IN THE SUPREME COURT OF FLORIDA

CASE NO.

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RICKEY BERNARD ROBERTS,

Plaintiff-Appellant,

v.

ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Respondent-Appellee.

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**EMERGENCY MOTION: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT.**

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ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, STATE OF FLORIDA

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# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's Order denying Mr. Roberts' complaint for disclosure of public records. The complaint was brought pursuant to Chapter 119 of the Florida Statutes. The circuit court denied Mr. Roberts' complaint by entering a Final Order in which Mr. Roberts was denied the opportunity to inspect numerous public records in the possession of the Attorney General.

The following symbols will be used to designate references to the record in this instant cause: "R" -- record on direct appeal to this Court. All other citations will be self-explanatory or will be otherwise explained.

The jurisdiction of this Court is invoked pursuant to Article V, § 3(b)(1) and § 3(b)(7) of the Florida Constitution.

## REQUEST FOR ORAL ARGUMENT

Mr. Roberts has been sentenced to death. A death warrant has been signed and his execution is imminent, currently scheduled for 7:00 a.m. on February 23, 1996. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Roberts, through counsel, accordingly urges that the Court permit oral argument.

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## STATEMENT OF THE CASE AND OF THE FACTS

This is an action for disclosure of public records pursuant to Chapter 119 of the Florida Statutes.

Appellant mailed to the Appellee two (2) formal requests for the disclosure of public records, pursuant to Chapter 119 of the Florida Statues, Article I, Section 24 of the Florida Constitution, and Brady v. Maryland, 373 U.S. 83 (1963) (R. 42, 44-45, Appellant's requests for public records to Appellee). These requests were mailed on August 7, 1995, and September 18, 1995 (Id.). The requests were for any and all records in Appellee's custody, care and/or control relating to Appellant, Rickey Bernard Roberts (Id.).

On September 27, 1995, Appellant filed a Complaint for Disclosure of Public Records in the Circuit Court of Leon County with a request for in camera inspection of withheld public records (R. 1-6).

On January 30 and February 5, 1996, Appellant inspected the files of the Appellee but was denied access to some public records. Appellee provided a written claim of exemption (R. 56), asserting the following exemptions:

> January 30, 1996
>
> Inventory of Withheld Documents in Rickey Bernard Roberts case:
>
> Enclosed is a list of items withheld from the Rickey Bernard Roberts file, to which CCR representatives have been provided access on this date. The basis for withholding is the undersigned's belief that these items do not constitute "public records" under section 119.011, as construed by State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990), as they simply contain the mental impressions of the

authors. Additionally, to the extent necessary, these items are exempt under Section 119.07(3)(l)(1995).

1.(a) One (1) yellow legal sized pad (25 handwritten pages)
(b) One (1) white legal sized pad (6 handwritten, 32 blank pages)
(c) Four (4) stapled yellow legal sized pages
(d) Twelve (12) stapled yellow legal sized pages
(e) Fifteen (15) stapled yellow legal sized pages
(f) Eight (8) stapled yellow legal sized pages
(g) Seven (7) stapled yellow legal sized pages
(h) One (1) white standard sized page.
(i) Handwritten proposed questions to a potential witness and related documents, compiled in preparation for collateral federal evidentiary hearing.

All of the above contain handwritten notes compromising AAG's mental impressions and strategy, used in preparation for direct appeal briefs and arguments, state and federal collateral actions, and, appeals therefrom.

2.(a) One legal sized manila folder containing a copy of defendant's statement at clemency proceeding (43 pages)
(b) One manila folder containing copy of case packet for clemency from Florida Parole Commission (145 pages)
(c) One manila folder containing a copy of Defendant's Memorandum In Support Of Rickey Roberts' Application and Prayer for Executive Clemency. (78 pages)

All of the above are exempt pursuant to Asay v. Florida Parole Commission, 649 So. 2d 859 (Fla. 1994) and Fla. Stat. 14.28 (Fla. 1995) and Rule 16 of the Rules for executive clemency.

(R. 56). The withheld documents comprised some 353 pages (R. 143).

Appellant and Appellee entered into a joint stipulation resolving several pending motions (R. 35-56). On February 8, 1996, a hearing was held in the circuit court. The parties presented argument, and the court conducted an on the record in camera inspection of the documents claimed to be exempt by Appellee.

