**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC00-2535**

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**ROBERT DEWEY GLOCK, II**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PASCO COUNTY**

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# INITIAL BRIEF OF APPELLANT

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**EMERGENCY MOTION, CAPITAL CASE DEATH WARRANT SIGNED, EXECUTION SET FOR JANUARY 11, 2001 AT 6 P.M.**

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## PRELIMINARY STATEMENT

This appeal is from the December 7, 2000 summary denial of Mr. Glock's Emergency Motion for Post-Conviction Relief and for Stay of Execution by Circuit Court Judge Wayne Cobb, Sixth Judicial Circuit, Dade City, Pasco County, Florida, following a hearing held at 5 p.m. on December 7, 2000. Mr. Glock is scheduled to be executed at 6 p.m. on Thursday, January 11, 2001.

At the time of filing this brief, counsel had not received the record on appeal from the lower court. The following abbreviations will be used to cite to the record in this case:

"R" - Record on Appeal;

"PC-R." - Post-Conviction proceedings;

"PC-R2" - Second motion for post-conviction relief. The includes transcripts from the status conference conducted on December 1, 2000 and the hearing conducted on December 7, 2000;

"T." - Testimony from the federal evidentiary hearing, March 31 - April 1, 1997

"3.850 Motion" - Mr. Glock's rule 3.850 Motion filed on December 4, 2000;

"Appendix" - Appendix to Mr.Glock's Rule 3.850 Motion;

"Compel" - Mr. Glock's Motion to Compel Public Records filed December 1, 2000;

"Order" - Court's December 18, 2000 order summarily denying Mr. Glock's claims.

## REQUEST FOR ORAL ARGUMENT

This Court scheduled oral argument for this case on January 4, 2000, provided that Mr. Glock file his Initial Brief with this Court by noon on December 18, 2000. Mr. Glock only received the trial court's order denying relief at 3:50 p.m. on December 18, 2000. A notice of appeal was not filed in the circuit court until December 19, 2000. Since this Court had already scheduled oral argument on two occasions,[1] Mr. Glock requests that he be given the opportunity again. Oral argument is warranted in this case given the issues presented and the severity of the stakes.

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[1]Before this Court's stay of execution went into effect, and before undersigned counsel contracted to represent Mr. Glock, this Court originally scheduled oral argument for November 30, 2000. At that time, counsel indicated that she was unable to abide by the Court's schedule because public records had not been provided at that time, and Circuit Court Judge Wayne Cobb set a status hearing on Mr. Glock's case for December 1, 2000.

## CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 12, 1983, Robert Glock and Carl Puiatti were charged with first-degree murder, robbery and kidnapping in the August 16, 1983 death of Sharilyn Ritchie. The two men were stopped on the New Jersey Turnpike by State Trooper William Moore for allegedly driving a car with an illegible license plate. After the car was stopped and both men could not produce driver's licenses, Trooper Moore alleged that he saw guns in the car and arrested the two men on gun charges. At the trooper station, after an NCIC check, Trooper Moore learned that the car that the men were driving was stolen and that the owner was the victim of a homicide in Florida (R. R.1760-1778).

On August 21, 1983, Mr. Glock and Mr. Puiatti each provided oral statements about the victim's death (R. 1830-32, 1836-38). On August 24, 1983, both men provided written statements to law enforcement (R. 1844-1845, 1847), and then participated in a joint oral statement (R. 1853). All of the statements were introduced at the men's joint trial.

Pre-trial, the defense moved to suppress the men's statements and the tangible evidence seized at the time of the stop. After a lengthy motion to suppress hearing, the trial court denied all the defense motions (R. 703).

At their joint trial, the state introduced the individual confessions of each defendant, and the jury was provided a cautionary

instruction not to consider Mr. Puiatti's confession as evidence of guilt against Mr. Glock and vice versa (R. 1835, 1841, 1847, 1849). The joint confession also was read into the record, and transcripts were provided to the jury (R. 1906). Neither defendant testified during the guilt/innocence phase of the trial.

At a joint trial, the jury found both defendants guilty of all counts (R. 2105). After a joint penalty phase, the jury recommended death for both defendants (R. 2443-2452). At joint sentencing, the judge imposed death, finding three aggravating circumstances (R. 2443-2452).

Mr. Glock appealed to the Florida Supreme Court, which jointly affirmed his conviction and sentence along with Mr. Puiatti's. Puiatti v. State/Glock v. State, 495 So. 2d 128 (Fla. 1986).

Clemency proceedings were held on November 20,1987 and denied when the governor signed a death warrant against Mr. Glock on October 28, 1988, scheduling Mr. Glock's execution for January 17, 1989.

On November 28, 1988, Mr. Glock was forced to file a Fla. R. Crim. P. 3.850 motion in state circuit court and a habeas corpus petition in the Florida Supreme Court while under warrant. The circuit court, Judge Wayne Cobb, denied Rule 3.850 relief on December 22, 1998, without an evidentiary hearing. The Florida Supreme Court affirmed the summary denial of the Rule 3.850 and denied Mr. Glock's state habeas corpus petition. Glock v. Dugger, 537 So. 2d 99 (Fla.

1989).

Mr. Glock filed a federal petition for a writ of habeas corpus in district court, which denied the petition. Glock v. Dugger, 752 F. Supp. 1077 (M.D. Fla. 1990). The district court issued a certificate of probable cause to appeal (R-3-43). After briefing and oral argument, the Eleventh Circuit Court of Appeals affirmed the district court's denial of Mr. Glock claim under Bruton v. United States, 391 U.S. 123 (1968), but reversed the district court's denial of Mr. Glock's claim under Espinosa v. Florida, 112 S. Ct. 2926 (1992). Glock v. Singletary, 36 F. 3d 1014 (11th Cir. 1994). The panel opinion did not address Mr. Glock's other sentencing claims.

The en banc Eleventh Circuit vacated the panel opinion and set Mr. Glock's case for en banc rehearing. Glock v. Singletary, 51 F. 3d 942 (11th Cir. 1995). After briefing and oral argument, the en banc court held that Mr. Glock was barred from obtaining relief on his Espinosa claim under Teague v. Lane, 489 U.S. 288 (1989). Glock v. Singletary, 65 F. 3d 878 (11th Cir. 1995) (en banc).

The panel then issued an opinion addressing the sentencing claims that were omitted in the first opinion. Glock v. Singletary, 84 F. 3d 385 (11th Cir. 1996). The panel affirmed the district court's denial of all but one of Mr. Glock's sentencing claims, ordering an evidentiary hearing on Mr. Glock's claim that his trial counsel rendered ineffective assistance of counsel in failing to

discover through routine investigation mitigating evidence and to present that evidence that the separate sentencing proceedings before the jury and the court. Concluding that Mr. Glock's claim was "not without merit," the panel ordered an evidentiary hearing.

The district court evidentiary hearing was held on March 31, and April 1, 1997 before a magistrate. The magistrate issued a report and recommendation on March 6, 1998, recommending that the petition be denied (R4-111). Mr. Glock timely filed objections to the magistrate's report.

The district court adopted the magistrate's report and recommendation, overruling Mr. Glock's objections and denied relief (R4-114). Mr. Glock timely filed a motion to alter and amend judgment (R4-117), which was denied. Mr. Glock filed a notice of appeal (R4-119) and a motion for certificate of probable cause (R4-120), which was granted (R4-121).

The Eleventh Circuit Court of Appeals denied relief, Glock v. Moore, 195 F.3d 625 (11th Cir. 1999). Rehearing was denied on February 23, 2000. Glock v. Moore, 210 F. 3d 395 (11th Cir. 200). A Petition for Certiorari was denied on October 2, 2000, Glock v. Moore, 121 S. Ct. 213 (2000).

On November 14, 2000, the Jeb Bush signed Mr. Glock's warrant and set execution for December 8, 2000 at 6 p.m. That same day, undersigned counsel was contacted about representing Mr. Glock as

private counsel. Counsel took over representation of Mr. Glock from the Capital Collateral Regional Counsel – Northern Region on Thursday, November 16, 2000.

Since that time, counsel sent out public records requests, but because of the short warrant period (20 days), counsel did not utilize her full ten days, as permitted by law.

Additionally, on December 1, 2000, counsel received more than 91,000 pages of documents from New Jersey that show a policy of drug profiling conducted by New Jersey State Troopers on the New Jersey Turnpike since the early 1980s. (See Appendix 1 to Motion to Vacate). The documents, which were only released to the public on November 28, 2000, are relevant to Mr. Glock's case because he was stopped on the New Jersey Turnpike under selective enforcement of New Jersey traffic laws. Counsel believes that Mr. Glock was illegally profiled and that his stop was illegal.

At a status hearing on December 1, 2000, the circuit court ordered counsel for Mr. Glock to file a Rule 3.850 motion by December 4, 2000. At the status hearing, in which there was limited discussion about the public records, the circuit court said he refused to review the exemptions taken by the state agencies and refused to do an in-camera inspection of the documents. (PC-R2. 12/1/00 at 22).

On Thursday, December 7, 2000, this Court temporarily stayed

Mr. Glock's execution until January 10, 2001 at 6 p.m. However, the circuit court hearing went forward that evening at 5 p.m. The trial court summarily denied all of Mr. Glock's claims from the bench. The judge's order, which was written by the State and which the judge adopted exclusively except for eleven (11) words and one sentence, was filed on December 18, 2000. A notice of appeal was promptly filed on December 19, 2000. This appeal follows.

## SUMMARY OF THE ARGUMENT

1. The trial court failed to exercise independent judgment in adopting verbatim the State's proposed order and summarily denying relief.

2. Newly-discovered evidence shows that the stop made by the New Jersey State Trooper was selective enforcement of the New Jersey Motor Vehicle Code because it was based on impermissible drug profiling that rendered the stop without probable cause. All confessions and tangible evidence obtained by authorities after the illegal stop is fruit of the poisonous tree and inadmissible. Mr. Glock was denied his rights under the Florida and U.S. Constitutions.

3. Mr. Glock was arbitrarily denied access to Florida's clemency process when the Governor triggered the provisions of the new Rules of Executive Clemency by initiating a clemency investigation. Mr. Glock was denied the right to counsel during his

clemency proceedings that is mandated under the Governor's own clemency rules and under Ohio Adult Parole Authority, et al. v. Woodard, 118 S. Ct. 1244 (1998).

4. The lower court's rulings on public records were contrary to Art. 1 Sec. 24, of the Florida Constitution, Chapter 119 Fla. Stat., Fla. R. Crim. P. 3.852. Fla. R. Crim. P. 3.852 and Fla. Stat. Sec. 27.708 and 119.19 are unconstitutional on their face and as applied to Mr. Glock.

## ARGUMENT I

**THE TRIAL COURT ERRED IN FAILING TO WRITE ITS OWN ORDER AND SUMMARILY DENYING RELIEF.**

In its December 18, 2000 order summarily denying Mr. Glock relief, the State substituted its judgment for that of the trial court. At the conclusion of the December 7, 2000 hearing in Circuit Court, Judge Cobb denied all of Mr. Glock's claims and allowed the State to write the proposed order.

The final order fails to reflect the substance of the lower court's wishes. The State's proposed order, which the trial court adopted wholeheartedly minus eleven (11) words and one sentence, are exactly the reasons argued by the State as to why Mr. Glock should be denied relief. Without even attempting to change the State's

proposed order, Judge Cobb simply deleted by hand eleven words and one sentence and then adopted the State's version of the facts. This is an independent review of Mr. Glock's case.

The trial court ignored defense counsel's objections that the order did not reflect his oral pronouncement in open court and failed to exercise his own judgment in drafting the final order.

In its proposed order, the State argued that Mr. Glock's claim that the stop along the New Jersey Turnpike was the result of an "impermissible racial policy to discriminate against one or more minority groups is meritless." (Order at 3). The order then listed three reasons why the State believed the stop was meritless: both Mr. Glock and Mr. Puiatti are Caucasian; Trooper Moore is black; are Trooper Moore testified that he stopped the car because the licence plate was illegible. (Order at 4).

The trial court never made those fact findings at the hearing. The only comment made by the judge was the following:

> Ms. Backhus, I find that you have not demonstrated any facial basis for believing that Trooper Moore stopped Mr. Glock and Mr. Puiatti because of any unlawful or unconstitutional profiling. I'm going to deny that.

(PC-R2. at 120).

The Court's final order is replete with conclusions not expressed by the judge in court. At no time did the trial court rely or even refer to any portion of the record on appeal to deny Mr. Glock relief. The court's final order is a fiction of reasons that

the Court never found. In adopting the State's order and their selection of parts of the record, the judge failed to use any independent judgment whatsoever. The court did not even go to the trouble of typing a corrected order.

