IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,439

STATE OF FLORIDA,

Appellant,

v.

GREGORY ALLEN KOKAL,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

In the course of the prosecution of Gregory Alan Kokal, the sheriff and the state attorney for Duval County compiled investigative files. The prosecution resulted in a first degree murder conviction and death sentence. Under Florida law, the conviction and sentence was automatically appealed to the Supreme Court of Florida. Fla. Stat. section 921.141(4). This Court affirmed the conviction and sentence. Kokal v. State, 492 So. 2d 1317 (Fla. 1986).

Imposition of a death penalty is a matter of substantial public interest and importance. The Florida Supreme Court and the Florida legislature have recognized that a death sentence will receive greater scrutiny than a sentence of imprisonment. To that end, the Florida legislature created the Office of the Capital Collateral Representative (CCR) to represent death row inmates, such as Mr. Kokal, who have been denied relief on direct appeal. Fla. Stat. section 27.02. In order to fulfill its statutory mandate to provide effective representation to its clients, **see** Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988), CCR routinely requests and obtains access to jail records, prison files, sheriff's files and state attorney's files of its clients.

The facts included in such records are often directly relevant to claims for relief predicated on Brady v. Maryland and its progeny, and this Court has relied on information obtained through such access to records in finding that Brady error has occurred, **see**, e.g., Roman v. State, 528 So. 2d 1169 (Fla. 1988). Indeed, because of this access individuals who were wrongly convicted of capital crimes are today no longer on death row.

See, Tribune Company (Jent/Miller) v. Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986), **rev**. denied, 503 So. 2d 337 (Fla. 1987). The vehicle by which access is gained to these records is section 119, Fla. Stat. That statute is founded on the legislative commitment to open access to the State's files.

On August 25, 1988, Governor Martinez signed a death warrant scheduling Mr. Kokal's execution for Wednesday, October 26, 1988. Upon the signing of the warrant, Mr. Kokal was obligated under Fla. R. Crim. P. 3.851 to file a motion to vacate judgment and sentence or forever waive in the Florida state courts any challenge to his death sentence. Mr. Kokal filed a motion under Rule 3.850 with the trial court and a writ of habeas corpus with the Florida Supreme Court.

Mr. Kokal and his counsel directed a request for public records to Ed Austin, the State Attorney of Duval County, on August 25, 1988. The request sought access under the Public Records Act to the files and records in Mr. Kokal's case. A copy of that request, inadvertently omitted from the record on appeal, is attached to this brief. After being notified by telephone that the state attorney would not comply with the public records request, Mr. Kokal filed a motion to compel disclosure on September 15, 1988 (R. 33-35). The Jacksonville Sheriff's Office also denied a 119 request made by Mr. Kokal's counsel and Mr. Kokal, except for jail inmate records and arrest and booking reports. Because of this, Mr. Kokal filed an amended motion to compel on September 18, 1988, also seeking public records from the Jacksonville Sheriff's Office (R. 51-53).

On October 6, 1988, a scant twenty days before Mr. Kokal was scheduled to be executed, the Office of the State Attorney sent a written denial of access (R. 72) citing its disapproval of the holding in Tribune Company v. Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986), rev. denied, 503 So. 2d 337 (Fla. 1987). The written denial also claimed exemptions from disclosure for criminal investigation materials and attorney work product. **See** Fla. Stat. sections 119.07(3)(d), and 119.07(3)(o) (R. 73).

Mr. Kokal, through counsel, made a request for a hearing on the motion to compel and sought a continuance of the evidentiary hearing on the motion to vacate judgment and sentence until the court resolved the demand for access to the state attorney's files (R. 67-71).

The trial court ordered the state attorney to disclose his file under the Public Records Act (R. 95). On October 28, 1988, the state attorney filed an appeal from the order to disclose records (R. 96). That appeal was taken to the District Court of Appeals.

On June 21, 1989, Mr. Kokal filed a Motion to Dismiss the State's appeal on grounds that the district court lacked jurisdiction. The district court, on July 18, 1989, transferred jurisdiction to this Court. This proceeding follows.