Regarding the claim of exemption for items 1(a) through 1(i), Appellee argued that these documents were not public records and if they were considered public records, they were exempt under Section 119.07(3)(l), Fla. Stat. (1995) (R. 92-96). Appellant argued that items 1(a) through 1(i) were public records (R. 116-121, 124-127). Regarding the exemption claimed under Section 119.07(3)(l), Appellant argued that this provision, which went into effect after Appellant made his public records requests and filed his complaint, could not be applied retroactively because a substantive law is to be construed as having prospective effect only (R. 96-98), because the provision was not remedial (R. 98-101), and because application of this provision only to death-sentenced persons would violate equal protection (R. 101-102, 109-110).

Regarding the claim of exemption for items 2(a) through 2(c), Appellee argued these documents were exempt under Asay v. Florida Parole Commission, 649 So. 2d 859 (Fla. 1994), and Section 14.28, Fla. Stat. (R. 128-130). Appellant argued that

Brady v. Maryland, 373 U.S. 83 (1963), applied to these documents (R. 130-131).

The court reviewed the withheld documents and ruled that none were disclosable (R. 131-142). The court entered two orders. The first order held that the Attorney General's office is obligated to disclose Brady material, but that Chapter 119 did not give the court jurisdiction to hear Brady claims, which must be brought in a court of competent jurisdiction (R. ____, Attachment 1).[1]

The second order ("Final Order") held that Section 119.07(3)(l), Fla. Stat. (1995), did not violate equal protection or due process and should be applied retroactively (R. 59-60). The court ruled that items 1(a) through 1(h) were exempt because they were not public records and because they were exempt under Section 119.07(3)(l) (R. 62-63), and that item (1)(i) was a public record but was exempt under Section 119.07(3)(l) (R. 63). As to items 2(a) through 2(c), the court ruled that these documents were exempt under Section 14.28, Fla. Stat. (R. 64).

Mr. Roberts filed a notice of appeal, and this appeal ensued.

## SUMMARY OF ARGUMENT

The trial court erroneously held that items 1(a) through 1(h) were not public records. Notes, preliminary drafts, working drafts, or any document prepared in connection with the official

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[1]This order is not in the record on appeal and is therefore attached hereto.

business of an agency that is to perpetuate, communicate or formalize knowledge are subject to disclosure under Chapter 119. Notes that are intended as evidence of knowledge obtained in the transaction of agency business are public records. Further, the Attorney General failed to establish that the withheld materials are non-public records.

The trial court erred in applying the exemption under Section 119.07(3)(l), Fla. Stat. (1995), to the withheld materials. This provision should not be applied retroactively because it is not remedial. That is, at the time the statute was enacted, no problem existed requiring a remedy, and the Attorney General did not argue that any such problem existed. Even if the provision applies retroactively, application of this exemption violates equal protection because the provision applies only to indigent death-sentenced persons.

The trial court erred in holding that it lacked jurisdiction to examine the withheld documents for Brady material, even though the court ruled that the Attorney General was obligated to disclose Brady material. The court's ruling leaves Mr. Roberts with no forum in which he can litigate the Attorney General's obligation under Brady.

The trial court erred in refusing to order disclosure of any of the clemency materials contained in the Attorney General's files. As with the other records, the court erroneously ruled that it lacked jurisdiction to examine these documents for Brady material. Further, the Parole Commission's and/or Governor's

disclosure of these documents to the Attorney General has lifted any claim of confidentiality as to these documents. Finally, disclosure of these documents to the Attorney General but not to Mr. Roberts violates due process.

## ARGUMENT

### THE TRIAL COURT ERRED IN HOLDING THAT ALL OF THE WITHHELD DOCUMENTS WERE NOT DISCLOSABLE.

### A. THE ATTORNEY GENERAL FAILED TO ESTABLISH THAT THE WITHHELD DOCUMENTS WERE NON-PUBLIC RECORDS.

In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court discussed the definition of "public records." The Court held public records are "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." Id. at 640. The Court went on to identify materials that are not public records:

> 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. Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of the agency's later, formal public product would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

