IN THE SUPREME COURT OF FLORIDA

CASE NO.

PHILLIP ALEXANDER ATKINS,

Plaintiff-Appellant,

v.

JERRY HILL, State Attorney,
Tenth Judicial Circuit, State of Florida,

Respondent-Appellee.

EMERGENCY MOTION: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's Order denying Mr. Atkins' complaint for disclosure of public records. The complaint was brought pursuant to Chapter 119 of the Florida Statutes. The circuit court denied Mr. Atkins' complaint by entering an Order Resulting From In Camera Inspection of State Attorney Records in which Mr. Atkins was denied the opportunity to inspect numerous public records in the possession of the State Attorney.

The following symbols will be used to designate references to the record in this instant cause: "R" -- record on direct appeal to this Court; "T" -- 63 page hearing transcript of November 15, 1995. All other citations will be self-explanatory or will be otherwise explained.

The jurisdiction of this Court is invoked pursuant to Article V, § 3(b)(1) and § 3(b)(7) of the Florida Constitution.

REQUEST FOR ORAL ARGUMENT

Mr. Atkins has been sentenced to death. A death warrant has been signed and his execution is imminent, currently scheduled for 7:00 a.m. on November 29, 1995. The resolution of the issues involved in this action will therefore determine whether he 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 would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Atkins, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND OF THE FACTS

This is an action for disclosure of public records pursuant to Chapter 119 of the Florida Statutes.

Appellant mailed to the Appellee three (3) formal requests for the disclosure of public records, pursuant to Chapter 119 of the Florida Statues, Article I, Section 24 of the Florida Constitution, and Brady v. Maryland, 373 U.S. 83 (1963) (R. 17-22, Appellant's requests for public records to Appellee). These requests were mailed on December 8, 1988, September 14, 1993, and November 4, 1993. The requests were for any and all records in Appellee's custody, care and/or control relating to Appellant, Phillip Alexander Atkins (R. 17-22).

On October 26, 1995, Appellant inspected the files of the Appellee but was denied access to some public records. The State Attorney did not provide a written claim of exemption (R. 1-7).

On November 3, 1995, Appellant filed a Complaint for Disclosure of Public Records in the Circuit Court of Polk County with a request for in camera inspection of withheld public records (R. 1-7). Appellant also filed a demand for an accelerated hearing pursuant § 119.11(1) Fla. Stat. (1993) (R. 10-11). Mr. Atkins had no pending Fla. R. Crim. P. 3.850 motion, or any other litigation, at the time he filed his Complaint for Disclosure of Public Records.[1]

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[1] On November 20, 1995, Plaintiff filed a motion for post conviction relief under Florida Rule of Criminal Procedure 3.850. Logically, there could not have been any "current litigation" files in the custody of the State Attorney on November 15, 1995, the date of Mr. Atkins 119 hearing.

After filing his complaint, Appellant received two written claims of exemptions from Appellee. The first exemption letter was mailed November 7, 1995, and received by Appellant on November 13, 1995 (R. 23). Without the required statutory citation, the Appellee's letter described and claimed a "work product" exemption for the following twelve (12) items:

1. Legal research [copies of case law];
2. Notes for my argument to the Governor and cabinet at clemency hearing;
3. Atkins "RAP" sheet;
4. State's copy of proposed jury instructions;[2]
5. Handwritten notes by myself and Jerry Hill re: prior request by CCR to have our office recused from the case;
6. Handwritten notes I made summarizing certain portions of the trial testimony prepared to assist me in filing a response to previous 3.850 motion;
7. Notes concerning voir dire of individual jurors;
8. Handwritten notes listing items I intended to introduce in evidence, order of witnesses, outline of questions to be asked of witnesses, outline of questions to be asked defendant, notes on testimony of defense witnesses, notes on testimony during penalty phase and outline of closing argument;
9. Handwritten notes: summarizing my office interviews with witnesses William Gary Powell, James Dixon, Samuel Hazell, Kevin Marler;
10. Notes of testimony given at suppression hearing;
11. Handwritten investigative requests to a State Attorney's Office Investigator re: work I needed him to do on the case;

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[2] This item has since been disclosed by the Defendant.