SUMMARY OF ARGUMENT

The State Attorney's file is a public record subject to disclosure pursuant to Florida's Public Records Act, section 119, Fla. Stat. (1988). The plain language of the statute, the intent of the statute, the nature of Mr. Kokal's proceedings, the stakes at issue in this action, and precedent from this Court, the

District Courts of Appeal, and the vast majority of Florida's circuit courts all dictate this conclusion. The trial court's ruling directing disclosure herein was eminently reasonable, was not an abuse of discretion, and should not be disturbed on this appeal.

The State contends that Mr. Kokal's 119 request and the circuit court's order compelling disclosure were overbroad. While conceding now that parts of the file should be disclosed, at the time of Mr. Kokal's request the state attorney did not produce any of its files and did not identity specific items that it claimed exempt. The State's failures to argue for limited disclosure below, or to even seek to abide by the in camera inspection provisions of the statute, forecloses the presentation of such issues here.

In its brief the State creates four categories for documents in its file -- categories not related to the definitions or categories of exemption under section 119 but instead categories similar to classifications of discovery rules. The State similarly argued at the hearing that section 119 does not expand discovery. Essentially the State is attempting to limit application of 119 to the scope of discovery rules. Section 119 is <u>not</u> a discovery rule, and is <u>not</u> so limited. Its intent and its terms are quite specific and quite different than the rules of criminal discovery: section 119 was designed to effectuate the policy of open government. The State's position also overlooks the nature of Mr. Kokal's proceeding and his need to examine these materials to determine if his trial and sentencing

were fair and constitutionally valid. Other capital inmates are afforded this protection, as this Court has recognized. There is no valid reason to deny this protection to Mr. Kokal.

Mr. Kokal requested specific items, but the entire state attorney's file is plainly a public record under the statute, case law, and rules.

Post-conviction action is a separate civil proceeding, distinct from the original criminal proceeding, and the State's assertions therefore fail.

In most cases similar to Mr. Kokal's, Florida's state attorneys have readily agreed to disclosure. Some of the few in which disclosure is denied are currently pending before this Court. One such case is Provenzano v. State, Case Nos. 73,981 and 74,101, and Mr. Kokal presents herein a discussion similar to that provided to the Court in Provenzano, for the State's position herein is as unfounded as the State's position in Provenzano. These issues are obviously of vital significance in capital post-conviction proceedings. Refusals by Florida state attorneys to comply with section 119 adversely affect the cases of those unfortunate litigants in whose cases the State refuses to abide by the disclosure provisions of section 119. Although the State's brief does not address disclosure of the sheriff's files, the arguments Mr. Kokal presents herein also apply to those files. This Court should affirm the trial court's order requiring the state attorney and the sheriff to provide their files to Mr. Kokal's counsel as required by section 119.

ARGUMENT

I. THE ENTIRE STATE ATTORNEY'S FILE IS A PUBLIC RECORD THAT MUST BE DISCLOSED UNDER THE PUBLIC RECORDS ACT.

The people of Florida have long been committed to open government, and to an open judicial process.

> Unlike other states where reform of the judicial system has sometimes lagged, Florida has developed a modern court system with procedures for merit appointment 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. McMillian, 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 state attorneys have uniformly been made available to counsel for criminal defendants once they have been prosecuted and convicted of an offense and have 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 for the Fourth Judicial Circuit has sought to immunize from production the files and records of Gregory Kokal, 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 has asserted various legal arguments that contravene the letter and 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), rev. denied, 475 So. 2d 695 (Fla. 1985). The state attorney suggests that his files and records comprise four types of documents and argues that most of these documents are immune from disclosure. By categorizing the files into various groups of documents the state attorney seeks to obscure the underlying policy of the public records act. In essence, the state attorney has sought to immunize from disclosure any materials that were not revealed to Mr. Kokal during pretrial discovery.

The Public Records Act, Fla. Stat. section 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 Companv 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. 4th DCA 1985). If an item is not expressly exempted, the statute's provisions are mandatory.

Without reference to an exemption, the State first seeks to shield certain documents in its file, by labelling them **"non-public"** records (such as handwritten notes for trial or depositions). The State raises this objection to disclosure for the first time in its brief to this Court. Although the state attorney bears the burden of proving that these documents are exempt from disclosure, **see**, Florida Freedom Newspapers v. Dempsey, 478 So. 2d 1128 (Fla. 1st DCA 1985), the State did not even assert this objection in the court below. This Court should decline to reach the merits of this argument because the failure to assert it before the trial court is a waiver of the objection.

