IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,853

PAUL WILLIAM SCOTT,

Appellant,

v.

ROBERT A. BUTTERWORTH,

Appellee.

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

INITIAL BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Litigation Director
CCRC-SOUTH
Florida Bar No. 0754773

WILLIAM M. HENNIS, III
Staff Attorney
Florida Bar No. 0066850

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
1444 Biscayne Boulevard, Suite 202
Miami, FL 33132
(305)377-7580

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order denying Mr. Scott's complaint for disclosure of public records. The complaint was brought pursuant to chapter 119 of the Florida Statutes. The circuit court denied Mr. Scott's complaint by entering a Final Order in which Mr. Scott was denied the opportunity to inspect numerous 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; "S" -- 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. Scott 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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TABLE OF AUTHORITIES

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 Brady v. Maryland, 373 U.S. 83 (1963). On August 11, 1995, Mr. Scott 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. Mr. Scott filed a formal Complaint for Disclosure of Public records on September 22, 1995 after receiving no response from the Attorney General. In a form letter dated October 6, 1995, the Attorney General responded, and offered to allow inspection of the "files" relating to Scott, except for documents claimed to be not public records or to be exempt from disclosure under ch.119, Florida Statutes.

An inventory of documents withheld from inspection by the Attorney General was created on March 8, 1996 by Assistant Attorney General Celia Terenzio, and supplemented in January 1997. These inventories provided:

> (a) One (1) yellow, legal size pad (5 handwritten, 6 blank pages) **This document is comprised of 5 handwritten pages (legal size) of notes. The notes are captioned "USDC J. Aronovitz," and cite to volumes and page numbers in the "record." The notes appear to be a listing of substantive points to be made in a later proceeding or pleading before the district court. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.**
>
> (b) One (1) yellow, legal-size pad (2 handwritten, 10 blank pages) **This document is comprised of two handwritten pages of notes. The notes appear to involve substantive**

points to be made in connection with a later hearing or in preparation of a pleading to be filed in federal district court as they contain names of various federal cases to research and names of fellow employees to call regarding the cases. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.

(c) Eight (8) stapled, yellow, legal-size pages of handwritten notes This document is comprised of eight pages of handwritten notes. The notes are outlined into points on appeal numbered 1 through 8 and contain facts and reference to pages of the record on appeal. The notes appear to be made in connection with preparation for either argument or pleadings to be litigated in federal circuit court. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product

(d) Four (4) stapled, yellow, legal-size pages of handwritten notes This document contains four handwritten pages of notes. The notes refer to substantive issues and possible arguments to be made in response. The notes appear to be made in preparation for use in federal district court. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.

(e) Ten (10) stapled, yellow, legal-size pages of handwritten notes This document contains ten pages of handwritten notes. The notes are captioned as "Issues as to Which Add'l evidentiary development sought by Pet." The notes appear to be made in preparation for argument or the filing of pleadings in federal district court. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.

(f) One (1) yellow, legal-size pad (9

handwritten pages) **This document contains nine pages of handwritten notes. The notes are captioned as "sentencing order." They contain facts and reference page numbers from the record on appeal. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.**

(g) Fourteen (14) stapled, white, standard-size pages of type-written notes **This document contains fourteen pages of typed notes. The document is captioned "Statement of Case and Facts". The notes appear to be made in connection for use in a state collateral proceeding. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.**

(h) Thirty-six (36) loose, yellow, legal-size pages of handwritten notes **This document contains thirty-six pages of handwritten notes. The document is captioned "outline of OA". It appears that the notes were made in preparation for a hearing in federal district court. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.**

(i) Eight (8) white, standard-size pages of types and handwritten notes **This document contains eight pages of typed and handwritten notes. The notes appear to contain argument regarding substantive issues in preparation for a hearing in federal district court. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.**

(j) Seventeen (17) stapled, standard-size pages of draft of pleading with handwritten notes on the back of some pages **This document contains seventeen typed pages with handwritten notes. The document is captioned "Response In Opposition to Stay of Execution**

and for an Evidentiary Hearing". The notes appear to be made in preparation for the filing a pleading. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.