12. Handwritten notes re: phone calls I made to various people concerning the case.

(R. 23). On November 14, 1995, Appellant received a facsimile from the Appellee dated November 7, 1995. In this facsimile, the State Attorney withdrew his objection to item number 4 above and claimed that the withheld items were not "public records under Chapter 119, Florida Statutes." To date, Appellant has never received a sufficient written claim of exemptions required under Chapter 119.07(a)(2) of the Florida Statutes.[3] These exemption letters were admitted into evidence at the November 15, 1995, hearing in this case (R. 23, T. 52).

On November 8, 1995, the circuit court issued an Order Setting Hearing in this case for November 15, 1995 (R. 15-16). The circuit court's Order Setting Hearing also directed the State Attorney as follows:

> As to documents where exemptions are being claimed, the State Attorney should be prepared to submit those for in camera inspection at the time of the hearing.
>
> * * *
>
> As to the in camera inspections the following rules shall apply:

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[3] Pursuant § 119.07(2)(a) Fla. Stat. (1993), "If the person who has custody of a public record contends that the record or part of it is exempt from inspection and examination, <u>he shall state the basis of the exemption which he contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute</u>, and if requested by the person seeking the right under this subsection to inspect, examine or copy the record, he shall state in writing and with particularity the reasons for his conclusion that the record is exempt." (emphasis added).

> Each document or set of documents of the same nature shall have a copy of the appropriate exemptions sought with a written citation attached as well as a proposed redacted copy. The claim for exemption shall be on a full sheet of paper suitable for surviving transmission to appellate courts. Copies of all confidentiality agreements shall be provided. The documents shall be separated into marked files according to the exemptions sought.

(R. 15-16).

Pursuant to the trial court's Order Setting Hearing, a hearing in this case occurred on November 15, 1995 (T. 1-63). At the beginning of the hearing, the trial court announced that it had already reviewed in camera the State Attorney's file (T. 2-4). Further, the trial court stated that the in camera materials appeared to be "work product" upon a preliminary examination (R. 58). The trial court also noted that the Appellee failed to comply with the trial court's order setting hearing; specifically, Appellee failed to attach written citations of proposed exemptions or a proposed redacted copy (T. 4). As a result, the trial court made the following ruling with respect to the State's lack of written citations:

> I pretty well understand what sections [Chapter 119 exemptions] the State is talking about in most instances. In some instances I may not, and if it's not there I'll guess and if I guess wrong for the State, too bad.

(T. 4)(emphasis added). Appellant also objected to the Appellee's failure to provide written statutory citations of exemptions as required by Chapter 119.07(2)(a) (T. 25). The trial court overruled Appellant's objection (T. 25-26).

At the November 15, 1995, hearing the Appellee stipulated to receiving plaintiff's requests and the trial court found that Mr. Atkins had made valid requests for records under Chapter 119 of the Florida Statutes (T. 6).[4] Appellee's Answer to Appellant's complaint also admitted "Appellee was properly served" with a request under Chapter 119 of the Florida Statutes (R. 24).

During the hearing, Appellant attempted to call Assistant State Attorney Hardy Pickard as a witness to determine whether the State Attorney's Office had conducted an adequate search for records and, in fact, disclosed all records and/or submitted the undisclosed materials to the trial court for <u>in camera</u> review (T. 13, 17).[5] Mr. Pickard represented the state at the hearing and objected to being called as a witness, despite the fact that he had personally culled through the requested records and deleted numerous allegedly exempt documents (R. 23, T. 17). The trial court sustained the Appellee's objection and ruled that Mr.

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[4] Mr. Atkins' three public records requests to the State Attorney were admitted into evidence (R. 17-22, T. 6).

[5] Because of the nature of public records litigation, the Plaintiff cannot know if all records have been disclosed as the Defendant is the custodian of the records sought. The Plaintiff can only guess what records are missing, e.g. there were no handwritten notes in the state attorney's file in this case. Although the state's exemptions described some handwritten notes, items appeared to be missing. For example, item number 9 of the State's exemption letter (R. 23) listed handwritten notes "summarizing [Mr. Pickard's] office interviews with" only four (4) witnesses. Because there were dozens of witnesses in this case and the witnesses listed were not even the state's most critical witnesses, Plaintiff doubted whether all documents had been searched for and/or disclosed. However, the trial court's ruling prohibiting Plaintiff from calling Mr. Pickard as a witness forced Plaintiff to rely on Mr. Pickard's unexamined assertions that all records had been provided.