Assuming arsuendo that this argument is properly before the Court, appellant has improperly defined these materials as non-public records. The Act itself defines public records as follows:

> 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, resardless 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). Thus, notes, drafts, and similar materials are public records in spite of their informal nature. Nonetheless, appellant argues that its file contains **"non-public"** records that should be exempt from disclosure under Shevin v. Byron, Harmless, Schaffer, Reid and Associates, **379** So. 2d **633** (Fla. **1980).** The analysis set forth in Shevin does not support appellant's contention that the state attorney file is immune from disclosure.

In Shevin, this Court considered whether a consulting firm hired to conduct a job search was required by the Public Records Act to release notes created by a psychologist while conducting confidential interviews of prospective job applicants. Disclosure was sought by a television executive and the attorney general. **See** Shevin, **379** So. 2d at **635.** The paramount concern of the Shevin court was maintaining the "promise of confidentiality to the persons interviewed." Id. An underlying premise of this right of confidentiality was the statutorily created psychotherapist-patient privilege. Fla. Stat. section **90.503.** In Mr. Kokal's case, no statutory exemption or evidentiary privilege protects the state attorney's file from disclosure.

Appellant also contends that Oranse County v. Florida Land Company, **450** So. 2d **341** (Fla. 5th DCA **1984), rev.** denied, **458** So. 2d **273** (Fla. **1984),** prevents disclosure of these records. The ruling in Oranse County was based on a request under the public records law for documents sought during pretrial discovery in a

civil proceeding. Obviously, that case differs significantly from the section **119** request in Mr. Kokal's case.

In Oranse County, the parties to a civil action were engage in pretrial discovery when one of the parties, a state agency, was requested to produce, before trial, certain trial preparation materials under the Public Records law. Oranse County, **450** So. 2d at **342.** This case was decided before the public records act was amended to provide a statutory exemption for the disclosure during the pendency of a suit of records classified as attorney work product. Compare Oranse County, **450** So. 2d at **343,** with Fla. Stat. section **119.07(o).** As will be discussed below, that analysis does not apply here -- the **"suit"** in Mr. Kokal's case ended when the State successfully obtained an affirmance of the conviction and death sentence on direct appeal.

The analysis applied in Orange County may not be applied to Mr. Kokal's requests: the Oranse Countv court relied on the decision in Shevin to prevent the disclosure of attorney work product during pretrial discovery. The Oranse County decision was thus concerned with the unfair disclosure burden placed on state agencies during pretrial discovery in a civil suit that was not faced by private litigants. The situation addressed by the court in Oranse County could not arise today because the public records act has been substantially amended to preclude the pretrial disclosure of attorney work product during a pending suit. Orange County does not create an exemption that prevents the state attorney from disclosing the files in Mr. Kokal's case.

The state attorney cannot support the argument that "notes,

drafts and trial preparation material" are exempt from disclosure because these items are allegedly defined as non-public records (Appellant's Brief at 8). Trial preparation material regardless of whether it is handwritten or typed is clearly attorney work product. Hillsboroush County Aviation Authority v. Azzarelli Construction Company, 436 So. 2d 153 (Fla. 2d DCA 1983). The attorney work product privilege is only a qualified privilege that primarily applies to pretrial discovery. Since there is a mechanism for discovery in that setting (i.e., the Rules of Civil Procedure), the right to access protected by the Public Records Act becomes virtually irrelevant. In contrast, under the Public Records Act, materials 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. Hillsboroush County, supra; Edelstein v. Donner, 450 So. 2d 562, approved, 471 So. 2d 26 (Fla. 1985). There is no other mechanism for Mr. Kokal to obtain these materials. Just as significantly, there is no applicable statutory exemption.

