IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-260

AMOS LEE KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

DEATH PENALTY CASE
EXECUTION SCHEDULED FOR FEBRUARY 26, 2003 AT 6:00 PM

AMENDED INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record in the instant case:

"TR."–The transcript of the hearing conducted on February 14th, 2003 in front of the Honorable Susan Schaeffer.

"EX."-- The exhibits attached to this brief as listed.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. King lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. King, through counsel, respectfully requests that the Court permit oral argument.

PROCEDURAL HISTORY

Mr. King was charged by indictment with first-degree murder, sexual battery, burglary and arson On April 7, 1977. The case was consolidated during voir dire with another case charging Mr. King with attempted murder and escape. The consolidated cases were tried before the Circuit Court Judge John Andrews. Mr. King was represented by Thomas Cole of the Public Defender's Office.

The jury found Mr. King guilty on all counts. At the penalty phase, the jury recommended death. The trial court followed the recommendation and sentenced Mr. King to death.

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence of death. ***King v. State***, 390 So.2d 315 (Fla. 1980). Mr. King sought post-conviction relief, but was denied by the circuit court. On appeal, the Florida Supreme Court affirmed the denial of post-conviction relief. ***King v. State***, 407 So.2d 904 (Fla. 1981). Mr. King filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida in 1981. The district court denied relief, however on appeal, Mr. King's sentence of death was vacated by the Eleventh Circuit Court of Appeals. ***King v. Strickland***, 748 F.2d 162 (11th Cir. 1984); ***previous history, King v. Strickland***, 714 F.2d 1481 (11th Cir. 1983).

Mr. King was resentenced and death was again imposed. The Florida Supreme Court affirmed the conviction and sentence of death. ***King v. State***, 514 So.2d 354 (Fla. 1987). A Petition for Writ of Habeas Corpus was filed by Mr. King, as well as a Motion for Post-conviction Relief. An evidentiary hearing was conducted in the circuit court on the Motion for Post-conviction Relief, and relief was denied. The Florida Supreme Court affirmed the denial of post-conviction relief. ***King v. State***, 597 So.2d 780 (Fla. 1992). The Florida Supreme Court also denied Mr. King's Petition for Writ of Habeas Corpus. ***King v. Dugger***, 555 So.2d 355 (Fla. 1990).

In October of 1992, Mr. King filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida. The District Court denied relief on May 12, 1998. An appeal of the denial was filed with the Eleventh Circuit Court of Appeals in May of 1999. On November 30, 1999, the Eleventh Circuit denied Mr. King's appeal. ***King v. Moore***, 196 F.3d 1327 (11th Cir. 1999). During the spring of 1997, Mr. King filed a pro-se Petition for Writ of Habeas Corpus in the Florida Supreme Court. Mr. King's pro-se pleading was denied by the Florida Supreme Court in an unpublished order filed on March 28, 1997. A subsequent Motion for Rehearing on said petition was denied in an unpublished order filed on May 30, 1997.

On November 19, 2001, a death warrant was signed scheduling Mr. King's execution for January 24, 2002. Mr. King filed a Successive Motion to Vacate Judgement and Sentence on December 18, 2001. The circuit court denied Mr. King's motion on January 1, 2002. King appealed the order of the circuit court denying a successive motion for post conviction relief and filed a successive petition for writ of habeas corpus and motions seeking a stay of execution, all of which were denied by this Court. ***King v. State,* 808 So.2d 1237 (Fla.2002),** ***cert. denied,*** --- U.S. ----, 122 S.Ct. 2670, 153 L.Ed.2d 843 (2002).

The United States Supreme Court in February 2002 stayed King's execution while it decided ***Ring v. Arizona***, --- U.S. ----, ----, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002). ***See King v. Florida***, 534 U.S. 1118, 122 S.Ct. 932, 151 L.Ed.2d 894 (2002). That Court then, in June 2002, issued its decision in ***Ring***, summarily denied King's petition for certiorari, and lifted the stay. King filed an original petition for writ of habeas corpus seeking a stay of execution in this Court on July 5, 2002. The Court issued an Order staying execution on July 8, 2002. ***King v. Moore***, 824 So.2d 127, 128 (Fla.2002). The

Court subsequently denied relief on Oct. 24, 2002, further ordering that the stay would expire thirty days after rendition of the order. ***King v. Moore,*2002** WL 31386234, 2002 WL 31386234 (Fla.), 27 Fla. L. Weekly S906. A petition for writ of certiorari has been filed with the Supreme Court of the United States.

