IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC96646

IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE - RULES 3.851, 3.852, AND 3.993

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RESPONSE

The Florida Department of Law Enforcement (FDLE), an agency of the State of Florida, by and through its undersigned General Counsel, responds to the notice inviting comments in the above styled case, and says:

1. In its explanation and background of the proposed amendments to Florida Rule of Criminal Procedure 3.852 (Capital Postconviction Public Records Production), this Court asks the Legislature to amend the definition of "active criminal investigative information" and "active criminal intelligence information" found at Section 119.011(3)(d)2, Fla. Stat.(1999), which now provides in part that such information "shall be considered 'active' while [it] is directly related to pending prosecutions or appeals."

2. This part of the definition of "active" has been construed to mean, in State v. Kokal, 562 So.2d 324, 326-27 (Fla. 1990), that such information remains active until the conviction and sentence of the underlying criminal case become final on direct appeal. (The files at issue in Kokal were the state attorney's trial files. It should be noted that law enforcement agency files on a particular person may be far more extensive than simply those records used to prosecute the person in a particular case.)

3. Because criminal investigative and intelligence information is exempt from disclosure as a public record as long as it is considered active, pursuant to Section 119.07(3)(b), Fla. Stat.(1999), criminal investigative and intelligence information pertaining to the capital defendant would not be available to collateral counsel until issuance of the Court's mandate on direct appeal. As noted by the Court in the instant Proposed Amendments, this prolonged exemption "would preclude collateral counsel from effectively investigating potential postconviction claims immediately upon appointment." 25 F.L.W. S285, S286 (Fla. April 14, 2000).

4. In contrast to the custodian of records made confidential by law for which the custodian has no discretion about disclosing (i.e. must not disclose), the custodian of a record to which a public records exemption applies may, or may not, exercise the exemption. This Court could address some of its concerns about capital case trial records by urging state attorneys to refrain from exercising the "pending appeal" exemption in capital cases, in the interest of expediting that appeal process.

5. The Court's suggestion *seems* to be for the Legislature to rewrite the exemption for active criminal investigative and intelligence information so that the exemption would not apply to *any* records sought by collateral counsel following conviction of the capital defendant and during the pendency of direct appeal. If this is the case, the suggestion carries dire consequences.

6. FDLE submits that such a drastic change in the law is unnecessary to resolve the problem described above and could have devastating consequences for the integrity of the criminal investigative and intelligence gathering process. Should the law simply be amended to provide that a pending direct appeal does not *ipso facto* render criminal investigative and intelligence materials directly pertaining to the conviction on appeal "active," collateral counsel would not be denied timely access to materials needed to investigate postconviction claims. Such an amendment would mean that the presence of otherwise active (i.e., ongoing in good faith) investigative or intelligence material in the records requested by collateral counsel would still have a bearing on whether the records sought were totally or partially exempt as "active."

7. The more modest statutory amendment suggested above should, at most, be all that is needed to address the problem current public records law poses for collateral appeals, as demonstrated hereafter.

8. It is vital to recognize that the definition of "active" in this context has two parts, which are distinct and independent of each other. The first part is at Section 119.011(3)(d), Fla. Stat.(1999):

> (d) The word "active" shall have the following meaning:
>
> 1. Criminal intelligence information shall be considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal

activities.

> 2. Criminal investigative information shall be considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

The first part transcends the fact of a subsequent conviction, and can pertain to records regarding a subject that were not utilized in a particular prosecution.

The second part is found in the "flush left" paragraph immediately below subparagraphs 1 and 2:

> *In addition*, criminal intelligence and criminal investigative information shall be considered "active" while such information is directly related to pending prosecutions or appeals. The word "active" shall not apply to information in cases which are barred from prosecution under the provisions of s. 775.15 or other statute of limitation. (Emphasis added.)

9. This second, separate, option for "active" exemptions is clearly *supplemental* to the first part, and is directed to the prosecution's trial records. It is significant that the Legislature separated these two parts of the definition of "active," both grammatically and conceptually, as indicated by the second part's introductory clause "In addition ... ."

