IN THE SUPREME COURT

STATE OF FLORIDA

STATE OF FLORIDA,)

Petitioner,)

vs.)

GREGORY ALAN KOKAL,)

Respondent.)

CASE NO.: 74,439

LOWER CASE NO.: 83-8975

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE ONLY ISSUE BEFORE THIS COURT IS WHETHER THE LOWER COURT ERRED IN HOLDING THAT THE ENTIRE STATE ATTORNEY FILE IS A NONEXEMPT PUBLIC RECORD.

Despite the lengthy arguments contained in Respondent's Answer Brief, the issue before this Court is a simple one: did the lower court err in holding that the entire State Attorney file is a public record and in ordering disclosure thereof. Obviously, this question cannot be answered without reference to what is contained in the file. The State has conceded that the file does contain nonexempt public records and has agreed to produce those from the start. However, the file also contains documents that are not public records and documents that are public records but are exempt from disclosure. The lower court erred, as does the Respondent, by viewing the State Attorney file as a single document, rather than numerous documents. It is up to the lower court, with appropriate guidance from this Court, to determine whether each particular contested document must be disclosed. The lower court erred in never undergoing this type of analysis.

Throughout his brief, the Respondent attempts to classify the issues in this case as death penalty issues, when in reality, they are not: they are public records issues. The fact that this is a death penalty case is incidental. The Public Records Act contains no special

exemptions or applications for death penalty cases. Either a document is a public record or it is not. Either a document is exempt under the Public Records Act r it is not. Contrary to Respondent's belief, the Public Records Act was not intended as a "vehicle" in death penalty cases for inmates to obtain possible evidence of Brady violations. If the legislature had intended it to be such a vehicle, it could have easily said so. However, the policies behind the Public Records Act and the exemptions thereto, promoting open government except in certain overriding circumstances, are much broader than and largely unrelated to specific types of litigation. Thus, most of the arguments and policies set forth by the Respondent are misplaced. Unless this Court is willing to create special applications of the Public Records Act in death penalty cases, which are absolutely nowhere found in the Act itself, the Court should ignore ninety percent of the Respondent's brief, which contains merely a restatement of the same argument -- because this is a death penalty case, different rules should apply and the records must be disclosed irrespective of the statute and the case law.

Clearly, the Respondent is arguing out of both sides of his mouth. On the one hand, the Respondent correctly notes that the Public Records 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." Answer Brief of Respondent at 7, quoting Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA), rev. denied, 475 So.2d 695 (Fla. 1985) (emphasis added). On the other hand, Respondent's arguments stress the purpose of his inquiry -- for possible use in overturning his conviction and death sentence -- as a reason for disclosure. Respondent was correct initially -- the fact that he is a death row inmate puts him in no different situation than any other person seeking records under the Public Records Act. The Act does not concern itself with who is requesting the record but just with whether the record is public.

II. THE LOWER COURT ERRED IN FAILING TO ANALYZE WHETHER CERTAIN DOCUMENTS CONTAINED IN THE STATE ATTORNEY FILE ARE IN FACT "PUBLIC RECORDS."

As stated in Petitioner's Initial Brief, this Court's decision in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980), makes clear that not all pieces of paper that are contained in a government file are "public records" within the meaning of the Public Records Act. In Shevin this Court stated that the "definition limits public information to those materials which constitute records - that is, materials that have been prepared with the intent of perpetuating or formalizing knowledge." Id at 640. In addition, this Court stated that 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." Id.

The Petitioner's Initial Brief also discusses Orange County v. Florida Land Co., 450 So.2d 341 (Fla. 5th DCA 1984), in which the court specifically held that attorney outlines of evidence for trial, lists of questions of a witness, a proposed trial outline, and notes regarding the deposition of an anticipated witness and a meeting with other attorneys, were not "public records." The court stated: "These documents are merely notes from the attorneys to themselves designed for their

own personal use in remembering certain things." Id at 344.

Thus, this Court and other courts have made clear that only documents that are intended to formalize or perpetuate knowledge are considered "public records.'' In this case, the State Attorney file clearly contains documents identical to those held not to be public records in Orange County, i.e., witness outlines, trial preparation materials, etc. The Respondent's response to this fact is to argue that since the Respondent needs such documents to discover possible Brady violation, the documents should be considered formal records for purposes of the Public Records Act. Thus, Respondent's argument is based simply on wanting the documents. It begs the question whether the documents are, in fact, public records.