The stay issued by this Court expired November 23, 2002. Mr. King's execution is scheduled for 6:00 pm, December 2, 2002.

On November 29, 2002, Mr. King filed:

1. Defendant's Successive Motion to Vacate Judgement And Sentence, And Request For Evidentiary Hearing And Stay of Execution;

2. Defendant's Motion to Release Evidence For DNA Testing; and

3. Emergency Petition to Stay Execution, Motion For Subpoena And Order to Release Any And All Autopsy And Medical Records in Possession of The Medical Examiner's Office Regarding John Peel, Jr.

The Circuit Court conducted a Huff hearing on December 1, 2002, and denied all requested relief. On December 2, 2002, Governor Bush entered a stay of execution for Amos King in order to conduct DNA testing requested by the defendant. In conducting the DNA testing, the Governor proceeded under a theory that this was done pursuant to executive clemency. Material was sent to FDLE and Bode Technology Group, Inc. for identification and DNA testing.

On February 5, 2003, counsel was informed of the results of the DNA testing and the identification procedure done at FDLE. The next day, counsel made a formal request to the Governor asking for certain data relating to the DNA testing. That request was denied without citing the exemption from public records

disclosure under section 14.28, F.S. (2002).

The Defendant filed a timely motions and argument was held on February 14th, 2003. The Court denied most of the defendant's motions.

This appeal follows.

STATEMENT OF THE CASE

Amos King was sentenced to death three days after the start of his trial and 94 days after the offense had taken place. There were no eyewitnesses to murder of Ms. Brady and no direct physical evidence linking Amos King to her murder. In reviewing the facts of Mr. King's case, the 11th Circuit noted the lack of evidence produced at Mr. King's trial. "King was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made." King v. Strickland, 748 F.2d 1462,1464 (11th Circuit 1984). The only evidence adduced at trial tying Mr. King to the Brady murder was misleading testimony concerning a paring knife found near the grounds of the facility(exhibit 2) that could never be matched with the weapon used to superficially wound Ms. Brady, a disjointed and misleading timeline of events allegedly chronicling the time Mr. King was missing from the Tarpon Springs work release center(exhibit 2), and the disputed and incredible testimony of a medical examiner who was forced to retire and now in ill repute(exhibit 2).

The only other collateral witness, James "Dan" McDonough, was later found to be not only incompetent but willfully fraudulent in his capacity as a state officer. (Exhibit 4) His testimony at King's trial contained various inconsistent statements. (See for example exhibit 2)

Evidence that could prove Mr. King's innocence was destroyed by the state. (Exhibit 2), King v.

State, 808 So.2d 1237 (Fla. 2002). The only possible scientific evidence adduced at trial was evidence that Mr. King was a blood type A secreator, a commonality he shares with one-third of the African-American population and over fifty-three percent of the male population. Even this evidence is questionable since all vaginal washings were destroyed. All other evidence has been tested and no evidence demonstrating Mr. King's guilt has been found, let alone any evidence that a sexual battery occurred. As such, Mr. King's conviction is in serious question.

SUMMARY OF ARGUMENT

ARGUMENT I: The trial court erred in denying Appellant's Motion to Disqualify where Appellant demonstrated his fear that he could not receive a fair hearing before the court because of prejudice or bias of the judge. The trial court should have recused herself. Appellant demonstrated that he is fearful that the trial court is bias and prejudice against him and that he cannot receive any fair hearings before the court. The trial court made public comments about Appellant's case before a senate subcommittee where she expressed her displeasure with the time requirements and work load of Appellant's case. The trial court made comments to Appellant that based on the length of time his case has gone on, he should be dead by now. Appellant expressed his fear that the trial court has sided with the State because of a relationship with a State witness. Appellant is fearful that the trial court cannot be fair and is bias and prejudice against him because the trial court misstated or misrepresented procedural matters and case history at previous hearings so that the trial court could ensure Appellant's claims be barred.