Pickard could not be called as a witness (T. 18). Thereafter, Mr. Pickard asserted that all records had been provided (T. 19-22). Appellant was not given an opportunity to cross examine Mr. Pickard.

The trial court heard argument regarding the two exemptions claimed by the State Attorney's Office: work product,§ 119.07(3)(n) Fla. Stat. (Supp. 1994); and, non-public records. Appellant argued that the work product exemption had terminated when Mr. Atkins' sentence and conviction had become final (T. 27-29). Further, because Mr. Atkins had no pending Fla. R. Crim. P. 3.850 motion or any other litigation, the State Attorney cannot assert a more limited work product exemption for current litigation files. The state acknowledged that there was no pending litigation, but argued that litigation was imminent (T. 29-30). Further, the state asserted that the documents were not "public records" (T. 30-33). Appellant then responded that the materials, although appearing to be trial preparation materials, could still be considered "public records (T. 33-37). Further, Appellant asserted the state had an obligation to sift through all of the withheld documents and disclose any segregable portions (R. 37, 45).

The trial court ruled that for the purposes of the work product exemption in Chapter 119 litigation,

> In some cases when the sentence is imposed by the Court and the time for appeal expires, that's it. In a death case, and death is different, can it really be said that the litigation is concluded at any time until either the governor's warrant is executed or

> the sentence is commuted something else? It's not been my observation that these matters are concluded in any way. The sentence of this statute is concluded by litigation or the adversarial administrative proceedings.
>
> Now, you can say, oh, yes, well the last sentence was entered in 1982 but is this proceeding --is the adversarial proceeding concluded and I suggest obviously it's not.

(T. 40-46). Appellant responded that the Court's ruling violated Mr. Atkins right to Equal Protection:

> If he's going to be executed then there is no way for him ever to get access to these material[s], whereas if someone who was convicted of a homicide who got a life sentence would have access to the materials. Access to the materials for Atkins when he's dead is not -- doesn't make any sense and that is treating him differently than it would be treating another citizen.

(T. 42).

Appellant objected once again to the Appellee's exemptions, to the withholding of any files contrary to Chapter 119 Florida Statutes (T. 46).

At the conclusion of the hearing, the Judge ordered the Appellee to provide Appellant with an Answer to the Complaint before 3:00 p.m. on Friday, November 17, 1995 (T. 55-56). The state complied (R. 24-27). In addition, the trial court ordered that the in camera materials would be sealed following the court's inspection (T. 2-3).[6] Finally, the trial court made a

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[6] Significantly, the State Attorney provided the trial court with original documents and did not retain any copies. Nor did the State request any copies of the in camera materials even though the trial court warned the State that these materials would be sealed and thus unavailable to the State (T. 57-58).

finding that Mr. Atkins was indigent for purposes of appeal (R. 54, T. 62).

Following the hearing, the trial court reviewed the withheld documents in camera and issued an Order Resulting from In Camera Inspection Of State Attorney Records on November 16, 1995 (R. 28-34). The State Attorney's itemized exemption letter was attached to the Order and the court referred to this letter in its analysis (R. 28-34). Notably, the trial court's Order did not find that these materials were "not public records." Instead, the trial court's Order sustained the Appellee's claim of exemption to almost all of the withheld items based on its finding that these materials were exempt under § 119.07(3)(n) Florida Statutes' "work product" exemption (R. 28-31).[7] It is this aspect of the trial court's Order which is the subject of this appeal.

On November 17, 1995, the day after the trial court entered it's Order, the Appellee furnished to Appellant an answer to Appellant's Complaint (See, Appellee's Response to Complaint for Disclosure of Public Records, R. 24-27).[8]

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[7] Besides the "work product" exemption, the only other exemption found by the trial court applied to item number 3, "Mr. Atkins' RAP Sheet" pursuant to § 119.07(3)(a) Fla. Stat. (R. 23). The State's objection to item number 4 was withdrawn. Also, the trial court released two of three pages from item number 11 because they were "inter-office" directives.

