the lower court's ruling and direct disclosure.

procedural bar for claims "based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." Rule 3.850, Fla. R. Crim. P. This Court is also well aware that Brady provides an exception to this procedural bar, precisely because Brady material is withheld from the defense attorney at trial and thus does not involve a matter of record which can be raised on appeal. Similarly, if, post-conviction, the State continues to withhold evidence to which the defense is entitled, a litigant cannot be barred from urging the claim when it is discovered, even when discovery occurs years after the conviction or even the initial post-conviction action.

A petitioner cannot be faulted for not raising a claim earlier when it is the State itself that suppresses the "tools" upon which a claim can be based:

> In the present case, [the petitioner] has not deliberately withheld this ground for relief, nor was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for [the petitioner's] delay in presenting this claim rested on the State's failure to disclose. Under the circumstances, [the petitioner] has not waived his right to [be heard] on the claim.

Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); see also, Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979).

Such claims therefore must be determined on their merits, whenever they surface, for such claims involve interference by state officials which preclude the petitioner from bringing the claims earlier. See Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights); cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986).

In this regard, in a different but related factual context, the United States Supreme Court has held that a State's asserted procedural obstacles are insufficient to overcome a post-conviction petitioner's entitlement to relief when it is the State's own misconduct that resulted in the petitioner's failure to urge the claim earlier. In Amadeo v. Zant, 108 S. Ct. 1771, 1777 (1988), the United States Supreme Court noted:

> If the District Attorney's memorandum was not reasonably discoverable

> because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for th failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents.

Likewise, in Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), the Seventh Circuit found cause for procedural default when the evidence which gave rise to a claim of ineffective assistance of counsel was concealed by the assistant state attorney.[11] Of course, in Mr. Provenzano's case it is "interference" (i.e., the refusal to comply with valid disclosure requests pursuant to section 119) which has made the factual basis for a Brady claim unavailable. Murray v. Carrier, 106 S. Ct. at 2646. No bar can be applied when and if Mr. Provenzano does establish a basis for his Brady claim, because it is the state's own conduct which causes this result, and is the reason why the claim cannot be pled properly in these proceedings. See Walker v. Lockhart, 703 F.2d 942, 955 n.26 (8th Cir. 1985)(Brady claim brought in successor petition must be heard on the merits because State's failure to disclose evidence prevented basis of claim from being presented earlier); cf. Freeman v. Georgia, 599 F.2d 65, 71-72 (5th Cir. 1979); Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 845 (4th Cir. 1964). Like Walker, in this case the State's refusal to provide

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[11] The evidence concealed concerned fifteen-year-old convictions of the defendant in another jurisdiction. The State argued that defense counsel, who stipulated to two such prior convictions which in fact did not exist, could have independently secured the records of the convictions from the other jurisdiction. The court pointed to the difficulty the State itself had had in attempting to secure the records, and said:

> As an indigent death row inmate relying on the efforts of appointed counsel, petitioner did not have available to him all of the resources of the State in attempting to secure copies of the alleged New York convictions. He sought the help of the NAACP Legal Defense Fund in New York in locating the records, but that office was unable to produce certified copies of the New York records until the summer of 1985. Without the factual information contained in those records, any ineffective assistance of counsel claim based on Mr. Kinser's stipulation to the existence of the New York convictions would have been useless for petitioner who would have been unable to demonstrate prejudice as a result of Mr. Kinser's error.

Lewis, 832 F.2d at 1457.

access, in contravention of the Public Records Act, precludes counsel from knowing the basis, if any, of the claim. Like Freeman and Barbee, Mr. Provenzano's collateral attorneys are now misled and kept in the dark by the State's own misconduct: its refusal to comply with section 119. Like Amadeo. Mr. Provenzano's claim will have to be heard when and if the facts come to light, whether they come to light today or at some point in the future. The state attorney's withholding in this case furthers no one's interest: it flies in the face of the courts' interests in avoiding protracted, piecemeal litigation; it flies in the face of the public's right to know whether Mr. Provenzano's capital conviction and death sentence were fair and reliable; it flies in the face of Mr. Provenzano's due process, equal protection, and eighth amendment rights -- if Brady was violated, Mr. Provenzano's conviction and death sentence are fundamentally unfair; however, Mr. Provenzano may be executed without ever knowing the truth in this regard because of the state attorney's desire to keep his files secret. The state attorney's position in this case flies in the face of the interests acknowledged by most other state attorneys in the State of Florida: if the State did not violate Bradv, it is in its interest to disclose its files and show all concerned that it has acted with "clean hands." One cannot help but wonder what it is that the state attorney here is so hesitant to disclose.