The State suggests that certain trial preparation documents in its file are non-public because they are "preliminary" in nature, although the State has not specifically identified these documents and has not offered them for appropriate in camera review. **See** Tribune Co. v. In re: Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986). The State, citing Oranse County, contends that the key question for determining whether the document is a public record is whether the document constitutes the final evidence of knowledge obtained. The legislature's

amendment adding an exemption for attorney work product request while suit is pending shows that its sole concern is whether litigation is in progress. Here, Mr. Kokal's original criminal litigation is no longer in progress -- it ended with the affirmance on direct appeal. There is **no** **"final"** as opposed to **"preliminary"** evidence exemption. If the legislature believed such an exemption to be appropriate, it would have established one. The fact that the legislature did not establish one is quite telling.

Furthermore, notes, drafts, outlines and similar materials are precisely the final materials to which Mr. Kokal needs access. Mr. Kokal seeks these documents in connection with post-conviction review of his capital trial and sentencing. It is essential to review these materials to determine if those proceedings were fair and constitutionally valid. Notes and similar materials are final evidence of the conduct of the state attorney's office of events and circumstances of the original proceedings. Indeed, claims predicated upon Napue v. Illinois, 360 U.S. 264 (1959), and other claims that misleading or inaccurate evidence may have been used by the State can only be proven through the use of the prosecutor's notes.

These materials differ from the materials the Shevin court found not to be public records. In Shevin the court protected preliminary notes made during job interviews. Those notes were ultimately formally recorded in reports and memoranda. Shevin, 379 So. 2d at 635, 640-41. Whether misleading information was used in job interviews was not at issue in Shevin. Whether

misleading evidence was used at trial is often at issue in capital 3.850 proceedings. In Shevin, after all, there was formalized evidence.

In contrast, there is no formal evidence of the questioned materials in Mr. Kokal's case. The trial itself is not formal evidence of the state attorney's file. It does not reveal all conduct by the prosecutors; it does not reveal information prosecutors possessed but did not disclose to the defense or use at trial. The state attorney's file itself **is** the final evidence of such information, and is what is at issue when a petitioner litigates a claim founded on Bradv and its progeny.

Materials such as these often reveal significant constitutional errors and grounds for meritorious post-conviction claims, such as claims under Bradv v. Maryland, 373 U.S. 83 (1963). A capital defendant should 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. Murrav, 106 S. Ct. 2639, 2668 (1986).

Florida cases in which material was wrongfully withheld under Bradv 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 of 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.

Recently the same trial judge who ordered disclosure in Mr. Kokal's case, Judge Wiggins, ordered this same State Attorney's Office to produce its file to another death row inmate, Charles Kight. Although initially refusing Mr. Kight's 119 request the state attorney did comply with the judge's order. Review of that file revealed handwritten notes and correspondence that established a Brady claim which is currently before this Court. Kight v. State, Case No. 75,086.

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, inspection of the State Attorney's files in that case revealed an immunity agreement that had not been provided to defense counsel at trial. Regardless of the eventual outcome of this claim, it 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 its file will provide 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 perjured testimony); Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987)(same, intentional use of misleading testimony); Aranao v. State, 497 So. 2d 1191 (Fla. 1986)(new trial ordered because evidence withheld in violation of Bradv v. Maryland and United States v. Bagley); 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 a state attorney under Bradv, or its progeny of cases, is finally brought to light, the courts are quick to order relief. Mr. Kokal 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 post-conviction actions. While this Court has not yet directly ruled on the issue, it has indicated that it also believes section 119 has long provided the access which Mr. Kokal and his counsel seek. 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 under the Public Records Act in earlier proceedings:

> 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 motion was filed that the Court found the claim to be procedurally barred.

The need to review the entire state attorney's file is clear. Mr. Kokal's 119 request, and the trial court's order, was not "a fishing expedition," as the State appears to assert. It was and is the only way Mr. Kokal can fully assess and present his post-conviction case. Mr. Kokal specifically requested items that were the same types of materials requested in Tribune Co. The state attorney should produce those items and its entire file in response to Mr. Kokal's public records request.

11. ATTORNEY WORK PRODUCT MUST BE DISCLOSED BECAUSE THE PROSECUTION OF MR. KOKAL'S CASE HAS BEEN CONCLUDED.

Appellant concedes that attorney work product as well as inter and intra office memoranda are public records that should be subject to disclosure under the Public Records Act (Appellant's Brief at 11). The State Appellant nevertheless asserts that these records, which the courts have repeatedly held to be subject to disclosure, **see** Shevin; Hillsborough; Edelstein, are nonetheless exempt from disclosure under the statutory exemption in 119.07(3)(o).