10. Among the evident reasons for distinguishing the two qualifiers or criteria for the active status of criminal investigative and intelligence information are the consideration that some cases never go to trial, and thus never become "final," but are not thereby rendered forever active; and that the same investigative or intelligence case may involve multiple subjects or crimes, not all of which have been "solved" by the conviction of the capital defendant or

that otherwise have utilized in the particular prosecution. In other words, the fact that a defendant is not prosecuted does not mean that intelligence or investigative information regarding him remains active indefinitely, while (conversely) the fact that a defendant is prosecuted does not mean that all criminal intelligence or investigative information regarding him can be considered no longer exempt from public disclosure after his conviction is affirmed on appeal. The two parts of the definition operate independently of one another. While in a "typical" case closure under one part of the definition will often coincide with closure under the other, such is not always true. Because not all cases are typical or uniform in their implications for other crimes, and because one conviction even for a capital offense does not mean there is no longer "active" intelligence or investigative information regarding the defendant, the two parts of the definition should not be merged, confused, or lost.

11. The importance of retaining and applying *both* parts of the definition of "active" is not conjectural and expands beyond the capital defendant himself. Many years of experience, involving many cases and many requests for records, have demonstrated (beyond dispute) that collateral counsel ask for records which have links or connections (actual or suspected) with persons as to whom criminal investigations and intelligence gathering activities are ongoing and quite active (e.g., other criminal defendants, international drug traffickers and money launderers, organized

crime figures, corrupt public officials, terrorist or racist organizations). The conjunction of these subjects with collateral counsel's defendant may be circumstantial, based on hearsay, rumor, "street talk," or unconfirmed "tips" and will not necessarily be exculpatory or even relevant to the homicide(s) for which the death sentence was imposed. To allow disclosure of active intelligence or investigative information regarding these subjects simply because the capital defendant has been convicted would be devastating to investigative efforts.

12. Other examples of when the active exemptions transcend one's capital conviction are available. The capital defendant himself may be the subject of other, ongoing and active criminal cases. For example, a suspected serial murderer may be tried and convicted in one case while the other murders are still being investigated, particular details of which may need to be exempted from disclosure to assure justice is done. A capital defendant may be part of an ongoing criminal enterprise still under investigation. The defendant's murder conviction is but a small part of the overall activities of the enterprise. To require disclosure of all active criminal investigative or intelligence materials related to the other investigations or the whole enterprise automatically upon one's capital conviction would adversely affect these investigations.

13. To further complicate the issue of "active" aspects of records sought in capital cases, collateral counsel may ask

for hundreds of names to be searched, which will in turn trigger other associations and circumstantial connections having little if any relevance to the actual defendant, but possibly of critical import for the continued investigation of other crimes and criminals. Because of the coincidence of names and the absence of demographic data, moreover, FDLE cannot in many instances even be sure that the records produced in response to such requests actually pertain to the subjects of those requests.

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14. If FDLE and other law enforcement agencies are forced, under tight time constraints, to disclose *all* criminal investigative and intelligence materials requested by collateral counsel, merely because the capital defendant has been convicted, the consequences will be adverse for all concerned. To request the Legislature to make the law such that no "active" exemption could be claimed, under any circumstances, once the defendant is sentenced, would be unwise. Such a draconian revision of the law would either curtail the comprehensiveness and accuracy of investigative and intelligence reports related to the homicide defendant, or compromise the ongoing investigation of other unsolved crimes and criminal activity.

