IN THE

SUPREME COURT

STATE OF FLORIDA

STATE OF FLORIDA,	)	
Appellant,	)	
vs.	)	CASE NO.: 74,439
GREGORY ALAN KOKAL,	)	LOWER CASE NO.: 83-8975
Appellee.	)	

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

INITIAL BRIEF OF APPELLANT

ED AUSTIN
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STATEMENT OF CASE AND FACTS

BACKGROUND

On October 20, 1983, the Appellee, GREGORY ALAN KOKAL, was indicted for First Degree Murder. (R.1). A Duval County petit jury subsequently found him guilty as charged and during the penalty phase recommended 12-0 that he be sentenced to death. (R.25). On November 14, 1984, Judge James L. Harrison sentenced Appellee to death. (R.21).

On July 17, 1986, this Court affirmed both the conviction and sentence. (R.24-29). Appellee subsequently made an application for clemency and the application was denied.

In September, 1988, the Appellee's attorneys filed numerous motions, among them a 155 page motion under Rule 3.850, Florida Rules of Criminal Procedure, which sought to vacate and set aside the conviction and sentence. The motion also sought a stay of Governor Martinez's August 25, 1988 death warrant. A stay was entered by the trial judge and an evidentiary hearing was set on Appellee's 3.850 motion to set aside the conviction and sentence. (R.62).

CURRENT CONTROVERSY

Through numerous motions to compel and amended motions to compel, Appellee sought disclosure of the State Attorney file through the Public Records Act. On September 15, 1988, (R.33-35), September 19, 1988,

(R.51-52), and October 17, 1988, (R.67-71), Appellee filed motions seeking the State Attorney file and other records. (T.4,5)(T.6).

Appellant stipulated and agreed to produce public records but objected to the production of the State Attorney file. (T.5-6). The State Attorney file, as argued in the subsequent hearing, contains essentially four types of documents:

1. Handwritten notes, evidence lists, outlines, opening and closing arguments, etc. prepared by the Assistant State Attorneys prosecuting the case;

2. Work product in the form of Assistant State Attorney mental impressions, conclusions, litigation strategy, or legal theory prepared for criminal litigation;

3. Discoverable reports, letters, sworn statements, depositions and other similar information;

4. Non-discoverable criminal intelligence and criminal investigative information in the form of reports and other documents.

On October 28, 1988 a hearing was held on Appellee's Motion to Compel the State Attorney File. On that same date, the trial judge, David C. Wiggins, granted Appellee's Motion to Compel and thus required the State to disclose the entire State Attorney file to Appellee. (R.95).

On November 10, **1988,** the State filed a Notice of Appeal to the First District Court of Appeal of the trial court's order. On January 30, **1989,** the trial court stayed the proceedings regarding Appellee's Motion to Set Aside the Conviction and Sentence and seeking a new trial, pending the outcome of the instant appeal.

In proceedings before the First District Court of Appeal, the State filed its brief on March 2, **1989.** The Court, in granting a second extension of time, required Appellee to file a brief by June 7, **1989.** Appellee never filed a brief.

On June 21, **1989,** the Appellee filed a Motion to Dismiss the State's Appeal on the grounds that the District Court lacked jurisdiction. After receiving pleadings from both sides addressing the jurisdictional issue, on July **18, 1989,** the District Court of Appeal entered an order transferring this appeal to this Court.

On December 11, **1989,** this Court entered an order denying the Appellee's Motion to Dismiss the State's Appeal and directing that briefs be filed.

SUMMARY OF ARGUMENT

The trial court erred in requiring disclosure of the entire State Attorney file. This error resulted from an overly broad demand by Appellee for the entire State Attorney file under the Public Records Act. The demand for the entire State Attorney file did not specify what was sought nor did it distinguish among: (1) non-public records, (2) public records which are not exempt from disclosure, or (3) public records which are exempt from disclosure. The trial court's order granting this overly broad demand was in error.