The State argues that Mr. Kokal is not claiming innocence and has no compelling need for the documents sought. This argument has two flaws. First, Mr. Kokal does have a compelling need for the documents. He faces a death sentence and without these materials his post-conviction proceedings can never be adequate or complete. Second, Mr. Kokal does not have to show a compelling need -- the statute provides for disclosure and the custodian has the burden of proving an exemption applies. **See** Florida Freedom Newspapers, 478 So. 2d 1128 (Fla. 1st DCA 1985).

Florida courts have repeatedly held that the Public Records Act is to be liberally construed in favor of open government. Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775 (Fla. 4th DCA 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. Byron, Harmless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980). Section 119 applies to all, not only to those defendants who claim "innocence". Indeed, in the capital context, innocence can mean many things. It can mean that the State cannot prove guilt beyond a reasonable doubt, that the defendant is culpable of something less than first degree murder, and in sentencing, that aggravating factors do not apply and that mitigating factors do apply. If a state attorney file contains evidence on any of these issues which is not disclosed to the defense, the defendant can state a valid claim for relief under Brady. In this case, however, the State would immunize its files and thus preclude Mr. Kokal from ever determining whether his trial and sentencing comported with the Constitution's guarantees.

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). If 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 State asks this Court to improperly expand an exemption beyond the bounds set by the legislature. The State asserts that parts of its file are exempt under section 119.07(3)(o), which provides that public records reflecting an attorney's mental impressions, conclusions, litigation strategy or legal theories are exempt until the conclusion of the litigation.

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 recognizes that limitation but argues that the pendency of Mr. Kokal's motion for post-conviction relief reactivates the litigation between the parties and immunizes its file from disclosure. The state attorney's position flatly conflicts with 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 Oranae 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 successfully prosecuted its murder case against Mr. Kokal. Mr. Kokal sought appellate review and was denied relief. [Kokal v. State, 492 So. 2d 1317 (Fla. 1986).] Once the Florida Supreme Court denied appellate relief the criminal litigation between the State and Mr. Kokal terminated. Carrying the state attorney's argument to its logical conclusion, Mr. Kokal was entitled to attorney work product contained in the state attorney's files after his appeal was terminated but before the governor signed a death warrant scheduling his execution. The state attorney's theory suggests that the signing of the warrant reactivated the litigation in this case. Under this interpretation, Mr. Kokal 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 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. Kokal did **not** involve any materials prepared or produced by the State in the litigation of ~~the Rule 3.850 action~~. Cf. Oranse County v. Florida Land Co., ~~supra~~, 450 So. 2d 341. Rather the materials sought involved 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 attorney is simply inapplicable to Mr. Kokal's request.

The Court in Seminole County explained the limits of the 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 holding in Tribune Co., that post-conviction proceedings are not appeals (discussed further in section IV of this brief), similarly recognizes that the original litigation has concluded when there is an affirmance on direct appeal. **See** Tribune Co., 493 So. 2d 480. 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.[1]

111. MR. KOKAL DOES NOT CONTEST THE STATE ATTORNEY'S WILLINGNESS TO DISCLOSE MATERIALS REVEALED DURING PRETRIAL DISCOVERY. BUT THERE IS A GREAT DEAL MORE THAT MUST BE REVEALED UNDER SECTION 119

Appellee in point III of his brief reveals the crux of his position. The state attorney suggests that disclosure is limited to those materials provided during pretrial discovery. As explained throughout this brief, this position is contrary to the law and policy of the Public Records Act.

Appellant relies on Satz v. Blakenship, 407 So. 2d 396 (Fla. 4th DCA 1981) and Bludworth, supra, but those cases do not support the position that a public records demand is limited to documents revealed during pre-trial discovery. In each of those cases, the public records demand was made before the prosecution of a criminal action. In each case, the state attorney declined to reveal to a third party information that had already been revealed to a defendant in a criminal action. In each case, the court subsequently ordered the state attorney to reveal to the third party information that had been disclosed to a criminal defendant during a pending criminal prosecution.