(k) Eighty-three (83) loose or stapled , legal - or standard-size pages of handwritten notes This document contains eighty-three pages of handwritten notes prepared by undersigned counsel. The notes include a procedural history of all the issues ever raised in the case. The notes also include facts and the appropriate page number of the record on appeal. The documents were prepared in preparation for state collateral litigation. For that reason, I concluded this document was not a public record subject to disclosure under ch.119; or, alternatively, if deemed a public record, was exempt as attorney work product

(l) Ten (10) stapled, standard-size pages of draft of pleading This document contains ten typed pages of notes prepared for by undersigned counsel. The document is captioned "Procedural History". It was drafted as a preliminary pleading in preparation for the filing of state collateral pleadings. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product

(m) Eighteen (18) stapled, standard-size pages of draft of pleading This document contains eighteen typed pages of notes prepared by undersigned counsel. The document is captioned "Response in Opposition for Stay of Execution and For An Evidentiary Hearing". The document was drafted as a preliminary pleading in preparation for the filing of state collateral pleadings. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.

(n) Thirty-five (35) stapled, standard-size pages of draft of pleading **This document contains thirty-five typed pages of notes prepared by undersigned counsel. The document is captioned "Procedural History Introduction". The document was drafted in preparation as a preliminary pleading in preparation for the filling of state collateral pleadings. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.**

(o) Fourteen (14) stapled, standard-size pages of draft of pleading **This document contains fourteen typed pages of notes. The document is captioned "Record cites to Scott". The document contains facts and references the appropriate page number from the record on appeal. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product**

(p) Five (5) stapled, yellow, legal-size pages of handwritten notes **This document contains five pages of handwritten notes prepared by undersigned counsel. The notes were prepared in connection for argument before the state circuit court. For that reason, I concluded this document was not a public record subject to disclosure under ch. 119; or, alternatively, if deemed a public record, was exempt as attorney work product.**

(a) One (1) manila envelope containing a stapled, 18-page transcript of Scott's testimony at first clemency hearing **The manila envelope contains the eighteen page transcript of Scott's testimony taken at his first clemency proceeding. The hearing was conducted at Raiford on February 18, 1983.**

(b) Thirty-seven stapled pages of Scott's "Application for Executive Clemency or Alternatively a Request to Defer Clemency to Allow New Evidence to be Presented to the Court for Paul William Scott" **B is a self styled document; "Application For Executive Clemency Or Alternatively A Request To Defer**

Clemency To Allow New Evidence To Be Presented To The Court For Paul William Scott"..

(c) One hundred two (102) clipped pages of State's "Supplementary Record" relating to Scott's second application for clemency **This document was prepared by Assistant State Attorney Kenneth Selvig for Scott's second application for Clemency.**

(R. 141-48).

On April 11, 1996, Celia Terenzio signed an affidavit which stated she was assigned to Paul Scott's case, that she had reviewed all the files in the office relating to his case, and that she had made the determination regarding which documents to withhold as exempt and had removed them (S. 135).

On July 16, 1996, a hearing was held before Judge Steinmeyer in Leon County Circuit Court. The parties agree during the hearing that Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996), requires the Attorney General to turn over Brady material and that Mr. Scott is entitled to an *in camera* inspection. The court ruled that Mr. Scott could amend his complaint within ten days of the hearing to include specific facts concerning Brady material that was being withheld.

On August 2, 1996, Mr. Scott filed an Amended Complaint for Disclosure of Public Records. On August 8, 1996, the Attorney General filed an Answer to Scott's Amended Complaint, including the inventory of documents withheld from disclosure created by Ms. Terenzio on March 8, 1996.

On January 7, 1997, Judge Steinmeyer signed an Order of the Court declining to consider Defendant's motion for summary

judgment until Mr. Scott had the opportunity to complete discovery, which was deemed to include the Attorney General filing supplemental answers to Mr. Scott's interrogatories and then allowing Mr. Scott to depose Celia Terenzio. On February 26, 1997, Deposition was held of Assistant Attorney General Celia Terenzio.