The citizenry, the courts, the state, and Mr. Provenzano all have an interest in this Brady claim being resolved sooner rather than later. Mr. Provenzano's interest is in vindicating his rights without years of delay. Likewise, all concerned have, or should have, a vital interest in insuring that the trial proceedings in this capital case were fundamentally fair, and if so, in carrying out the courts' sentence. Given these interests, the state attorney's position here is quite troubling.

In related contexts, the United States Supreme Court has repeatedly reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable

principles." Kuhlmann v. Wilson, *477* U.S. *436, 437* (1986), quoting Fay v. Noia, 372 U.S. *391, 438 (1963).* "Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." **Fay**, *372* U.S. at *438.* The state attorney comes before this Court not with clean hands, but in breach of a fundamental statutory and constitutional duty -- to provide access to his files and records in order to assure due process and equal protection of the law. A holding that Mr. Provenzano should not be provided with access to the requested files under the facts of this case would not serve any equitable principles which govern the equitable nature of post-conviction remedies. Instead, it would potentially reward the State for unconstitutional conduct.

Procedural bars, after all, depend on the proper functioning of the adversarial system. That functioning, in turn, is founded upon **two** independent components. On the one hand, it requires discharge of the defense function. **See** Murray v. Carrier, *477* U.S. *478, 496 (1986).* Criminal proceedings are a "reliable adversarial testing process" only where an accused is represented by counsel whose performance satisfies professional standards commensurate with the sixth amendment. Strickland v. Washinnton, *466* U.S. *668 (1984).* If the adversarial process is to work, defense functions must be carried out in a way that precludes "sandbagging," or the withholding of claims at trial **so** that they may be relied upon in subsequent proceedings. Wainwright v. Sykes, *433* U.S. *72. 89 (1977).* No sandbagging or intentional withholding of claims has taken place here. Indeed, Mr. Provenzano s counsel have done all they could to withhold no claims from this, petitioner's first and only post-conviction action.

The adversarial process is also impaired by the perversion of its other component, the prosecutorial function. Giglio v. United States, *405* U.S. 150 *(1972);* Miller v. Pate, *386* U.S. 1 *(1967);* Napue v. Illinois, *390* U.S. *264 (1959);* United States v. Banley, *473* U.S. *667 (1985).* Such **a** perversion unquestionably occurs where the prosecutor jeopardizes the integrity of formal proceedings by

misleading or deceptive conduct that is intended to accomplish illegal ends. Franks v. Delaware, 438 U.S. 154 (1978)(fourth amendment violated where state relies upon material misstatements in warrant proceedings); Oreaon v. Kennedy, 456 U.S. 667 (1982)(fifth amendment violated where prosecutor commits acts with the specific intent to violate double jeopardy rights); Napue v. Illinois (due process violated by prosecutor's failure to correct misleading trial testimony); United States v. Bagley (due process violated by prosecutor's withholding of critical impeachment evidence).

None of the interests served by any procedural rule, or ultimately by the adversarial system, would be furthered by enforcement of a procedural bar in the future against Mr. Provenzano if he is not allowed access to the tools upon which to base his claim at this juncture.

In this case it is the State, not Mr. Provenzano, that has undercut the integrity of judicial process and that is responsible for the failure, if any, to litigate paramount constitutional questions in accord with state procedural law. It is the state attorney who is jeopardizing the adversarial process when he withholds his files in direct contravention of section 119, due process, equal protection, and the eighth amendment's requirement of reliability in capital proceedings.