The trial court abdicated its responsibility of acting and adjudicating matters as a neutral detached tribunal to Mr. Glock's adversary – the State. The judge's actions in this regard are similar to when the State prepares a sentencing order for mere signing by the judge. This Court had determined that such behavior is impermissible. See, Maharaj v. State; 2000 WL 1752209 (Fla. November 20, 2000); and Card v. State, 652 So. 2d 344 (Fla. 1995).

On Mr. Glock's second issue – clemency, the court simply said it had no "jurisdiction over the governor or the Clemency Board" and that no due process violation had occurred.

During the December 7, 2000 hearing the State argued that clemency issue was a "repetitive appointment of counsel." The judge made no such representation, yet he signed the State's order indicating it was so.

On Mr. Glock's third claim on the short period of time on the death warrant, the trial court said he was denying this claim. The trial court never addressed the fact that counsel now has "over fifty days" in which to prepare Mr. Glock's case because it was not true (PC-R2 at 121-122). The court orally denied the claims within the

original 20 day time period set by the court and denied Mr. Glock's request to amend his Rule 3.850 motion. In fact, Mr. Glock has no additional time in which to litigate his Rule 3.850 motion in circuit court, no less 50 days.

Although the errors in the State's order were illustrated plainly in Mr. Glock's Objections to the State's Proposed Order, the judge ignored them. The court's order must be reversed.

At the close of the December 7, 2000 hearing, after the judge summarily denied Mr. Glock's claims without an evidentiary hearing and after the judge denied Mr. Glock the opportunity to amend his Rule 3.850 motion, the court said:

> And since this is a supplemental 3.850 motion, I don't believe he's entitled to an evidentiary hearing, although I would have taken evidence tonight if it had been presented, but I don't see any reason for it.

(PC-R2. 12/7/00 at 123)(emphasis added).

Before the December 7, 2000 hearing, counsel for Mr. Glock sought clarification from the judge as to what type of hearing he intended to have. At the earlier hearing on December 1, 2000, the judge said he was having a "hearing on the motion." It was unclear at that time whether the judge meant to hold a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) or an evidentiary hearing. Counsel for Mr. Glock filed a Motion for Clarification, seeking to clarify what type of hearing it intended to have and whether she would be entitled to subpoena witnesses to appear in court. The

trial court ignored the motion. Because the court ignored the clarification request, counsel for Mr. Glock did not present witnesses at the hearing. Yet, on his way out of court, the judge made above comment.

The trial court was either confused or unfamiliar with the law in post-conviction. The judge also failed to conduct a proper review of the record of Mr. Glock's case. In order for the court to determine whether a defendant is entitled to relief on his post-conviction motion, the court must first review all the files and records in the case.

Florida Rule of Criminal Procedure 3.850 states that if the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. The lower court failed to follow the basic requirements – reviewing the files and records before determining that Mr. Glock was entitled to no relief.

The lower court also failed to see that Mr. Glock pled sufficient facts that warranted an evidentiary hearing. Mr. Glock pled factual claims that cannot be refuted by the record. The records relied on by the State in its order, but ignored by the judge at the hearing, fall short of conclusively refuting Mr. Glock's claims as required for summary denial, Lemon v. State, 498 So. 2d 923 (Fla. 1986), but demonstrate that facts are in dispute

necessitating an evidentiary hearing.

## ARGUMENT II

## THE NEWLY-DISCOVERED EVIDENCE CLAIM

> [A]s a New Jersey Turnpike State Trooper I was directed and urged to stop and search persons who fit the profile if I wanted to make "good arrests." We were given wide discretion and told to follow our hunches. If we wanted to stop and search someone or some persons, we would stop and search. Any possible violations such as speeding, or improper equipment, were afterthoughts.
>
> Standard justifications for stopping were speeding, improper equipment or failure to maintain a single lane of travel. I personally know of incidences that I was involved in and other Troopers were involved in, when there was no violation but one was alleged afterwards so as to justify a stop.

Ex-Trooper Kenneth Wilson (Appendix 3 to 3.850).

In August, 1983, as Robert Glock and Carl Puiatti drove the New Jersey Turnpike, state troopers were illegally targeting blacks, Hispanics, Jamaicans, Italians, young people, and those driving with out-of-state plates. Troopers relied on "hunches" on whether a car contained drugs or guns. These stops, many of which were illegal and had no basis in law or fact, were conducted in the hopes of making a "good arrest." It didn't matter if the stop was illegal. It didn't matter if the stop was based on a "hunch." All that mattered was that these illegal stops turned into "good arrests." Robert Glock and Carl Puiatti became part of the "good arrests," in violation of their rights to be free from unreasonable search and seizure.

On November 28, 2000, for the first time in seventeen years, the New Jersey Attorney General's Office made public more than 91,000 pages of documents detailing the New Jersey State Highway Patrol's practice of drug and racial profiling along the New Jersey Turnpike.

Not surprisingly, Mr. Glock and Mr. Puiatti matched the "profile" that the New Jersey State Police were looking for. They were young, dark haired, dark complected, and driving a car with out-of-state plates northbound on the New Jersey Turnpike. Newly-discovered evidence, released only within the last few days, establishes that the illegal stop by Trooper William Moore on the New Jersey Turnpike seventeen years ago was what led to Mr. Glock's confessions, conviction and eventual sentence of death.

This information was "unknown by the trial court, by the party, or by counsel at the time of trial...and could not have been [then known] by the use of diligence," Jones v. State, 591 So. 2d 911 (Fla. 1991). This newly-discovered evidence of 91,000 pages of documents detailing the New Jersey State Police's practice of drug profiling that began in the mid 1980s, and was the reason for the illegal stop of Mr. Glock and Mr. Puiatti, only became available to counsel on December 1, 2000. This new information requires an evidentiary hearing, and relief.

To be considered newly-discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at

the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994).

The newly-discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911, 915 (1991). To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916.

In Lightbourne v. State, 742 So. 2d 238 (1999), this Court addressed the proper procedure for considering new evidence in the context of the evidence that already exists.

> ...the trial court is required to “consider all newly discovered evidence which would be admissible” at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial in determining whether the evidence would probably produce a different result on retrial. This cumulative analysis must be conducted so that the trial court has a “total picture” of the case. Such analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See, Kyles v. Whitley, 514 U.S. 419, 436 (1995).

The new evidence that the trial court failed to consider was that the stop that resulted in Mr. Glock’s arrest and subsequent confessions was illegal and based on impermissible profiling by the New Jersey State Police.

**A. Due Diligence**

The State's order erroneously misconstrued the facts plead by Mr. Glock. It is obvious from sworn witness affidavits and the "Right to Know" documents from New Jersey that Mr. Glock could not have discovered this drug profiling information through due diligence prior to the November 28, 2000 release of the New Jersey Police documents. The State's order adopted by the trial court says that Mr. Glock should have litigated this issue "fourteen years ago" because New Jersey lawyers have been litigating this issue for year. Order at page 2. This is incorrect.

In his Rule 3.850 motion, Mr. Glock pled the sworn statement of William Buckman, a New Jersey attorney who has been actively involved in litigating drug profiling cases. New Jersey attorneys attempted to obtain this information but to no avail until litigation.

> Undersigned, William Buckman, under penalties of perjury, states the following:
>
> 1. My name is William Buckman. I am an attorney licensed to practice law in the state of New Jersey. Currently, I am a sole practitioner with an office in Moorestown, New Jersey where I practice in the areas of criminal and civil rights law.
>
> 2. Over the past few years I have represented and am currently representing individuals in criminal cases which involve issues about the "racial profiling" or "drug profiling" which was practiced by the New Jersey State Troopers.
>
> 3. During the litigation known as *State v. Soto,* 324

N.J. Super 66 (Law Div. 1996), appeal withdrawn April 20, 1999, the defendants focused their challenge on the Southern half of the New Jersey Turnpike in the area patrolled by the Moorestown Barracks of the New Jersey State Police. I moved to suppress the evidence seized in those cases under the 14th Amendment of the United States Constitution as well as its New Jersey counterpart alleging that the New Jersey State Police were motivated by a desire to target minorities for stop and search.

4. At the motion to suppress hearing the defense presented statistical data which supported the defendants' claim of institutional racism practiced by the New Jersey State Troopers. The defense also presented testimony from former Troopers who admitted that they had been trained and coached to "profile" so that they could increase their criminal arrests. Further, I elicited testimony that the State Police hierarchy allowed, condoned, cultivated and tolerated discrimination. The Honorable Robert E. Francis granted the motions to suppress in the published opinion cited above.

5. I was also recently granted discovery in the litigation of *New Jersey v. Maiolina*, 752 A. 2d 735 (Sup. Ct. New Jersey 2000).

6. I was contacted Wednesday, November 29, 2000, by counsel for Robert Glock. Mr. Glock's counsel informed me that she had learned that I was familiar with the litigation of the "profiling" practiced by the New Jersey State Troopers.

7. I informed counsel that the New Jersey's Attorney General released over 90,000 pages of documents relating to the "profiling" problems on Monday, November 27, 2000. Of the approximately 2000 pages of these documents I have reviewed to date it is clear that most of these documents were never produced although they were clearly required in the *Soto* and *Maiolino* matters pursuant to *Brady v. Maryland* as well as the New Jersey Court Rules governing discovery. documents were previously unavailable.

8. I also informed counsel that in my experience litigating the "profiling" issues, the race of the individual stopped on the turnpike by the troopers was a

> critical factor. However, the appearance of the individual was equally important because, as was noted in the *Maiolina* opinion, while "some individuals who are not Hispanic may have some characteristics classically linked to Hispanics and may be wrongly considered to be Hispanics." *Maiolina*, 752 A. 2d at 743.
>
> 9. In addition, the age and gender of the individuals as well as the facts that the registration reflected that the individuals were from out of state all appear to play a role in whether or not an individual would be stopped.
>
> 10. To date, the State of New Jersey has conceded that there is a colorable basis to believe that "profiling" occurred as early as 1988. However, the documents I have reviewed provide a reasonable inference that "profiling" extends back to the early 1980s.
>
> 11. Finally, I informed counsel that the Moorestown Station was one of the posts along the turnpike which received the most criticism for conducting "profiling" stops.
>
> Signed, WILLIAM H. BUCKMAN

Appendix 10.

Mr. Buckman acknowledged that most of the documents were not previously provided to him, even though he litigated claims arising from stops in 1996 and 2000. The New Jersey police only recently conceded that drug profiling occurred from 1988 to the present. Never before the release of the documents did Mr. Glock know that profiling occurred much earlier, according to the DEA Intelligence Bulletin. See Appendix 2. Prior to November 28, 2000, the New Jersey authorities had never acknowledged that drug profiling occurred in 1983.

With the release of the 91,000 pages of documents, Mr. Glock

discovered that the New Jersey State Police actively hid as much information as possible, even from the Department of Justice.

> To: Col.Williams
> Via: Lt. Blaker
> From: Sgt. Gilbert
>
> 1. **In respect to the original request, we have consistently attempted to limit what we will be giving the Department of Justice. With your approval, we have been able to limit the production of actual data so far to the two turnpike stations**. Although the original request was overly broad, they have acknowledged their primary interest is the southern end of the turnpike. We have responded accordingly and been successful so far. **Providing radio log and consent to search/pc search data for all stations in the Division would erase how we've been able to steer this thing thus far.** We have a pretty good handle on what our turnpike stats are before we start collecting the ongoing data, **thus little risk of unpleasant surprises.** Expanding to other stations is uncharted territory. **There is no "best case scenario" or upside to this course of action;** if other stations are statistically higher for minority activity (not very probable), the DOJ says problem is division wide. If their numbers are lower, DOJ will use this to reinforce their claim of racial profiling on the turnpike.

Appendix 8 (emphasis added).

It is obvious from this internal memo that limiting the information even to other law enforcement agencies was of paramount importance.

The State incorrectly argued and the trial court adopted the view that Mr. Glock should have known about this information. Even though some litigation was occurring in New Jersey in 1990's, there was no indication that the misdeeds went back any further than 1988. According to Mr. Buckman, the New Jersey courts had found that even

in 1996 through 2000 that trial counsel could not have found this information by the exercise of due diligence. Cf. State v. Soto, 324 N.J. Super 66 (Law Div. 1996); New Jersey v. Maolina, 752 A.2d 735 (Sup. Ct. New Jersey 2000). Mr. Glock could not know that the police were drug profiling in 1983 when they were actively denying it occurred at all even in the 1990's.

Mr. Glock had no reasonable basis to believe the profiling occurred in 1983 nor that one of the ethnic groups the New Jersey Troopers targeted was Italian Americans. None of this information was provided in the 1988 New Jersey police files requested by Mr. Glock under New Jersey's "Right to Know" Act. See, N.J.S.A. 47:1A-1 to -4.