First, many of the documents contained in the State Attorney file are simply not public records and not subject to the Public Records Act. Assistant State Attorney handwritten notes, drafts, and other documents which were not intended to perpetuate, finalize, or formalize knowledge are not public records. Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc., 379 So.2d 633 (Fla. 1980). Examples include notes on order of proof, evidence lists, cross-examination questions, and other such documents.

Second, documents reflecting Assistant State Attorney mental impressions, conclusions, litigation strategy, or legal theory, which were prepared as formalized knowledge, and in anticipation of criminal litigation, are exempt from the Public Records Act until the "conclusion of the litigation or adversarial administrative proceedings."

Section 119.07(3)(o), Florida Statutes (1987). The trial court erred in failing to recognize this limited exemption in the Public Records Act.

Third, records which are discoverable and required to be given to Appellee are public records and no exemption applies. The error of the trial court here was in not recognizing that Appellee was properly entitled to these documents and in not drawing a distinction between non-public records and non-exempt public records. Under Section 119.011(3)(c)(5), Florida Statutes (1987), Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981) and Bludworth v. Palm Beach Newspapers, 476 So.2d 775 (Fla. 4th DCA 1985), Appellee was properly entitled to these documents. These records include arrest and booking reports, evidence technician's reports, lab reports, depositions, correspondence by a co-defendant or witness, medical examiner's reports and other such discoverable documents or documents which have been made public or provided to the defense. Appellant stipulates and agrees this is the current state of the law in Florida. Appellant further stipulates and agrees to disclose such documents if they exist.

Fourth, the only category of documents remaining --- non-discoverable criminal intelligence and criminal investigative information --- are exempt from disclosure under the Public Records Act under Section 119.07(3)(d), Florida Statutes (1987). This section provides that

"active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1)." (Requiring disclosure). Section 119.011(3)(d)(2), Florida Statutes (1987) states that this information "shall be considered 'active' while such information is directly related to pending prosecutions or appeals." The trial court erred in requiring disclosure of active non-discoverable criminal intelligence and investigative information.

The overriding error in the present case was the failure of the trial court to draw distinctions among the various types of documents contained in the State Attorney file. The file contains (1) non-public records, (2) public records which are not exempt from disclosure, and (3) public records which are exempt. The overly broad demand by Appellee in the present case led to the trial court's error.

The trial court's order should be reversed with instructions to modify the order to require disclosure of public records which are not exempt and to exclude from disclosure non-public records and public records which are exempt under the statute.

ARGUMENT

I. THE LOWER COURT ERRED IN REQUIRING THAT THE ENTIRE STATE ATTORNEY FILE BE PRODUCED UNDER THE PUBLIC RECORDS ACT TO THE EXTENT THAT THE FILE CONTAINS NON-PUBLIC RECORDS, SUCH AS ASSISTANT STATE ATTORNEY HANDWRITTEN NOTES, OUTLINES OF QUESTIONS, DRAFTS, AND OTHER DOCUMENTS THAT WERE NOT INTENDED TO PERPETUATE, COMMUNICATE, OR FORMALIZE KNOWLEDGE.

The trial court's order, granting the Appellee's Motion to Compel Public Records, is simply too broad. Many of the documents contained in the State Attorney file are not public records.

Chapter 119 of the Florida Statutes, Florida's Public Records Act, defines a public record 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 regardless 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.

This Court specifically addressed this definition and its scope and limitations in Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc. **379** So.2d **633** (Fla. 1980). In Shevin, this Court stated that the "definition limits public information to those materials which constitutes records --- that is, materials that have been prepared with the intent of perpetuating or formalizing

knowledge." Id. at 640. In addition, the Court went on to state specifically that:

> [w]e hold that a public record, for purposes of Section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. To be contrasted with "public records" are materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation. Id. at 640.