Id. All such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted by the Legislature. Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979). Notes, preliminary drafts, working drafts, or any document prepared in connection with the official business of an agency that is to perpetuate, communicate, or formalize knowledge regardless of whether it is in final form or the ultimate product of an agency, are subject to disclosure under Chapter 119. Shevin, 379 So. 2d 633; Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990); Hillsborough Co. Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983); State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1977, cert. denied, 360 So. 2d 1247 (Fla. 1978); Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976); and Copeland v. Cartwright, 38 Fla. Supp. 6 (Fla. 17th Cir. Ct. 1972), affirmed, 282 So. 2d 45 (Fla. 4th DCA 1973); Op. Att'y Gen. Fla. 85-79 (1985). That a document is considered a personal note is immaterial. Notes that are prepared for filing or are otherwise intended as evidence of knowledge obtained in the transaction of agency business are public records. Florida Sugar Cane League v. Florida Department of Environmental Regulation, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992). Furthermore, "interoffice and intra-office memoranda may constitute public records even though encompassing trial preparation materials." Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st DCA 1988). See Orange County v. Florida Land Co., 450

So. 2d 341 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984); Hillsborough County Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983).

Kokal addressed the distinction between records that are public and records that are not. The documents at issue in Kokal were a list of items of evidence that may be needed for trial, a list of questions the attorney planned to ask a witness, a proposed trial outline, handwritten notes regarding a meeting with the other party's attorneys, and notes "in rough form" regarding the deposition of an anticipated witness. The Court held:

> 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 formalized 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.

Kokal, 562 So. 2d at 327 (emphasis in original). In Mr. Roberts' case, the Attorney General's office improperly asserted that items 1(a) through 1(h) were non-public records. The Attorney General provided these records to the court for an in camera inspection. After such inspection, the court concluded the records were non-public records. The court's conclusion was erroneous. Kokal; Tribune Company. The records at issue are public records.

These items all contain "notes," mostly handwritten. Nonetheless, the essential requirements of Chapter 119 apply. If

the "prosecutor's notes to himself" are intended as "final evidence of the knowledge to be recorded," Kokal, at 327, then the notes are public records. If the "prosecutor's notes to himself" "supply the final evidence of knowledge obtained in connection with the transaction of official business," id., then the notes are public records. A record "merely prepared for filing," is nonetheless a public record because it "suppl[lies] the final evidence of knowledge obtained in connection with the transaction of official business." Orange County v. Florida Land Co., 450 So. 2d 341, 343 (Fla. 5th DCA 1984)(citing Shevin). The notes at issue here may fall into this category; even if never circulated as inter-office memoranda, the notes at issue were made part of the Attorney General's file on Mr. Roberts' case. Further, the inclusion of these notes into the Attorney General's files evinces the intent of the attorney preparing them to perpetuate their existence.

If, on the other hand, the notes are "mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded," or "rough drafts," or "notes to be used in preparing some other documentary material," then the notes are not public records. Shevin; Kokal. However, the determination of whether a record is a public record is a factual determination that can be made only when the party claiming the exemption provides the court with the document claimed to be merely preliminary, and thus not a public record, and the document supplying the final evidence of the knowledge

contained in the notes or draft, thus a public record. Only by comparing the draft/notes with the final version can the court make the determination that the draft or notes are not public records. In this case, the State did not provide the court with the final version of these notes in order to make the comparison and determine whether the notes were indeed simply "preliminary guides intended to aid the attorneys when they later formalized the knowledge." Shevin; Kokal. Without such final document(s) or at least testimony regarding such document(s), the court is, by definition, unable to make the determination of whether the notes are public records.

In this case, if the "prosecutor's notes to himself" were never formalized into a final version, then the notes themselves are "the final evidence of knowledge obtained in connection with the transaction of official business." Shevin at 640; Kokal at 327. In Shevin, the Court held that the party's handwritten notes made during or shortly after interviews were not public records because the party later formalized the knowledge gained during the interview. Shevin at 641. Here, if the Attorney General never formalized the notes into a final form, the notes themselves are the final form, and are public records. If the notes were formalized into some final document, the Attorney General must provide that document to the court so that it may conduct an adequate in camera inspection to determine whether the notes claimed exempt are public records.