On October 1, 1997, a final circuit court hearing was held before Honorable F.E. Steinmeyer, III, in Leon County Circuit Court, on State's Motion for Summary Judgment and in camera examination of documents. An Order was entered on October 17, 1997 by Judge Steinmeyer, granting final summary judgment to the Attorney General.

SUMMARY OF ARGUMENT

The trial court erred in failing to review the withheld documents for Brady material, even though the court ruled that the State was obligated to disclose Brady material. The trial court stated on the record it was unfamiliar with the facts of Mr. Scott's case, thus making it impossible under the circumstances to review the material for Brady. The trial court's action leaves Mr. Scott without a forum in which he can litigate the State's obligation under Brady.

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

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 intended 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.

ARGUMENT

ARGUMENT I

THE COURT ERRONEOUSLY RULED THAT BASED ON ARGUMENTS OF COUNSEL AND THE COURT'S *IN CAMERA* INSPECTION OF WITHHELD DOCUMENTS THAT SAID DOCUMENTS WOULD NOT BE DISCLOSED TO MR. SCOTT EVEN THOUGH THE TRIAL COURT'S REVIEW FOR BRADY V. MARYLAND MATERIAL WAS INADEQUATE AND AS A CONSEQUENCE MR. SCOTT WAS DENIED A FORUM FOR REVIEW OF THE WITHHELD MATERIAL FOR BRADY.

Judge Steinmeyer presided below and resolved the Brady issue without any knowledge of the Paul Scott record. He also relied upon a general request versus specific request distinction even though the United States Supreme Court has thrown out such distinctions, Kyles v. Whitley, 115 S.Ct. 1555 (1995). Mr. Scott's initial complaint regarding public records held by the attorney general was filed on September 22, 1995 (S. 1-9). Judge Steinmeyer allowed Mr. Scott to amend, both because the State had not answered his original complaint and because Judge Steinmeyer found that it was necessary for Mr. Scott to supplement the original complaint with a specific request for exculpatory material.

> MS. ANDERSON: [for Mr. Scott] Your Honor, being familiar with the Scott case peripherally, I can tell you this was remanded for a Brady claim. There are Brady issues in this case. And they are of particular interest to Mr. Scott. I would differentiate the subject matter of the Roberts case in that way.
>
> THE COURT: But my problem is -- and apparently the supreme court has indicated that you've got to do something other than make a general request for exculpatory material.

MR. McCOY: Your Honor, I would point out that Paragraph 8 of the complaint doesn't even make a request for exculpatory material in those words. It just cites to Brady versus Maryland and then cross references the earlier request for public records. I'll give them that much. But that's all they did.

THE COURT: It appears to me what the supreme court is saying is that if your complaint makes only a general request for Brady material, then the state decides what that is. And unless you have specific facts that you can bring to the court's attention that exculpatory evidence was withheld, it's over and done with.

MS. ANDERSON: Well, Your Honor, at the time that this original complaint was filed, I don't think some of these facts -- the Brady facts had come to light. I think that's part of the reason for the discovery process that hasn't occurred here yet.

THE COURT: Why didn't you amend your complaint?

MS. ANDERSON: Because we don't have an answer yet and we don't know what they are not disclosing to us.

THE COURT: Well, then you have a right to amend your complaint at will.

(S. 161-62).

Count three of Mr. Scott's amended complaint filed on August 2, 1996 stated, in relevant part:

25. Plaintiff, through his attorney(s), has requested disclosure of records within the possession, custody, care and/or control of the Defendant and/or his designated agents.

26. Plaintiff has also requested disclosure of all records exculpatory in nature.

27. Defendant and/or his designated agents refuse to disclose the requested materials. Exculpatory evidence was withheld by the

State in this case.

(R. 86).

A Motion for Summary Judgment was filed by the Attorney General, and that motion contended that any determination made by the Attorney General as to whether Brady material was being withheld was final and not subject to review (R. 120):

> Here, the withheld documents were essentially of two types: handwritten notes claimed to be work product, if public records at all; and clemency materials. (Ex. E) As to either type of document, Count III, as amended, does not allege facts specifically supporting Scott's Brady claim. Consequently, Defendant's determination that none of the withheld documents were exculpatory was final, not subject to review.