Many of the documents in the instant case are precisely those discussed in Shevin --- notes and drafts that are preliminary in nature. More specifically, this case involves notes and drafts of the Assistant State Attorneys. In Orange County v. Florida Land Company, 450 So.2d 341 (Fla. 5th DCA 1984), the Fifth District applied Shevin to the notes, drafts, and trial preparation materials of attorneys. In Orange County, the Court reiterated that the key determination was whether the questioned document contained the final evidence of knowledge obtained. Often, trial preparation materials in the nature of inter-office or intra-office memoranda would meet this criteria.

Particularly important and applicable here, however, the Court found that the following documents did not constitute public records:

1. An outline of evidence needed for trial;

2. An outline of questions to be asked of a witness;

3. A proposed trial outline;

4. Handwritten notes from the meetings with attorneys; and

5. Notes regarding the deposition of an anticipated witness.

Id. at 344.

Shevin and Orange County are directly applicable to the instant case. Many of the handwritten documents by Assistant State Attorneys in the present case, such as evidence lists, tentative order of proofs, possible cross examination questions, opening and closing argument notes, deposition notes, etc., were never intended to formalize or finalize knowledge but were merely to assist the attorneys. The language of Orange County is directly applicable:

> These documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. They seem to be simply preliminary guides intended to aid the attorneys when they later formalize the knowledge. We cannot imagine that the Legislature, in enacting the Public Records Act intended to include within the term "public records" this type of material. Id. at 344.

In the instant case, the trial judge mistakenly relied upon Tribune Co. v. Public Records, 493 So.2d 480 (Fla. 2d DCA 1986). Tribune Co. does not apply to this issue. The Second District in Tribune Co. never addressed

the threshold question of what constitutes a public record. Instead, unlike the present case, a specific demand was made in Tribune Co. for specific documents. In Tribune Co., there was no question the documents were public records. The question addressed in Tribune Co. was whether they were exempt under the Public Records Act.

The problem in the present case is that Appellee's demand for the entire State Attorney file, without specifying what documents were sought, is a broad "fishing expedition" that encompasses non-public records, public records, and exempt public records alike.

The trial court's order granting this overly broad request was an error. Non-public records are encompassed by the order and are not subject to the Public Records Act. Attorney notes, drafts, and other documents, which were preliminary in nature and not designed to perpetuate, communicate or formalize knowledge, should not have been encompassed by the lower court's order. This was error.

11. THE LOWER COURT ERRED IN REQUIRING THAT THE ENTIRE STATE ATTORNEY FILE BE PRODUCED UNDER THE PUBLIC RECORDS ACT TO THE EXTENT THAT THE ORDER ENCOMPASSED RECORDS REFLECTING AN ASSISTANT STATE ATTORNEY'S MENTAL IMPRESSIONS, CONCLUSIONS, LITIGATION STRATEGY, OR LEGAL THEORIES PREPARED FOR CRIMINAL LITIGATION.

While the attorney notes and drafts mentioned in Section I of this brief are not public records, attorney memoranda, such as inter-office and intra-office memoranda, which are intended to perpetuate, communicate, or formalize knowledge, are in fact public records. Coleman v. Austin, **521** So.2d **247** (Fla. 1st DCA **1988).** The documents must be disclosed pursuant to a public records demand if no statutory exemption applies.

There is, however, a recently created limited attorney work product exemption under the Public Records Act that exists until the "conclusion of the litigation or adversarial administrative proceedings." Section **119.07(3)(o),** Florida Statutes **(1987).** Section **119.07(3)(o)** provides that:

> A public record which was prepared by an agency attorney... or prepared at the attorney's expressed 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 litigation or adversarial administrative proceedings.

In the present case, the trial judge ignored this exemption and ordered that the entire State Attorney file be produced. The lower court held that Tribune Co., supra, was controlling and the entire file had to be produced. (T.21-22). This was error.