Far from being an "eleventh hour exercise in speculation," as described by the State, Mr. Glock discovered that the DEA's own documents proved that drug profiling occurred in 1983. See, Appendix 2. Before the November 28, 2000 disclosure of 91,000 pages of documents by the New Jersey Attorney General, Mr. Glock did not know the pervasive extent of the drug profiling that occurred along the New Jersey Turnpike. "Taken as a whole, the reams of memos, internal investigations, complaint letters and confidential reports show how the institutions of state government denied accusations of selective enforcement for nearly a decade before grudgingly admitting it and making changes," New York Times, 12/3/00. See, Appendix 12.

The documents show that in the early to mid-1980s, the Drug Enforcement Administration (DEA) enlisted local police to catch drug smugglers who were importing drugs from Latin America, often from Florida, and moving them to major American cities by car. In an internal March, 1998 DEA Intelligence Bulletin, the DEA aimed "to prevent illicit drugs from entering the country" for the last fifteen years. See Appendix 2. The DEA called the program "Operation Pipeline" and said:

> Beginning in the early 1980's, New Mexico state troopers grew suspicious when there came **a sharp increase in the number of motor vehicle violations**, particularly along Interstate 40, that resulted in drug seizures and arrests. **At the same time, and unknown to those in New Mexico, troopers in New Jersey began making similar seizures during highway stops along what would become the Interstate 95 drug corridor from Florida to the Northeast**. Independently, troopers in New Mexico and New Jersey established their own highway drug interdiction program.

Appendix 2 (emphasis added).

New Jersey had already started a drug interdiction program well in advance of the official federal sanctioning of "Operation Pipeline" in 1984. As the drug seizures increased in New Jersey and New Mexico, troopers continued to "zero in" on physical characteristics that they developed about various ethnic groups.

By 1989, DEA officials boasted that the New Jersey State Police troopers were "exemplary models" of the successful Operation Pipeline program. But, in the glow of the successful program, black and

Hispanic drivers on the New Jersey Turnpike were subjected to frequent and unjustified traffic stops. The searches created a new vocabulary to add to the state's traffic code: "driving while black." New York Times, 12/3/00. See Appendix 12. As it was later shown, blacks and Hispanics were not the only ethnic groups targeted.

The New Jersey State Police training bureau offered a course called "Sociology for the Police Officer." One of the topics was "ethnic and racial minorities." The outline for the course had the following as a topic of discussion:

IV. Police Stereotypical View of Minorities

A. Wary of minority people.

B. Believe minorities are more likely to be involved in criminal activities

1. Chinese Americans are more likely to be involved in crimes of gambling.

2. Italian Americans are more likely to be involved in organized crime.

3. Black Americans are more likely to be involved in crimes of violence.

4. Spanish-speaking Americans are more likely to be involved with fights or taunting officers. Appendix 12.

While the training programs listed the agenda above, the

Attorney General's Report to the New Jersey Governor stated the exact opposite. The report suggested that an officer can make no rational conclusion about a person's membership (in a gang or related crime family) based to any degree on the person's race or ethnicity. The author of the report used the "Mafia" as an example:

> The La Cosa Nostra families that continue to operate in New York, New Jersey and Philadelphia areas are comprised almost entirely of persons of Italian descent. Needless to say, it would be ludicrous for a police officer to treat a person stopped for a motor vehicle violation who appears to be an Italian-American as if he were a suspected soldier, associate, or made member of a La Cosa Nostra family. All but the most unenlightened bigot understands that the percentage of Italian-Americans who are associated with organized crime is negligible.

As unenlightened as the training programs were, it appeared that any Italian American group could be targeted at any time for a pretextual traffic stop to search for drugs.

In its order, the State and trial court erroneously believed that only white troopers engaged in the practice and policy of drug profiling. The order suggested that if the trooper was black (as he was in this case); testified at trial that he stopped the car pursuant to a traffic violation; and the defendants were Caucasian; then the drug profile could not be used. See, Order at page 3. According to the sworn affidavit of Trooper Wilson, also a black trooper, this is not true. In a sworn declaration, Kenneth Wilson described just how troopers were instructed to conduct these "drug

profile" stops on the New Jersey Turnpike.

CERTIFICATION OF KENNETH WILSON

KENNETH WILSON, certifies as follows:

6. My name is Kenneth Wilson. I was formerly a New Jersey State Trooper from January 15, 1987, to March 4, 1989. I began work as a Trooper on the New Jersey Turnpike in August of 1988.

7. Shortly after I began working on the New Jersey Turnpike, I became schooled in what was known as a profile to be used to stop persons suspected of transporting drugs on the New Jersey Turnpike.

8. I was trained in the use of this profile during seminars with representatives from the Drug Enforcement Administration, as well as superiors within the New Jersey Turnpike [sic]. I will describe the drug profile immediately below. However, I wish to stress that the drug profile was imparted to me verbally through the New Jersey State Police, as well as verbally at seminars. It is not written; however, it was and to my knowledge is, still standard operation. We were not told to employ the words "drug profile." Rather, I use that term to abbreviate the procedures, "lessons," and techniques that comprise the "profile." Additionally, the "drug profile" has never been shown by those who advocate and indeed order its use and those who employ it to be accurate.

9. The drug profile was such that while patrolling the New Jersey Turnpike, black people and hispanics of "Columbian" features with out of state plates and particularly, young people of these descriptions with out of state plates, were targeted for scrutiny, stops and search. It was an underlying belief of the drug profile that because of the assumption that New York was a clearing house for drugs, that "profile" people with out of state tags on their cars going North on the Turnpike, if searched would be in possession of money and guns. The money was to purchase drugs, the guns were to protect themselves from other nefarious individuals in the drug trade.

10. The profile went on further to indicate that "profile" people in out of state cars travelling southbound, if

searched would have drugs or money. The drugs were present because the cash on the northbound route had now been turned into drugs by way of purchase in New York.

11. Accordingly, as a New Jersey Turnpike State Trooper I was directed and urged to stop and search persons who fit the profile if I wanted to make "good arrests." We were given wide discretion and told to follow our hunches. If we wanted to stop and search someone or some persons, we would stop and search. Any possible violations such as speeding, or improper equipment, were afterthoughts. Standard justifications for stopping were speeding, improper equipment or failure to maintain a single lane of travel. I personally know of incidences that I was involved in and other Troopers were involved in, when there was no violation but one was alleged afterwards so as to justify a stop.

12. The profile and the abuses that it has spawned has also been the downfall of Troopers. I am personally aware of persons who were stopped and searched by Troopers who had money on them. Often, Troopers would not account for this money, taking it personally and keeping it either individually or sharing it in groups.

13. For the sake of specificity, I wish to point out that the State Police have a Drug Interdiction Unit. With the help and participation of DEA officials, they taught us the profile and how to make arrests and "justify them." All Troopers in the State Police, however, received this training.

14. The profile was not difficult to utilize. It was common knowledge within the State Police that the average speed on the Turnpike is 63 to 67. So everyone was speeding. It was very rarely a problem to pull over a car for speeding. However, I wish to stress that the great majority of persons on the Turnpike were speeding, white and black alike. However, when a "profile stop" was made, we would immediately order the occupants of a car out and pat them down, even though nothing had occurred to pique our fear of danger.

15. As part of my general thinking, I was specifically taught how to write operations reports. We were specifically taught how to justify in our subsequent reports our stops

and searches so that we would utter the right words which would stand up in Court. We were taught to write the right reports to justify our actions in Court, whether or not that is what actually occurred on the roadway.

16. As part of my consultation with counsel in this case I reviewed Radio and Patrol logs they were provided with. I have confirmed that numerous abbreviations that commonly appear do identify based on race. Those are: WF" means white female. "BM" means black male. "WM" means white male. "BF" means black female. "H" or "HIS" means hispanic. "Bfam" means black family. "Wfam" means white family. "Bcouple" or "Bcou" means black couple. "Wcouple" means white couple. "Occ" means occupants. "Bocc" means black occupant, etc.

17. I certify that the foregoing statements made by me are correct. I am aware that if any of the foregoing are willfully false I am subject to punishment.

Kenneth Wilson

Appendix 3.

The State's order which the trial court adopted, said that this evidence was "insufficient" to justify an evidentiary hearing. Yet, no where in the State's case did it indicate what trial facts rebut this claim. These statistical and documentary facts were precisely the evidence that has led to the suppression of evidence or further discovery disclosures in numerous New Jersey cases. See, Kennedy v. State, 247 N.J. Super. 21, 588 A. 2d 834 (1991) and State v. Letts, 254 N.J. Super.390, 603 A.2d 562 (1992).

Contrary to the State's opinion, Mr. Glock and Mr. Puiatti fit the profile. Sworn witness affidavits and testimony show that:

In August of 1983, my brother Bobby and his friend Carl Puiatti stopped by my house. They were travelling from Florida up to New Jersey. I had a chance to observe

the appearance of Bobby and Carl while they stayed at my house.

Carl is Italian and dark with black hair. Bobby was very tanned because it was summertime and he had wiry curly black hair. When I first met Carl, I thought he was Hispanic. They both looked very young for their age.

Appendix 7.

At the federal evidentiary hearing in 1997, Brenda Skiba testified as to Mr. Glock's appearance:

Q. Okay. Can you tell us what he [Bobby] was like?

A. When he first came there, he was - - I really don't know how to explain it. It - -

Q. Can you describe what he looked like?

A. He had dark hair. He was a small person. Dark-skinned.

* * *

Q. Would she[the mother] say certain things to him [Bobby] that you recall? Would she- -

A. She would - - when he first came there, he - - he's a small person, and he stood with his hands in his pocket a certain way. That was just his way. And she would say to him - - excuse my language- -but she would say to him, "You look like a fucking queer."

And she never had anything nice to say about him. She always told him he was dirty; he didn't know how to bathe himself. And he - -excuse my language again – - she would say, "You got nigger in you somewhere," and just never nothing nice.

Appendix 6.

The photographs in Appendix 13 show that Mr. Puiatti was Italian with dark skin and black hair. He looked Hispanic. Mr.

Glock had a deep tan with dark skin and black wiry hair. Both men were young and traveling north on the New Jersey Turnpike with out-of-state Florida tags. All of these factors fit the "drug profile." In his Rule 3.850 motion, Mr. Glock pled that ex-trooper Wilson's account of a typical profile traffic stop describes precisely how Mr. Glock was stopped.

Just as in the Kennedy, Soto, Maolina, and Letts cases, where this type of anecdotal evidence was used to help prove selective enforcement of the New Jersey Traffic Code, Mr. Glock could have used this evidence to establish that an illegal stop occurred against him had he been given an evidentiary hearing.

Contrary to the trial court's order, it is not necessary that Trooper Moore himself recant his trial testimony in order to prove Mr. Glock's claim. Another document released by the New Jersey Attorney General corroborates ex-trooper Wilson's allegations. An anonymous trooper complained to the NAACP about the training methods and consequences of speaking out against profiling stops:

> ...I have heard instructors at training sessions state that when Hispanics with Florida plates are seen heading North to start looking for a violation to stop them because they may be carrying drugs. I have heard instructors suggest that Rastafarians are drug users and they are identified by dread lock hairdos. So now troopers stop everyone with dreadlocks. Most of these bias' are techniques that are passed along from trooper to trooper and the cycle continues.
>
> For Col. Pagano to deny any racial motivation exists in motor vehicle stops shows that he doesn't know what's

> going on in the state police. Minority troopers don't speak out on these bias' issues because of the 5 year probation system and fear of not being selected for special jobs or promotions within the state police. There is no civil service protection. Discrimi- [sic] is always hard to prove in these type situations. Overcoming institutional discrimination is hard enough without bringing more hardship on oneself by speaking out individually. However, collectively and through the legal methods you are persuing I'm sure we can make some needed changes.
>
> Signed An Inside View.

Appendix 4.

Another way Mr. Glock could have proved his claim was through statistical probabilities. Cf. Kennedy v. State, 247 N.J. Super. 21, 588 A. 2d 834 (1991).

Drug profiling was most heavily concentrated in two areas of New Jersey -- Moorestown and Cranbury stations. In its 1999 report to the Governor, the New Jersey Attorney General stated that data suggested that "minority motorists were disproportionately subject to searches (**eight out of every ten** consent searches conducted by troopers assigned to the Moorestown and Cranbury stations involved minority motorists). At the same time, the overall number of searches is small when compared to the total number of stops that are made by troopers on the Turnpike." However, a memo from an assistant attorney general to then attorney general Peter Verniero in July, 1997 indicated that an audit of the Moorestown barracks, which had been the subject of repeated complaints of racial profiling,

showed that blacks and Hispanics, who make up 13.5 percent of the drivers on the turnpike, accounted for more than 33 percent of the traffic stops. See, Appendix 1.