[8] Appellee admits that the "Defendant was properly served with a request for disclosure of public records pursuant to Chapter 119 of the Florida Statutes" (R. 24).

A timely notice of appeal was thereafter filed and this appeal ensues (R. 45-52).

SUMMARY OF ARGUMENT

THE TRIAL COURT ERRED IN FINDING THE STATE ATTORNEY'S FILES AND NOTES WERE EXEMPT UNDER THE LIMITED WORK PRODUCT EXEMPTION, § 119.07(3)(N), FLA. STAT., BECAUSE THE TRIAL COURT ERRONEOUSLY HELD THAT "THE CONCLUSION OF LITIGATION" HAD NOT BEEN REACHED BY MR. ATKINS, DESPITE THE FACT THAT HIS DEATH SENTENCE HAD BECOME FINAL AND HE HAD NO PENDING LITIGATION IN STATE OR FEDERAL COURT. FURTHER, THE STATE DID NOT PROVE THE RECORDS COULD BE WITHHELD AS NON-PUBLIC RECORDS.

This Court has consistently held that a capital defendant is entitled to Chapter 119 disclosure. "It is well settled that capital post conviction defendants are entitled to chapter 119 records disclosure." Muehleman v. State, 623 So. 2d 480 (Fla. 1993), citing, Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Kokal v. State, 562 So.2d 324 (Fla. 1990); Provenzano v. State, 561 So.2d 541 (Fla. 1990).

This Court has further held that if there is a dispute as to documents claimed to be exempt the circuit court must hold an "evidentiary hearing to determine whether the defendant was entitled to the records." Muehleman v. State.

In this case, the trial court erroneously held that the State Attorney was entitled to a "work product" exemption under § 119.07(3)(n) of the Florida Statutes. The "work product" exemption under Chapter 119 is only a temporary exemption and terminates at the "conclusion of litigation." For the purposes of a capital defendant sentenced to death, the "conclusion of litigation" occurs when the conviction and sentence become final on direct appeal. Although this Court has recognized a limited

work product exemption for State Attorney files related to "current litigation," this limited exemption could not be applied to Mr. Atkins because he did not have a Fla. R. Crim. P. 3.850 motion pending, or any other litigation pending in state or federal court at the time of his request or the trial court's in camera review. Even if Mr. Atkins did have a pending Rule 3.850 motion, the files at issue in this cannot be considered "work product" because the files do not relate to "current litigation."

In addition, this Court cannot find the documents at issue to be non-public records. First, the trial court's Order only relied upon the work product exemption. Second, the State failed to meet its burden of proving this exemption applies. The State failed to prove these materials were only preliminary, uncirculated notes and/or point to any final agency document which incorporated these materials. Third, the trial court did not allow the Appellant to inquire into the facts and circumstances surrounding this exemption. Thus, the record in this case is utterly devoid of the requisite factual predicates which would have allowed the trial court or this Court to find the withheld documents are not public records.

On these facts, to uphold the trial court's Order would deny Mr. Atkins equal protection of the laws, due process, access to courts, effective assistance of post conviction counsel, and the ability to inspect these files guaranteed to him by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution, the

Public Records Laws of the State of Florida, and this Court's well established precedents favoring broad disclosure of public records and firmly established principle that capital defendant's are entitled to public records under Chapter 119.

This Court should order the immediate release of the *in camera* materials to Appellant.

ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THE STATE ATTORNEY'S FILES AND NOTES WERE EXEMPT UNDER THE LIMITED WORK PRODUCT EXEMPTION, § 119.07(3)(n), FLA. STAT., BECAUSE THE TRIAL COURT ERRONEOUSLY HELD THAT "THE CONCLUSION OF LITIGATION" HAD NOT BEEN REACHED BY MR. ATKINS, DESPITE THE FACT THAT HIS DEATH SENTENCE HAD BECOME FINAL AND HE HAD NO PENDING LITIGATION IN STATE OR FEDERAL COURT.