Further, this Court should reject any contention by the Attorney General that the pleadings and evidence it presented in court constitutes the formal agency statement on the subject matter and all else is merely preliminary or preparatory and, therefore, not a public record. Hillsborough County Aviation Authority v. Azzarelli Construction Company, 436 So. 2d 153 (Fla. 2d DCA 1983); See also Bay County School Board v. Public Employees Relations Commission, 382 So. 2d 747 (Fla. 1st DCA 1980)(concluding that school board budget work sheets were materials prepared in connection with official agency business and tended to perpetuate, communicate, or formalize knowledge of some type and thus were public records); Op. Att'y Gen. Fla. 85-79 (1985)(concluding that interoffice memorandum, correspondence, inspection reports, and other documents maintained by county public health units are public records).

In order to determine whether the notes are public records, the court must be provided with both the notes and the final document that formalized the knowledge contained in the notes. The court then has a two-step analysis to conduct: is the record a public record, and if so, is it part of the State's current file relating to any pending motion for post-conviction relief? This determination may be made after an evidentiary hearing. Walton v. Dugger, 634 So. 2d at 1059. If the State provides both the draft and final form of the record, and testimony is not needed to establish that a document was later formalized, then the Court may conduct an in camera inspection of both documents

to determine whether the draft or notes are public records. Kokal, 562 So. 2d at 327; Mendyk, 592 So. 2d at 1081; Walton, 634 So. 2d at 1062; Shevin, 379 So. 2d at 640-41; Fritz v. Norflor Construction Co., 386 So. 2d 899, 901 (Fla. 5th DCA 1980); Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487, 491 (Fla. 2d DCA 1990); Tribune Company, 493 So. 2d at 484. Likewise, if the State claims a document is work product relating to current post-conviction litigation and not the trial and appeal, the State must provide that record for an in camera inspection. Walton, 634 So. 2d at 1062; Lopez v. Singletary, 634 So. 2d 1054, 1057-58 (Fla. 1993); Tribune Company, 493 So. 2d at 484. If the record is a public record, and does not relate to a current motion for post-conviction relief, the record must be disclosed.

The burden of establishing a right to withhold a record falls on the agency. Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985). At this time, the Attorney General has failed to prove the existence of a work product exemption or that the withheld materials are non-public records. Simply stated, the record in this case is completely devoid of the factual predicates which would permit this Court or the trial court to withhold these materials as non-public records.

Therefore, this Court should vacate the trial court's Final Order and order the immediate release of withheld documents because the documents are public record. Kokal; Walton.

Alternatively, this Court should remand this case for an evidentiary hearing in this matter in order to allow the Appellant an opportunity to investigate the factual predicates necessary to support the exemptions claimed by the Appellee.

### B. THE EXEMPTION FOR ATTORNEY GENERAL RECORDS IN SECTION 119.07(3)(L) SHOULD NOT BE APPLIED RETROACTIVELY AND VIOLATES EQUAL PROTECTION.

#### 1. Section 119.07(3)(l), Fla. Stat. (1995), Does Not Apply Retroactively.

Florida courts uniformly recognize that access to public records is a substantive rather than a procedural right and therefore that an exemption to the public records law is substantive, not procedural, law. Wait v. Florida Power & Light, 372 So. 2d 420 (Fla. 1979); Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984) ("Access to public records is a matter of substantive rather than practice and procedure"). In the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only. Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985); State v. Lavazolli, 434 So. 2d 1152 (Fla. 1983).

This rule "mandates that statutes that interfere with vested rights will not be given retroactive effect." Young, 472 So. 2d at 1154. Such legislative attempts which abrogate vested rights are unconstitutional, especially in those instances in which retrospective operation of law would impair or destroy existing rights. Id.

In this case, the attorney work product exemption at Section 119.07(3)(l), which took effect on October 1, 1995, is substantive in nature. The exemption provides:

> For purposes of capital collateral litigation as set forth in §27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

Application of this work product exemption to the withheld Attorney General files will destroy Mr. Roberts' rights to those files. Mr. Roberts' right to the Attorney General's files vested and his cause of action accrued prior to the effective date of Section 119.07(3)(l), which was October 1, 1995. Mr. Roberts requested public records from the Attorney General on August 7, 1995, and September 18, 1995. Mr. Roberts filed his complaint under Chapter 119 on September 27, 1995.