ARGUMENT II: The trial court erred in denying Appellant's demand for production of additional public records in violation of Brady v. Maryland and Giglio v. United States. The medical examiner in Appellant's case performed an inadequate and incomplete autopsy of the victim in his case. Her work was flawed, incomplete, contradictory, misleading, and inconsistent.

On November 21, 2002, a man was released from prison after serving four years of a ten year sentence for the killing of his child. In another case where Joan Wood performed the autopsy on a baby allegedly shaken to death by her father, the father was exonerated after a review of Joan Wood's work. Both cases involved incompetence on the part of Joan Wood.

Joan Wood's testimony was instrumental in the conviction of Appellant. Numerous errors,

inconsistencies, and unusual practices were identified in the autopsy of the victim in Appellant's case.

Appellant is entitled to a review of the medical records in both the Peel and Long cases as the information in the autopsy reports is information that should be provided pursuant to Brady and Giglio. Joan Wood has demonstrated a pattern of incompetence in conducting autopsies. There is a possibility that Wood's performance was the result of an intentional effort to assist the State in all of these cases. Appellant cannot know this unless he is granted the opportunity to review the records requested.

ARGUMENT III: The trial court erred in not granting Mr. King's motion to compel or in the alternative issue the writ of mandamus. The release of the records were claimed to be exempt under section 14.28, F.S. (2002). This exemption was waived when the Governor partially released the records to counsel. In addition, the records requested are not specifically exempt under Fl.R.Crim.P. 3.852, and any non-disclosure violates the state and federal constitution's prohibition against cruel and unusual punishment and additionally violates state and federal due process requirements. Finally, the exemption claimed is not narrowly drawn as required by the constitution.

ARGUMENT

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY WHERE APPELLANT DEMONSTRATED HIS FEAR THAT HE COULD NOT RECEIVE A FAIR HEARING BEFORE THE COURT BECAUSE OF PREJUDICE OR BIAS OF THE JUDGE. THE TRIAL COURT SHOULD HAVE RECUSED HERSELF

Appellant feared that he could not receive a fair hearing in the trial court because of prejudice or bias of the judge. Appellant filed a motion to disqualify specifically alleging facts and reasons to show the

grounds for disqualification yet the trial court refused to grant the motion to disqualify. The failure of the trial court to recuse herself was in violation of state and federal law.

Fla. Stat. § 38.10 states:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and hold that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

The Florida Rules of Judicial Administration Rule 2.160 provides the procedure for disqualification of trial judges. Fla. R. Jud. A. 2.160 (d) states that a motion to disqualify shall show that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge.

Appellant sought disqualification of the trial court based on four grounds. The first ground upon which Appellant sought trial court disqualification was that the trial judge made public comments about his case before a Florida Senate Subcommittee on Article V. The trial judge made comments before the subcommittee on how troublesome it was to address Appellant's postconviction claims and how her holiday was interrupted by Appellant's case. The judge was annoyed with Appellant's case. The judge was distressed with the work load that Appellant's case required. During the hearing a legislator presumed that the pleadings filed by Appellant were previously addressed and suggested that a brief order could have been entered by the court. The inference of her response was that she would if she could. The judge said that you cannot just say it is "old hat." (R. 253) Her response indicated her belief that Mr. King's pleadings were a dilatory action on behalf of his attorneys rather than pleadings given careful consideration of the merits of his claim.

The second ground upon which Appellant sought trial court disqualification was a comment made by the court to Appellant after a hearing on January 11, 2002. During the course of the hearing Mr. King was allowed to stand and speak on his behalf. Mr. King was saying that he was locked away for 20 years and was not able to access his transcript and now the court wants to say he is procedurally barred. Mr. King said "this whole thing is corrupt, it's not fair and I'm just trying to do the best I can." Mr. King continued and the judge interjected. She said she was not going to accept anymore filings from Mr. King, that the case has been going on and on, and that you should be dead by now Mr. King (See Ex. 3).