Tribune Co. is clearly distinguishable. First, in Tribune Co., the file of the Pasco County Sheriff was sought, not the State Attorney file. Second, the information sought in Tribune Co. was specific in nature, such as police reports, lab reports, arrest reports, etc.,[1] and was not a request for Assistant State Attorney notes, drafts, or work product. In fact, most of the information sought in Tribune Co. was discoverable.

Thirdly, in Tribune Co., the information was sought by the following people: (1) Defendants who claimed it might exonerate them, (2) a brother and sister of a missing Tennessee woman who may have been the murder victim (identification of the victim was unclear), (3) the Tribune Company (publishers of the Tampa Tribune), and (4)

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[1] Unlike the present case, the demand in Tribune Co. was specific in nature. As stated by the Second District: "The information sought included: (1) investigative reports pertaining to the disappearance of the Tennessee woman; (2) police reports of the crime scene investigation; (3) transmittal sheets of evidence to a crime lab; (4) crime lab reports; (5) arrest reports; (6) information regarding other suspects; (7) statements of co-defendants and witnesses; (8) arrest records of particular witnesses; (9) a report of an autopsy of the victim with fingerprints and dental charts; (10) and a composite sketch of the victim." 493 So 2d at 482.

a reporter for the St. Petersburg Times. Each party had a recognized and special need for the requested information.

None of these compelling reasons for disclosure exists in the present case. Appellee does not claim he is innocent. In addition, the only party seeking the information is Appellee so that he may use it to assist in overturning the conviction and sentence as part of the 3.850 motion and for subsequent appeals and retrial, if a retrial results.

Fourth, the State in Tribune Co. alleged that the criminal investigative information at issue in that case was exempt from public disclosure under Section 119.07(3)(d), Florida Statutes (1987) which makes active criminal intelligence and investigative information exempt. The State alleged in Tribune Co. that the information was "active" within the meaning of Section 119.011(3)(d)(2) which provides that this information will be considered 'active' when directly related to "pending prosecutions or appeals."

The Second District rejected this argument, stating that, given the posture of the Tribune Co. case, there was no "pending prosecutions or appeals" within the meaning of the statute and therefore the information sought was not "active." The Second District went on to hold specifically that:

> The term 'pending appeals' as used in Section 119.011(3)(d)2 of the Florida Statute does not include... any other proceeding other than the first appeal of right. 493 So.2d at 484.

While this conclusion of the Second District will be addressed at length in Section IV of this brief, suffice it to say at this point that the Court was addressing criminal investigative information and not attorney work product. Even if the Second District was correct in its interpretation of the word "appeals" within the meaning of Section 119.011(3)(d)2, that was not the exemption applicable to attorney work product.

In short, the trial court's reliance upon Tribune Co. was misplaced. Requiring disclosure of the State Attorney file, including attorney work product of the nature just discussed, was error. The order was too broad and should have been limited to public records for which no exemption existed.

111. WHILE IT WAS ERROR TO REQUIRE PRODUCTION OF THE ENTIRE STATE ATTORNEY FILE, IT WAS CORRECT UNDER FLORIDA LAW TO REQUIRE DISCLOSURE OF DISCOVERABLE DOCUMENTS AND THOSE DOCUMENTS ALREADY PROVIDED TO APPELLEE IN THE PAST.

The majority of documents normally contained in the State Attorney file --- arrest and booking reports, evidence technician's reports, FDLE reports, medical examiner's reports, written statements of a witness or co-defendant, and depositions --- are properly the subject of a public records demand under current Florida law. Under Section 119.011(3)(c)5, Florida Statutes (1987), criminal intelligence information and criminal investigative information does not include documents given or required by the law to be given to the Defendant. Thus, documents discoverable under the Florida Rules of Criminal Procedure are subject to a public records demand.