The Court's Order Resulting from In Camera Inspection of State Attorney Records dated November 16, 1995, finding that the documents provided by the State Attorney for in camera inspection are exempt as work product, is erroneous as a matter of law and is a determination made absent the necessary factual basis. The Court's reliance on Ch. 119.07(3)(n)(Supp. 1994) is entirely misplaced. Any analysis of a Ch. 119 claim must begin with the definition of public records:

> "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

§ 119.011(1)(1993). All public records, not exempt, must be disclosed. §§ 119.07(1)(a) & (3). The so-called "work product" exemption at issue here is found at § 119.07(3)(n)(Supp. 1994):

> A public record which was prepared by an agency attorney . . . or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal

> litigation or imminent adversarial administrative proceedings, is exempt from the provisions of subsection (1) until the conclusion of the litigation or adversarial administrative proceedings.

For purposes of Chapter 119, work product is, by definition, a "temporary exemption." City of North Miami v. Miami Herald Pub. Co., 468 So. 2d 218, 219 (Fla. 1985); City of Orlando v. Desjardins, 493 So. 2d 1027, 1028, 1029 (Fla. 1986). The exemption is valid only during the pendency of the litigation. Id.

A key consideration in determining the validity of a claimed exemption under § 119.07(3)(n)(Supp. 1994) is what the Legislature meant by "the conclusion of the litigation." For purposes of the "work product" exemption contained in § 119.07(3)(n)(Supp. 1994), "conclusion of litigation" has the same meaning as does the concept in § 119.07(3)(d) exempting active criminal intelligence information and active criminal investigative information. State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990)("The rationale set forth above with respect to section 119.07(3)(d) appears equally applicable to section 119.07(3)(o).")[9] The rationale referred to in Kokal regarding what is meant by the "conclusion of litigation" originated in Tribune Company v. Public Records, 493 So. 2d 480, review denied, 503 So. 2d 327 (Fla. 1987). At issue in Tribune Company were the records of the Pasco County Sheriff's Office regarding death-

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[9] When the Kokal opinion was issued in 1990, the "work product" exemption was found in § 119.07(3)(o), whereas in 1995 the same exemption is found in § 119.07(3)(n).

sentenced individuals William Riley Jent and Ernest Lee Miller. While Jent and Miller had post-conviction proceedings pending in state and federal court, Jent, Miller, and several newspapers sought access to the sheriff's records regarding Jent and Miller. The lower court found the records exempt under the "active criminal investigative information" exemption to Chapter 119. The appeals court reversed, finding that the term "pending appeals" in the active criminal investigative information exemption:

> [D]oes not include post-conviction proceedings such as petitions for habeas corpus or appeals thereof, petitions for write of error coram nobis, petitions for certiorari, motions pursuant to Florida Rule of Criminal Procedure 3.850, or any other proceedings other than the first appeal of right.

Tribune Company, 493 So. 2d at 484. "If the legislature had meant to include post-conviction relief proceedings as a basis for an exemption to the Public Records Act it surely would have said so." Id. at 483. The holding of Tribune Company is that, for purposes of public records exemptions, litigation is concluded when the trial and direct appeal are concluded. Id. at 484.

In State v. Kokal, 562 So. 2d 324 (Fla. 1990), the issue was a capital post-conviction litigant's entitlement to the state attorney's file to pursue post-conviction claims. The State contended the files were "work product," and thus exempt under § 119.07(3)(n). The Florida Supreme Court adopted the Tribune Company definition of when an investigation is active and applied

it to the "work product" exemption's term "conclusion of the litigation."[10]

> [W]e further hold that 'the conclusion of litigation' with respect to a criminal conviction and sentence occurs when that conviction and sentence have become final . . . In summary, we hold that portion of the state attorney's files which fall within the provisions of the Public Records Act are not exempt from disclosure because Kokal's conviction and sentence have become final.

Kokal, 562. So. 2d at 327. See also Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992), receded from on other grounds in, Hoffman v. State, 613 So. 2d 405 (Fla. 1992). The Court held Kokal was entitled to the state attorney's file to pursue his post-conviction claims, even though Kokal had a pending 3.850 motion.