The third ground upon which Appellant sought trial court disqualification is fear on the part of Mr. King that he would not receive a fair hearing before Judge Schaeffer. In a letter written by Mr. King to Judge Schaeffer, Mr. King alleges statements by one of his attorneys that the judge and the medical

examiner in this case had an outside relationship that would cause the judge to be bias toward the State. (See Ex. 3). Furthermore, any attempts by the trial court to verify the truth and veracity of the allegations would violate the ethical considerations and canons regarding attorney client privilege.

Finally, on December 1, 2002, counsel for Appellant requested that certain autopsy records be released for review by Appellant's retained medical examiner expert. The judge inquired why previous counsel did not hire an expert to challenge the autopsy done by Joan Wood, the medical examiner in Mr. King's case and who performed the autopsy on the victim. Previous counsel did move for the appointment of a medical expert, however the request was denied. Appellant believes that the judge knew that previous counsel moved for appointment of a medical expert (See Ex. 3). Appellant believes the judge did not acknowledge the request for the purposes of denying his motion.

To establish a basis for relief a movant:

> [N]eed only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex. Rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So.2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983) (emphasis added).

The grounds for recusal of the judge before whom the case is pending is whether the party fears that he will not receive a fair hearing because of specifically described prejudice or bias of the judge. Mr. King feels that he cannot receive a fair hearing before the assigned trial judge. Mr. King's fear is shown by his belief that the judge is bias toward the State because of an alleged relationship the judge had with the

medical examiner in the case. Mr. King feels that the judge has a bias against him such that he cannot get a fair hearing on any pending issues before the court.

Judge Schaeffer should have disqualified herself because by testifying before the Florida Senate Subcommittee on Article V and discussing Mr. King's case, she demonstrated her bias and prejudice against Mr. King. The Code Of Judicial Conduct Canon 3 (B) (9) states that a judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. Judge Schaeffer's comments made before the subcommittee demonstrated a proclivity to interfere with a fair hearing on any of Mr. King's pending matters before the court. Judge Schaeffer apparently believes that any claim Mr. King brings before the court is simply "old hat." If she believes that any claims previously brought before the court were "old hat," surely she will think the same of any future claim brought before her. Mr. King cannot get a fair hearing before Judge Schaeffer where she shows such disdain for any claims that he may raise.

The Code of Judicial Conduct Canon 3 E (1) (a) states:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Judge Schaeffer, by expressing her opinion or belief that Mr. King should be dead by now, was expressing deep seated visceral and vehement personal desire to see Mr. King dead. Judge Schaeffer personally wants to see Mr. King's case ended. Such a personal bias or prejudice against Mr. King precludes her sitting in judgement on any of Mr. King's matters the court. The personal bias and prejudice

toward Mr. King mandates recusal pursuant to Canon 3E.

Judge Schaeffer demonstrated that she cannot grant to Mr. King a fair hearing. At a hearing on December 1, 2002, counsel for Mr. King requested that certain autopsy records be released for review by Mr. King's retained medical examiner expert. Judge Schaeffer inquired why previous counsel did not hire an expert (See Ex. 3). Previous counsel did move for the appointment of medical expert (See Ex. 3). The request was denied. Mr. King believes that Judge Schaeffer knew or knows that his previous counsel moved for appointment of a medical examiner expert. Mr. King has a well grounded fear that he will not receive a fair hearing on pending matters at hands of Judge Schaeffer.

The United States Supreme Court has recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialog by affected individuals in the decision making process. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). It preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J.,concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Due Process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken

deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978); Taylor v. Hayes, 418 U.S. 488, 501 (1974); State v. Steele, 348 So.2d 398 (Fla. 3d DCA 1977).