(R. 117).

A hearing was held on December 3, 1996 during which the State's motion for summary judgment was argued. Assistant Attorney General Charlie McCoy acknowledged during the hearing that any review of the withheld documents by Judge Steinmeyer for Brady material was limited by the fact that Judge Steinmeyer had not presided over Mr. Scott's death case:

> MR. McCOY: I understand, I guess Counsel's conceded even if you saw exculpatory material, that they would still have to take that back to the court where Scott was tried in order for him to get any relief. And I recognize when your Honor goes through presumably these withheld documents, **you are going to be looking, to the extent of your ability not being the trial court**, if there isn't any exculpatory, you would at least let them know of that (Emphasis added)

(R. 206-07).

Judge Steinmeyer ruled during the hearing that before he

would consider the State's motion for summary judgment, Mr. Scott had to have an opportunity to complete his discovery (R. 26). The court then went on to allow for a civil deposition of Assistant Attorney General Celia Terenzio limited to the question of "whether or not the attorney general is withholding documents that should be released under chapter 119" (R. 239-40).

During argument by the parties concerning Judge Steinmeyer's limitations on the discovery process, the judge made a remark that revealed his inability to make a reasoned determination as to the presence of Brady material in the withheld documents he examined before the hearing:

> THE COURT: **Well, I don't know what the facts are about the case that's on appeal.** It may be that vehicle mileage reports is very relevant, but I doubt seriously that you have vehicle mileage reports that mention Paul William Scott or any of his aliases (Emphasis added)

(R. 259). At the final hearing on the motion for summary judgment on October 1, 1997, Judge Steinmeyer recalled his review of the documents in December 1996:

> THE COURT: Yes, I do recall having gone through the documents. I don't recall at this point the individual documents, but I do recall having gone through them and making the determination at that time that they were properly withheld. So I do -- do you have anything else?

(S. 187). An examination of the documents by the judge for Brady material was not possible under these facts.

After the judge permitted additional discovery, a deposition of Celia A. Terenzio was held on February 26, 1997 (S. 9-135).

Ms. Terenzio revealed that there was a photograph contained in Document C., the document prepared by Assistant State Attorney Ken Selvig for Scott's second application for clemency. In her deposition, Ms. Terenzio also stated that all the clemency material withheld had been received by her from the State Attorney's Office (S. 66-67). Such a disclosure of the clemency materials would constitute a waiver of any exemption, or preclude the recipient from claiming a clemency exemption. During the deposition, counsel for Mr. Scott requested copies of any e-mail related to Mr. Scott's case (S. 74). Ms. Terenzio stated, "In this particular case, as it so happens, everything generated in this case is either a pleading or correspondence or exempt" (S. 83).

A final hearing was held on the defendant's Motion for Summary Judgment on October 1, 1997. Mr. McCoy reported to the court that discovery was now complete and that some additional public records had been provided to Mr. Scott (S. 172). The Attorney General also turned over to the court additional documents in the form of e-mail that had been discovered that were now being claimed as exempt from disclosure and subject to *in camera* examination during the hearing (S. 172-73). Of course at her deposition, Ms. Terenzio claimed all the e-mail was exempt. The court briefly reviewed the new documents (the withheld e-mails) and then ruled on them:

> THE COURT: ...All of these are obviously drafts of pleadings, and I think we'll go ahead and put those in the Manila envelope and keep those together with the other.

> MR. McCOY: Your Honor, could we just hand label those maybe supplemental Exhibits A, B, and C, if you would, so if there is any need to refer to them later, we'll all know which ones are which? You don't have any objection?
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> MR. HENNIS: I think that's fine.
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> THE COURT: Okay.
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> MR. McCOY: Do you recall the earlier submitted documents well enough to rule on those at this time?
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> THE COURT: Yes, I do recall having gone through the documents. I don't recall at this point the individual documents, but I do recall having gone through them and making the determination at that time that they were properly withheld. So I do -- do you have anything else?
>
> MR. HENNIS: No, Your Honor.
>
> THE COURT: All right, On that it would seem to me that the defendant's motion for summary judgment should be granted. And I will -- I'll do that, if you all can get together on an order.