In order to insure the integrity of procedural bars in the future, the state has a compelling interest in disclosure now. As noted, if no Brady violation is apparent upon inspection of the state attorney's file, then no such claim can or will be argued. What is the state hiding? One cannot help but conclude that it is because the state attorney acted unconstitutionally in the first place that he should be wary of public scrutiny now.

VI. AUTHORITY FROM OTHER JURISDICTIONS ALSO SUPPORTS THE RESULT URGED BY MR. PROVENZANO IN THIS CASE

Florida's most immediate neighbor to the north has recently ruled on its Open Records Act. In Parker v. Lee, ___ S.E. 2d (No. 46301, decided May 4, 1989,

Georgia Supreme Court)(Appended hereto as App. E), the Georgia Supreme Court had before it a defendant whose murder conviction and death sentence were affirmed on direct appeal but whose rape conviction was reversed and remanded. Despite the fact that the defendant faced the possibility of reprosecution for rape, the Georgia Supreme Court found "that under the circumstances of this case the possible retrial of the defendant does not warrant non-disclosure of the [satate's] investigatory files." Id. at 1.

The Georgia Supreme Court had previously held that the state's files should be made available for inspection at the conclusion of a direct appeal and any petition for certiorari. Napper v. Georgia Television Co., 257 Ga. 156, 160 (356 S.E. 2d 640) (1987). After Napper, the Georgia legislature revised the Open Records Act to include a pending prosecution exemption. The Georgia Supreme Court had interpreted that exemption in the same way that Florida's Second District Court of Appeals did in Tribune Co., supra: the "pending prosecution" exception no longer applies after a conviction has been affirmed on direct appeal. The Georgia high court then went even further than that and in Parker v. Lee held that despite the fact that the defendant could be reprosecuted at any time, the state "to prevail in preventing disclosure, had the burden to show that Parker's retrial for rape is imminent and of a finite duration." Id. This requirement was necessary "so as not to defeat the overriding purpose of the Open Records Act, which is to encourage the evaluation of and to foster confidence in our government by providing access to public records. . . ." Parker v. Lee, slip op. at 6 (emphasis added).

This Court should do no less. Florida's dedication to open and accountable government should certainly be no less than that of Georgia. The relief sought by Mr. Provenzano is more than reasonably requested.

VII. CONCLUSION

Mr. Provenzano is entitled to the same treatment as other similarly situated litigants. Section 119 has consistently been understood (by the public, capital

post-conviction counsel, state attorneys and assistant attorneys general, circuit courts, district courts of appeal, and this Court) to allow the open accessibility to state attorney and law enforcement files and records after the completion of direct appeal in a criminal case. No less is due to Mr. Provenzano, a death row inmate.

Likewise, the state has a strong interest in vindicating its reputation as adhering to constitutional mandates which require a fair prosecution, not a victory at any cost, The judiciary has just as strong an interest in avoiding piecemeal litigation and in assuring that constitutional rights were not ignored in proceedings resulting in a capital conviction and death sentence. The citizenry similarly has a compelling interest in the functions of its courts and public officials, and in assuring that its government not operate in secret. Looking at this case from any perspective, there is absolutely no interest that is served by the state attorney's refusal to comply with section 119, except, of course, a possible interest in keeping constitutional violations hidden, an unlawful interest which is no interest at all.

The statute, the Constitution, common sense, and the ends of justice all counsel the result urged by Mr. Provenzano. Accordingly, Mr. Provenzano prays that this Honorable Court order that the state attorney provide reasonable access for inspection and copying of his files regarding Mr. Provenzano, that the lower court's order refusing to order such access be reversed, and that this case be remanded for proceedings consistent with the mandate of the Public Records Act. Mr. Provenzano also respectfully requests that this Honorable Court remand this cause for an

evidentiary hearing, and that the Court vacate his unconstitutional capital conviction and sentence of death for all of the reasons presented to this Court in this brief and in petitioner/appellant's prior submissions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid to Robert Butterworth, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 22 day of August, 1989.

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