Mr. King has a reasonable fear that he cannot receive fair hearings before Judge Schaeffer. The facts alleged in this motion are "sufficient to warrant fear on [Mr. King's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So.2d 191,192 (Fla. 1988). Because of Judge Schaeffer's comments to Mr. King "a shadow is cast upon judicial neutrality so that disqualification is required." Chastine v. Broome, 629 So.2d 471 (Fla. 4th DCA 1988). Further, the appearance of impropriety violates state and federal constitutional rights to due process. Fairness required Judge Schaeffer to recuse herself.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING APPELLANT'S DEMAND FOR PRODUCTION OF ADDITIONAL PUBLIC RECORDS IN VIOLATION OF BRADY V. MARYLAND AND GIGLIO V. UNITED STATES

On November 21, 2002, a man was released from prison after serving four years of a ten year sentence for the manslaughter conviction of his eight week old son. The manslaughter conviction of John Peel was set aside when the State Attorney in Pinellas County questioned Peel's guilt.

The State Attorney had the work of Joan Wood, the medical examiner in the Peel case, reviewed by an independent medical examiner. After a review of Wood's work in the case, the independent medical examiner concluded that Wood's conclusions could not be relied upon. Peel was then released.

Peel told police that his child rolled off his chest and onto a concrete floor. The child died from the fall. Peel was charged with first-degree murder after Joan Wood conducted an autopsy. Wood observed

"gross" hemorrhaging in the child's eyes, and concluded the baby's death was a homicide. Although Wood said the hemorrhaging was visible with the naked eye, she conducted a microscopic examination of eye tissue months later and could find no evidence of it.

After Peel pled to a ten year sentence to avoid the possibility of life in prison, Wood's successor, medical examiner Jon Thogmartin, re-examined the autopsy. Dr. Stephen Nelson, the Polk County medical examiner also reviewed the case. Nelson found no evidence associated with shaken baby syndrome. Only upon exposing Joan Wood's flawed autopsy practices was Mr. Peel released from prison.

Joan Wood's routine practices caused another innocent person to be charged with a serious crime only later to be exonerated. David Long's seven month old child, Rebecca Long, who was born three months premature, stopped breathing. Long attempted to revive the child but hours later, at the hospital, the child died. Eighteen months later, Joan Wood generated an autopsy report that concluded that the child died as a result of shaken baby syndrome. The results of the report stated that there was severe hemorrhaging along the child's spinal cord. In her report, Wood wrote the brain has "no distinct areas of hemorrhage," but in the next paragraph, she contradicts that statement, claiming, "the brain has...hemorrhage." Wood further stated that the child had retinal hemorrhaging which was caused when a baby is shaken. Wood's replacement, Jon Thogmartin, and four other pathologists all determined the child died of bronchial pneumonia. The experts found no evidence of hemorrhaging along the spinal cord or hemorrhaging of the retina. According to several experts, Wood's autopsy report was plagued with problems. There were several discrepancies with the medical findings, and there was not a shred of evidence that the child was abused. Charges were dropped but not before David Long lost his job and went bankrupt.

After the Peel case was reported on November 21, 2002, Appellant filed an emergency petition to stay execution, motion for subpoena and order to release any and all autopsy and medical records in possession of the medical examiner's office regarding John Peel, Jr. A hearing was held on December 1, 2002.

Appellant requested the autopsy records of John Peel because Joan Wood conducted the autopsy of the victim in Appellant's case. In Appellant's largely circumstantial case, Wood's testimony was instrumental. Wood testified as to cause, manner, and time of death yet there was scant evidence upon which Wood could credibly render her opinions.

Wood testified at trial that she found at the autopsy the presence of motile sperm in the fluid from the vagina of the victim. The vaginal fluid, or washing, was a mixture of blood and semen. (R.1797) The washings were tested and tested and prostatic acid phosphatase was found in the washings. There was the presence of type A secretor blood, while the victim was identified as possessing type O blood. Mr. King , through counsel, filed a motion for DNA Testing and a Motion to Compel Evidence for DNA Testing. The State responded that the vaginal washings of the decedent are no longer in existence. According to Marion Hill, a medical technologist employed at the Medical Examiner's office, she returned the washings to Joan Wood. Joan Wood was the last person known to have possession of the washings and is believed to have destroyed the washings.