Section 119.07(3)(l) also does not apply retroactively because it is not a remedial statute. Remedial statutes are exceptions to the rule that statutes are addressed to the future rather than to the past, and remedial statutes, like procedural rules, do not come within the general rule against retrospective operation of statutes. "[A] remedial statute is one which confers a remedy, and a remedy is the means employed in enforcing a right or in redressing an injury." Grammer v. Roman, 174 So. 2d 443 (Fla. 1965).

Consistent with Appellee's burden to prove the validity of his claim of exemption, he must prove this new statute is

remedial in nature. Nothing in the statutory language itself or in the Florida cases suggests that the legislature was attempting to remedy an existing problem or imbalance between the parties.

In holding that the statute could be applied retroactively, the lower court relied upon City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986). However, the court in Desjardins was confronted with a very different question that is at issue in this case. In Desjardins, the legislation at issue was prompted by the harsh effect, imbalanced posture and disadvantaged status of public entities involved in ongoing litigation, when opposing parties could obtain access to the public entity's files under the public records law. For years, the problem had been repeatedly recognized by the courts in their refusal to create or recognize a work product or attorney client exemption. The courts repeatedly stated that the problem should be remedied by the legislature. When the legislature acted, its remedial motivation was documented in the legislative history and noted by the court in Desjardins. 493 So. 2d at 1029 (citing cases).

No such problem exists in this case. Appellee did not in the lower court and cannot here point to any specific case where the Attorney General's current litigation has been adversely affected by disclosure to its files relating to direct appeal and other closed matters. Appellee has pointed to no legislative history establishing that the legislature had a remedial motivation. There being no existing problem which enactment of the work product exemption in Section 119.07(3)(l) was intended

to cure, the statute is not remedial and therefore may not be applied retroactively.

Desjardins is distinguishable also because the work product exemption recognized there was only temporary. The rights of the requester were not completely extinguished, but merely delayed. Here, the work product exemption completely extinguishes Mr. Roberts' right to inspect and copy inactive Attorney General files because those files will not become available until Mr. Roberts is dead.

**2. Application Of Section 119.07(3)(l) To Mr. Roberts Violates Equal Protection.**

Application of Section 119.07(3)(l) to Mr. Roberts, an indigent, death-sentenced person, violates equal protection. First, Section 119.07(3)(l) states that it applies to "capital collateral litigation as set forth in [section] 27.7001." Section 27.7001 is the Capital Collateral Representative's enabling statute. Section 27.7001 applies to "any person convicted and sentenced to death in this state who is unable to secure counsel due to indigency." It provides for state paid counsel for individuals under a sentence of death who cannot otherwise obtain counsel. Thus, the new work product exemption applies to indigent capital defendants who are represented by state paid counsel, in violation of equal protection and due process.

Government acts predicated upon a person's indigency create a "suspect" classification. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 61 (1973) (Stewart, J.,

concurring). Such acts violate equal protection unless they can survive a strict scrutiny analysis. Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966). Under a strict scrutiny analysis, government acts "will be sustained only if they are suitably tailored to serve a compelling state interest." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 373, 440 (1985). Here, the Attorney General offered no "compelling" state interest which the indigent, death sentenced person classification was "suitably tailored to serve." The classification therefore violates equal protection, and Section 119.07(3)(l) should not be applied to Mr. Roberts.

Even if the classification in the work product exemption is not subjected to strict scrutiny, it still cannot survive an equal protection challenge. When no suspect or quasi-suspect classification is involved in a government act, "[t]o withstand equal protection review, legislation that [creates a classification] must be rationally related to a legitimate governmental purpose." City of Cleburne, 473 U.S. at 447.

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. . . . Furthermore, some objectives--such as "a bare . . . desire to harm a politically unpopular group," . . . --are not legitimate state interests.

Id. Even when the group making up the classification is clearly different from other groups, "this difference is largely irrelevant unless . . . it would threaten legitimate interests of

the [government] in a way that [other groups] would not." Id. at 448.

Here, the new work product exemption treats public records requests regarding death-sentenced persons who are represented by CCR differently from other public records requests, including those involving persons subjected to lesser criminal penalties. The lower court found that the statute does not violate equal protection because "death penalty litigation is different from other postconviction proceedings. Capital postconviction proceedings usually last for years in both the state and federal courts. For this reason the Legislature could rationally distinguish between capital collateral litigation and postconviction proceedings in non-death cases" (R. 60). This determination does not rely upon anything in the language of the statute or in the legislative history. A court may not create a rational basis for legislation. See McGinnis v. Royster, 410 U.S. 263, 277 (1973). Moreover, it does not explain why a capital defendant who is not represented by CCR may obtain the public records while similar records in a case wherein CCR is counsel are exempt.

