IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,022

TERRELL M. JOHNSON,

Appellant,

v.

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

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order denying Mr. Johnson's complaint for disclosure of public records. The complaint was brought pursuant to chapter 119 of the Florida Statutes, The circuit court denied Mr. Johnson's complaint by entering a Final Order in which Mr. Johnson 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 appeal to this Court; "SR" -- supplemental record on 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. Johnson requests oral argument. 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.

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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 and Bradv v. Maryland.

On January 10, 1995, Mr. Johnson mailed a formal request for the disclosure of public records to the Office of the Attorney General pursuant to chapter 119 of the Florida Statutes and Brady v. Maryland, 373 U.S. 83 (1963).

In a letter dated February 9, 1995, the Attorney General refused to provide Mr. Johnson access to the public records requested. On August 10, 1995, Appellant filed a complaint for disclosure of public records in the Second Judicial Circuit Court, Leon County, Florida.

On September 9, 1995, a status conference was held on the complaint. On October 3, 1996, Appellee filed a Motion to Strike Demand for Jury Trial and Schedule In Camera Proceeding and a Motion to Dismiss in Part and Motion for More Definite Statement.

On October 16, 1995, Appellee filed a Notice of Providing Access to Public Records. On October 16, 1995, the Court entered an order regarding discovery. On October 17, 1995, a hearing was held on the Appellee's motions and proposed orders were generated. The Attorney General took the position that it had no obligation to disclose Brady material because it was not a prosecutorial agency,

On October 19, 1995, Appellee filed a Motion to Stay explaining that counsel for Mr. Johnson and the Attorney General had begun to make arrangements for inspection of the file. That

motion was heard on November 9, 1995. Counsel for Mr. Johnson did not oppose the Motion in light of the fact that access to the requested Attorney General's files had been offered during the course of the litigation. On November 22, 1995 the Court entered an order granting a stay.

On October 30, 1995 the Court signed an order on Appellee's Motion to Dismiss in Part and Motion for Definite Statement and Motion to Strike Demand for Jury Trial noting that the Motion for More Definite Statement and the demand for a jury trial had been withdrawn. The Order stated that the Attorney General is obligated to disclose Bradv material and that Mr. Johnson should file an Amended Complaint within 20 days in conformity with the Order. On November 1, 1995, Appellee filed a Motion to Reconsider the Court's verbal order of October 17, 1995. On November 9, 1995 a hearing was held on Appellee's Motion to Reconsider. That motion was denied, but the Appellee's request that the Order be clarified was granted. The Order clarifying was entered on May 21, 1996.

On May 20, 1996, the Appellee also filed a Motion to Dismiss. Appellant was ordered to file his Amended Complaint. That Amended Complaint was filed on May 24, 1996. Appellee answered the complaint on May 28, 1996 and thereafter withdrew his Motion to Dismiss. On July 2, 1996, the Attorney General submitted, to the trial court, copies of the documents which it was withholding from Mr. Johnson. The Complaint was heard on July 16, 1996. At that hearing, the Court conducted *in camera*

inspection of the copies of the documents withheld from disclosure. Thereafter the Court denied the Complaint, ruling that Mr. Johnson is not entitled the inspect the withheld material because they were either exempt from disclosure or not public record. At that hearing, Mr. Johnson challenged the Attorney General's reliance of section 119.07(3) (1); whether the exemptions claimed by the Attorney General justify withholding the documents; and whether the Attorney General properly claimed exemptions withholding documents.

Proposed final orders were drafted and submitted by both parties. On July 29, 1996, the Court signed the Attorney General's proposed order. Appellant filed a Motion for Rehearing which was denied. Thereafter, a timely Notice of Appeal **was** filed.

A Motion to Determine Indigency to Appeal was filed by Mr. Johnson in the trial court. On September 17, 1996, the Attorney General filed a response opposing Mr. Johnson's motion. On October 2, 1996 the trial Court denied Mr. Johnson's motion and directed him to renew his motion with the documentation required by section 57.085 of the Florida Statutes. That section along with other amendments to chapter 57 became law as part of the Inmate Lawsuits Act effective July 1, 1996.