She testified as to the time of death using outdated methods and testing procedures. Joan Wood's autopsy report of the victim showed that Wood used a vitreous test to determine the time of death. The vitreous test is an inherently unreliable test for determining time of death. Furthermore, Wood applied the

test using improper procedures in conducting the scientifically unreliable test. She relied on lividity and rigor of the body but did not document the degree or if it was fixed. She did not take temperature and did not address the issue of temperature and its effect on the deceased. Wood used junk science to determine the time of death of the victim in this circumstantial case.

Joan Wood in a deposition in 1977 stated the most severe stab wounds were to the upper chest of the victim. The final anatomical diagnosis only refers to superficial stab wounds to the head and neck. There is no mention in the autopsy report of any stab wounds to the chest. The worst of one of the superficial stab wounds would still be just a superficial stab wound not resulting in death.

At least seven different toxicology reports were generated. All had different data contained on them. There was no explanation for the varied information.

There were approximately 40 injuries described by Joan Wood that were not documented in any photographs.

Appellant filed on January 29, 2003 a demand for production of additional public records requesting the Peel and Long autopsy reports. A hearing was held on February 14, 2003. The court denied Appellant's demand.

The Peel case is newly discovered evidence that Appellant is entitled to under Brady v. Maryland, 373 U.S. 83, (1963). The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87. Appellant is entitled to the newly discovered evidence in the Peel case. Joan Wood has demonstrated a pattern of performing flawed, incomplete, contradictory, misleading, and inconsistent autopsies. This pattern dates back to Appellant's

case. Appellant is entitled to the autopsy records of John Peel, Jr. and Rebecca Long so that he may review the records. Suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution. Giglio v. United States, 405 U.S. 150, 154 (1972). Appellant is entitled to the records under Brady and Giglio as exculpatory material may be discovered upon review of the records in conjunction with the medical records produced in Appellant's case.

Appellant should be permitted to review the records to determine if Joan Wood's work on autopsies goes beyond incompetence. Joan Wood may have been actively and intentionally assisting the State in her reports. Appellant would be unable to know this unless he obtained the autopsy records.

ARGUMENT III

THE TRIAL COURT ERRED IN NOT GRANTING MR. KING'S REQUEST FOR RECORDS FROM THE OFFICE OF THE GOVERNOR BY RULING THAT SUCH RECORDS WERE EXEMPT UNDER SECTION 14.28, F.S.

On December 2, 2002, Governor Bush entered a stay of execution for Amos King in order to conduct DNA testing requested by the defendant. In conducting the DNA testing, the Governor proceeded under a theory that this was done pursuant to executive clemency. Material was sent to FDLE and Bode Technology Group, Inc. for identification and DNA testing.

On February 5, 2003, counsel was informed of the results of the DNA testing and the identification procedure done at FDLE. The next day, counsel made a formal request to the Governor asking for certain data relating to the DNA testing. That request was denied without citing the exemption from public records disclosure under section 14.28, F.S. (2002).

The Defendant filed a timely Motion to Compel or in the Alternative to Issue a Writ of Mandamus

and argument was held on February 14th, 2003. The Court denied the defendant's motion and writ. (Exhibit 1)

By way of its order, the Court conceded that the request and service was adequate and proper under the law. (Exhibit 1) The Court then proceeded to conduct its analysis of the issue. Contrary to the Court's order, the issue of waiver was not the main argument presented by Counsel. Rather, the issue of waiver was one of three. (TR. 125-168).

Section 14.28, F.S. states "All records developed or received by any state entity pursuant to a Board of Executive Clemency investigation shall be confidential and exempt from the provisions of s. 119.07(1) and s.24(a), Art.I of the State Constitution. However, such records shall be released upon approval of the Governor."

The defendant claims that the protections of section 14.28 do not apply to the request and therefore no exemption may be claimed. Further, the defendant claims that an action before the trial court was proper under Lopez v. Singletary,634 So.2d 1034 (Fla. 1999), in which the this Court held "that any postconviction movant dissatisfied with the response to any requested access must pursue the issue before the trial judge or that issue will be waived."

A. Waiver

The defendant claims that any alleged exemption under section 14.28, F.S. was waived when the information was **partially** released by the Governor. Section 14.28 does state that the Governor may release such records, thus removing the exemption he may be able to claim under the statute. However, the statute fails to state, nor does the Act provide for, a partial exemption of such records.