The legislative history provides:

> HB 2701 also amends the exemption to allow the attorney general's office to claim such an exemption for records developed by an attorney from the attorney general's office in a capital collateral litigation case when such records are prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence. The premature disclosure of this

> information could be detrimental to the attorney general's legal representation in these proceedings if the material were disclosed prior to final disposition of the post-conviction proceedings, thus interring with the effective and efficient administration of government. Furthermore, a capital defendant's ability to secure other public records is not diminished by nondisclosure of these attorney work products. See State v. Kokal, 562 So.2d 324, 327 (Fla. 1990)(with regard to the states attorney, "the conclusion of litigation" with respect to a criminal conviction and sentence occurs when that conviction and sentence have become final).

This history does not provide a rational basis for why disclosure of public records "inter[es] with the effective and efficient administration of government" but the disclosure of the public records in a non-capital setting does "interfer[] with the effective and efficient administration of government." Moreover, the legislative history does not explain why the exemption only exists for "capital collateral litigation as set forth in §27.7001" and not for all capital collateral litigation as defined in Rule 3.851.

There is no rational basis for exemptions to arise only for indigent capital defendants represented by CRR.

**C. THE LOWER COURT'S REFUSAL TO EXAMINE THE WITHHELD DOCUMENTS FOR BRADY MATERIAL LEAVES MR. ROBERTS WITH NO FORUM WHICH WILL CONDUCT SUCH AN EXAMINATION.**

Mr. Roberts properly filed a civil Complaint for Disclosure of Public Records against the Attorney General in the Circuit Court of the Second Judicial Circuit, in and for Leon County. The Leon County Circuit Court had full jurisdiction to consider Mr. Roberts' claim for disclosure.

This Court has held:

> We agree that with respect to agencies outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney, requests for public records should be pursued under the procedure outlined in chapter 119, Florida Statutes.

Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992). Since the Attorney General was not found in the circuit which entered the judgment and sentence, jurisdiction was proper in Leon County, where the Attorney General was found. This Court's ruling in Hoffman was a determination that full jurisdiction to decide Mr. Roberts' civil case against the Attorney General, brought under Chapter 119, rested with the Leon County Circuit Court.

Nevertheless, the Leon County Circuit Court held that it did not have jurisdiction to entertain claims that withheld material claimed to be exempt from Chapter 119 disclosure constituted Brady material (Attachment 1). Despite Mr. Roberts' request, the Leon County Circuit Court refused to review withheld material for exculpatory evidence.

This Court should reject the Circuit Court's conclusion that it was without jurisdiction to determine whether the withheld exempt materials constituted Brady, reverse, and remand for an in camera inspection. The lower court's conclusion places Mr. Roberts in an untenable position. Pursuant to Hoffman, Mr. Roberts properly pursued his public records issue in Leon County, where the Attorney General is located. However, despite ruling that the Attorney General is obligated to disclose exculpatory

evidence under Brady, the circuit court ruled it lacked jurisdiction to examine withheld documents for Brady material. Mr. Roberts has no forum in which to litigate this issue and is scheduled to die on February 23, 1996, while a package containing potentially exculpatory evidence remains secret and inviolate. This violates due process.

The circuit court's refusal to review the undisclosed records for Brady material denied Mr. Roberts the rights guaranteed by Brady. Further, in Kyles v. Whitley, 115 S. Ct. 1555 (1995), the United States Supreme Court held that in determining whether evidence not disclosed by the State is "material" in violation of Brady, the defendant is entitled to a determination of the cumulative effect of all suppressed evidence favorable to the defendant rather than consideration of each item of evidence individually. Mr. Roberts was denied that determination by the Leon County Circuit Court, under Hoffman the only court with proper jurisdiction over the Office of the Attorney General.

The Leon County Circuit Court determined that the Attorney General has an obligation to disclose exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963), but refused to hold the Attorney General to that obligation. As the only court with proper jurisdiction over the Attorney General, the circuit court's ruling refusing to review withheld material for Brady effectively relieved the State of Florida of its obligation to

disclose exculpatory evidence and left Mr. Roberts without recourse in a court of law.