The situation in Kokal is identical to the situation of Mr. Atkins, except that at the time of Mr. Atkins Chapter 119 litigation he did not have a pending Rule 3.850 motion. Like Kokal, Mr. Atkins is a capital post-conviction litigant. Like Kokal, Mr. Atkins seeks access to the state attorney's file regarding his conviction and sentence. Like Kokal, the state attorney has refused to turn over part of his files claimed to be "work product." The holding of Kokal is clear: the state attorney cannot claim the "work product" exemption to withhold the State's file regarding a death-sentenced person once that person's conviction and sentence have become final. For this reason, the Court's order of November 16, 1995, denying Mr. Atkins access to certain of the state attorney's files because

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[10] § 119.07(3)(n)(Supp. 1994).

the files contain work product of the State Attorney's office and are exempt under the provisions of FS 119.07(3)n, is clearly erroneous.

Kokal does provide that "[T]he state attorney was not required to disclose his current file relating to the motion for post conviction relief because there is ongoing litigation with respect to those documents." 562 So. 2d at 327. See also Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993). However, the filing of a 3.850 motion does not breathe life back into the work product exemption that expired when the conviction and appeal became final. Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990). Only those documents relating to the currently pending post-conviction motion itself are exempt, not the entire state attorney's file. Kokal; Walton. To hold that the filing of a Rule 3.850 motion regenerates the work product exemption "would make disclosure depend on the vagaries of chance, a result so capricious and illogical as to be absurd. The legislature cannot be deemed to have intended an absurd result where a reasonable interpretation is available." Tribune Company, 493 So. 2d at 483. Otherwise, a death-sentenced person would have a one-year window of opportunity after his conviction and sentence become final but before he must file his Rule 3.850 motion in which to demand the state attorney's file pursuant to Chapter 119, during which time the state attorney would have no claim of work product. Such an interpretation "at best make access to public information unpredictable, and at worst, forecloses it

altogether." Tribune Company at 483. It is apparent that the Legislature intended for the state attorney to provide the entire trial file, and to withhold only those records relating to currently pending motions for post-conviction relief, from a litigant involved in post-conviction proceedings.

In this case, Mr. Atkins had no pending 3.850 motion or any other litigation in state or federal court at the time he filed his complaint for public records. Therefore, the work product exemption could not be claimed as a matter of law.

It is predictable what the State's response will be here: because the post-conviction motion raises issues relating to the trial, the trial file does relate to the motion for post-conviction relief. Such an interpretation of "conclusion of the litigation" is not what is meant by § 119.07(3)(n). Five years have passed since Kokal held that the state attorney's file is non-exempt after the conviction and sentence become final. If the Legislature wished to extend the definition of "conclusion of the litigation," it could have done so. It has not.[11] See

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[11] The Legislature has extended the definition of "conclusion of the litigation" in the work product exemption for the office of the Attorney General. In 1995 Fla. Laws ch. 95-398, § 13, the Legislature amended Chapter 119 and the work product exemption to read:

> For the purposes of capital collateral litigation as set forth in s. 27.001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

The Legislature has not chosen to similarly enlarge the exemption for the state attorney's files.

Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775, 780 n.1 (Fla. 4th DCA 1985), review denied, 488 So. 2d 67 (Fla. 1986). Thus, the State may withhold only records relating to a currently pending post-conviction motion.

A review of the files the State has withheld in this case reveals that none of the withheld files relates to "current litigation." In its exemption letter, the State Attorney identified and described the following materials as exempt under Chapter 119 as work product:

1. Legal research [copies of case law];
2. Notes for my argument to the Governor and cabinet at clemency hearing;
3. Atkins "RAP" sheet;
4. State's copy of proposed jury instructions;[12]
5. Handwritten notes by myself and Jerry Hill re: prior request by CCR to have our office recused from the case;
6. Handwritten notes I made summarizing certain portions of the trial testimony prepared to assist me in filing a response to previous 3.850 motion;
7. Notes concerning voir dire of individual jurors;
8. Handwritten notes listing items i intended to introduce in evidence, order of witnesses, outline of questions to be asked of witnesses, outline of questions to be asked defendant, notes on testimony of defense witnesses, notes on testimony during penalty phase and outline of closing argument;
9. Handwritten notes: summarizing my office interviews with witnesses William Gary Powell, James Dixon, Samuel Hazell, Kevin Marler;
10. Notes of testimony given at suppression hearing;

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12. This item has since been disclosed by the Defendant.