This interpretation was the ruling of the Fourth District Court of Appeal in Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981). In Satz, the Fourth District held that a tape recording discoverable under the rules and produced to the Defendant was subject to a public records demand. Once produced, the need for secrecy no longer existed. The Court reaffirmed its ruling in Bludworth v. Palm Beach Newspapers, 476 So.2d 775 (Fla. 4th DCA 1985). In addition, once the State goes public with information, even if the information was exempt from disclosure, no further purpose is served by non-disclosure

and the information is subject to a public records demand. Downs v. Austin, 522 So.2d **931** (Fla. 1st DCA **1988).**

In the present case, Appellant stipulates that Appellee filed a demand for discovery in **1983** and that these types of documents --- lab reports, medical examiners reports, transmittal sheets, arrest and booking reports, depositions, written statements of a witness or co-defendant --- are properly the subject of a public records demand. The production of these documents is consistent with the ruling of the Fourth District Court of Appeal and does not compromise the prosecution or law enforcement since these documents were discoverable and produced to the Defendant from the outset.

The error of the trial court, however, was its failure to limit its order to the disclosure of public records to which no exemption applied. The across-the-board requirement to produce the entire State Attorney file was error. These documents, discoverable criminal intelligence and criminal investigative information, were properly the subject of a public records demand by Appellee and the court's order should have been properly limited to these documents.

IV. THE LOWER COURT ERRED IN REQUIRING THAT THE ENTIRE STATE ATTORNEY FILE BE PRODUCED UNDER THE PUBLIC RECORDS ACT TO THE EXTENT THAT THE FILE CONTAINS NON-DISCOVERABLE ACTIVE CRIMINAL INTELLIGENCE INFORMATION AND NON-DISCOVERABLE ACTIVE CRIMINAL INVESTIGATIVE INFORMATION.

A. BACKGROUND

This brief has already addressed various types of documents. The only documents remaining are non-discoverable criminal intelligence information and non-discoverable criminal investigative information. These documents are "public records" within the meaning of Shevin and Section 119.011(1) and the only issue before the Court is whether they are exempt from disclosure during the pendency of Appellee's Motion to Set Aside the Conviction and Sentence and Appellee's subsequent appeals or retrial.

Section 119.011(3), Florida Statutes (1987) defines "criminal intelligence information" and "criminal investigative information" as follows:

> F.S. 119.011(3)(a): "criminal intelligence information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.
>
> F.S. 119.011(3)(b): "criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

This type of information is contained in the State Attorney file in the present case. This information is exempt from disclosure under Section 119.07(3)(d), Florida Statutes (1987).

Section 119.07(3)(d) provides that "active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1)." (Requiring disclosure). Thus, under this provision, if the criminal intelligence or investigative information is "active" it is exempt from the disclosure provisions of the Public Records Act.

Section 119.011(3)(d)2, Florida Statutes (1987) provides that "criminal intelligence and criminal investigative information will be considered 'active' while such information is directly related to pending prosecutions or appeals." Thus, the court must determine whether the criminal intelligence and investigative information is "active" within the meaning of the Public Records Act.

B. POSITION OF APPELLEE AND THE SECOND DISTRICT IN TRIBUNE COMPANY

The exact posture of the present case needs to be clear: There is no allegation that the Defendant-Appellee is innocent (unlike Tribune Co.), no allegation that the State has violated Brady, and no allegation that the State has at any time violated discovery rules. There is also no allegation that the State has refused to disclose discoverable documents.

The Appellee's position is clear: Appellee seeks disclosure of non-discoverable criminal intelligence and investigative information. This information will be used in Appellee's 3.850 motion and subsequent appeals or retrial.

Appellee's basis for seeking this non-discoverable information is equally clear: "Appeals" in the Public Records Act really means "the first appeal of right" (i.e. direct appeal) and since Appellee-Kokal has completed his first appeal of right, the documents are not exempt under the Public Records Act. Appellee cites Tribune Co. for this definition of "appeals". In fact, Tribune Co., as stated supra, does hold that "appeals" is limited solely to "the first appeal of right."