(S. 187-88).

The final order signed by the court makes no specific reference to whether or not the court reviewed all the withheld materials for Brady v. Maryland, but the language of the order is that "based on arguments of counsel at the noted hearing and the court's inspection of the withheld documents, it is ORDERED and ADJUDGED that Scott's amended complaint for disclosure of public records is denied" (R. 163). Both the Assistant Attorney General and the court had already stated on the record during prior hearings that the court was not in a position to make a

determination about Brady content of any of the materials that the defendant had withheld and the court inspected.

> MR. McCOY: I understand, I guess Counsel's conceded even if you saw exculpatory material, that they would still have to take that back to the court where Scott was tried in order for him to get any relief. And I recognize when your Honor goes through presumably these withheld documents, you are going to be looking, to the extent of your ability not being the trial court, if there isn't any exculpatory, you would at least let them know of that.

(R. 206-07). And later in the same hearing, Judge Steinmeyer acknowledged the Attorney General's point, admitting, "**Well, I don't know what the facts are about the case that's on appeal.**" (Emphasis added)(R. 259). Judge Steinmeyer never reviewed the documents at issue after the hearing in December 1996, as is clear from this discussion in the final hearing in October 1997:

> MR. McCOY: ...There should be, in your court file, a Manila envelope, sealed envelope, of all the documents that we had withheld earlier in this case, and --
>
> THE COURT: Let me check with Judy, because she didn't give that to me and she normally does when we have those.
>
> (Discussion off the record)
>
> MR. McCOY: I remember distinctly because when I spoke to Judy on the phone, she said we got this envelope of stuff, and I said no it's got to stay with the case file.
>
> THE COURT: I know that we had done that in a couple of instances.
>
> Mr. McCOY: And you had signed the envelope saying leave this sealed.
>
> THE COURT: Right.

> MR. McCOY: In fact, what happened was you had gone through them in anticipation of the hearing in December, and when you said the summary judgment was premature, you just kept them, said, well, I've already gone through them, let's leave them sealed and left them.
>
> THE COURT: Okay.

(S. 172-73).

Judge Steinmeyer did not read the trial court records or files in Mr. Scott's case or familiarize himself adequately with the facts in the case. It was impossible for the judge to make a determination of whether Brady material existed when he did not know the facts of the criminal case or what materials had been provided to trial counsel. Judge Steinmeyer was unable to conduct a proper *in camera* review under Brady and Pennsylvania v. Richie, 107 S. Ct. 989 (1987).

The lower court's conclusion places Mr. Scott in an impossible position. Pursuant to Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992), Mr. Scott properly pursued his public records issue in Leon County, where the Office of the Attorney General is located. However, despite ruling that the Attorney General is obligated to disclose exculpatory evidence under Brady, the circuit court advised the parties that it was unfamiliar with the record and the facts of the case. Thus, Mr. Scott has no forum in which to litigate this public records Brady issue. This is a violation of due process.[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 to be litigated in the 3.850 trial court.

undisclosed records for Brady material denied Mr. Scott 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. Scott was denied such a determination.

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 their obligation. Judge Steinmeyer seemed to rely upon a general versus specific request distinction - a distinction the United State Supreme Court has discarded. See Kyles. Judge Steinmeyer did not conduct a Brady review; and without knowing the facts or the record, could not. Mr. Scott has been denied any protection against Brady violations.

The Florida Constitution guarantees that all persons shall have the courts of Florida available for redress of injuries.[2] The inability of Judge Steinmeyer to make an informed determination whether the material withheld by the State constituted Brady denied Mr. Scott such access. By placing Mr.

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[2]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.

Scott in this impossible situation, the lower court denied Mr. Scott the due process guaranteed by the Fourteenth Amendment and the Florida Constitution.

ARGUMENT II

ON ITS FACE AND AS APPLIED TO THIS CASE, SECTION 119.07(3)(l), FLORIDA STATUTES, VIOLATES DUE PROCESS AND EQUAL PROTECTION BY DENYING MR. SCOTT ACCESS TO THE 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."