11. Handwritten investigative requests to a State Attorney's Office Investigator re: work I needed him to do on the case;

12. Handwritten notes re: phone calls I made to various people concerning the case.

With the exception of items number 5 and 6, all of these items clearly relate to the trial. As such, they do not qualify as work product. Kokal, Walton. Further, items 5 and 6 relate to previous post conviction motions which have already become final. Items 5 and 6 do not relate to "current litigation." Kokal. Finally, because Appellant did not have any pending litigation at the time of his complaint and when the trial court conducted its in camera review, these items did not qualify under Chapter 119's temporary work product exemption.[13]

Therefore, this Court should vacate the trial court's Order Resulting from In Camera Inspection of State Attorney Records and order the immediate release of withheld documents. Under Kokal and Walton, the work product exemption cannot be validly asserted because Mr. Atkins has reached the "conclusion of litigation."

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[13] Although Mr. Atkins recently filed a 3.850 motion on November 20, 1995, the State Attorney files which have been sealed should not be considered exempt under "work product." These documents were all clearly created prior to Mr. Atkins' current filing and thus cannot be considered related to his "current" warrant litigation. Kokal. Further, the State Attorney believed Mr. Atkins would be filing a 3.850 due to his imminent execution (T. 29-30), yet he submitted original documents for in camera review without retaining a copy, knowing they would be sealed and he not would have access to them. This fact evinces the State Attorney's belief that these withheld materials would not be related to the current litigation.

B. THE STATE FAILED TO PROPERLY ASSERT, PRESERVE, OR OTHERWISE PROVE THAT ANY WITHHELD DOCUMENTS WERE PROPERLY WITHHELD AS NON-PUBLIC RECORDS.

The trial court did not base its order on a finding that the records at issue were not public records under the definition of § 119.011(1). Therefore, this Court should not consider whether the in camera materials would be exempt as non-public records.

Further, the State Attorney waived any claim that the withheld materials were exempt as non-public records. The State Attorney had the burden of properly asserting and proving the existence of a valid exemption. § 119.07(2)(a) Fla. Stat. (1993)(requiring written claim of exemption with proper statutory citation); See also Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128 (Fla. 1st DCA 1985)(an agency claiming an exemption from disclosure bears the burden of proving the right to an exemption); Bludworth v. Palm Beach Newspapers, Inc., 476 775 (Fla. 4th DCA 1985); Tribune Company v. Public Records, 493 So. 2d 480 (Fla. 2nd DCA 1986)(doubt as to the applicability of the an exemption should be resolved in favor of disclosure rather than secrecy). The State failed to properly assert or prove that the withheld materials were non-public records.

In its Order Setting Hearing, the trial court directed the State Attorney as follows:

> As to documents where exemptions are being claimed, the State Attorney should be prepared to submit those for in camera inspection at the time of the hearing.
>
> * * *

> As to the in camera inspections the following rules shall apply:
>
> Each document or set of documents of the same nature shall have a copy of the appropriate exemptions sought with a written citation attached as well as a proposed redacted copy. The claim for exemption shall be on a full sheet of paper suitable for surviving transmission to appellate courts. Copies of all confidentiality agreements shall be provided. The documents shall be separated into marked files according to the exemptions sought.

(T. 5-6).[14] The State Attorney failed to comply with the trial court's specific directions and supply the court with a "written citation." As a result, the trial court made the following ruling with respect to the State's lack of written citations:

> I pretty well understand what sections [Chapter 119 exemptions] the State is talking about in most instances. In some instances I may not, and <u>if it's not there I'll guess and if I guess wrong for the State, too bad</u>.

(T. 3). Because the State Attorney failed to properly assert and preserve its claim that the withheld materials were non-public records pursuant to Chapter 119.07(2)(a) and the trial court's Order Setting Hearing, the Appellee waived this basis for an exemption.

Nonetheless, an examination of the records claimed to be exempt by the State Attorney establishes that the records are public records, and must be disclosed to Mr. Atkins.

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[14] Chapter 119.07(2)(a) also requires a written claim of exemption with statutory citations which the Defendant failed to provide.