As stated before, section 119 is not a mere discovery rule. The public records act mandates also the disclosure of records contained in the state attorney file that were **not** revealed during pretrial discovery. **See** Tribune Company v. Public

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[1]Indeed, it is in such purported "work product" materials that proof of a petitioner's claim that the prosecutor knowingly used perjured testimony, **see** Brown v. Wainwrisht, 785 F.2d 1457 (11th Cir. 1986), will often be based.

Records; Downs v. Austin, 522 So. 2d 931 (Fla. 1st DCA 1988). To limit 119 access to only discoverable documents would render Section 119 meaningless in this context.

The state attorney broadly asserts that the trial court erred in failing to limit disclosure. However, the state attorney failed to provide *any* documents to Mr. Kokal in response to the request, and provided nothing for **in** camera inspection. Aside from the fact that no recognized exemption applies, and that the circuit court's ruling was proper, the state attorney's objection here is not well taken since the State declined to even pursue an **in** camera inspection procedure below. The trial court could not exempt documents it did not view. The statute directs the records' custodian to produce public records. Section 119.07(2)(a). The statute further provides that in civil actions, questioned materials should be submitted to the court for **in** camera inspection, if exemption is claimed under, inter alia, section 119(3)(o) (work product during litigation), or section 119(3)(d)(active criminal investigative or intelligence information). Section 119(2)(b). The Tribune Co. court explained the need for such an **in** camera inspection:

> It is always better practice, however, to conduct such an inspection in cases where an exemption to the Public Records Act is asserted. An inspection lends credence to the decision of the trial court to release or not, and provides a much better basis for appellate review. State ex rel. Times Pub. Co. v. Patterson, 451 So.2d 888, 891 (Fla. 2d DCA 1984); Donner v. Edelstein, 423 So.2d 367, 368 (Fla. 3d DCA 1982). An in camera inspection also helps dispel any cloud of public suspicion that might otherwise be suspended over governmental efforts to sustain secrecy sua sponte. See Lorei, 464 So.2d at 1331-31.

Tribune Co., 493 So. 2d at 484. The court further noted that the

inspection is to determine whether exemptions apply:

> In consonance with the principle of free access to public records it is not the purpose of an in camera inspection for the court to decide whether there are sufficient reasons to release requested information, but rather to decide whether there are sufficient reasons not to release it. Cf. Lorei v. Smith, 464 So.2d at 1332.

Id.

Here the state attorney failed to produce its file, or the questioned materials, for **in** camera review (indeed, for any review whatsoever) by the lower court. The State has yet to even specifically identify the materials it claims to be exempt. Instead the state attorney consistently has refused to produce any of its file, a position which indicates that the real purpose of its refusal is to thwart Mr. Kokal's right to access. There are no valid exemptions, the State's position is not well taken, and Mr. Kokal's request and the trial court's order of disclosure were proper.

IV. SECTION 119 DOES NOT PROVIDE AN EXEMPTION FOR CRIMINAL INTELLIGENCE OR INVESTIGATIVE INFORMATION AFTER A CRIMINAL CONVICTION HAS BEEN AFFIRMED ON DIRECT APPEAL.

The state attorney acknowledges that nondiscoverable criminal intelligence information and criminal investigative information may be public records. However, the state attorney then attempts to fit the material herein at issue into the statutory exemption for **"active"** criminal intelligence or investigative information, which relates to cases pending appeal, section 119.07(3)(d), by asserting that Mr. Kokal's post-conviction action is merely an appeal of his original criminal proceeding. This argument distorts the exemption, lacks legal or

common sense support, and would render section 119 meaningless.

A. MR. KOKAL'S POST-CONVICTION PROCEEDING IS NOT A CRIMINAL **"APPEAL"**

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 Co. 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).
>
> 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. Strople, 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. Michael, 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.

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 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 obligation. 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). This Honorable Court declined to disturb the District Court of Appeals' eminently reasonable opinion. **See** 503 So. 2d 327 (Fla. 1987).

Obviously, the arrest and prosecution of Gregory Kokal were 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 distinguished between appeals and post-conviction relief actions, the answer is the same.

