IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO FLORIDA RULES)
OF CRIMINAL PROCEDURE 3.851,) Case No. 96,646
3.852, AND 3.993)
_____/

**COMMENTS OF THE SOLICITOR GENERAL
ON BEHALF OF THE ATTORNEY GENERAL AND
THE STATE OF FLORIDA**

THOMAS E. WARNER
Solicitor General

T. KENT WETHERELL, II
Deputy Solicitor General

OFFICE OF THE SOLICITOR GENERAL
The Capitol – Suite PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681

(850) 410-2672 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Florida Constitution:

Florida Statutes:

Court Rules:

STATEMENT OF INTEREST

The Attorney General has delegated responsibility to the Solicitor General for presenting the views of the State of Florida in civil cases pending in this Court and involving matters of great public importance. Although this proceeding involves proposed amendments to the rules of criminal procedure, a broader constitutional issue is implicated, namely:

> **Whether the Court's obligation to protect a criminal defendant's constitutional due process rights as well as its inherent authority to adopt rules of discovery requiring the production of documents relevant to postconviction relief are limited by exemptions in the Public Records Act?**

The Solicitor General appears in this proceeding primarily to address this narrow constitutional issue, and the following comments are intended to supplement the comments offered by the Attorney General through the Assistant Deputy for Criminal Appeals.

COMMENTS

The Solicitor General, on behalf of the Attorney General and the State of Florida, hereby offers the following comments on the Court's proposed "Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993" (published April 14, 2000), as modified by the Court's Order dated May 17, 2000.

1. It is not necessary for the Legislature to amend sections 119.07(3)(b) or (3)(l),

Florida Statutes (1999), in order for the Court to implement the "modified dual track system" set forth in the proposed "Amendments" of April 14, 2000, or as such rules may otherwise be modified after consideration of comments from other interested parties. The Court's obligation to protect a criminal defendant's due process rights and its inherent authority to adopt rules of discovery requiring the production of documents relevant to postconviction relief are not limited by any exemptions or confidentiality provisions in the Public Records Act. Accordingly, the Solicitor General respectfully suggests that the Court can adopt appropriate rules for discovery in capital postconviction relief proceedings to provide:

a. All discovery of relevant documents and information for postconviction relief be in accordance with the Florida Rules of Criminal Procedure and not Chapter 119;

b. An express definition of documents and information subject to the discovery rules for postconviction relief that is not dependant on the definitions or exemptions in Chapter 119;

c. Discovery and production of the documents and information relevant to postconviction relief shall occur automatically and without motion from defense counsel in accordance with time frames set forth in the rules;

d. Any claim that certain records should not be produced or disclosed shall be asserted by motion or deemed to be waived and, if a timely motion is filed, said motion shall trigger an automatic hearing and in camera inspection within times specified by the rules;

e. There shall be no grounds for non-production or non-disclosure of documents

and information relevant and material to a postconviction motion unless based upon a "recognized privilege of exclusion from discovery" (*see Department of Professional Regulation v. Spiva*, 478 So. 2d 382, 383 (Fla. 1st DCA 1985)), but the court may use in camera inspection and appropriate protective orders to "ensure the confidentiality of records" (*see Department of Highway Safety and Motor Vehicles v. Krejci Co.*, 570 So. 2d 1322, 1325 (Fla. 2d DCA 1990), *rev. denied*, 576 So. 2d 286 (Fla. 1991));

f. Requests for public records under Chapter 119 in addition to or independent of discovery under the rules for capital postconviction relief shall not be grounds for any extension or delays in the requirements or time periods set forth in the rules for postconviction relief.

2. It is not necessary to wait until "After Mandate Issues On Direct Appeal" to start the time for filing the initial motion for postconviction relief or to start the discovery process of "additional" records that may be necessary for such motions. The Solicitor General has not been able to identify any reported case since the re-institution of the death penalty, where the Court has set aside a sentence of death on motion for rehearing, after issuing an initial opinion affirming the death sentence on direct appeal. Thus, the Court's concern that a defendant's postconviction relief attorney has "no road map" to follow until the opinion is issued on direct appeal, or that the high reversal rate on direct appeal would result in wasted efforts and resources if a true "dual track system" were employed, would not be applicable if the pertinent time periods for the postconviction relief motion and additional discovery, commenced upon the issuance of the opinion

affirming the death sentence on direct appeal.