The circuit court's ruling also denied Mr. Roberts access to courts as guaranteed by Article I, Section 21, Florida Constitution:

> **Access to courts.** - The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

By determining that it was not the court of competent jurisdiction to review the withheld material in camera to determine if any materials constituted Brady, the Leon County Circuit Court in effect decided that the proper court to make that determination was the trial court where Mr. Roberts was convicted and sentenced. Yet, the Circuit Court in Dade County is without jurisdiction over the Attorney General. Mr. Roberts is left without any court in which to seek redress.

The Attorney General is in possession of material that has not been disclosed to Mr. Roberts. No court has accepted the responsibility to determine whether any of that undisclosed material is exculpatory. Mr. Roberts is caught in an egregious "Catch 22." This Court has told him that he must bring any Chapter 119 lawsuits against the Attorney General in the circuit court where the Attorney General is found (Hoffman), but that circuit court has ruled that while it will decide to sustain the withholding of material by the Attorney General, it will not determine whether those materials constitute Brady. The Leon County Circuit Court decided that the 3.850 court was the proper

court to perform Brady. However, this Court has held that jurisdiction over agencies outside the judicial circuit in which the sentence was imposed rests only where that agency is found. Hoffman. In the case of the Attorney General, jurisdiction lies in Leon County.

The Constitution of this State guarantees that all persons shall have the courts of this stat available for redress of injuries. The Leon County Circuit Court should have reviewed the withheld material for Brady, yet refused to conduct the review mandated by Kyles, Brady, and Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993).

The Circuit Court's refusal to make the determination whether the material withheld by the State of Florida constituted Brady also denied Mr. Roberts the effective assistance of post-conviction counsel. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1986). Post-conviction counsel sought the disclosure of records in order to pursue claims on behalf of Mr. Roberts. Yet, post-conviction counsel has been foreclosed from pursuing claims based on Brady because the Circuit Court refused to review withheld material for exculpatory evidence and no court has reviewed that withheld material for Brady material. By placing Mr. Roberts in this untenable "Catch 22", the circuit court for Leon County has acted to deny Mr. Roberts any semblance of the due process guaranteed by the Fourteenth Amendment and the Florida Constitution.

### D. THE LOWER COURT'S APPLICATION OF AN EXEMPTION TO CLEMENCY MATERIALS CONTAINED IN THE ATTORNEY GENERAL'S FILE VIOLATES DUE PROCESS.

The lower court determined that items 2(a) through (c) were exempt from disclosure under Section 14.28, Fla. Stat., because they were clemency materials. This ruling was erroneous.

First, the lower court held it was without jurisdiction to determine whether these documents contained any Brady material. As explained in Section C, above, this holding has deprived Mr. Roberts of due process.

Second, clemency materials are deemed exempt from public disclosure because they are considered confidential documents whose release would impair the clemency process. Section 14.28, Fla. Stat.; Asay v. Parole Commission, 649 So. 2d 859 (Fla. 1994). However, the Governor has the discretion to release such materials. Rule 16, Rules of Executive Clemency.

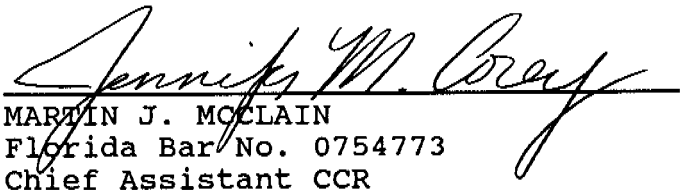
Here, the clemency materials have been released to the Assistant Attorney General representing the state in Mr. Roberts' post-conviction proceedings, yet these materials are still kept hidden from Mr. Roberts. Releasing the materials to the Assistant Attorney General has divested those materials of their confidential nature. Refusing to also disclose those materials to Mr. Roberts is a clear violation of due process.

## CONCLUSION

Based upon the foregoing, Mr. Roberts respectfully urges the Court to reverse the lower court, to direct disclosure of

wrongfully withheld materials, and to direct the lower court to examine the withheld documents for Brady material.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by hand delivery, to all counsel of record on February 19, 1996.



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