Section 119.07(3)(l), Florida Statutes on its face and as applied to Mr. Scott violates due process and equal protection. Moreover, the section interferes with Mr. Scott's right to the effective assistance of postconviction counsel.[3]

Section 119.07(3)(l.) states that:

> (1). A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for

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[3]Counsel recognizes that the legal issue of legislative construction was presented to this Court in Johnson v. Butterworth, 23 Fla. L. Weekly S161 (Fla. March 19, 1998), and that an adverse ruling issued. However, at the time this brief is being written, a rehearing motion is pending in Johnson.

> adversarial administrative proceedings or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from the provisions of subsection (1) and s.24(a),Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 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.

§ 119.07(3)(l.), Fla. Stat. (1997).

Section 27.7001, Florida Statutes (1997) establishes the Legislative intent to create part IV of Chapter 27, creating the Capital Collateral Regional Counsels and otherwise "to provide for the collateral representation of any person convicted and sentenced to death in this state..."

Judge Steinmeyer's order in Mr. Scott's case, denying Mr. Scott access to withheld documents, based that denial on the work product exception or, in the alternative, a conclusion that the documents at issue were not public records:

> The disputed documents, except for the three items withheld as clemency materials, were properly withheld from disclosure pursuant to Scott's public records request, as the documents were not public records subject to disclosure. Alternatively, the documents were exempt from disclosure under the attorney work product exemption in §119.07(3)(l), Florida Statutes (1996). The last three items listed in Appendix A were properly withheld as clemency materials. These documents were exempt from disclosure under §14.28, Florida Statutes (1995); and Rule 16 of the Clemency Board.

(R. 162). The order also included, as attachments A & C, the descriptions as provided by Assistant Attorney General Celia Terenzio in March 1996 and January 1997 of sixteen withheld documents (a)-(p) and three additional withheld clemency documents (a)-(c).[4]

On March 19, 1998, this Court denied Terrell Johnson's appeal from the denial of public records access. Johnson v. Butterworth. The Johnson case was also heard on the public records issue only by Judge Steinmeyer in Leon County Circuit Court.

This Court in its opinion in Johnson v. Butterworth recognized that there existed a conflict between this Court's opinion in State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Section 119.07(3)(l). As this Court stated "Apparently some confusion has arisen as to whether there is a distinction between documents which are work product under Kokal, and therefore never discoverable as public record, and documents which are work product for the purpose of the exemption in section 119.07(3)(l)." This Court then decided that an entirely Court created exemption from Kokal trumped the much more limited exemption passed by the legislature.

This Court in rejecting the more narrow exemption adopted by the legislature in favor of a court adopted exemption breached principles of law. First it violated separation of powers. It

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[4]Of course, the factual issue of whether the documents identified in this case fit with the statutory exemptions is not controlled by Johnson v. Butterworth, See Argument III.

is not for this Court to act as a legislative body and adopt on its own legislative exemptions to the Public Records Act. Second, where the legislature has spoken and indicated that there shall be openness in government, records shall be open for inspection unless specifically exempted by the legislature. This Court has ignored the specific legislative intent.[5]

This Court indicated that the Kokal was premised upon Shevin v. Byron, 379 So. 2d 633 (Fla. 1980). This Court stated that "It appears that the exemption in section 119.07(3)(l) is just a codification of our decisions in Kokal and Shevin." However, the Court recognized that the work-product exemption codified in 119.07(3)(l) expires when the litigation the work product was prepared for is finally over. This, according to this Court, was different than the work-product exemption discussed in Shevin. Rather, than construing the difference in the obvious fashion, that the legislature intended to waive the work product exemption when the litigation is over, this Court completely ignored the unambiguous statutory language. Certainly, the legislature has the prerogative to issue such a waiver. Yet, this Court ignored

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[5]Note the recent decision by a sister state's highest court, interpreting a new state capital post-conviction discovery statute, N.C.G.S. § 14A-1415(f), which reads, "[t]he State, to the extent allowed by law, shall make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." The Court held that the language of the statute was "clear and unambiguous" and that it means that "the post-conviction disclosure contemplated by N.C.G.S. § 15A-1415(f) does not provide for an express or implied protection for work product of the prosecutor or law enforcement agencies," State v. Bates, 497 S.E. 2d 276, 277, 281 (N.C. 1998).

this fact without explanation and concluded that in order to avoid confusion the legislature's scheduled expiration of the work product privileged would be ignored:

> Thus if documents are work product, they are not and never will be considered public records and are never subject to public record disclosure. Using this interpretation, there is no distinction between the way work product applies to death sentenced inmates and other inmates, and thus no constitutional infirmity.