A post-conviction action is **not** 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). Although there are presently no federal appeals pending in Mr. Kokal's case, any federal habeas action would likewise be a civil proceeding. **See**, e.g., Hilton v. Braunskill, 107 S. Ct. 2113, 2118 (1987)(federal habeas corpus proceedings are civil in nature). This Court should hold, as was held in Tribune Co., that the sought-after records are no longer an **"active"** criminal case, and thus are no longer exempt from disclosure.

B. LEGISLATIVE INTENT AND PUBLIC POLICY SUPPORT THE CONSTRUCTION OF THE TRIBUNE CO. COURT

The State correctly notes that legislative intent should guide statutory construction and that courts should avoid statutory interpretation that would lead to absurd results or render a statute meaningless. However, a proper analysis of section 119 and the claimed exemption under these principles leads to the very conclusion reached by the court in Tribune Co.

The Legislature provided the exemption for "pending prosecutions or appeals." The Legislature 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 significant.

The criminal investigation exemption, 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 Dart and rev'd in Dart, **380** So. 2d **419 (1980);** Glow v. State, **319** So. 2d **47, 49** (Fla. 2d **DCA 1975).** Gregory Kokal has already 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. Kokal's files will disrupt any law enforcement process or hinder prosecutions. Certainly, there is no danger of allowing a suspect to escape apprehension. Mr. Kokal is incarcerated, and the prosecution was concluded upon the direct appeal affirmance. The state attorney argues that release of his records would thwart prosecutorial efforts because, should Mr. Kokal succeed in having his conviction and sentence set aside, the files would be used to prosecute him. This argument is clearly an effort to frustrate the public interest in insuring that the present

conviction was constitutionally obtained.

Mr. Kokal will be entitled to a new trial if material, exculpatory information was withheld from the defense, see Bradv v. Maryland, 373 U.S. 83 (1963), for if such evidence was withheld, Mr. Kokal'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 Bradv 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.

The State's contention that Mr. Kokal has not asserted his innocence, or any Bradv or discovery violation, is a circular argument that demonstrates the dilemma Mr. Kokal faces. Without the state attorney file, Mr. Kokal cannot determine if such violations occurred. The State here would withhold the tools for ascertaining whether in fact a Bradv violation has occurred, merely so that it can keep the information forever concealed, possibly even in a retrial. This argument was expressly rejected in Tribune Co.,

> 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.

Contrary to the State's assertions herein, 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. Tell Service Co., 183 So. 2d 1 (Fla. 2d DCA 1966). There is then no longer a criminal case -- the criminal proceedings are finished. White, supra. It **was** logical for the legislature to determine that the active status ceased at the point at which the direct appeal concluded. From that point forward, the legislature has found disclosure warranted, **see** 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 instance of the need for such an evaluation. 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 the State's infliction of the death penalty. 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); Witherspoon v. Illinois, 391 U.S. 510 (1968), and through its legislature that 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 Gregory Kokal.

Unless his post-conviction efforts are successful, Mr. Kokal 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. Kokal withdraws all efforts at post-conviction relief or until his execution is carried out 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.

The legislature, by the plain language of the statute, decided that the need for secrecy was outweighed by the need for disclosure after direct appeal is concluded. The judiciary has

no 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). **As** noted, the legislature has amended the statute since the issuance of the Tribune Co. opinion. In light of Tribune Co. and its application throughout the State, if the legislature believed that the Tribune **Co.** opinion (an opinion which this Court did not disturb) was in error, it could have and would have amended or otherwise altered the statute. The legislature chose not to do so, an action which quite emphatically signals that the legislature considered that Tribune Co. properly construed the language and intent of the statute.

The specific meaning of active prosecution as discussed above by Mr. Kokal 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 under active prosecution has sought to distinguish this case from the clear holding in Tribune Co. v. In re: Public Records that the prosecution is 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),** and the active status of investigative records

ceases on the unsuccessful disposition or expiration of that appeal of right by a defendant. The termination of the secret status of investigative records at that point allows citizens to determine with certainty when those records become open.