3. Public confidence in the collateral appeals system would be enhanced, if the Florida Rules of Criminal Procedure expressly provided sanctions for non-compliance and a mechanism to monitor and enforce the time frames and requirements of the rules for capital postconviction relief and potential. The Solicitor General respectfully suggests inclusion of a provision in these rules instructing the Clerk of this Court to issue a show cause order, (as to why there has been failure of compliance and why sanctions should not be imposed), whenever it appears that the court below or any party has failed to comply with the requirements and time periods specified by these rules (with due regard for an appropriate grace period). See for examples:

> **Fla.R.App.P 9.410** providing that a court on its own motion, on 10 days' notice may impose sanctions for any violation of the rules;
>
> **Fla.R.Crim.P 3.220(n)** providing sanctions for failure to comply with criminal discovery rules;
>
> **Fla.R.Civ.P. 1.380(b)** providing sanctions for failure to comply with civil discovery rules;
>
> **Fla.R.Civ.P.1.420(e)** providing for dismissal for failure to prosecute;
>
> **U. S. Sup.Ct Rule 14.5** authorizing the Clerk to return a petition for writ of certiorari deemed to be deficient along with a letter explaining the deficiencies and requesting corrections.

ARGUMENT IN SUPPORT OF COMMENTS

THE COURT HAS AN OBLIGATION TO PROTECT A CRIMINAL DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS AS WELL AS THE INHERENT AUTHORITY TO ADOPT RULES OF DISCOVERY REQUIRING THE PRODUCTION OF DOCUMENTS RELEVANT TO POSTCONVICTION RELIEF, WHICH POWERS ARE NOT LIMITED BY EXEMPTIONS IN THE PUBLIC RECORDS ACT.

A criminal defendant has a constitutional right to discover information in the possession of the State that is relevant and material to his prosecution. *See Brady v. Maryland*, 373 U.S. 83 (1963); *see also Strickler v. Greene*, 527 U.S. 263 (1999) (summarizing post-*Brady* cases). This right extends not only to exculpatory evidence, but also to impeachment evidence, *see United States v. Bagley*, 473 U.S. 667, 676 (1985); it also extends to evidence known to the police investigators but not known to the prosecutor, *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); and the duty to disclose applies even if there has been no request by the defendant. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). The discovery rules in the Florida Rules of Criminal Procedure, enacted pursuant to this Court's authority in Article V, section 2(a) to "adopt rules for the practice and procedure in all courts", provide the mechanism to enforce this constitutional right. *See Henderson v. State*, 745 So.2d 319, 324 (Fla. 1999); *see also State v. Tascarella*,

580 So.2d 154, 156 (Fla. 1991) (explaining that the purpose of the criminal discovery rules "is to avail the defense of evidence known to the state so that convictions will not be obtained by the suppression of evidence favorable to a defendant or by surprise tactics in the courtroom.").

The Public Records Act has a distinctly different purpose. It implements Article I, section 24(a) of the Florida Constitution and establishes the general public's right "to discover the actions of their government." *See Henderson*, 745 So.2d at 324 (quoting *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997)). The Public Records Act establishes the procedures for inspecting and copying public records and, as authorized by Article I, section 24(c), it exempts certain records from public disclosure. It does not expand or limit the "the right and extent of discovery by the state or by a defendant in a criminal prosecution or in collateral postconviction proceedings." *See* § 119.07(8), Fla. Stat. (1999).