Johnson at 4.

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."

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 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 statute says exactly what 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 if their purpose is "capital collateral litigation." The Court's effort

in Johnson to protect the statute from constitutional scrutiny by essentially re-writing it should fail and the statute should be interpreted as it was written.

Section 119.07(3)(l) and the lower Court's application of it to Mr. Scott, violate due process and equal protection. The requirements of due process apply to state postconviction proceedings. See Evitts v. Lucey, 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.

ARGUMENT III

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), this 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 inasmuchas they supply the final evidence of knowledge obtained in connection with the transaction of official business.

Id. All such materials (inter-office memoranda as final evidence of knowledge), regardless of whether they are in final form, should be open for public inspection unless a specific exemption created by the Legislature exists. 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. 2DCA 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).

Judge Steinmeyer's Order Granting Final Summary Judgment was entered on October 16, 1997 (R. 160-173). The trial court noted

in the order that final summary judgment in favor of the Attorney General was granted after the trial court heard argument of counsel and conducted in camera inspection of all the withheld documents. The trial court's conclusions of law were as follows:

> The disputed documents, except for the three items excluded as clemency materials, were properly withheld from disclosure pursuant to Scott's public records request, as the documents were not public records subject to disclosure. Alternatively, the documents were exempt from disclosure under the attorney work product exemption in Section 119.07(3)(l), Florida Statutes (1996).
>
> The last three items listed in Appendix A were properly withheld as clemency materials. These documents were exempt from disclosure under Sect. 14.28, Florida Statutes (1995); and Rule 16 of the Clemency Board.
>
> Therefore, based on arguments of counsel at the noted hearing, and the Court's inspection of the withheld documents, it is ORDERED and ADJUDGED that Scott's amended complaint for disclosure of public records is denied.

(R. 162-63).

The fact that many of the withheld documents described were handwritten or were claimed to be work product relating to current postconviction litigation is in no way definitive. If the document contains Brady material or is the final or only form of an otherwise unavailable document that formalized knowledge, it is subject to disclosure despite the status of work-product. The court should be provided with both the notes or drafts and the final documents at the time of the *in camera* inspection. Kokal, 562 So. 2d at 327; Mendyk v. State, 592 So. 2d 1976, 1981 (Fla. 1992); Walton, 634 So. 2d 1059, 1062 (Fla. 1993); 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.

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 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 that applies to a particular public record, "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 was exempt and what was not. The circuit court adopted the State's laundry lists of documents withheld and failed to

segregate from that mass of material what it considered to be mental impressions and work product from what was not.

Therefore, this Court should vacate the trial court's Final Order on the State's motion for summary judgment and order the immediate release of withheld documents because the documents are public records. Kokal; Walton. Alternatively, this Court should remand this case for an evidentiary hearing to allow Mr. Scott an opportunity to investigate the factual predicates necessary to support the State's claimed exemptions.

CONCLUSION

Based on the foregoing, Mr. Scott respectfully urges the Court to reverse the lower court, order the release of the *in camera* materials to Mr. Scott, or, in the alternative, order a proper *in camera* inspection of the withheld materials for Brady in a court of proper jurisdiction.

I HEREBY CERTIFY that a true copy of the foregoing BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 16, 1998.

William M. Hennis III

MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director

WILLIAM M. HENNIS, III
Florida Bar. No.0066850
Staff Attorney

Office of the CCRC-South
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Appellant

Copies furnished to:

Charlie McCoy
Assistant Attorney General
Office of the Attorney General
The Capitol - PL01
Tallahassee, FL 32399-1050