On October 14, 1996, Mr. Johnson filed a Motion for Rehearing/Motion to Alter or Amend. The trial court granted that Motion on October 15, 1996 and declared Mr. Johnson insolvent for purposes of appeal. On October 18, 1996, the Attorney General

filed a Motion in this Court for Review of Indigency Determination. On November 4, 1996, Appellant filed his Response to that Motion. On December 16, 1996, Appellee filed a Renewed Motion for Review of Indigency Determination on the basis of a recent change of the Florida Rules of Appellate Procedure. Appellee therein stated that based on that new rule it no longer sought outright denial of indigency status, but did seek Appellant's compliance with the amendments to section 57.085. On March 19, 1997, this Court issued an order stating that the "motion of Terre11 Johnson to be adjudged indigent is granted. Terre11 Johnson is adjudged indigent for the purposes of this appeal. The motion of the Attorney General to require monthly payments of costs in compliance with Section 57. 085(5), Florida Statutes, is denied. The Court has determined that Terre11 Johnson has ten cents in his trust account."

Meanwhile on October 11, 1996, the Attorney General filed a Motion to Consolidate this appeal with the appeal in Krawczuk v. Butterworth, Case No 89,079. Mr. Johnson opposed that motion and on November 4, 1996, that motion was denied.

Appellant's brief was scheduled to be filed on or before April 11, 1997. Appellant filed an Unopposed Motion for Twenty-One Day Extension of Time in Which to File Initial Brief. On April 4, 1997 that Motion was granted making this brief due to be filed by May 2, 1997. On May 2, 1997, Appellant filed a Motion to Supplement the Record, Motion to Temporarily Relinquish Jurisdiction to the Circuit Court, and Motion to Toll Time.

On May 19, 1997, this Court granted the Motion to Toll Time and ordered the record to be supplemented with the transcript of the final hearing held on July 16, 1996 and the Appellee's Notice of Submitting Documents dated July 2, 1996. All other requests by Appellant were denied and the Court ordered this brief be filed within five (5) days of receipt of the supplemental record. On June 20, 1997, Appellant filed the original transcript of the July 16, 1997 hearing in the circuit court.. On July 3, 1997, Appellant received the index to the supplemental record. The Court then ordered this brief filed by July 11, 1997. Appellant requested but was not provided an actual copy of the record on appeal. Counsel has relied on the indexes to provide this Court with citations to the record. This brief is timely filed.

On July 2, 1997, Appellant received Appellee's Renewed Motion to Dismiss and Motion to Accept Documents as Supplements to Record on Appeal. Appellant will respond separately to those Motions.

SUMMARY OF ARGUMENT

Section 119.07(3)(1) violates due process and equal protection when it denies Mr. Johnson access to requested materials requested "for purposes of capital collateral litigation." Based on the plain language of the statute, if an individual requested the same materials, access could not be denied on the basis of 119.07(3)(l) If the request was not "for purposes of capital collateral litigation."

The trial court erroneously held that items withheld by the State were not public records. 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 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 State failed to establish that the withheld materials are not public records.

The trial court erred in holding that it did review the withheld documents for Bradv material, even though the court ruled that the State was obligated to disclose Brady material. The Court's order was erroneous because it had stated on the record it did not review the material for Brady. The court's action leaves Mr. Johnson without a forum in which he can litigate the State's obligation under Brady despite the Court's written order to the contrary,

ARGUMENT

ARGUMENT I

THE LOWER COURT'S INTERPRETATION OF SECTION 119.07(3)(1), FLORIDA STATUTES IS ERRONEOUS. ON ITS FACE AND AS APPLIED TO THIS CASE, THE SECTION VIOLATES DUE PROCESS AND EQUAL PROTECTION BY DENYING MR. JOHNSON ACCESS TO REQUESTED MATERIALS REQUESTED "FOR PURPOSES OF CAPITAL COLLATERAL LITIGATION." BASED ON THE PLAIN LANGUAGE OF THE STATUTE, IF AN INDIVIDUAL REQUESTED THE SAME MATERIALS, ACCESS COULD NOT BE DENIED ON THE BASIS OF 119.07(3) (1) IF THE REQUEST WAS NOT "FOR PURPOSES OF CAPITAL COLLATERAL LITIGATION."