While the definition of "appeals" formulated by the Second District in Tribune Co., and advocated by Appellee, is simple, neat, and easy to use, it is inconsistent with legislative intent and the plain statutory language:

First, the Second District and Appellee have inserted the words "first appeal of right" or "direct appeal" into the statute. The statute does not limit appeals to a "first appeal of right" or a "direct appeal". In death penalty litigation, there are numerous appeals, only the first of which is a direct appeal or a first appeal of right. The Second District arbitrarily rewrote the statute to say "first appeal of right" instead of the

clear language stating "appeals" without such a limitation.

Second, the Second District and Appellee have changed the plural "appeals" in the statute to the singular "first appeal" or "direct appeal." While the statutory language of the Public Records Act clearly anticipated more than one appeal, the Second District and Appellee limit the Public Records exemption to one appeal. Once again, the Second District in Tribune Co. re-wrote the statute.

Third, by limiting "appeals" to a first appeal of right (direct appeal), the Second District excluded Federal appeals from the statute. The statute itself contains no such limitation. The statute simply states that the criminal intelligence and investigative information is active during the pendency of "prosecutions or appeals," without regard to whether the appeal is in State or Federal court.

In short, the Second District Court of Appeal re-wrote the statute by (1) inserting words, (2) deleting the plural, and (3) limiting the appeal to State court. This was not statutory construction but statutory revision.

This revision was flatly inconsistent with legislative intent:

First, the result of limiting "appeals" to a "first appeal of right" is inconsistent with legislative intent that the Public Records Act not be used to expand

discovery. Section 119.07(6), Florida Statutes (1987) provides that:

> The provisions of this section are not intended to expand or limit the provisions of Rule **3.220**, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution.

Under the rule announced in Tribune Co., once the first appeal of right is concluded in death penalty cases, all non-discoverable documents must be turned over to the defendant under the Public Records Act. The defendant may then use the non-discoverable documents in his next appeal, the **3.850** motion attacking the conviction and sentence, and his re-trial or re-sentencing if one results. Such a result is inconsistent with legislative intent, the statutory language of the Public Records Act, and common sense.

Second, the result of limiting "appeals" to a direct appeal or "first appeal of right" is inconsistent with the legislative purpose in having an exemption in the first place. It must be presumed that the Legislature intended that criminal intelligence and investigative information not be disclosed "pending prosecutions or appeals" for a reason.

The reason is apparent: the Legislature did not want disclosure of this information until there was finality in the prosecution so that law enforcement and prosecution efforts would not be undermined or compromised. To suggest that a prosecution is over, and thus not

compromised, after a "first appeal of right" in a death penalty case ignores the reality of death penalty litigation in Florida. Whether called a "pending prosecution," "pending appeal," or some other label, the fact remains that the prosecution and appellate process is far from over after the "first appeal of right."

The Second District in Tribune Co. looked to form and labels and failed to address the substance of the Public Records Act exemption and death penalty litigation. Tribune Co. analyzed the purpose of the Public Records Act in general, but failed to look at the purpose of the exemption itself. The result of the Tribune Co. definition is a premature disclosure of non-discoverable criminal intelligence and investigative information in violation of the exemption's purposes and legislative intent.

C. LEGISLATIVE INTENT AND THE PUBLIC RECORDS EXEMPTION CODIFIED IN SECTION 119.07(3)(d), FLORIDA STATUTES

In interpreting the meaning of the exemption codified in Section 119.07(3)(d), Florida Statutes, and the meaning of "pending prosecutions or appeals" as used in Section 119.011(3)(d)(2), the court must look to legislative intent. This is a fundamental principle of statutory construction. As the Florida Supreme Court stated in State v. Webb, 398 So.2d 820 (Fla. 1981):

> It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given affect even though it

> may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided. Id. at 824.