The Moorestown station was the same barracks where Mr. Glock and Mr. Puiatti were arrested by Trooper Moore (R. 396-437). Posted in that same station was a KKK flyer that said, "Do the White Thing." See, Appendix 21.

Another memo from Col. C.A. Williams to Sgt. T. Gilbert regarding the Justice Department inquiry into the department shows in statistical form the extent of the internal problems at the Mooretown and Cranbury stations:

> In order to get a handle on what we are facing, **I've looked at various types of reports from 1994-1996 from the 'Pike (Cranbury/New Brunswick and Moorestown). The numbers are not good.** As a reference point, Dr. Lamberth's study of Maryland SP data for 1/95-9/96 revealed their searches were 80.3% minority and 72.9% black. It was on the basis of Lamberth's analysis that the Maryland SP [state police] was compelled by the court to enter into the settlement agreement. Here is a sampling of our numbers concerning searches:
>
> Consent to Search:
>
> Moorestown (January-April & December, 94)
>
> (July-December, 96):
> Total cases: 160
> 89% minority
> 67% black
>
> Cranbury (January-March '94):
> Total cases: 32
> 94% minority
> 69% black

Appendix 5(emphasis added).

After going through these numbers, Sgt. Gilbert ran the numbers by individual trooper. Though each trooper was not mentioned by name, Gilbert acknowledged that the sample percentages “were not promising.”

Moorestown: consent searches:

> Trooper #1–13 searches (7 black, 10 total minority)
> Trooper #2-12 searches (11 black, 12 total minority)
> Trooper #3-13 searches (5 black, 10 total minority)
> Trooper#4-7 searches (6 black, 1 white).

Appendix 5.

Gilbert acknowledged that the arrest percentages for those troopers in the Moorestown station were **between 84-100%**. He said:

> In order to achieve the above numbers, its obvious what their corresponding probable cause and consent search numbers would come in at. With all the foregoing numbers in hand, I think its clear that our complete numbers are probably on par with those generated by the Maryland SP. **At this point, we are in a very bad spot...**

Appendix 5(emphasis added).

The Moorestown station and the troopers from that barrack were the worst offenders in the drug profiling scheme. It was already evident in the DEA Intelligence Bulletin that a sharp increase in traffic stops occurred in the early 1980's. If the statistics in 1983 are consistent with the above numbers, Mr. Glock had an 84-100% chance that his stop was a minority drug profile stop. Neither the

State nor the record can rebut these facts.

In light of these revelations from the New Jersey Attorney General, Mr. Glock now has evidence that his attorneys sought in 1984 to question the credibility and motivation of Trooper Moore in making the stop on the New Jersey Turnpike (January 19, 1984 Deposition of Trooper Moore at pages 5-8). Statistics were not disclosed for the early days of the program, but it is obvious from the newly-discovered documents that drug profiling existed in the early 1980s. If Mr. Glock were afforded more time to investigate the data from 1983, he could conclusively prove his claim.

The DEA's own Intelligence Bulletin shows that New Jersey and New Mexico were the forerunners for the federal programs. New Jersey was actively practicing drug profiling long before "Operation Pipeline" was started in 1984. However, this information was never disclosed to Mr. Glock despite the "right to know" requests to the New Jersey State Attorney's Office and the New Jersey State Police in 1988 when his original Rule 3.850 was filed under warrant.

It is equally clear from the interoffice memoranda recently disclosed that New Jersey State Police and Attorney General's Office actively sought to limit any information that was disseminated regarding drug profiling that was rampant in its agencies. Even though Mr. Glock exercised due diligence throughout his trial and appellate proceedings, these materials were not of the type that were

available to counsel. See, Jones v. State, 591 So. 2d 911 (Fla. 1991).

Mr. Glock pled unrebutted facts that he and Mr. Puiatti fit the New Jersey drug profile. They were young. Mr. Glock was twenty-two, but he looked younger. He was small, only 5' 3" tall and weighed 130 pounds. See Appendix 13. Mr. Glock had black, wiry hair and was tanned and dark skinned. Mr. Puiatti is Italian American, but looked Hispanic. See, Appendix 6 & 7. He also had black hair and dark skin. At the time of the stop, Mr. Puiatti was twenty years old. The two men were driving a red car with out of state license plates northbound on the New Jersey Turnpike and they were in the vicinity of the Moorestown station where they were taken after their arrests. Mr. Glock and Mr. Puiatti fit practically every criteria for the typical drug profile stop as described by the New Jersey State Police's own documents.

If the 1994-1996 averages are applied to 1983, the probability that Mr. Glock's 1983 stop was a drug profile stop is overwhelming. Between 84-100% of the stops in the Moorestown station in 1994-1996 were minority stops. The probabilities are very high that the same was true for Mr. Glock.

Based on the sworn affidavit of Ex-Trooper Wilson, Mr. Glock's stop was more than likely a pretextual drug stop. Trooper Wilson stated that any hunch was followed and the thought of a traffic

violation was an “afterthought.” Appendix 3. All indications were that Mr. Glock’s traffic violation was indeed an afterthought. In his original report, Trooper Moore admitted he looked at the occupants before pulling them over. It wasn’t until Trooper Moore’s deposition that he stated that he looked at the license plate first before he pulled them over for an alleged motor vehicle infraction.

According to New Jersey Statutes Title 39 for Motor Vehicle and Traffic Regulation, “all identification marks [on the license plate] shall be kept clear and distinct and free from grease, dirt or other blurring matter, so as to be plainly visible at all times day and night.” See, N.J. Stat. 39:3-33. There was no indication from Trooper Moore that anything was blocking the display of the license or that the tag was not “plainly visible.” Later in his trial testimony, he indicated that the license was faded. However, Mr. Glock had driven through five states before arriving on the New Jersey Turnpike without a stop. It was clear that Trooper Moore had no trouble ascertaining that the tag was “out-of-state.” Moore’s conflicting testimony did not raise “articulable facts” that supported a “reasonable suspicion” that a crime had been committed as is required under New Jersey law. Cf. State v. Letts, 254 N.J.Super.390, 397, 603 A.2d 562 (1992) citing U.S. v. Sokolow, 490 U.S. 1 (1989)[the police officer making the investigative stop must be able to describe something more than a hunch or an unreasoned

suspicion that criminal actions are underway].

**B. The Law**

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Whren v. United States, 507 U.S. 806, 809 (1996).[2] "Once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case." Illinois v. Gates, 462 U.S. 213, 237 n.10 (1983). "The possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power.'" Id. at 236. The Fourth Amendment established a "strong preference" for searches and seizures conducted pursuant to a warrant. Ornelas v. United States, 517 U.S. 690, 699 (1996). See Whiteley v. Warden, 401 U.S. 560 (1971). This preference is "not lightly dispensed with, and the burden is on the State, as the party seeking to validate a warrantless search, to bring it within one of those recognized exceptions." State v. Alston, 440 A.2d 1311 (1981).

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[2]Article I, paragraph 7 of the New Jersey Constitution provides "...no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."

Arrests made for "investigatory" purposes on less than probable cause do not comport with the Fourth Amendment. Brown v. Illinois, 422 U.S. 590 (1975). "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even strong reason to suspect was not adequate to support a warrant for arrest.'" Dunaway v. New York, 442 U.S. 200, 213 (1979). This was recently reaffirmed by the United States Supreme Court when it held that an anonymous tip that a person is carrying a gun is not without more, sufficient to justify a police officer's stop and frisk of that person. Florida v. J. L., 120 S.Ct. 1375 (March 28, 2000).

In evaluating the evidence presented by the State to justify a warrantless search or arrest, consideration must be given to the motives of the police officers involved. In Florida v. Wells, 495 U.S. 1, 4 (1990), the United States Supreme Court said "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Similarly, in Colorado v. Bertine, 479 U.S. 367, 372 (1987), the Court noted there was no evidence "that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." In New York v. Burger, 482 U.S. 691, 716-17 (1987), the Supreme Court upheld a warrantless administrative inspection saying that the search did not

appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws." And in Colorado v. Bannister, 449 U.S. 1, 4, n.4 (1980), the Supreme Court stated "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." However, the United States Supreme Court has said that for Fourth Amendment purposes, the presence of an ulterior motive by itself will not "strip the [police] of their legal justification" for a warrantless search or arrest if the State has met its burden to prove the conduct lawful. Whren v. United States, 517 U.S. 806, 812 (1996).

New Jersey law tracks the United States Supreme Court decision in Terry v. Ohio, 392 U.S. 1 (1968) and its progeny that police may act upon suspicious behavior. However, the police officer making the investigative stop must be able to describe something more than a hunch or an unreasoned suspicion that criminal actions are underway. See, State v. Letts, 254 N.J.Super.390, 397, 603 A.2d 562 (1992) citing U.S. v. Sokolow, 490 U.S. 1 (1989). The officers' suspicions need not consist of evidence needed to effectuate an arrest, but at a minimum, the officer must have a "reasonable suspicion" justifying the stop. Id, at 397. Based on the totality of the circumstances, a "reasonable suspicion" is an articulable basis to believe criminal action is either planned for the imminent future or presently

underway using common sensical reasoning. U.S. v. Cortez, 449 U.S. 411 (1981).

Florida law follows this same principle. In Florida v. Royer, 460 U.S. 491 (1984), the court found the articulable, reasonable suspicion needed to make an investigatory stop in an airport when the defendant was young, appeared to be nervous, paid for his one-way airline ticket to New York with cash, had incorrectly labeled luggage and was traveling under an assumed name. Id. In this instance, race was not a factor taken into account by the drug enforcement agents and that the officers observed suspicious behavior **before** making the stop. State v. Letts, 254 N.J. Super. at 398. That was not the case here.

Under Wren, Letts, and Sokolow, an analysis of the police officer's motivation is relevant in determining the credibility of the police officers and in analyzing whether their conduct was objectively lawful under the Fourth Amendment.

An officer is entitled to act upon suspicious behavior. See, Terry v. Ohio, 392 U.S. 1 (1968). However, in order to make an investigative stop there must be an "objective reason" for the stop. The officer must have "an articulable basis to believe criminal activity is either planned for the imminent future or presently underway" using common sense. See, U.S. v. Cortez, 449 U.S. 411 (1981). None of these tests were met in this case.

In light of this newly-discovered evidence, Mr. Glock's stop was a textbook example of an illegal drug profile stop. Trooper Moore did not testify that he saw "suspicious behavior" **before** making the stop. Had counsel been given access to the statistics hidden by the police and attorney general, he could have proven Trooper Moore was following the policy of the department. The evidence pled by Mr. Glock in his Rule 3.850 motion was significant and compelling. But the trial court agreed with the State that the information though sufficient in New Jersey, was not enough for Mr. Glock in Florida. In Kennedy v. State, 247 N.J. Super. 21, 588 A. 2d 834 (1991), the public defender's statistical survey was sufficient to raise a colorable claim of selective enforcement of traffic laws against minorities. While the Kennedy court said that an officer's subjective motives for a stop would be "generally beyond the appropriate bounds of judicial inquiry" it specifically found that "different considerations are applicable when there is a claim that a police agency has embarked upon an officially sanctioned or de facto policy of target minorities for investigation and arrest." Id. at 29-30.

The Kennedy court granted discovery to the Public Defender's office on the basis of its claim and noted that it would suppress the evidence if a statistic on the racial composition of the stops in this particular area were proved. Mr. Glock could have done the same

had he been given access to this information. See, New Jersey v. Maiolina, 752 A.2d. 735 (Sup. Ct. N.J. 2000).

As a result, Mr. Glock was prejudiced by this constitutional violation. Any evidence obtained as the fruit of the unlawful search or seizure must be suppressed. See, State v. Smith, 155 N.J. 82, 713 A. 2d 1033 (1998). Thus, the confessions and gun evidence would have been suppressed and as a consequence of the suppression, the state's case would have collapsed. The result of the trial would have been different had this information been disclosed. Cf. Jones v. State, 591 So. 2d 911 (Fla. 1991).

The trial court erred in failing to grant Mr. Glock a reasonable time to conduct an evidentiary hearing. The trial court also refused to give counsel time to examine the remainder of the 91,000 pages of documents disclosed by the New Jersey Attorney General, and amend his Rule 3.850 motion with any new facts he discovered from those documents. Mr. Glock was entitled to an evidentiary hearing on this claim.

## ARGUMENT III

## THE CLEMENCY CLAIM

Mr. Glock has a continuing interest in his life until his death sentence is carried out, as guaranteed by the Due Process clause of the Fourteenth Amendment of the United States Constitution. See, Ohio Adult Parole Authority, et al. v. Woodard, 118 S. Ct. 1244, 1253 (1998)(Justices O'Connor, Souter, Ginsburg and Breyer, concurring)("A prisoner under a death sentence remains a living person and consequently has an interest in his life"). This constitutionally-protected interest remains with him throughout the appellate processes, including during clemency proceedings.

> Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, **or in a case where the State arbitrarily denied a prisoner any access to its clemency process**.

Woodard (emphasis added). Mr. Glock has been arbitrarily denied access by the State to Florida's clemency process. Mr. Glock was denied the right to counsel during his clemency proceedings. Mr. Glock was denied the right to effectively present information that would illustrate the appropriateness of clemency in his case. Mr. Glock also was denied the right to a hearing.

Mr. Glock's first death warrant was signed October, 1988 after

his direct appeal was affirmed. [3] A clemency investigation was completed with the appointment of Mr. Glock's direct appeal attorney as his clemency counsel. Mr. Glock was ultimately granted a stay of execution by the Eleventh Circuit Court of Appeals and his case proceeded through postconviction. No mitigating evidence was available at the time.

Throughout his post-conviction investigation, Mr. Glock discovered issues that called into question the reliability of his conviction and sentence of death. The facts surrounding these issues were never presented during Mr. Glock's clemency hearing because they had yet to be discovered. To this day, these mitigating factors have never been considered in executive clemency.

In Bundy v. Dugger, 850 F. 2d 1402, 1424 (11th Cir. 1988), the Eleventh Circuit Court of Appeals held that due process rights regarding clemency procedures are derived from the rules governing the procedure. Bundy relied on the United States Supreme Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), which addressed

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[3]During Mr. Glock's first warrant in 1988, his collateral counsel had four active death warrants. At the same time, the CCR office had seventeen (17) outstanding warrants in less than two months. Counsel for Mr. Glock was working under extreme time constraints that prevented counsel from providing effective representation. Mr. Glock's first post-conviction motion was filed on November 28, 1988 in an effort to stave off his first death warrant, despite the fact that he had by law until January, 1989 to file it. Collateral counsel was prevented from fully investigating many of Mr. Glock's factual claims because of the premature warrant.

whether due process applied to clemency proceedings. In Hewitt, the Supreme Court recognized that a liberty interest is present when the regulations are of an "unmistakably mandatory character" and require "specific substantive predicates." 459 U.S. at 471-472.

While the Eleventh Circuit Court of Appeals found that the rules that were in effect at the time of Bundy's clemency in 1988 proceedings were only discretionary, Bundy, 850 F. 2d at 1424, the same cannot be said of the new Rules of Executive Clemency. See, Fla. Admin. Code T. 27, App. (2000).

**A. The Governor's New Rules**

Two sets of rules govern executive clemency, both of which appear to be in effect. The first set of rules is published in the Administrative Code and on the corresponding electronic research systems. See, Fla. Admin. Code T. 27, App. However, the second set of rules provided to undersigned by the Office of Executive Clemency is not published. On the first page of the unpublished rules is a handwritten note that states: "New rules;" "Effective 1-1-2000." The two sets of rules, one of which is not published, illustrates the arbitrariness of the current clemency procedure.

The published rules governing Executive Clemency contain mandatory provisions. Fla. Admin. Code T. 27, App. (2000). The Rules state:

> In all cases where the death penalty has been imposed, the Florida Parole Commission **shall**

> conduct a thorough and detailed investigation into all factors relevant to the issue of clemency. The investigation **shall** include (1) **an interview with the inmate (who may have legal counsel present) by at least three members of the Commission**; (2) an interview, if possible with the trial attorneys who prosecuted the case and defended the inmate; and (3) an interview, if possible with the victim's family. . . . After the investigation is concluded, the members of the Commission who personally interviewed the inmate **shall prepare and issue a final report on their findings and conclusions**.

Fla. Admin. Code T 27, App. at 15 A (2000)(emphasis added).[4] These mandatory provisions have not been applied. Mr. Glock was not interviewed by any member of the clemency board, nor was he given an attorney. The denial of a clemency attorney was a clear due process violation under both sets of rules.

Even though the governor's office initiated a clemency investigation triggering the new clemency rules, Mr. Glock was **never** provided with an attorney to assist him in the clemency process. The Florida Parole Commission was requested by the governor to conduct an "investigation." In records obtained from Mr. Glock's Florida Department of Corrections file, Parole Examiner Supervisor Felix Ruiz on March 6, 2000 sought information on Mr. Glock's family

[4]The unpublished rules contain a similar provision about the investigation, but also require that the investigation include an interview with the presiding judge and an interview with the defendant's family. Appendix 19.

and friends for the purpose of an “executive clemency investigation as requested by the governor.” See Appendix 14.

Mr. Glock was Mirandized and given psychological tests by Corrections personnel who said the tests could “hurt him” if the results did not come out in his favor. Without an attorney to counsel him on whether to submit to testing, Mr. Glock gave potentially damaging information to the clemency board without knowing it. He had **no** attorney who could provide materials on his behalf to rebut any conflicting information. Mr. Glock had **no** attorney who could be present for an interview. He had no attorney who could present a statement at a hearing or ensure that the clemency procedures were followed.

As the new rules suggest, an attorney was critical to ensure Mr. Glock's due process rights were not violated. The Court has recognized "that this state has established a right to counsel in clemency proceedings for death penalty cases." Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990). This Court held that the statutory right "carries with it the right to have effective assistance of counsel." Id. Mr. Glock has been denied effective assistance counsel in his clemency proceedings.

**B. The Trial Court’s Order**

Judge Cobb adopted verbatim the State’s proposed order on this claim without correction. The State said:

> The Court is in agreement with the cited case law that it is not the function of the judiciary to second guess the application of this exclusive executive function. See, Bundy v. State, 497 So. 2d 1209 (Fla. 1986); Provenzano v. State, 739 So. 2d 1150 (Fla. 1999). Moreover, it appears that counsel previously represented Glock in an earlier clemency proceeding. Neither the case law nor the due process clause require the repetitive appointment of counsel before the Governor concludes that clemency is not appropriate.

See, Order at page 5-6.[5]

Had the trial court read the Rule 3.850 motion, it would have known that it had the authority to address the issue. Under Fla. Stat. § 27.51 the ability to appoint counsel is vested in the trial court.

> The trial court shall retain the power to appoint the public defender or other attorney not employed by the capital collateral representative to represent such person in proceedings for relief by executive clemency pursuant to § 925.035.

Fla. Stat. Sec. 27.51.

In giving this authority to the trial court, the legislature and the governor concomitantly give with it the constitutional obligation to ensure that Mr. Glock is given due process.

The clemency rules were triggered anew when the governor requested that a another investigation be conducted to update the

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[5]In both Bundy and Provenzano, the defendants requested a second clemency investigation. The distinction in Mr. Glock's case is that the Governor, not Mr. Glock, initiated the second investigation, thereby triggering the new Rules of Executive Clemency that require appointment of counsel.

information it gathered in 1988 at Mr. Glock's original clemency proceeding. Had the governor not requested the investigation, the trial court's "repetitive clemency proceeding" argument may have merit. But in this case, the governor asked Mr. Ruiz to begin an investigation. At that point, Mr. Glock was entitled to counsel under the dictates of the governor's own rules and Woodard.

Mr. Glock's constitutionally-protected interest in life remains with him throughout the appellate processes, including during clemency proceedings. See, Woodard. Therefore, Mr. Glock's interests must be taken into consideration when the Governor initiated a new clemency investigation.

The purported "investigation" conducted by Florida Parole Commission failed to comport with these considerations and was arbitrarily applied. The Commission failed to follow the rules and failed to ensure that Mr. Glock was appointed clemency counsel to assist him in the process. As a result, the clemency board saw only what the State, the Department of Corrections psychologist assistant, Lisa Wiley, and Felix Ruiz wanted them to see. Because the Commission arbitrarily failed to follow its own rules, those who decided whether Mr. Glock should die were not provided with the valuable information in which to make an informed clemency determination.

For example, Mr. Glock would have presented sworn testimony

from his federal evidentiary hearing about his abusive childhood. Mr. Glock would have presented testimony of an expert who diagnosed Mr. Glock from suffering from post-traumatic stress disorder (PTSD) due to the violent and traumatic circumstances of his childhood. As the Eleventh Circuit Court of Appeals said in its opinion denying Mr. Glock post-conviction relief, much of this evidence was new and was not considered by the jury or judge who sentenced Mr. Glock to death. Glock v. Dugger, 195 F. 3d 625, 633 (11th Cir. 1999). This information was precisely the type of information that was relevant and necessary to a proper clemency determination but was ignored.

**C. The Evidence the Parole Commission Should Have Considered**

It is unclear what rules the Parole Commission followed in "investigating" clemency in Mr. Glock's case. Several family members of Mr. Glock were contacted and told they could send letters to the commission. Mr. Glock was administered a psychological evaluation, at which time he was told that the results of the examination "could hurt him," yet he was not given the opportunity to discuss whether or not to participate in the evaluation with an attorney. Mr. Glock was never interviewed by any members of the Parole Commission or told that he could submit information that would assist the Parole Commission. Mr. Glock was never notified of any clemency hearing.

Sheila Garrett, the wife of Mr. Glock, said in a sworn affidavit:

I, Sheila Garrett, having been duly sworn or affirmed, do hereby depose and say:

1. I am married to Robert Dewey Glock, II, who is currently under a death sentence in the State of Florida.

2. In March 2000, I was contacted by Felix Ruiz, who identified himself as an investigator with the governor's office on clemency. I spoke with him twice on the phone in March. The conversations were very brief. He treated me as though I could not possibly have any relevant information about my husband to offer to him.

3. Mr. Ruiz did not ask me for any specific information but instead stated that I could write and/or fax a letter if I wanted. I got the impression that he was just going through the motions and was not interested in any information I might have been able to provide.

4. I didn't know exactly what information to include in the letters and I didn't feel comfortable asking Mr. Ruiz because he seemed so abrupt with me and like he didn't care.

5. I didn't understand the clemency process and I have several questions, but again I have not asked anyone because don't know who to ask.

6. I spoke to Bobby about it, but he doesn't understand what is going on, either.

7. Even though he did not tell me I could, I also asked my kids (sic) write and fax letters of support for their father.

8. Mr. Ruiz called me back after receiving these letters and implied that my children did not really write the letters of support for Bobby. I got the distinct impression that he believed that I had written the letters and just put my

kid’s names on them.

9. Bobby Glock is one of the most sincere and honest people that I have ever met. He has never tried to deny responsibility for the death of Sherrie Ritchie.

10. Bobby has told me many times how remorseful he is about the death of Mrs. Ritchie and for the loss that he caused their family.

11. My husband is a very spiritual man. He believes that God wants us to rid our hearts of hate. He is very upset that he might be responsible for causing Larry Ritchie (the victim’s husband) to carry hate around in his own heart.

12. Bobby is very conscientious and thinks of how he can help others before thinking of himself.

13. When I first started writing to Bobby, I was going through a divorce and I was very depressed. He was always sending me words of encouragement and never asked anything in return.

14. Two years ago, when my father died, Bobby was there for me with words of faith and encouragement. Even when I felt like I was bottoming out and couldn’t take any more, Bobby helped me realize that everything was going to be alright.

15. Bobby goes out of his way to make me and my children know the he loves us. He has shared some of his experiences with my children to help them to stay on the right path. He give me help and advice with the children and they look up to him as a father figure.

16. I know in my heart that Bobby was a very abused person with no one who loved him and no one to turn to. He has expressed to me many times his willingness to spend the rest of his life paying for his mistake.

17. My husband has never been in any trouble in prison, and other than this incident and running away from a physically and mentally abusive home, he has not been in any trouble outside of prison.

(Affidavit of Sheila Garrett, November 27, 2000)(Appendix 15).

Martha Goggins, the daughter of Sheila Garrett, had a similar response from Felix Ruiz:

I, Martha Goggins, having been duly sworn or affirmed, do hereby depose and say:

1. I am the twenty-six year old daughter of Sheila Garrett and I consider Robert Dewey Glock, II, who is currently under a death sentence in Florida, to be my father.

2. Felix Ruiz called me in March of 2000. He said that he was an investigator and that he was investigating clemency for my father.

3. I told him that I would be willing to do anything to help him with clemency. He told me that all I could do for my father was to write and fax a letter of support.

4. Mr. Ruiz did not seem to care one way or the other if I sent a letter. I told him that if he needed me to come to Florida, I would be on the first flight from Indiana.

5. He stated that he would contact me if he needed anything further. I sent him a letter and I never heard from him again.

6. I have no idea what happened with my letter,

but If I had the opportunity to tell someone what a mistake it is to kill my dad, I would.

7. I love my father very much. He has been loving, caring and compassionate to me. He has always gone out of his way to make me feel special. I call him heart-pop.

8. When craft supplies were still allowed on death row, my father would knit me blankets, afghans, and sweaters. He made sure that felt loved and special on Christmas and my birthday.

9. My father is a fantastic artist. All around my house are pictures that he painted for me. When I look around my house, I am reminded of how much my father loves me.