The lower court's interpretation of section 119.07(3) (1), Florida Statutes is erroneous. The section **on its face and as** applied to Mr. Johnson violates due process and equal protection. Moreover, the section interferes with Mr. Johnson's right to the effective assistance of postconviction counsel.

Section 119.07(3) (1) states that:

> A public record which was prepared by an **agency attorney** . . which reflects a mental impression, conclusion, litigation strategy, or legal theory ... is exempt from the provisions of subsection (1) and s. 24(a) Art. I of the State Constitution... until the conclusion of the litigation.... For purposes of **capital** collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption ... until execution of sentence or imposition of a life sentence.

§ 119.07(3) (1), Fla. Stat. (1996).

Section 27.7001, Florida Statute (1996) 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."

Appellant argued below that this new section of chapter 119 treats public records requests made by CCR lawyers and investigators on behalf of death sentenced inmates, for the purpose of capital collateral litigation, differently from requests made by other persons or for other purposes. The lower court found that the statute does not violate equal protection or due process by erroneously interpreting the statute to avoid the necessity of constitutional scrutiny. In doing so, the lower court engaged in improper statutory construction:

> Nothing on the face of the statute so limits the Attorney General's ability to claim the exemption. Johnson's reading would render the exemption meaningless, by making the statute simple to evade. This Court cannot so interpret the challenged statute. The exemption is available to the Attorney General's office regardless of the source of the public records request. Therefore, the statute does not violate equal protection or due process.
>
> Johnson also contends the 1995 amendment to the work product exemption, now codified within § 119.07(3)(1), cannot be applied retroactively to public records requests made before its effective date. The Florida Supreme Court has recently said otherwise. Roberts v. Butterworth, ***668*** So.2d 580, 582 (Fla. 1996). The 1995 amendment applies to Krawczuk's request for access to public records.

(R. 146-47) (emphasis added).

In so ruling, the lower court disregarded the fundamnetal rules of statutory construction.

> Where, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning. ***Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources,*** 453 So.2d 1351 (Fla.1984).

> Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment. *See Florida State Racing Comm'n v. McLaughlin, 102* So.2d 574 (Fla.1958). Indeed, "[i]t is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided [in construing enactments of the legislature]." *State v. Webb, 398* So.2d 820, 824 (Fla.1981).

Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Administrative Hearings, 686 So. 2d 1349, 1354 (Fla. 1997).

This Court has also explained:

> When interpreting a statute, courts must determine legislative intent from the plain meaning of the statute. See St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071 (Fla. 1982). If the language of the statute is clear and unambiguous, a court must derive legislative intent from the words used without involving rules of construction or speculating as to what the legislature intended. See Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1993).

State v. Dugan, 685 So. 2d 1210, 1212 (Fla. 1996).

The plain meaning of section 119.07(3)(l) could not be more clear. The statute reads that "for purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption ... until execution of sentence or imposition of a life sentence."

Moreover, the legislative history reveals the purpose and objective of the section and legislature's intent when it was drafted:

> 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 seneral'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 resard 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).

Section 119.07(3) (1) applies to persons who request records from the Office of the Attorney General for the purposes of "capital collateral litigation," and until the conclusion of the litigation. This provision, on its face and as applied below, violates the Florida and United States constitutional guarantees to due process and equal protection as well as the constitutional right of access to public records in Florida.

Section 119.07(1) (a), F.S., establishes a right of access to public records in plain and unequivocal terms:

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

> record upon payment of the fee prescribed by law . . . and for all other copies, upon payment of the actual cost of duplication of the record.