Respondent seeks to make a subtle but important change in the test that this Court set forth in Shevin. Rather than focusing on the intent of the preparer of the document, i.e., did the preparer of the document intend to perpetuate or formalize knowledge therein, the Respondent seeks to shift the Court's focus to the desire of the person seeking access to the questioned documents. Under the Respondent's theory, if the document is important enough to be "needed" or wanted by the requester, for whatever purposes intended, the document becomes a "public record" irrespective of the intent of the preparer. This

is simply not the test under the case law. The fact that preliminary notes or drafts may contain useful information to the requester does not make them public records.

The fact is that despite Respondent wanting the entire file, there are documents in that file that clearly were never intended to "perpetuate, communicate, or formalize knowledge of some type." Shevin, 379 So.2d at 640. In short, they were never intended as records. As in Orange County, they are merely personal notes from the attorneys to themselves prepared to aid them in the prosecution of the case.

The lower court should have examined the documents in the State Attorney's file to determine whether they were intended as formal records. Had the lower court done so, it would have found that the file contains documents that are simply not public records.

111. THE LOWER COURT ERRED IN FAILING TO ANALYZE WHETHER CERTAIN DOCUMENTS CONTAINED IN THE STATE ATTORNEY FILE ARE EXEMPT FROM DISCLOSURE AS ATTORNEY WORK PRODUCT.

The sole issue before the Court regarding the aforementioned exemption is whether the "litigation" between the Petitioner and the Respondent has concluded. The fact that the Petitioner and the Respondent are now here before this Court arguing this issue in itself answers the question. Obviously, the "litigation" between the Petitioner and the Respondent is far from concluded. If it had been concluded, it is a safe assumption that the Respondent would not be seeking these documents in the first place.

Again, the Respondent is arguing out of both sides of his mouth. On the one hand, he states that the litigation has been concluded. On the other hand, Respondent's explicit reason for wanting access to these records is to search for evidence of a Brady violation, to be raised as part of the litigation between Respondent and the State. To say that the litigation between the Respondent and the Petitioner has concluded is to be completely blind to reality, as evidenced by the Respondent's pending 155 page motion under Rule 3.850, Florida Rules of Criminal Procedure. Respondent is clearly "litigating" with the State in any sense of that term. Furthermore, to draw an artificial distinction between Respondent's trial and his post-conviction motions again ignores realities. There is

only but one case between the Respondent and the State: the case arising from his act of murder.

The Respondent argues that the litigation between the Respondent and the State never really ends until he is put to death. Unfortunately, this may be true. That fact, however, represents a sad commentary on death penalty litigation, rather than a problem with the Public Records Act. The Public Records Act was not meant as a discovery device in death penalty litigation and it was not meant as a vehicle for death row inmates to establish Brady violations. The Public Records Act is no more concerned with death penalty litigation than it is with any other types of litigation. Thus, there is nothing unconscionable about the idea that the Public Records Act does not provide access to litigants seeking attorney work product. In fact, that is exactly what is intended by the exemption.

In short, it is up to the legislature, and not this Court, to provide that death row inmates have a right of access to attorney work product to establish Brady violations. That is exactly what the Respondent wants this Court to do and it is simply not within the province of this Court to create such law. Clearly, the litigation between the Respondent and the State is far from concluded, and thus the exemption for attorney work product is fully applicable.

IV. THE LOWER COURT ERRED IN FAILING TO ANALYZE WHETHER CERTAIN DOCUMENTS CONTAINED IN THE STATE ATTORNEY FILE ARE EXEMPT FROM DISCLOSURE AS ACTIVE CRIMINAL INTELLIGENCE OR CRIMINAL INVESTIGATIVE INFORMATION.

As to this final category of documents, the Petitioner relies primarily on the arguments contained in its Initial Brief. Once again the arguments contained in the Respondent's Answer Brief rely primarily on the Respondent's alleged need for the State Attorney file and his status as a death row inmate. Such arguments miss the point completely. The issue before the Court is simple -- whether the term "pending prosecutions or appeals" contained in Section 119.011(3)(d)2, Florida Statutes, includes a prosecution, conviction and sentence that are being attacked collaterally by way of a Rule *3.850* motion. For the reasons stated in Section III of this brief and the Petitioner's Initial Brief, the prosecution of Respondent has not been concluded because Respondent has chosen to attack that prosecution collaterally. Realistically, Respondent's prosecution is still pending and is far from concluded. Thus, the aforementioned

exemptions apply and the questioned documents are not subject to disclosure under the Public Records Act.

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 Respondent, Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida, this 22ND day of March, 1990.

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SB03.07901