In addition, the only person to be protected under the exemption is the defendant. Generally, such

clemency investigations may include interviews with victims, witnesses and family members. Here, it is clear that this is not the case. By requesting the DNA data and FDLE data, the defendant-subject waives any exemption.

B. Records Under Fl.R.Cr.P. 3.852

Further, as an alternative argument, it is posited that the records requested were not done under the procedure outlined in Chapter 119 nor are they generally requested under section 24(a), Article I of the Florida Constitution. Rather such records were **also** requested under Fl.R.Cr.P. 3.852. (See exhibit 1) Section 14.28 specifically states that only those records requested under "s. 119.07(1) and s.24(a), Art.I of the State Constitution" are exempt from disclosure. It is clear that all exemptions are narrowly drawn. Tribune Co. v. Public Records, 493 So.2d 480, 483 (Fla. 2nd DCA 1986). Failure to include Rule 3.852 is clear indication, under the rules of statutory construction, that no exemption was to apply.

In an analogous situation, section 119.07(3)(c) makes exempt any information revealing the identity of a confidential informant or source from the provisions of s. 119.07(1) and s.24(a), Art.I of the State Constitution. The exemption contained in section 119.07(3)(c) reads exactly as the exemption contained in section 14.28, compared, in pertinent part, below:

> **Section 14.28, F.S.** All records developed or received by any state entity pursuant to a Board of Executive Clemency investigation shall be confidential and ***exempt from the provisions of s. 119.07(1) and s.24(a), Art.I of the State Constitution***. However, such records shall be released upon approval of the Governor.
> **Section 119.07(3)(c)** Any information revealing the identity of a confidential informant or confidential source is ***exempt from the provisions of subsection (1) [s. 119.07(1)] and s.24(a), Art.I of the State Constitution***.

(Emphasis added)

In Styles v. State, 780 So.2d 1040 (4th DCA 2001) the state was required to reveal the identity of a confidential informant as a result of a pre-trial discovery demand under Fl.R.Crim.P. 3.220. Similarly, in Miller v. State, 729, So.2d 417 (4th DCA 1999), the state was again required to disclose the identity of an individual expressly exempted from disclosure under Chapter 119 using the same language as section 14.28. The court reasoned that "[d]isclosure is the balancing of the public's interest in protecting the flow of information against the individuals [constitutional] right to prepare his defense."

Rule 3.852 is a discovery rule for public records production ancillary to capital postconviction proceedings. Amendments to Florida Rules of Criminal Procedure 3.852, 754 640 (Fla. 1999). The same constitutional balancing act must be performed with the protection afforded to the public versus Mr. King's right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution. There is no protection of the public to be gained by granting the exemption in this specific case. All information relates to Mr. King's case and the deceased Mrs. Brady. The only other person which may be affected would be the true donor of the DNA which the State has an interest in bringing to justice. As such, the provisions of section 14.28, **in this case**, do not outweigh the interests of Rule 3.852.

C. Law Not Narrowly Drawn

Any reliance by the Governor on Rule 16 of the Rules of Executive Clemency is without merit. While it is clear that the three branches of government and agencies can adopt rules, see Chapter 120, F.S. (2002), it is also clear that those rules cannot run afoul of the Florida Constitution.

Section 24(c), Article I of the Constitution clearly states that the "Legislature, however, may provide by general law for the exemption of records". In this case, Rule 16 is a clear violation of s.24(c) and any provision allowing such a rule would violate the doctrine of non-delegation. Only the legislature can

create an exemption, not the court or custodian. Douglas v. Michel, 410 So.2d 936, 940 (Fla. 5th DCA 1982); Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla.1979).

Section 14.28 fails **under the limited facts of this case**. To begin with, the offending section is not narrowly drawn as required by section 24(c), Art.I. It is a broad exemption of all public records relating to clemency without narrowly tailoring the needs of the public verses the need for openness. It is clear that in construing the Act and it exemptions, the Act is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited to their designated purpose. City of Riveria Beach v. Barfield, 642 So.2d 1135 (4th DCA 1994); Tribune Co. v. Public Records, 493 So.2d 480, 483 (Fla. 2nd DCA 1986).