The lower court's interpretation of the statute must fail as it has no basis in the plain language or legislative intent. The statute sucessfully says exactly what the legislative history reveals it means to say: that any person requesting chapter 119 materials from the Office of the Attorney General may be denied access to some materials is there purpose is "capital collaterial litigation." The lower court's effort to protect the statute from constitutional scrutiny by essentially re-writing it should fail and the statute should be subjected to that scrutiny. Once subjected, the statute's failure to pass constitutional muster is evident,

Section 119.01, Florida Statutes, provides that "[i]t is the policy of this state, county, and municipal records shall at all times be open for personal inspection by any person." A public employee is a person within the meaning of chapter 119, Florida Statutes and, as such, possesses the same right of inspection as any other person. Op. Atty. Gen. Fla. 75-175 (1975). Chapter 119, Florida Statutes, requires no showing of purpose or "special interest" as a condition of access to public records. See, State ex rel. Davis v. McMillan, 38 So. 666 (Fla. 1905) (abstract companies may copy documents from the clerk's office for their own use and sell copies to the public for a profit); News-Press Publishins Company, Inc. v. Gadd, 388 So. 2d 276 (Fla. 2d DCA 1980); and warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976).

"Even though a public agency may believe that a person or group are fanatics, harassers or are extremely annoying, the public records are available to all of the citizens of the State of Florida." Salvador v. City of Stuart, No. 91-812 CA (Fla. 19th Cir. Ct. December 17, 1991). "[A]s long as the citizens of this state desire and insist upon 'open government' and liberal public records disclosure, as a cost of that freedom public officials have to put up with demanding citizens even when they are obnoxious as long as they violate no laws." State v. Colby, No. MM96-317A-XX (Fla. Highlands Co. Ct. May 23, 1996).

As the court stated in Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), review denied, 475 So. 2d 695 (Fla. 1985):

> The legislative objective underlying the creation of chapter 119 was to insure to the people of Florida the right freely to gain access to governmental records. The purpose for such inquiry is immaterial.

See also, State ex rel. Davidson v. Couch, 156 So. 297, 299 (Fla. 1934); Op. Atty. Gen. Fla. 73-167 (1973) (a person may inspect records maintained by the Department of Banking and Finance without being required to show a special interest herein); and Op. Atty. Gen. Fla. 72-413 (1972) (a private person may inspect and copy worthless check affidavits without demonstrating a "personal interest" in such records),

Sections 119.07 (3) (1) and the lower Court's application of it to Mr. Johnson, violate due process and equal protection. The requirements of due process apply to state postconviction proceedings. See Evitts v. Lucev, 469 U.S. 387 (1985); Huff v.

State, 622 So. 2d 982 (Fla. 1993). In keeping with due process, state courts must apply rules in a way that provides "a fair opportunity to obtain an adjudication on the merits of [an] appeal." Evitts, 469 U.S. at 405.

Here, the new work product exemption treats public records requests made for the purpose of capital collateral litigation CCR differently from requests made for other purposes.

The legislative history does not provide a rational basis for why disclosure of public records "interfer[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. 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).

There is no rational basis for exemptions to arise only for persons who request the materials for the purpose of capital collateral litigation.

Moreover, this new chapter 119 provision interferes with Mr. Johnson's right to effective assistance of appellate counsel, CCR is required by law to provide effective legal representation to all death row inmates in postconviction proceedings. §

27.702, Fla. Stat. (1996). Death row inmates in postconviction proceedings are guaranteed effective representation. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Section 119.07(3)(l) constitutes state interference with Mr. Johnson's right to that effective representation in postconviction proceedings. Postconviction litigation involves research and investigation of several aspects of a case. Those aspects include allegations of ineffective assistance of appellate counsel through prejudicial deficient preformance. State interference can cause counsel to be ineffective. In this case, one such issue regards the "re-construction" of the record during the pendancy of the direct appeal. Because the exemption protects attorney work-product of the Attorney General during direct appeal and postconviction, collateral counsel is prevented from fully investigating issues which may give rise to claims of error in the appellate review process, as well as those which could give rise to claims of contitutional violation at the trial level.

ARGUMENT II

THE TRIAL COURT ERRED IN HOLDING THAT ALL OF THE WITHHELD DOCUMENTS WERE NOT SUBJECT TO DISCLOSURE.