Because the criminal discovery rules are designed to protect the constitutional rights of the criminal defendant, the exemptions in Chapter 119 cannot be used to preclude his discovery of relevant and material information. *See Henderson*, 745 So.2d at 323. In *Ivester v. State*, 398 So.2d 926 (Fla. 1st DCA 1981), the First District reversed a trial court order that denied the defendant's motion to compel production of a witness' deposition testimony which contained information that was exempt from disclosure under

the Public Records Act. The court noted that the scope of criminal discovery was necessarily broad because its purpose is to "help a defendant to prepare his case" and therefore any limitation on the discovery of the deposition testimony "would have to be based on the Florida Rules of Criminal Procedure and not the Public Records Act." *Id.* at 931. *See also State v. Tascerella*, 580 So.2d 154 (Fla. 1991), in which the Court reaffirmed the supremacy of the Florida Rules of Criminal Procedure over criminal discovery issues and affirmed a trial court order which precluded a federal law enforcement officer from testifying at trial because he failed to appear at a deposition even though a federal statute purported to preclude him from testifying at a deposition.

Recently, the Fourth District Court of Appeal in *B.B. v. Department of Children and Family Services*, 731 So. 2d 30 (Fla. 4th DCA 1999), considered the relationship between the rules of discovery and the Public Records Act in the context of a dependency hearing. In that case, a mother sought to compel the production of investigative reports by the sheriff's office and the medical examiner's autopsy report. *Id.* at 32. Production was refused based on the Public Records Act exemption for active criminal investigative information. *Id.* at 32-33.

The Fourth District recognized that the mother's right to access derived not from her status as a member of the public under the Public Records Act, but as a party to a pending dependency proceeding subject to the rules for discovery. *Id.* at 34. The court

then concluded that the rule in dependency actions requires the same type of open discovery that exists in criminal proceedings and therefore, a public records exemption could not limit the mother's access to discovery. *Id.* at 34 ("No provision of Chapter 119 suggests that the public records act should override the discovery authorized by the Rules of Judicial Procedure."). Accordingly, the Fourth District ordered the records to be disclosed notwithstanding the public records exemption. *Id.*

Similarly, it has been held in civil proceedings that records which are exempt from disclosure under the Public Records Act are nevertheless subject to discovery pursuant to court rules. As this Court recognized in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 425 (Fla. 1979), "we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially-created rules of procedure." The same principle has been applied in the context of the federal Freedom of Information Act. *See Kerr v. United States District Court for Northern District of California*, 511 F.2d 192, 197-98 (9th Cir 1975), *aff'd*, 426 U.S. 394 (1976) (exemptions in federal Freedom of Information Act to disclosure of sensitive information on law enforcement officials do not render that information privileged from civil discovery; exceptions in FOIA are intended to permit withholding of certain types of information from the general public).

The district courts, interpreting and applying *Wait*, have held that a public record

is not automatically privileged for purposes of discovery solely because it is exempt from disclosure under the Public Records Act. In *Department of Professional Regulation v. Spiva*, 478 So. 2d 382 (Fla. 1st DCA 1985), the court expressly rejected an argument that grade reports of the applicants for the position of state pilot, which were exempt from disclosure under the Public Records Act, were automatically exempt from production under Fla. R. Civ. P. 1.280 or 1.350. Because the grade reports were not subject to "any recognized privilege of exclusion from discovery", the agency was required to produce them. *Id.* at 383. *Accord Department of Highway Safety v. Kropff*, 445 So. 2d 1068, 1069 n.1 (Fla. 3d DCA 1984) (commenting on the distinction between production of records under the Public Records Acts and production pursuant to the Florida Rules of Civil Procedure). Similarly, in *Department of Highway Safety and Motor Vehicles v. Krejci Co.*, 570 So. 2d 1322, 1325 (Fla. 2d DCA 1990), *rev. denied*, 576 So. 2d 286 (Fla. 1991), the court held that photographic records maintained by the department which were exempt under the Public Records Act were nevertheless subject to discovery, but it urged the trial court to "take[] all precaution to ensure the confidentiality of the records."