The State, however, seeks to interpret **"active"** to include post-conviction proceedings, and in fact any action taken by Mr. Kokal before 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); see also Richardson v. State, 546 So. 2d 1037 (Fla. 1989). 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"**,[2] 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 would 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. Strople, 39 So. 2d 468 (Fla. 1949); Tribune Co. v. In re: Public Records. As discussed herein, there are numerous legal distinctions between criminal appeals and other post-conviction civil proceedings. More important, 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.

The day after the appeal of right was disposed of, and before any writs or collateral actions were filed, Mr. Kokal, or anyone else (e.g., Mr. Kokal's counsel, members of the press, interested citizens, indeed any citizen) could have requested and received these records. The state attorney would have been required to provide access because the investigation was no

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

longer "active" and no writs or collateral actions were pending. Under the argument put forward by the state attorney here however, 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, has been specifically held to have no effect on the substantive right to public records. See 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 the "criminal" proceedings have been completed -- i.e., after direct appeal. There is today no criminal proceeding in this case. Nor could there be: the pending Rule 3.850 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 holdings that records, once public, cannot be resealed by subsequent events. Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984), app. dismd., 105 S. Ct. 2315 (1985); Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982), pet. for rev. den. sub. nom., Metropolitan 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 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.

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, 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." 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 or she 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 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. But public policy simply cannot countenance disclosure solely at Mr. Kokal's funeral. That, however, is the effect of the position taken by the State in this case.

The effect of the state attorney's position is to provide fewer assurances of accuracy in death penalty cases than in ordinary prison sentences. Under the state attorney'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. Petersburs v. Siebold, 48 So. 2d 291 (Fla. 1950) Miami v. Romf, 63 So. 440 (Fla. 1913); Curry v. Lehman, 47 So. 18 (Fla. 1908).

C. 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. The distinction is not merely a matter of form -- post-conviction proceedings differ substantively from appeals as well.

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); ~~see also~~ 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); Washinston v. State, 110 So. 259 (Fla. 1926)(writ of error coram nobis). Far from being "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 matter of right. **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 Burnett v. 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 . . ." 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 ameals 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.**[3] For example, special rules of procedure

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[3]**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, 546 So. 2d 1037 (Fla. 1989).

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.

Thus, the distinctions between appeals and writs is recognized in federal 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. To permit nondisclosure here would create a judicial exemption for the records, inconsistent with the Act and with the judicial interpretations of the Act. **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).

D. 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 consistently 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 continues to be **"active"** in this case. The State's **"investigation"** in Mr. Kokal'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. Kokal 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 disclose 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.

E. AUTHORITY FROM OTHER JURISDICTIONS ALSO SUPPORTS DISCLOSURE

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), 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 for a retrial. Despite the fact that the defendant faced 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 [state'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 interpretation the same way that Florida's Second District Court of Appeals did in Tribune Co., supra: the revised Georgia "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 was to be reprosecuted, 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).

Florida's dedication to open and accountable government should certainly be no less than that of Georgia. The policy of open records overrides any secrecy interest in records relating to a case already concluded. The lower court's order should be affirmed.

CONCLUSION

The trial court's order compelling disclosure of the state attorney's file is consistent with decisional law, legislative

intent, and the public policy behind the Public Records Act. The state attorney's refusal to produce any part of the file or to identify exempt materials demonstrates that the real purpose of the State's refusal is to thwart Mr. Kokal's post-conviction proceedings. The State's argument stretches and distorts the plain language and intent of the statute in an attempt to exclude the State's file from the Act's provisions. The State's position herein is inconsistent with the position of most other Florida state attorneys (who generally provide full disclosure as a matter of course) and with the construction given to the Act by this Court, the District Courts of Appeal, and most Florida circuit court judges. The State argues that secrecy is necessary to protect the integrity of its prosecutions. In fact, disclosure is necessary to protect the integrity of the criminal justice system. Mr. Kokal respectfully urges that this Honorable Court affirm the trial court's order requiring disclosure of the state attorney's file and the sheriff's public records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid to, Richard A. Mullaney and Joel B. Toomey, Assistant State Attorneys, Duval County Courthouse, Jacksonville, Florida 32202, this 31 day of January, 1990.

Billy H. Nolas / Attorney