The State failed to establish that the withheld documents were not public records. Public records are "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 so. 2d 633 (Fla. 1980), the Florida Supreme

Court identified 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 Publishins 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. Citv 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). The State failed to present evidence that the drafters of the documents did not intend them to be public records. The Court had held that whether or not the drafters of the documents intended them to be public record was part of the required analysis along with the legislative intent.

Moreover, the Court's Order itself was inaccurate in its recitation of the Court's rulings that a document was not a public record. Mr. Johnson's proposed order reflected how the court actually ruled but the Court signed the State's proposed order. The Order issued by the Court deletes all the Court's rulings withholding specific documents on the basis that the records were never intended to be public record. In fact, the Order states:

> The Court concludes that none of the withheld documents were intended to be public records, as contemplated by ch. 119. The Court is not basing its decision on the intent of the drafter of the withheld documents.

(R. 149). The Order mischaracterizes the Court's rulings because that is simply not what happened. Rather, during the hearing the Court clarified its comments in agreement with counsel for Mr. Johnson, and said that when it said a record was not intended to be public record, it was referring to **both** the intent of the drafter and the intent of the legislature (Transcript of July 16, 1996 hearing at 51; SR. 53). This is evident:

> MR. McCLAIN: So its the intent of the drafter as opposed to the legislature you

were speaking of?

THE COURT: Well, I guess it's both.

(Id.). Further reading of the transcript makes it obvious that the Order is wrong and so was Mr. McCoy's letter to the Court. For example, the following occurred:

> THE COURT: All right. The next one is designated Number 9 encircled. At the top it says, "Terrell Johnson outline" in pencil. It is otherwise typed. And this is obviously to me a review of witnesses that were presented.
>
> This obviously is not intended to be a final record because it uses all kinds of abbreviations and it's not in complete sentences and obviously refers to pages from a transcript of prior witnesses' testimony. And I don't consider this to be a public record.

(Transcript of July 18, 1996 hearing at 46; SR. 48)(emphasis added). That the Court was considering **both** the intent of chapter 119 and the intent of the drafter is evident. Mr. Johnson's proposed order was correct in reiterating the Court's rulings that the withheld documents were not intended to be public record.

That a document is considered a personal note or is handwritten is immaterial, Notes that are prepared for filing or are intended as evidence of knowledge obtained in the transaction of agency business are public records. Handwritten notes of agency staff used to communicate and formulate knowledge within the agency are public records and subject to no exemption, Florida Sugar Cane League v. Florida Department of Environmental Regulation, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992).

In this case, the State exempted various pages of hand written notes. However, "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 Oranse Countv v. Florida Land Co., 450 so. 2d 341 (Fla. 5th DCA 1984), review denied, 458 So. 2d 273 (Fla. 1984); Hillsborough Co. Aviation Authoritv v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983). But see Bryan v. Butterworth, Case No. 87,777 (Fla. March 27, 1997), reh'g denied, (April 28, 1997).

Furthermore, in 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), a report prepared by an assistant city attorney at the direction of the city council, and which concerned suspected irregularities in the city's building department, was not confidential and subject to public record disclosure. The decisive factor is whether the document was intended to perpetuate, communicate or formalize knowledge of some type. Shevin.

Kokal v. State, 562 So. 2d 324 (Fla. 1990), 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. Johnson's case, the State improperly asserted that items (1), (2) and (3) were non-public records. The State 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 v. Public Records, 493 So. 2d 480, review denied, 503 So. 2d 327 (Fla. 1987). The records at issue are public records.

These items all contain "notes," mostly handwritten. The essential requirements of chapter 119 apply, nonetheless. If the State's "note to himself," summaries of psychological reports or maps with "colored annotations" are intended as "final evidence of the knowledge to be recorded," Kokal, at 327, then the notes are public records. If the records "supply the final evidence of knowledge obtained in connection with the transaction of official business," id., then the notes are public records. A record "used in preparation for state evidentiary hearing/collateral appeals" 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 State's file on Mr. Johnson's case. Further, the inclusion of these notes into the State's files evinces the intent of the attorney preparing them to perpetuate their existence.

If 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.

If the pages of notes 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. A 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 State 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 State 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 State 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 Co. 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).