Based upon the foregoing, the Solicitor General submits that this Court has inherent authority to require the disclosure of public records through its criminal discovery rules notwithstanding the statutory exemptions in section 119.07. Thus, contrary to the comments in *Allen v. Butterworth* (slip op. at 30-32) and the April 14,

2000 order proposing amendments to Fla. R. Crim. P. 3.851, 3.852 and 3.993 (slip op. at 8-9), the Legislature's failure to amend section 119.07(3)(b) and (3)(l) is not fatal to the implementation of the modified dual-track system set forth in the rule amendments proposed on April 14, 2000.[1]

State v. Kokal, 562 So.2d 324 (Fla. 1990), cited in *Allen* and April 14 order proposing the rule amendments, does not affect the court's inherent authority to adopt criminal discovery rules which require disclosure of relevant files, documents and records prior to the issuance of the mandate on direct appeal. *Kokal* does not stand for the proposition that materials exempt under the Public Records Act are not subject to discovery under a court rule. In *Kokal*, the defendant requested disclosure of certain records in the state attorney's file pursuant to chapter 119 not pursuant to a discovery rule.[2] *Id.* at 325. The Court in *Kokal* affirmed the trial court's order requiring disclosure

---

[1]This Court is aware of the fact that the Legislature debated the issue but ultimately failed to amend these public record exemptions during the 2000 regular session. *See* Fla. CS for SB 2112 (2000) (died in Committee on Fiscal Policy); *see also* Order dated May 17, 2000 in which this court modified the proposed amendments to Rule 3.852 because of the "continuing exemptions to the public record production contained in sections 119.07(3)(b) and (3)(l), Florida Statutes (1999).

[2] *Kokal* relied heavily *Tribune Co. v. Public Records*, 493 So.2d 480 (Fla. 2nd DCA 1986), to support its conclusion that the state attorney was not required to disclose exempt public records to the defendant pursuant to Chapter 119. *Tribune Co.* is equally inapposite because it involved a public records request made by a newspaper (not a criminal defendant) for records relating to two convicted murders whose motions for postconviction relief were pending.

of the state attorney's files, except for records that were exempt from the public records pursuant to section 119.07(3)(d)2. and (3)(o) (now (3)(l)). *Id.* at 327-28. The court further held that the exemption pursuant to those statutes continued until the "conviction and sentence have become final." *Id.* at 327.

Kokal predated Rule 3.852 but is the kind of case that likely prompted the adoption of Rule 3.852. *See In re Amendment to the Florida Rules of Criminal Procedure– Capital Postconviction Public Records Production*, 683 So.2d 475, 477 (Fla. 1996) (Anstead, Kogan & Grimes, concurring) ("capital defendants should utilize this rule [Fla.R.Crim.P. 3.852] to conduct *all* discovery, including discovery that was previously conducted pursuant to chapter 119"). Nevertheless, *Kokal* is inapposite on the dispositive issue to which the Solicitor General comments are directed – whether the court could order disclosure of a record pursuant to the discovery rules even if it was exempt from disclosure under chapter 119. Because no such discovery rule existed when *Kokal* was decided, the Court did not need to address the issue in that case.

CONCLUSION

In summary, the Court has the inherent authority to enact procedural discovery rules governing the production of records in postconviction relief proceedings. The rules should be independent of the provisions of Chapter 119. The Solicitor General respectfully requests that the Court incorporate the comments set forth above in

formulating the rules.

Respectfully submitted this **1st** day of June, 2000

THOMAS E. WARNER
Solicitor General
Florida Bar No.176725

T. KENT WETHERELL, II
Deputy Solicitor General
Florida Bar No. 060208

OFFICE OF THE SOLICITOR GENERAL
The Capitol – Suite PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this _____ day of June, 2000, a true and correct copy of the foregoing has been furnished to the following by U.S. Mail:

_____
THOMAS E. WARNER
Solicitor General

Hon. Stanley R. Morris
201 E. Univ. Ave. Ste 302
Gainesville, FL 32601-5461

Hon. Philip John Padovano
1st. Dist. Court of Appeal
301 S. Martin L. King Jr. Blvd
Tallahassee, FL 33301-3304

Hon. John Patrick Kuder
MC Blanchard Judicial Bldg.
190 W. Gov. St. Fl. 6
Pensacola, FL 32501-5773