15. Unfortunately, this is what the Court's original suggestion appears to have sought from the Legislature. This undesirable result could be avoided by recognizing the

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[1] Although not encompassed by this Court's current invitation for comments, FDLE submits that the collateral appeal process regarding public records issues could be expedited if this Court would more strongly limit supplemental public records requests by collateral counsel by requiring a clearer demonstration of relevancy of the requested records and information to material issues of the collateral appeal before supplemental requests may be made. FDLE's experience with supplemental requests suggests that despite recent rule changes, these requests often continue to be very broad "fishing expeditions" that seem designed to prolong the appeal process by seeking this or that record (along with the inherent delays while the records are produced--with or without an objection to production being made) rather than seeking to resolve issues truly material to the appeal itself.

possibility of an "active" exemption under the first part of the definition, even after one's conviction and sentence for a capital crime. For the law to be otherwise could have an inhibiting effect on the disposition of the police to follow up *and report* on all investigative or intelligence leads pertinent to a crime or suspect, which would serve no one's interest, least of all an accused (or convicted) defendant's.

16. Other considerations weigh against simply categorically terminating the exemption for "active" materials upon conviction. The Legislature provides that some exemptions continue after conviction, such as the identity of a confidential source. See Salcines v. Tampa Television, 454 So.2d 639 (Fla. 2d DCA 1984). Similarly, the Legislature implicitly recognized that not all parts of an involved, far-ranging criminal case will cease to be active upon conviction of one particular defendant, to say nothing of files on other subjects as may be requested by collateral counsel.

17. Attempting to segregate out the "active" subjects from records pertaining to the convicted defendant in advance or at the time of preparing (writing) those records would be impractical, cumbersome, and time-consuming, and would decrease the utility of the reports to law enforcement agencies and prosecutors. Ultimately this "pre-editing" would not be in the interest of either the prosecution or the defense. Law enforcement agents should be free to address all reasonably related aspects of an investigation or intelligence gathering effort, without fear that some or all of such materials would be involuntarily disclosed to collateral counsel while still active (under the first part of the definition of "active") upon the conviction of the capital defendant.

18. Existing law in no way requires, or even points to

the advisability of, subsuming the first part of the definition of "active" under the second. The distinction between the two parts was explicitly recognized in Christy v. Palm Beach County Sheriff's Office, 698 So.2d 1365 (Fla. 4th DCA 1997). *First*, the Court there discussed why the records sought were not active investigative records - because "nothing in the ... materials ... demonstrate[d] a reasonable good faith belief that the information would lead to the detection of ongoing or reasonably anticipated criminal activities." Id. at 1367. Then, turning to *the second part* of the definition of "active," the Court noted that, "In addition, the [custodial agency] did not establish" that the records sought were "directly related to a pending prosecution or appeal." Id. The Christy Court's two-pronged analysis is highly instructive: If the only issue as to whether the records had "active" status or not were whether the criminal case was pending or final, the first part of the Court's analysis would have been unnecessary. That is, the Court need not have inquired whether the underlying investigation was still active, it could simply have concluded by observing that the conviction had become final.

19. An analogy with the exemption allowed for investigative and intelligence records received from non-Florida agencies on a confidential basis, Section 119.072, Fla. Stat.(1999), is also helpful. In State v. Buenoano, 707 So.2d 714, 718 (Fla. 1998), this Court reasoned that

"[t]he legislature could not have intended [the exemption at] section 119.072 to be applied so as to chill the exchange of information [by releasing such records to collateral counsel]. Moreover, the federal government should not be penalized for sharing information with the State." *By the same logic*, the police should not be penalized for or discouraged from including potentially useful information regarding other criminals, witnesses, and crimes in their investigative and intelligence reports by the prospect that such information must be given out to collateral counsel once the criminal case against the capital defendant results in a conviction, if the records are demanded by that counsel in a blanket request for all records in any way pertaining to certain subjects.

20. The holding in Kokal, supra, does not support dispensing with the first part of the definition of "active" in capital collateral appeals. Kokal, 562 So.2d at 325-26, held that the pendency of a post-conviction relief motion did not (by itself) give rise to an active criminal investigative or intelligence exemption. Kokal did *not* hold (and need not have held) that a claim for an active criminal investigative or intelligence exemption could *never* be asserted once the conviction became final on appeal. Such a holding would have eviscerated the first part of the definition of the "active" criminal investigative and intelligence exemption. The same analysis applies to the Court's requested amendment to public records law: The law

need not be changed to reflect that a claim for an active criminal investigative or intelligence exemption could *never* be asserted once the capital defendant is convicted. Rather, the delay in capital collateral counsel's access to records pertaining directly to the capital defendant could be eliminated by requesting the Legislature to revise the exemption by providing that the pendency of a direct appeal of a capital conviction would not (by itself) give rise to an active criminal investigative or intelligence exemption.