10. My father has also encouraged me to form a personal relationship with God. He is a very spiritual man and his gentle strength and compassion has helped me through many a tough time.

11. I know that my father has endured a lot of physical and mental abuse from his parents and step-parents. He had tried very hard to give me the love and understanding that he never got.

12. He has always expressed to me remorse and pain for the part that he played in the death of Sherrie Ritchie. He did not deny responsibility for his actions or claim that he was innocent to me or my mother.

13. If Mr. Ruiz had asked me I would have told him these things. I did not know when he called what was important clemency information.

(Affidavit of Martha Goggins, November 27, 2000)(Appendix 16).

Information about Mr. Glock's ability to form loving relationships; his rehabilitation while in prison; his responsibility and feelings of remorse for the crime; and his strong religious beliefs were not included or properly presented to the Office of Executive Clemency. Mr. Glock had no opportunity to make his own statement to the Parole Board as to why he should be considered for clemency.

Additionally, records are available that could have corroborated and provided details about Mr. Glock's history. For instance, Mr. Glock's Department of Correction's file shows that while he spent the last sixteen years of his life on death row, he only received <u>two</u> disciplinary reports, neither of which were for violent or aggressive behavior. Appendix 18.

Tammy Simpson, Mr. Glock's sister, also was contacted by the Florida Parole Commission and said:

> I, Tammy Simpson, having been duly sworn or affirmed, do hereby depose and say:
>
> 1. I am the sister of Robert Dewey Glock II.
>
> 2. In March of 2000, I was contacted by Felix Ruiz. He told me that he was an investigator working for the governor's office doing clemency investigation.
>
> 3. Mr. Ruiz told me that the family

could write letter of support for Bobby Glock and that they had 30 days in which to do so. He said that the more letters that were sent the better it would be but, he didn't explain why

4. It seemed like he wanted me to help him so I tried to contact as many family members as I could to let them know about where to fax letters of support for Bobby's clemency. I wasn't sure what kind of information to include in the letters.

5. Mr. Ruiz told me I could not give him any records about Bobby because he had to get records from the original source to make sure that they were complete and hadn't been altered.

6. I was worried during this process that Mr. Ruiz would not get all the records that he needed. I told him that in 1998, CCR tried to get family court and children's home records from Bobby's federal evidentiary hearing. I told him that CCR did eventually get the records but that they were probably destroyed at the original agencies by now.

7. I thought that these records would help show the kind of childhood that Bobby had.

8. I was confused about this whole process and would have liked to contact Bobby's clemency lawyers. I was not aware if Bobby even had lawyers at this time.

9. Bobby and I were beaten on a daily basis by our mother who was an alcoholic. We often had bruises and other marks that were ignored by

our step-father who felt like it wasn't his business because he wasn't our father. He protected his own children from my mother's anger but left us to fend for ourselves.

10. Our mother called us names and was exceptionally cruel, especially to Bobby. She treated Bobby badly because he reminded her of our father. She was always talking down to Bobby.

11. My mother tried to give us away on more than one occasion. She gave Bobby and my brother Kenny away when Bobby was two. My father made her go back and get Bobby because he was his namesake but, they left Kenny with a virtual stranger.

12. Bobby protected me in our mother's house as much as he could. Bobby brought attention to our abusive home and because of this I got a lot of counseling and care. Bobby never got any counseling that I know of.

13. When I first got taken out of my mother's home, I was so traumatized that I did not care whether I lived or died. I remember trying to kill myself at least once during this period. I was fortunate to have counselors that genuinely seemed to care about me and want me to live through my horrible experience.

14. I know that Bobby never had any of that. When he got taken out of my mother's home he was briefly placed in a children's home and then given to my natural father and his wife.

15. Bobby was then physically and mentally abused by his step-mother.

He has never known a loving home.

16. I feel that my brother has started rehabilitating himself in prison without anybody's help or encouragement. He is a very good-hearted and loving person. He expresses that side of himself whenever given a chance. I know that he has become a loving husband to Sheila Garrett and a surrogate father to her children. I also know that Bobby has not had any disciplinary problems in prison.

17. I know that my brother feels so much guilt and remorse for what he has done. He is extremely sorry for hurting Mrs. Ritchie and causing her family pain.

18. Bobby also worries about me and what his impending execution will do to me.

19. I want the information I have to be properly presented and I wish that I could talk to someone about why my brother should not be executed.

Appendix 17.

Tammy Simpson suggested that Mr. Ruiz contact Mr. Glock's collateral counsel, the Office of the Capital Collateral Counsel (CCC-NR), because that office had all the records. The Parole Commission failed to contact collateral counsel. In fact, Mr. Glock's collateral counsel at CCC-NR had no idea that a clemency investigation was being conducted until Mr. Glock's death warrant was signed and family members informed counsel that they had been

contacted about clemency. None of the record material about Mr. Glock's life was sought or presented to the Parole Commission.

Significant background information was ignored by the Florida Parole Commission. These facts were testified to at Mr. Glock's hearing in federal court on March, 31 and April 1, 1997 and are Appendix 22 and 23. This is the precise type of information that the clemency board should be aware of.[6]

Mr. Glock's death warrant, signed on November 14, 2000 by Governor Jeb Bush states:

> WHEREAS, it has been determined that Executive Clemency, as authorized by Article IV, Section 8 (a), Florida Constitution, is not appropriate...

The governor's determination was arbitrary and did not comport with the principles of due process. Neither the governor nor any members of the clemency process considered any of the available information on Mr. Glock. As Woodard makes clear, the courts are the appropriate venue to bring forward a due process violation regarding clemency proceedings. Mr. Glock's clemency proceedings were afflicted with due process violations which resulted in an arbitrary determination.

**D. The Equal Protection Violation**

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[6]Because of this Court's page limitations, the testimony adduced at Mr. Glock's federal evidentiary hearing are not produced here. Those facts are found in Mr. Glock's Rule 3.850 Motion and Appendix 22 and 23.

Unlike other condemned inmates who had legal representation in successive clemency proceedings, Mr. Glock was arbitrarily denied the right to present a case to the governor before a death warrant was signed. Adams v. American Agr. Chemical Co., 78 Fla. 362, 82 So. 850 (1919). See also Goodrich v. Thompson, 118 So. 60 (1928). In State v. Hauser, Case No. 95-0427, First Circuit, Okaloosa County, Circuit Court Judge John P. Kuder appointed Hauser clemency counsel. (Appendix 20).[7] Undersigned counsel represented Anthony Braden Bryan in clemency. Mr. Bryan was executed in February, 2000.[8] The states's failure to appoint Mr. Glock clemency counsel violates his equal protection rights.

The Preamble to the Constitution of Florida states:

> We, the people of the State of Florida . . . guarantee equal civil and political rights to all. . .

This concept is secured as a right in that "All natural persons are equal before the law . . ." Art. I, § 2, Fla. Const. Constitutional equality applies with equal vigor to privileges, such as clemency, as

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[7] Hauser was a "volunteer." He dismissed his collateral counsel and waived his collateral appeals. Hauser neither requested nor wanted clemency proceedings, yet he was provided with clemency counsel. Mr. Glock wants full and fair clemency proceedings, including the appointment of counsel, yet none has been provided.

[8] A clemency petition also was prepared and presented on behalf of Thomas Harrison Provenzano, a capital defendant who was executed in June, 2000.

well as other rights. ABC Liquors, Inc. v. City of Ocala, 366 So. 2d 146 (Fla. 1st DCA 1979), cert. denied 376 So. 2d 69. Similarly situated parties are entitled to equal treatment before the law. Caldwell v. Mann, 26 So. 2d 788 (Fla. 1946). Fundamental fairness demands equal treatment for those persons similarly situated. All men are equal before the law in the defense of their lives. Sheperd v. State, 46 So. 2d 880 (Fla. 1950), rev'd. on other grounds 71 S.Ct. 549, 341 U.S. 50, mandate conformed to 52 So. 2d 903.

During his post-conviction appeals, Mr. Glock was represented by the Capital Collateral Counsel for the Northern Region, and formerly by the Capital Collateral Regional Counsel. These agencies were forbidden and are currently unable to petition for executive clemency on behalf of Mr. Glock. See, Fla. Stat. 27.001. On November 14, 2000, Governor Bush signed Mr. Glock's second death warrant. A stay was granted by this Court on December 7, 2000. The Governor set another execution date for January 11, 2001. Mr. Glock was denied the opportunity to present a petition for executive clemency before this warrant was signed even though others in his situation have.[9]

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[9]Similarly-situated death-sentenced individuals were allowed to petition for clemency and the governor considered those petitions before signing warrants. Many of those cases involved successive petitions for clemency. These individuals include Joseph Spaziano, Daniel Doyle, John Bush, Ian Lightbourne, Bobby Lusk, Larry Joe Johnson, Dan Routley, Rickey Roberts, Marvin Johnson, Paul Scott, Raleigh Porter, Phillip Atkins, and Bernard Bolender.

By conducting a one-sided investigation and preventing Mr. Glock from petitioning for clemency, the State has violated his right to equal protection under the law. Mr. Glock's right to minimal due process was further violated when the governor signed his death warrant based on a clemency determination that never addressed mitigation issues discovered during postconviction – issues that warrant a commutation of Mr. Glock's death sentence.

Although Mr. Glock's death warrant states that "...it has been determined..." that executive clemency is not appropriate, that determination was made more than ten years ago, and was made before any post-conviction proceedings had occurred in this case.

The 1988 clemency determination was made by a governor who knew of none of the mitigating information subsequently gathered that calls for Mr. Glock's sentence to be commuted. It is especially important that condemned individuals like Mr. Glock be given counsel and the opportunity to present to the governor a clemency petition and have a hearing after the termination of the post-conviction proceedings. Mr. Glock is entitled to a new clemency proceeding that comports with Woodard and due process of law.

## ARGUMENT IV

## THE PUBLIC RECORDS CLAIM

### A. The Proceedings Below

Mr. Glock timely and properly sought public records from state

agencies involved in the investigation and/or prosecution of his case pursuant to Fla. R. Crim P. 3.852 (h)(3) and (i), and in accordance with Sims v. State, 753 So. 2d 66 (Fla. 2000).[10]

By law, Mr. Glock had ten (10) days from the date his death warrant was signed in which to file public records requests. Counsel for Mr. Glock filed the majority of public records requests within two (2) days and followed up with requests on November 20-22 and November 27, 2000.[11]

Under Fla R. Crim. P. 3.852, the agencies had ten (10) days in which to respond to Mr. Glock's 3.852 (h)(3) requests. The initial requests were received by the agencies on November 20, 2000. The agencies had until December 30, 2000 in which to respond to the initial requests. The agencies had until November 30, December 1-2, and December 4, 2000 in which to respond to follow-up requests before the scheduled execution. The lower court, however, had the authority

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[10]Mr. Glock made public records demands pursuant to Fla. Stat. Ch. 119, Fla. R. Crim P. 3.852 (h)(3); (i), Article I, Section 24, Florida Constitution, Brady v. Maryland, 83 S.Ct. 1194 (1963); Strickler v. Greene, 119 S.Ct. 1936 (1999) and Ohio Adult Parole Authority v. Woodard, 118 S.Ct. 1244 (1998). See also Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 634 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990).

[11]The later requests were made in response to the records that had already been received.

to order the agencies to comply sooner. See Fla. R. Crim. P. (h)(3) ("A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court").

Because of the short warrant period[12], Mr. Glock filed a Status of Public Records and Motion to Compel Production of Public Records on December 1, 2000, even though, technically, the time frame for compliance by all agencies had yet to run.

At the December 1, 2000 status conference in circuit court, counsel for Mr. Glock told the court of the circumstances surrounding public records and the need to have agency compliance before filing the Amended Motion for Postconviction Relief. The lower court said it would not conduct an in camera inspection of the records that state agencies had claimed were exempt (PC-R2. 12/1/00 at 22). The lower court ordered Mr. Glock to file his postconviction motion on December 4, 2000. The court also scheduled a "hearing on the motion" for December 7, 2000 at 5:00 p.m. Both Mr. Glock and the State noticed the agencies upon whom public records demands were made.

At the December 7, 2000 hearing, the lower court made rulings

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[12]Jeb Bush signed Mr. Glock's warrant on November 14, 2000 with execution scheduled for December 8, 2000. Undersigned counsel contracted to do Mr. Glock's case on November 16, 2000. Because of the Thanksgiving holiday, Mr. Glock's twenty-four (24) day warrant became a 20 (twenty) day warrant because state agencies were closed four (4) days for the holidays.

that denied Mr. Glock's his rights under Article 1, Section 24, of the Florida Constitution, Chapter 119 Florida Statutes, Florida Rule Criminal Procedure 3.852, and his rights to Due Process and Equal Protection under the United States and Florida constitutions as well as his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Fla. R. Crim. P. 3.852 (2000) and Fla. Stat. sections 27.708 (2000) and 119.19 (2000) are unconstitutional on their face and as applied to Mr. Glock.