In the present case, if the legislature had intended to limit nondisclosure of non-discoverable criminal intelligence and investigative information until the completion of the "first appeal of right" the legislature would have simply said *so.* Such a limited exemption, however, would have served no purpose. Nothing is accomplished by requiring nondisclosure during the first appeal of right and requiring disclosure immediately afterwards.

The legislature rejected this limited language and instead used the language "pending prosecutions or appeals." The obvious intent was that the prosecution, whether at the trial stage or post-trial stage, be completed prior to the disclosure of non-discoverable criminal intelligence and investigative information.

In the present case, the Defendant-Appellee was sentenced to death and subsequently completed his first appeal of right. Under Rule 3.850, Florida Rules of Criminal Procedure, the defendant then had two years in which to file a motion seeking to vacate and set aside the conviction and sentence. Appellee filed just such a motion, seeking to overturn the conviction and sentence, on September 26, 1988. After this motion is heard, there will either be a re-trial, or under Rule 3.850(f), appel-

lee will have thirty days from rendition of the order in which to take an appeal.

The point is simple: the prosecution in the present case is far from completed. Whether the status of the current case is labeled a "pending prosecution," or "a pending appeal,!' (as the trial court judge in Tribune Co. would have characterized it, i.e., "appeals" is generic referring to any judicial review of the conviction and sentence), or some other label,[2] the legislative intent remains the same. The legislature did not intend disclosure of this information until the prosecution was concluded.

In the present case, unlike the posture of Tribune Co., the 3.850 motion filed by Appellee was the next step in death penalty litigation after the first appeal of right and is a condition precedent to future appeals or a re-trial. The criminal intelligence and investigative information at issue in the present case is

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2 Labels should not be controlling and the court should look to the substance of the proceeding. In Nelson v. State, 414 So.2d 505 (Fla. 1982), this Court held that the State's petition for certiorari, to review a District Court's reversal of a conviction, was an "appeal" by the State for purposes of speedy trial rule 3.191(f) and that the State's petition, therefore, constituted an exceptional circumstance for extending speedy trial. The court stated it would interpret the term "for appeals by the State", under criminal rule 3.191(d)(f) to include "all appellate applications made by the State.'! 414 So.2d at 508. The court looked to the substance of the proceeding and not its form in concluding "appeals" meant appellate review of any nature.

very much "active" within the meaning of the Public Records Act.

The Public Records Act was not designed as yet another vehicle for Death Row inmates to further support their attacks on their conviction and sentence. The Act was designed to promote an open policy with respect to State, County, and Municipal records. Satz, supra. Section 119.01, Florida Statutes (1987). It was not the Act's purpose or intent to be a tool by which criminal defendants obtain access to information they could not obtain otherwise. Appellant urges this Court to reject the narrow definition of "pending prosecutions or appeals" espoused in Tribune Co. and to construe the statute consistent with legislative intent and common sense.[3]

The trial judge in the present case erred in requiring disclosure of non-discoverable criminal intelligence and investigative information. This information is exempt from disclosure under the Public Records Act.

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The trial judge himself, in the instant case, stated that he did not agree with the logic, rationale, or conclusion of the Second District in Tribune Co. but felt compelled to follow it. As stated by the trial judge, "...I think the Tribune case did not intend the ramifications of the opinion that it has given..." (T.20). "...I would encourage you (Appellant-State) to have a full hearing before the First District Court of Appeals and hopefully they will address this issue because I agree with you (Appellant)..." (T.21). "...I wish you luck because I think the Second District Court of Appeals needs clarification, and I can't agree with the (their) rationale and the logic..." (T.24).

CONCLUSION

Based on the foregoing, Appellant urges this Court to reverse the trial court's order requiring disclosure of the entire State Attorney file. Further, Appellant requests that the case be remanded to the trial court with instructions to modify its order to require disclosure of public records which are not exempt from disclosure and to exclude from disclosure non-public records and public records which are exempt from disclosure.

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 mail to Leslie Delk, Esquire, Attorney for Appellee, Capitol Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida, this 15th day of December, 1989.

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