21. The capital defendant and collateral counsel are protected from unreasonable or unsubstantiated claims of exemption for active materials. The burden is on the agency claiming the exemption to demonstrate entitlement to an exemption. Christy, 698 So.2d at 1367. With *in-camera* review, collateral counsel is in no danger of missing any relevant or helpful information by virtue of an agency claim that some aspect (or even the totality) of a case file remains active notwithstanding the finality (or fact, if the law is amended) of the defendant's conviction and sentence.

22. In sum, FDLE asks this Court to take into account that "the Legislature has expressed a significant concern regarding the importance of preserving the confidentiality of police records compiled during an active criminal investigation." Christy, 698 So.2d at 1366.

23. That confidentiality would be seriously undercut if all "active" exemptions residing in records requested by collateral counsel expire upon sentencing for a capital

offense. In effect, one half of the definition of "active" investigative and intelligence records would be lost, contrary to legislative intent. Active investigations and intelligence gathering must be protected from premature disclosure as long as they are, in good faith, active. The exemptions were never intended to exist only until one of the subjects named therein has been convicted of a capital offense. This Court's request for legislative action, and the rule revision it makes on this matter, must take this reality into account and clarify that all that is sought is a change in the law to provide that the pendency of a direct appeal of a capital conviction would not, by itself, give rise to an active criminal investigative or intelligence exemption as to records related to the convicted defendant.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to The Honorable **Stan R. Morris**, Circuit Judge, Eighth Judicial Circuit, Alachua County Courthouse, 201 E. University Avenue, Gainesville, Florida 32601, The Honorable **Philip J. Padovano**, 1st District Court of Appeal, 301 Martin Luther King Blvd., Tallahassee, Florida 32399-1850, The Honorable **O.H. Eaton, Jr.**, Seminole County Courthouse, 301 N. Park Avenue, Sanford, Florida 32771, Professor **Jerome C. Latimer**, Stetson University of Law, 1401 61st Street South, St

Petersburg, Florida 33707, President **John F. Harkness**, Jr., The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, Attorney General **Robert A. Butterworth**, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, Assistant Deputy Attorney General **Carolyn M. Snurkowski**, Office of the Attorney, PL-01, The Capitol, Tallahassee, Florida 32399-1050, Capital Collateral Counsel **Neal A. Dupree**, CCRC South, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 32301, Litigation Director **Todd G. Scher**, 101 NE 3rd. Avenue, Suite 400, Ft. Lauderdale, Florida 33301, Capital Collateral Counsel **Gregory C. Smith**, Northern Region, 1533 B S. Monroe Street, Tallahassee, Florida 32301, **Mark E. Olive**, P.A., 320 West Jefferson Street, Tallahassee, Florida 32301-1608, Public Defender **Bennett H. Brummer**, 1320 NW 14th Street, Miami, Florida 33125-1609, Public Defender **Nancy A. Daniels**, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301, Public Defender **Richard Jorandby**, 15th Judicial Circuit, 421 3rd Street, West Palm Beach, Florida 33401, **Stephen Krosschell**, Esq., 14020 Roosevelt Blvd., Suite 808, Clearwater, Florida 33762, Representative **Tom Feeney**, 28 West Central Blvd., Orlando, Florida 32801-2466, Mr. **Johnnie B. Byrd**, Jr., PO Box TT, Plant City, Florida 33564-9040, and Representative **John Dudley Goodlette**, 3301 E. Tamiami Trail, Administration Bldg., Suite 203, Naples, Florida 34112 this ____ day of June, 2000.

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Michael R. Ramage