Hon. Charles J. Kahn, Jr.
1st DCA
301 ML King Jr. Blvd
Tallahassee, FL 32399-1850

Hon. Susan F. Schaeffer
545 1st. Ave. N.
St. Petersburg, FL. 33701-3701

Hon. Scott Jay Silverman
1351 NW 12th. Ste 712
Miami, FLA 333125-1627

Hon. Joseph P. Farina, Jr.
73 W. Flagler St. Ste. 511
Miami, FL 33130-1707

Hon Oscar H. Eaton, Jr.
Seminole county Courthouse
301 N. Park Ave.
Sanford, FL 32771-1243

Hon. Belvin Perry, Jr.
Circuit Judge
425 N. Orange Ave.
Orlando, FL 32801-1544

Hon. Dudley Goodlette
3391 Tamiami Trail
Administration Bldg. Suite 203
Naples Fl. 34112

Hon. Tom Feeney
P. O. box 622109
101 Geneva Drive
Oviedo, FL 32762-2109

Hon Johnnie B. Byrd, Jr.
P. O. Drawer E
121 N. Collins St., Suite 202
Plant City, FL 33564

Hon. Bennett H. Brummer
Public Defender's Office
1320 NW 14th. St.
Miami 33125-1609

Hon. Nancy Ann Daniels
Public Defender's Ofc.
301 S. Monroe St. #401
Tallahassee, FL 32301-1803

Hon. Richard L. Jorandby
421 3rd St.
West Palm Beach, FL 33401

Hon. James Marion Moorman
Polk County Courthouse
P. O. Box 9000-Drawer
Bartow, FL 33830-9000

Hon. James B. Gibson
Public Defender's Office
251 N. Ridgewood Ave.
Daytona Beach, FL 32114-3275

John A. Boggs
The Florida Bar
650 Apalachee, PKWY
Tallahassee, FL 32399

Billy Jack Hendrix
The Florida Bar
650 Apalachee, PKWY
Tallahassee, FL 32399

William Carl McLain
Leon Co. Cthse
301 S. Monroe St. Ste 401
Tallahassee, FL. 32301-1803

Michael J. Minerva
Leon Co. Cthse
301 S. Monroe St. Ste 401
Tallahassee, Fl. 32301

Chet Kaufman
Public Defender's Off.
Leon Co. Court House Ste. 401
Tallahassee, FL 32301
Gary Caldwell
Public Defender's Off.
421 3rd St.
West Palm Beach, FL 33401

Stephen Krosschell
14020 Roosevelt Blvd.
Clearwater, FL 33762

Timonthy P. Schardl
Mark E. Olive
320 W. Jefferson St.
Tallahassee, Fl. 32301

Christina A.-Spaulding
Off. of Public Defender
1320 NW 14th St. Room 519
Miami, FL 33125

John W. Moser
Capital Collateral Regional Counsel
3801 Corporex. Park Dr. Ste. 210
Tampa, FL 33619

Arthur I. Jacobs
401 Centre St. 2nd Fl.
P. O. Box 1110
Fernandina Beach, FL 32035

Neal A. Dupree
Todd G. Scher
101 N.E. 3rd Ave. Ste. 400
Ft. Lauderdale, FL 33301

Jerome C. Latimer
Stetson College of Law
1401-61st South

St. Petersburg, FL 33707

John F. Harkness, Jr.
Executive Director, Fl. Bar
P. o. Box 389
Tallahassee, FL 32302

Richard Greene
Office of the Public Defender
421-3rd. St. FL 6
West Palm Beach, FL 33401

Larry B. Henderson
Public Defender's Office
112 Orange Ave. Ste. A
Daytona Beach 32114-4310

Michael Pearce Dodson
2305 Forsythe Ct.
Tallahassee, FL 32308-3011

Elliott C. Metcalfe, Jr.
2071 Ringling Blvd. Fl 5
Sarasota, FL 34237-7036

Gregory Conley Smith
Andrew B. Thomas
P. O. Box 5498
Tallahassee, FL 32314-5498