A demand for records under Fla. Rule Crim P. 3.852 (h)(3) was made upon the State Attorney's Office, Sixth Judicial Circuit. Previous counsel for Mr. Glock requested records from this agency in 1988.[13]

The State Attorney sent three banker boxes of records to the repository, which were made available to Mr. Glock's counsel only after the December 7, 2000 hearing. Counsel was given the opportunity to review the records at the Office of the State Attorney before that time. A supplementary disclosure by the State attorney was made on December 6, 2000 – the night before the hearing.[14]

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[13]Mr. Glock's only other post-conviction motion considered by any court also was filed under warrant in 1988 when Governor Martinez signed Mr. Glock's death warrant.

[14]As counsel stated at the December 7, 2000 hearing, she had insufficient time to review the materials and requested an opportunity to amend Mr. Glock's postconviction motion which the court denied.

The State claimed exemptions under Fla. Stat., Section 14.28 clemency material; 119.072 NCIC arrest history; 943.053 FCIC arrest history; 945.10 Post Sentencing Investigation of co-defendant Puiatti; "Attorney notes; and "Attorney legal research."

During the December 1, 2000 status conference, the judge said:

> I don’t have any intention of doing an in-camera review of all those records. I’m not sure why you would even request that.

(PC-R2. 12/1/00 at 22).

The court then sustained all the exemptions and scheduled a hearing for December 7, 2000.

The State exemptions were addressed again at the December 7, 2000 hearing. The lower court ruled:

> I'm going to find all of your exemptions are justified and the attorneys notes are not public records. They might be discoverable under some unusual constitutional basis, but I don't find any in this case.

(PC-R2. 12/7/00 at 78).

The lower court erred in its rulings.

The State exempted all "attorney notes" and "attorney legal research.” Mr. Glock’s counsel urged the lower court to consider the content of the material that should control the disclosure of attorney notes (PC-R2. 12/7/00 at 70). Merely labeling material as "attorney notes" to avoid disclosure is inappropriate. "[P]ersonal notes **can constitute public records** if they are prepared in

connection with the business of an agency for the purpose of perpetuating, formalizing or communicating knowledge." See, Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980)(emphasis added).

Materials deemed not to be public records under Kokal are "merely notes from the attorney to themselves designed for their personal use." State v. Kokal, 562 So. 2d 324 (Fla. 1990); See also Walton v. Dugger, 634 So.2d 1059 (Fla. 1993). Once materials are circulated, however, they may constitute public records even though they were intended for personal use. Coleman v. Austin, 521 So.2d 247, 248 (Fla.1993); See also Hillsborough County Aviation Authority v. Azzarelli Construction Company, 436 So. 2d 153 (Fla. 2d DCA 1983).

The State still has an obligation to turn over exculpatory information even if such document is not subject to the public records law. Brady v. Maryland, 83 S. Ct. 1194 (1963). Walton v. Dugger, at 1062. Accord , State v. Kokal at 327 n.* See also Kyles v. Whitley, 115 S.Ct. 1555 (1995). The requirement to turn over exculpatory information supersedes any characterization of material as merely "attorney notes."

Circulated trial materials might be exempt from disclosure under 119.07 (3)(1) while litigation is ongoing. However, once the case is over, the materials would be open to inspection. Government in the Sunshine Manual, Attorney General's Office at 74 (2000

Edition). The "close of litigation" in a criminal case is when the conviction and sentence are final. State v. Kokal, 562 So. 2d 324 (Fla. 1990). Only the current file regarding a pending posconviction motion may still be exempt. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993). And then, only those records that reflect a "mental impression, conclusion, litigation strategy, or legal theory of the attorney are exempt until the conclusion of litigation." City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986). See also Seminole County. v. Wood, 512 So. 2d 1000 (Fla. 5th DCA 1987). Jordan v. School Baord of Broward County, 531 So. 2d 976 (Fla. 4th DCA 1988); Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992) Additionally, to qualify for the exemption, the records must have been prepared by the attorney or at his express direction for or in anticipation of litigation. Records prepared for other purposes may not be converted into exempt material simply because they were used in litigation. Smith & Williams, P.A. v. West Coast Regional Water Supply Authority, 640 So. 2d 216 (Fla. 2d DCA 1994).

The State also claimed exemptions on NCIC and FCIC arrest histories. Defense counsel has no method of obtaining these types of records. Once these records are used in the prosecution against Mr. Glock, any exemption should be considered waived. To hold otherwise denies Mr. Glock's right to confrontation.

The State claimed an exemption for the Post-Sentencing Investigation of co-defendant Carl Puiatti. This document should have been turned over for the same reasons the lower court allowed Mr. Glock's counsel to have Puiatti's confidential mental health records (PC-R2. 12/7/00 at 31). Counsel for Mr. Glock has evidence that shows Mr. Glock's personality is such that he is suggestible, i.e. capable of being dominated by another. This is relevant to the degree of Mr. Glock's culpability. The lower court accepted this reason in ordering the disclosure of Puiatti's mental health records. Similar evidence would likely be present in Mr. Puiatti's post-sentencing investigation. The lower court's refusal to release this document is inconsistent with his ruling regarding the mental health records. Mr. Glock should have access to this document when balancing the competing interests in Mr. Puiatti's interest in privacy with Mr. Glock's interest in life.

The State also claimed an exemption for Mr. Glock's clemency records. Once the records were used in adversarial proceedings against Mr. Glock at the federal evidentiary hearing, the character of the records changed and the lower court erred in refusing Mr. Glock access to these records.

Previous requests for Mr. Glock’s records were made on the Pasco County Sheriff on November 14, 1988, November 14, 1988 and November 17, 1988. Counsel for Mr. Glock made public records demands

on this agency under (h)(3). The Pasco County Sheriff failed to produce a videotape taken of the crime scene. Counsel for Mr. Glock in good faith asserted that she learned from discussions with detectives who handled Mr. Glock's case that a videotape was created. The agency also failed to produce officer notes, field notes and materials received from the New Jersey State Police. This agency was allowed to rely upon the statement that the attorney representing this agency was unaware of any notes or videotape. Counsel for Mr. Glock said it was not established whether the officers were asked about the existence of notes, thus the agency's response was insufficient. Furthermore, counsel for Mr. Glock showed that New Jersey records were turned over to the Pasco County Sheriff. Mr. Glock established a good-faith basis that the Pasco County Sheriff possessed those documents.

At the December 7, 2000 hearing, the Pasco County Sheriff delivered a banker's box full of additional requested records. No explanation was offered why this agency held onto these records when they were ready and only turned them over to Mr. Glock at the hearing. The only reason was to gain an unfair advantage against Mr Glock.

Mr. Glock previously requested records from the Department of Corrections when he was under warrant on November 22, 1988. While under warrant again, on November 18, 2000, November 22, 2000 and

November 27, 2000, Mr. Glock made demands on the Department of Corrections under Fla. R. Crim. P. 3.852 (h)(3).[15] Some records were initially produced. As late as December 7, 2000 at 11:50 a.m.,the day of the scheduled hearing, however, Mr. Glock received a ten (10) pound box of records from DOC. Based on review of Mr. Glock's prison records, counsel learned that Mr. Glock underwent interviews and mental health testing within the last few months, but neither the tests nor the results were provided to counsel. Mr. Glock promptly requested this additional material from DOC, including the MMPI. DOC said it did not maintain those types of records and that a "diligent search" was conducted for the MMPI, but no such document was found. (See DOC Response dated November 25, 2000). However, on December 6, 2000 at 5:17 p.m., and the night before the hearing, DOC faxed a portion of the MMPI (electronic answer card) that was administered to Mr. Glock. DOC said this document was located after yet another "diligent search."

Mr. Glock was unable to review the materials that were provided at such a late juncture. (See statement of DOC Attorney Roger Pickles: "They may have just arrived, and they haven't had a chance to see them yet . . ." (PC-RC. 12/7/00 at 24).

Because the lower court denied Mr. Glock the opportunity to

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[15]The last request was made on this date because after a review of the records produced by DOC it was learned that additional records existed that had not been produced.

amend his Rule 3.850 motion, the State has benefitted from the late disclosure of records. Ventura v. State, 673 So. 2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital post-conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post conviction motion should be denied or dismissed. Ventura. ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act").

The lower court erred in denying Mr. Glock's demand that DOC produce all of the records surrounding the interviews and testing of Mr. Glock. These records were generated by DOC mental health professionals as a result of interviews and interactions with Mr. Glock.[16] The lower Court said Mr. Glock's counsel failed to justify the need for these materials, despite the fact that the records were new and relevant to Mr. Glock's mental health *vis a vis* his degree of culpability (PC-R2. 12/7/00 at 27).

The lower court's ruling was logically inconsistent. The court

[16]DOC personnel interviewed and tested Mr. Glock in response to a clemency investigation. During that investigation, Mr. Glock was not afforded the opportunity to consult an attorney. His attorneys were not notified that their client was to be interviewed and subjected to mental health testing.

granted access to co-defendant Puiatti's mental health records yet denied Mr. Glock access to his own mental health records. The materials sought from DOC form the basis of Mr. Glock's claim that he was denied the minimal due process in clemency hearings as recognized in Ohio Adult Parole Authority v. Woodard, 118 S.Ct. 1936 (1999).

The lower court erred and Mr. Glock is entitled to these records. Mr. Glock also should also be afforded an opportunity to amend with the DOC material after it is produced. To hold otherwise would reward agencies for withholding public records until such time as production of the records is virtually useless to a defendant because he has no time to review and use the records. Such gamesmanship should not be tolerated in any litigation let alone litigation where a life lies in the balance. See, e.g. Ventura.

Mr. Glock made a demand for public records under Fla. R. Crim.P. 3.852 (h)(3) to the Florida Department of Law Enforcement. Mr. Glock had previously requested records from FDLE in 1988. FDLE filed a response to Mr. Glock's demand on November 29, 2000 objecting to the demand and did not provide any records at that time. Not until the day of the hearing, December 7, 2000 at 10:02 a.m., did FDLE file a Notice of Production of Records with the Repository. Such dilatory tactics are transparent -- objecting to records in the first instance and then producing them at a time when it was too late for Mr. Glock’s counsel to review them.

The lower court ruled that Mr. Glock was entitled only to an update of records he had previously requested from FDLE, and that unless counsel could "show some specific reason or justification for any other [record]" he would not be entitled to them (PC-R2. 12/7/00 at 15-16).

The lower erred when it ruled that Fla. R. Crim. P. 3.852 (h)(3) allowed Mr. Glock access to only an update of **records** he previously requested from FDLE. Fla. R. Crim. P. 3.852 (h)(3) states:

> Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records **from a person or agency from which collateral counsel has previously requested public records.** A person or agency shall copy, index, and deliver to the repository any public record:
>
> (A) that was not previously the subject of an objection;
>
> (B) that was received or produced since the previous request; or
>
> (C) **that was, for any reason, not produced previously.**

Fla. R. Crim. P. 3.852 (h)(3) (2000)(emphasis added).

Contrary to the lower court's ruling, the rule does not say that an (h)(3) demand is limited to ***records*** that had been previously requested. Instead, the rule states that a demand made pursuant to (h)(3) is to be directed to "a ***person or agency from which*** collateral

counsel has previously requested public records." The importance of (h)(3) is to whom the request is made, as opposed to being record specific. See also, Sims. To hold otherwise would result in a defendant being able to request records he had previously requested. This is precisely what the State Attorney complained about when objecting to the demands made on that office. Here, the State's position and the lower court's ruling are inconsistent with the practical application of Rule 3.852. Any concerns such as those stated in Sims, regarding interpretation of (h)(3) and the concern of a defendant holding back requests for records in the hope of saving some for the time when a death warrant is signed, are absent in Mr. Glock's case.

This is true because Mr. Glock's only other Rule 3.850 motion also was litigated under warrant, so he had no tactical advantage of holding back since his life was literally at stake. Mr. Glock also had no way of knowing in 1988 when he initially made public records requests that the legislature would change the rules ten (10) years later or what those changes would be.

Mr. Glock established that the records were relevant to the extent possible given the fact that counsel was denied the opportunity to review the records before the hearing because of FDLE first objecting to disclosure and then, at the last minute, releasing the records. These FDLE records contain forensic information

including ballistics testing and serology. These types of records are certainly relevant to a criminal case and in fact, it is incumbent upon any defense attorney to review such material in defense of a criminal defendant.

As counsel explained at the hearing, under the circumstances of this case, counsel for Mr. Glock was required to investigate, prepare and file a Rule 3.850 motion within a short period of time – 24 days. That fact, coupled with the time frame of Fla. Rule Crim. P. 3.852 and the lower court's order to file a postconviction motion by December 4, 2000, before the time for public records compliance, failed to provide Mr. Glock with sufficient time.