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 v. State, 592 So. 2d 1976, 1081 (Fla. 1992); 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 State 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 that would permit this Court or the trial court to withhold these materials as non-public records.

A person who has custody of a public record and who asserts an exemption or a special law applies to a particular public record, then that person "shall delete or excise from the record only that portion of the record with respect to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and examination." Section 119.07(2)(a), Fla. Stat. The State failed to segregate what is exempt and what is not. The Circuit Court also failed to segregate what it considered mental impressions and work product from the materials submitted by the State.

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 to allow Mr. Johnson an opportunity to investigate the factual predicates necessary to support the exemptions claimed by the State.

ARGUMENT **III**

THE COURT ERRONEOUSLY RULED THAT THERE WERE NO MATERIALS WITHHELD WHICH CONSTITUTED BRADY V. MARYLAND MATERIAL. THE TRIAL COURT'S REVIEW FOR BRADY MATERIAL WAS INADEQUATE. FURTHERMORE, MR. JOHNSON WAS DENIED A FORUM FOR REVIEW OF THE WITHHELD MATERIAL FOR BRADY V. MARYLAND.

A final hearing on Mr. Johnson's action for the disclosure of public records under chapter 119 of the Florida Statutes, including an ***in camera*** inspection of the documents withheld by the Attorney General from disclosure, was held on July 16, 1996. Thereafter, both parties submitted proposed orders outlining the rulings made by the Court at that hearing. The Court signed the State's proposed order on July 29, 1996. In its letter accompanying the State's proposed order, counsel for the Attorney General mischaracterized what occurred at the hearing. Counsel for the Attorney General stated:

> Hon. F. E. Steinmeyer, III HAND DELIVERY
> Circuit Judge
> Second Judicial Circuit
> Leon County Courthouse
> Tallahassee, FL 32301
>
> RE: Johnson v. Butterworth, Case **No. 95-3894**
>
> Dear Judge Steinmeyer:
>
> During the hearing on July 16, you upheld the Attorney General's decision to withhold certain documents from disclosure. As counsel for the prevailing party, I drafted a final order. Counsel for CCR and myself cannot agree on the language, and are thus

submitting our respective versions for the court's consideration.

The Brady section on page 4 differs in how it treats the Court's determination that no Brady material was withheld.

Throughout the hearing, the Court used the phrase that a given document was "not intended to be a public record." However, at the end of the hearing--at my request--the Court clarified its ruling, to state the use of the word "intended" did *not* reflect the intent of the person withholding the documents; but the intent of ch. 119, Florida Statutes.

Consequently, I did not include the "intent language" in my version of the final order. CCR's version does so, *but deletes the Court's final clarification of its ruling.*

Sincerely,

/s/
Charlie McCoy
Assistant Attorney General
(904) 488-9935

The Order issued by the Court incorrectly reflected the Court's rulings at the hearing.

The Court's written Order regarding whether or not it reviewed the withheld materials for Brady v. Maryland was incorrect. The Order states that the Court "reviewed the withheld documents for Brady material; by determining the nature of the withheld document, and spot-checking to verify the Court's initial impression" (R. 147). That is not what happened. At the hearing, the Court was very clear that its review for Brady material did not consist of any checking against the record in this case because the Court was unfamiliar with the record and

facts of this case. The Court stated that if "something was obvious to me that it was Brady material" it would indicate that to the defendant meaning the Office of the Attorney General. In fact, the Court made it clear that it viewed the matter at hand as nothing more that a determination of what was public record and that in making that determination, it "spot-checked" that the documents themselves were what the Court initially thought they were. The Order did not accurately reflect what occurred and what the Court actually ruled:

> THE COURT: Well, as I have previously stated, I am probably in the worst position to make a determination of what is Brady material and what is not. And it just would be impossible for me to make that determination.
>
> And I don't see the matter that is in front of me as anything other than a determination of what is public record.
>
> Now, I think I have previously stated that if something was obvious to me that it was Brady material, I would certainly make that indication to the defendant. And if they didn't furnish it, I might very well furnish it.
>
> But there is just not any basis on which I can make a determination just from reading the handwritten notes of the records.
>
> MR. McCLAIN: And I guess just to clarify the record, it's clear that you've reviewed the materials. I mean I don't know whether you've reviewed the material specifically by reading each line and word.
>
> THE COURT: No, I have not read each line and each word. What I have done in going through these records is to read enough of each of the documents to form an opinion as to what that document is and then spot-check it throughout the document to see that it is still the same thins that I thought it was.