Further, the original response to the request formally given to the Governor on February 6 was not a valid claim of exemption under section 119.07(2)(a). This section requires that the exemption include the statutory citation. No citation was contained in Mr. Muniz's response of February 6, 2003.

Further, any claimed exemption under s.14.28 regarding the defendant's case must be submitted to the court for an *in camera* inspection. Section 119.07(2)(b); Tribune Co. v. Public Records, 493 So.2d 480, 483 (Fla. 2nd DCA 1986)(post-conviction records request). It is the best policy for courts to conduct an *in camera* inspection in order to dispel any "clouds of suspicion over governmental efforts to sustain secrecy". Id at 484. An *in camera* inspection should be done for a court to decide whether to not release the requested information, not whether to release such records. Id. By not allowing the in camera inspection, the law is clearly not narrowly drawn.

For example, in *Tribune Co.*, the court conducted an analysis of a record exemption for two capital post conviction defendants who were seeking access to records of a criminal investigation, records

specifically exempted under Chapter 119. (At the time of the case, Chapter 119 was the vehicle post conviction defendants used to obtain public records, as opposed to today's Fl.R.Crim.P. 3.852.) In beginning its analysis, the District Court enunciated what is now the mantra of Florida's public record law.

> The Public Records Act is to be liberally construed in favor of open government to the extent possible in order to preserve our basic freedom, without undermining significant governmental functions such as crime detection and prosecution....Exemptions from disclosure are to be construed narrowly and limited to their stated purposes....When in doubt the courts should find in favor of disclosure rather than secrecy.

493 So.2d at 483 (Internal quotes and citations ommitted).

The Court then conducted an analysis of the claimed exemption. The analysis was to both the general intended purpose of the exemption and the way that exemption was to be applied specifically in that case. Id at 483-84. The Court concluded that to enforce the exemption would produce a "result so capricious and illogical as to be absurd." Id. at 483.

In the instant action, as stated previously, it is clear that the exemption, in this case, is not narrowly drawn. Mr. King requested that DNA testing be conducted. Those tests were conducted in which all the samples were consumed, forclosing any chance of additional testing. Coupled with the previous destruction of evidence in this case, see King. V. State, 808 So.2d 1237 (2002) it is clear that the exemption is being used as a sword to keep King from challenging the sufficiency of his conviction, in violation of the state and federal constitutional prohibitions against cruel and unusual punishment and in violation of state and federal due process standards.

Lastly, the law is not narrowly drawn for the reason that the exemption being claimed is larger than the one set by the statute. Again, section 14.28, F.S. states: "All records **developed or received by any state entity** pursuant to a Board of Executive Clemency investigation shall be confidential and exempt from

the provisions of s. 119.07(1) and s.24(a), Art.I of the State Constitution. However, such records shall be released upon approval of the Governor." (Emphasis added). In the original letter of February 6, it was requested that the defendant receive the information or be allowed to gather the information from Bode Technology Group, Inc. directly. In that scenario, the defendant was not requesting any records developed or received by any state entity but rather by a private corporation.

CONCLUSION AND RELIEF SOUGHT

Based upon the testimony at trial, the testimony of the December 10th 2001 hearing, the December 1, 2002, the hearing on February 14, 2003, hearing on all pending motions, exhibits attached to the instant pleadings, and arguments presented above, Mr. King contends that his FIFTH, SIXTH, EIGHTH and FOURTEENTH AMENDMENT rights under the United States Constitution and his corresponding rights under the Florida Constitution have been violated. Mr. King requests the following relief:

1. Enter a stay of execution.

2. Afford such other relief as this Court may deem proper.

CERTIFICATES OF COMPLIANCE AND SERVICE

I hereby certify that a true copy of the foregoing, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**;** that a true copy of the foregoing Initial Brief of The Appellant has been furnished by United States mail, electronic transmission, and/or facsimile transmission to all counsel of record on this _____ day of February 19, 2003.

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