Although this Court entered a stay of execution until January 10, 2001, the lower court denied Mr. Glock’s motion to amend his Rule. 3.850 motion. Mr. Glock is barred from amending this pleading with records produced after December 4, 2000. The lower court erased any benefit Mr. Glock would have received from the stay because the lower court denied Mr. Glock the opportunity to amend with information obtained during the stay period. Accordingly, the lower court erred in its rulings and Mr. Glock is entitled to relief.

Mr. Glock argued at the December 7, 2000 hearing that the provision of Fla. R. Crim. P. 3.852 (i) requiring him to establish relevancy of the requested documents was unconstitutional. Because of the rule's requirement, however, Mr. Glock, did establish

relevancy. The lower court erred in finding to the contrary.

The lower court found that the following public records to be irrelevant:

> Palmetto Police Department records concerning polygraph tests (PC-R2. 12/7/00 at 48);
>
> Lake Worth Police Department records regarding other suspects (PC-R2. 12/7/00 at 41);
>
> State Division of Elections records regarding campaign contribution were not relevant to determine potential bias (PC-R2. 12/7/00 at 40-41);
>
> Palm Beach County Sheriff's Office records regarding other suspects were not relevant (PC-R2. 12/7/00 at 44);
>
> Agency for Health Care Administration license records were not relevant even though the mental health professionals about whom records were requested, had interviewed and evaluated Mr. Glock (PC-R2. 12/7/00 at 58); and
>
> the records maintained by the Office of Executive Clemency and Florida Parole Commission were not relevant, despite the fact that counsel demonstrated that the clemency materials lost their traditional confidential nature once they were used and relied upon by the Attorney General against Mr. Glock at his federal evidentiary hearing and after Mr. Glock's due process rights were violated when he was subjected to interviews, evaluations and mental health testing without his attorney being notified or being present, which formed the basis for Claim II raised in his post-conviction motion (PC-R2. 12/7/00 at 38).

In addition to relevancy, Mr. Glock established that the records maintained by the Office of Executive Clemency and Probation and Parole were not protected under Section 14.28, Florida Statutes, Rule 16 of the Rules of Executive Clemency, Florida Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993) or Asay v. Florida Parole

Commission, 649 So. 2d 859 (Fla. 1994). Records maintained by the Office of Executive Clemency and the Florida Parole Commission are not subject to disclosure under the controlling law. In Mr. Glock's case, counsel established that the Office of Executive Clemency and Florida Parole Commission waived the confidentiality protection normally afforded these records. Confidentiality was waived when the records were released to the State Attorney and Attorney General and used by them during its case against Mr. Glock in federal court. At that point, the character of the documents changed from that which would otherwise be used only in a clemency determination, i.e. as a "matter of grace," to that of a prosecutorial nature. Basic fairness dictates that once the agency advocating for Mr. Glock's death was provided these records, Mr. Glock should be entitled to them as well. To hold otherwise denies Mr. Glock his right to confrontation. At the evidentiary hearing in federal court, these materials were provided to Assistant Attorney General Robert Landry for adversarial use.

Additionally, the materials generated in March, 2000 about Mr. Glock and maintained by the Office of Executive Clemency and Probation and Parole lost their confidential nature when the clemency process was initiated and conducted contrary to the clemency rules. Mr. Glock was interviewed and subjected to mental health testing without the benefit of an attorney. The right to minimal due process

during a clemency process recognized by the United States Supreme Court in Ohio Adult Parole Authority v. Woodard, 118 S.Ct. 1244 (1998) was denied Mr. Glock. Mr. Glock was denied minimal due process in his clemency proceedings and the lower court denied Mr. Glock access to the materials generated as a result of an unconstitutional process. Minmial due process now requires that Mr. Glock be provided the records. Given these circumstances, the lower court erred in denying Mr. Glock access to these records.

The lower court ruled that the State made no waiver and sustained the State's objections as to these clemency records. (PC-R2. 12/7/00 at 37-39) After the court's ruling, the court told counsel to demonstrate specific justification for the records. Counsel did so (PC-R2. 12/7/00 at 39). The lower court erred in denying Mr. Glock these records. Mr. Glock is entitled to the records and should be allowed an opportunity to amend after the records are produced.

Because of the State's failures to fully comply with public records, the gamesmanship it used to gain a tactical advantage, and the lower court's erroneous rulings, Mr. Glock was precluded from fully investigating his case for claims traditionally found in successor and death warrant status, e.g., claims of newly- discovered evidence. The lower court's rulings also precluded Mr. Glock from filing a complete Rule 3.850 motion to defend against the death

warrant.

Collateral counsel must obtain every public record in existence regarding a capital case. Porter v. State, 653 So. 2d 375 (Fla. 1995). This Court has recognized that a concomitant obligation under relevant case law as well as Chapter 119 rests with the State to furnish the requested materials. Ventura v. State, 673 So. 2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital post-conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post conviction motion should be denied or dismissed. Ventura.

Despite the circumstances present in Mr. Glock's case; counsel's request for a motion to compel agencies to provide the records; and for additional time to review and amend the post-conviction motion, the lower court denied Mr. Glock's requests.

The lower court has the authority to order the agencies to comply sooner but failed to do so. See Fla. R. Crim P.(h)(3). Mr. Glock was without a proper remedy.

**The Lower Court Committed Reversible Error In Refusing to Conduct an In-Camera Inspection of Submitted to the Court Under Seal and Withheld From Mr. Glock**

The lower court emphatically said at the December 1, 2000 hearing that "I have no intention of reviewing all of these records." (PC-R2. 12/1/00 at 22). Despite counsel's attempt to inform the court

to the contrary, the judge refused to review the records for in-camera review of exemptions (PC-R2. 12/1/00 at 22-23). The court said he was unaware of any obligation on him to do so (PC-R2. 12/1/00 at 23). The trial court erred.

Fla. Stat. sec. 119 (2)(b) states that if an exemption is alleged to alleged to exist under or by virtue of paragraph l, the public record **shall be submitted to the court for an in camera inspection**. The exemption included in paragraph l involves attorney notes. Thus, the in camera inspection is mandatory because the statute expressly stating the circumstances under which an in camera inspection is discretionary does not include attorney notes. See Government in the Sunshine Manual, p. 162 (2000 Edition). Chapter 119.19 (6) also provides the mechanics of submitting exempt material to a court for an in camera inspection. In camera inspections for Brady material and determining the adequacy of the exemptions claimed is routinely conducted in capital postconvition cases. To deny Mr. Glock this same right denies him due process of law and equal protection.

The lower court had an obligation to review the withheld records for Brady material. The state has the duty to turn over exculpatory information. When a state agency attempts to benefit from an exemption, the only way to ensure that Brady material has not been included is for the court to conduct an in camera inspection.

To hold otherwise is to deny Mr. Glock due process of law, equal protection and his right of confrontation.

**Mr. Glock was denied access to public records**

The only public records that may be kept from the public are those that are **expressly exempt** from disclosure by the Florida Constitution or a general law and "shall state with specificity the public necessity justifying the exemption" and which is "no broader than necessary to accomplish the stated purpose of the law." Article I, Section 24 of the Florida Constitution.

Fla. Stat. secs. 119.19 and 27.708 and Fla. R. Crim. P. 3.852 violate Mr. Glock's rights under Article I, Section 24, of the Florida Constitution, Amendments V and XIV to the U.S. Constitution, and relevant case law. The Florida rules and statutes restrict Mr. Glock’s access to public records by requiring him to demonstrate: **i)** that he has made his own search for the records from sources other than the agencies subject to his public records demands (e.g., the records repository maintained by the Secretary of State); Warden v. Bennett, 340 So.2d 977 (Fla. 2d DCA 1976) (the Public Records Act contains no requirement that, simply because the information contained in certain public records might be available from other sources, the person seeking access to those records must first show that he has unsuccessfully sought the information from these sources); see also Davis v. Sarasota County Public Hosp. Bd., 480

So.2d 203 (Fla. 2d DCA 1985) (rev. denied 488 So.2d 829) (a citizen seeking to examine records of a public agency is entitled to examine the **actual** records and not merely extracts); **ii)** that his requests are relevant to his postconviction proceedings; News-Press Pub. Co., Inc. v. Gadd, 388 So.2d 276 (Fla. 2d DCA 1980) (the Public Records Act does not direct itself to the motivation of the person seeking public records); Lorei v. Smith, 464 So.2d 1330 (Fla. 2d DCA 1985) (the purpose of a request for public records is immaterial); and **iii)** that his requests are not overly broad or unduly burdensome; Id. (the breadth of right to public records access is virtually unfettered); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990) (Chapter 119 was enacted to insure free access to governmental records); Tal-Mason v. Satz, 614 So.2d 1134 (Fla. 4th DCA 1993) (rev. denied 624 So.2d 269) (denial of postconviction relief reversed 700 So.2d 453) (public policy is that any public record must be freely accessible unless some overriding public purpose can only be secured by secrecy); see also Barron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988) (there exists a strong presumption in favor of public access to records).

Section 27.708, by prohibiting a capital postconviction defendant from seeking public records by means other than those unconstitutionally detailed within section 119.19 (and, by extension, rule 3.852), violates Article I, Section 24 of the Florida

Constitution and relevant case law by impermissibly restricting the defendant's right to access public records through his counsel. Warden v. Bennett; News-Press Pub. Co., Inc. v. Gadd; Lorei v. Smith; Kight v. Dugger; Tal-Mason v. Satz; Barron v. Florida Freedom Newspapers; Op. Atty. Gen. 075-175 (June 17, 1975) (a state employee is a "person" within the meaning of Chapter 119 and, as such, possesses a right of access to public documents or records for personal inspection and examination which may not be preconditioned upon said employee obtaining his or her supervisor's approval or authorization to inspect and examine such documents); see also, e.g., Robert A. Butterworth, Attorney General, "Introduction," Government-in-the-Sunshine Manual (1998).

In requiring Mr. Glock to demonstrate that a public records demand is not "overly broad or unduly burdensome," Fla. Stat. sec. 119.19 and Fla. R. Crim. P. 3.852 should be found to be, **on their face and as applied** to Mr. Glock, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution as well as the due process guarantee in the Florida Constitution, by virtue of their vagueness and overbreadth. State v. Gray, 435 So.2d 816, 819 (Fla. 1983).

Without knowledge of the record-keeping practices and automation level of a given agency, Mr. Glock is unable to know whether his request is "overly broad or unduly burdensome." In fact,

a capital postconviction defendant **might** be justified in "guessing" that every state agency **should** be technologically advanced to such a point that **any** public record would be available with the touch of a button. But this is not the case. Agencies have achieved different levels of automation. Mr. Glock and any other capital postconviction defendant, is left with no choice but to guess at the meanings of such vague terms as "overly broad or unduly burdensome." Were a capital postconviction defendant to guess incorrectly as to what is an "overly broad or unduly burdensome" request, and were he to err on the side of caution, he would be confronted by a procedural bar to later requesting those records in support of a facially-valid claim that his life be spared or his sentence reversed. Where the interest at stake is a capital postconviction defendant's **life**, such unconstitutionally vague language must be struck down.

Fla. R. Crim. P. 3.852 and section 119.19 dictate the procedural and substantive rights to a capital postconviction defendant and severely limit a defendant's access to public records based upon the status of the litigant, i.e., captial postconviction defendants. Certain requirements and restrictions are attached to a capital defendant who attempts to obtain and use public records whereas no such requirement or restrictions are placed upon a non-capital defendant in postconviction.

Such restrictions are prohibited. See, e.g. Government-in-the

Sunshine Manual at p. 101 (2000 Edition) ("Chapter 119, F.S. requires no showing of purpose or 'special interest' as a condition of access to public records").

The actions of the lower court and the implementation and enforcement of Fla. Rule Crim. P. 3.852; Chapter 119.19 ; 27.708 deny Mr. Glock equal protection under both the Florida and United States constitutions.

## CONCLUSION

Because of the lower court's summary denial of Mr. Glock's Motion for Post-Convicton Relief With Request for Leave to Amend and for Stay of Execution, refusal to grant a stay of execution, refusal to grant Mr. Glock an evidentiary hearing, and mistreatment of the public records issues, Mr. Glock has been denied a full and fair adversarial testing of his meritorious claims. As a result, Mr. Glock has been denied due process of law and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding Florida law. Accordingly, this Court should stay Mr. Glock's impending execution and remand this case to the lower court for an evidentiary hearing providing Mr. Glock the opportunity to vindicate his constitutional rights or grant any other relief this Honorable Court deems appropriate.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by hand delivery to Robert Landry, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, 33607 this 19th day of December, 2000.

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