(Transcript of July 16, 1996 hearing at 22-23; SR. 24-25) (emphasis added).

Mr. Johnson properly filed a civil Complaint for Disclosure of Public Records against the State 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. Johnson's 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). Jurisdiction was proper in Leon County, where the Office of the Attorney General was found. This Court's ruling in Hoffman was a determination that full jurisdiction to decide Mr. Johnson's civil case against the State, brought under chapter 119, rested with the Leon County Circuit Court.

In Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996), the circuit court dismissed part of the complaint dealing with possible Brady material in the withheld records because the records dealt with clemency materials. The issue of clemency material was not an issue in Mr. Johnson's case.

In Mr. Johnson's case the Court's order did state that "it is very difficult to determine if any individual document is exculpatory, given that Johnson was tried elsewhere and this

Court cannot be expected to have the trial court's familiarity with the entire record" (R. 147).

Judge Steinmeyer did not read the trial court records or files or familiarize himself adequately with the facts of Mr. Johnson's case. It is impossible for the judge to make a determination of whether Brady material existed when he did not know the facts of the case or what materials had been provided to trial counsel. Because he had not read the record and was unfamiliar with the case, Judge Steinmeyer was unable to conduct a proper ***in camera*** review under Brady and Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987). This Court should reject Judge Steinmeyer's conclusion that it "is satisfied no Brady materials were withheld from disclosure" (R. 147).

The lower court's conclusion places Mr. Johnson in an impossible position. Pursuant to Hoffman, Mr. Johnson 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 could not be expected to know the record well enough to determine if an individual document is exculpatory. Mr. Johnson has no forum in which to litigate this issue. This violates due process. Pennsylvania v. Ritchie.[1]

Judge Steinmeyer's failure to properly review the

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[1]Fla. R. Crim. P. 3.852 now requires all Chapter 119 issues be litigated in the Rule 3.850 proceedings.

undisclosed records for Brady material denied Mr. Johnson 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. Johnson was denied that determination by the only court with proper jurisdiction over the Office of the Attorney General. See Hoffman.

Judge Steinmeyer 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 State to that obligation. As the only court with proper jurisdiction over the Attorney General, Judge Steinmeyer removed the checks and balances that it has to impose over the Attorney General. Mr. Johnson has been denied any protection against Brady violations by Judge Steinmeyer.

The circuit court's ruling also denied Mr. Johnson 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, Judge Steinmeyer,

in effect, decided that the proper court to make that determination was the trial court where Mr. Johnson was convicted and sentenced. Yet, the Circuit Court in Orange County was without jurisdiction over the Attorney General.[2] Mr. Johnson cannot seek redress in any other court. This a denial of access to courts.

The State is in possession of material that has not been disclosed to Mr. Johnson. No court has accepted the responsibility to determine whether any of that undisclosed material is exculpatory. Mr. Johnson is caught in a "Catch 22" situation, created by the Circuit Court. This Court has told Mr. Johnson 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 the 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. Judge Steinmeyer 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 state available for redress of

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'Under Rule 3.852, jurisdiction would be proper in Orange County.

injuries. The lower court should have reviewed the withheld material for Bradv, 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 constituted Brady also denied the Mr. Johnson's 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. Johnson. Yet, post-conviction counsel has been foreclosed from pursuing claims based on Bradv 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. Johnson in this impossible situation, the lower court denied Mr. Johnson due process guaranteed by the Fourteenth Amendment and the Florida Constitution.

CONCLUSION

Based upon the foregoing, Mr. Johnson respectfully urges the Court to reverse the lower court, order the release of the *in camera* materials to Mr. Johnson and a proper *in camera* inspection of the withheld materials for Brady.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 11, 1997.

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