In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court discussed the definition of "public records." The Court held public records are "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." Id. at 640. The Court went on to identify materials that are not public records:

> To be contrasted with "public records" are materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation. Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of the agency's later, formal public product would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

Id. All such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted by the Legislature. Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979). Notes, preliminary drafts, working drafts, or any document prepared in connection with the official business of an agency that is to perpetuate, communicate, or formalize knowledge regardless of whether it is in final form or the ultimate product of an agency, are subject to disclosure under

Chapter 119. Shevin, 379 So. 2d 633; Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990); Hillsborough Co. Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983); State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1977, cert. denied, 360 So. 2d 1247 (Fla. 1978); Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976); and Copeland v. Cartwright, 38 Fla. Supp. 6 (Fla. 17th Cir. Ct. 1972), affirmed, 282 So. 2d 45 (Fla. 4th DCA 1973); Op. Att'y Gen. Fla. 85-79 (1985). That a document is considered a personal note is immaterial. Notes that are prepared for filing or are otherwise intended as evidence of knowledge obtained in the transaction of agency business are public records. Florida Sugar Cane League v. Florida Department of Environmental Regulation, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992). Furthermore, "interoffice and intra-office memoranda may constitute public records even though encompassing trial preparation materials." Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st DCA 1988). See Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984); Hillsborough County Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983).

Kokal addressed the distinction between records that are public and records that are not. The documents at issue in Kokal were a list of items of evidence that may be needed for trial, a list of questions the attorney planned to ask a witness, a proposed trial outline, handwritten notes regarding a meeting

with the other party's attorneys, and notes "in rough form" regarding the deposition of an anticipated witness. The Court held:

> These documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. They seem to be simply preliminary guides intended to aid the attorneys when they later formalized the knowledge. We cannot imagine that the Legislature, in enacting the Public Records Act, intended to include within the term "public records" this type of material.

Kokal, 562 So. 2d at 327 (emphasis in original). In Mr. Atkins' case, the State Attorney's office improperly asserted that all twelve (12) items it withheld were non-public records:

1. Legal research [copies of case law];

2. Notes for my argument to the Governor and cabinet at clemency hearing;

3. Atkins "RAP" sheet;

4. State's copy of proposed jury instructions;[15]

5. Handwritten notes by myself and Jerry Hill re: prior request by CCR to have our office recused from the case;

6. Handwritten notes I made summarizing certain portions of the trial testimony prepared to assist me in filing a response to previous 3.850 motion;

7. Notes concerning voir dire of individual jurors;

8. Handwritten notes listing items I intended to introduce in evidence, order of witnesses, outline of questions to be asked of witnesses, outline of questions to be asked defendant, notes on testimony of defense witnesses, notes on testimony during penalty phase and outline of closing argument;

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[15] This item has since been disclosed by the Defendant.

9. Handwritten notes: summarizing my office interviews with witnesses William Gary Powell, James Dixon, Samuel Hazell, Kevin Marler;

10. Notes of testimony given at suppression hearing;

11. Handwritten investigative requests to a State Attorney's Office Investigator re: work I needed him to do on the case;

12. Handwritten notes re: phone calls I made to various people concerning the case.

(R. 23, State Attorney's itemized inventory of withheld records). The State provided these records to the court for an in camera inspection. After such inspection, the court concluded the records were exempt because they contain work product. As discussed above, the court's conclusion was erroneous. Kokal, Tribune Company. The records at issue are not work product, and they are public records.

Items number 2, and 5-12 all contain "notes," mostly handwritten.[16] Nonetheless, the essential requirements of Chapter 119 apply. If the "prosecutor's notes to himself" are intended as "final evidence of the knowledge to be recorded," Kokal, at 327, then the notes are public records. If the "prosecutor's notes to himself" "supply the final evidence of knowledge obtained in connection with the transaction of official

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[16] Item number 1 "Legal research (copies of case law)", would clearly appear to be public records. That the State Attorney wrote notes on the margins does not magically transform them into non-public records or work product for the reasons discussed elsewhere in this brief. Finally, to the extent these cases contain exempt commentary by the State Attorney, that commentary should be excised and/or redacted and the remainder of the public record disclosed to Plaintiff. § 119.07(2)(a) (segregable non-exempt portions must be disclosed), Fla. Stat. (1993).

business," id., then the notes are public records. A record "merely prepared for filing," is nonetheless a public record because it "suppl[lies] the final evidence of knowledge obtained in connection with the transaction of official business." Orange County v. Florida Land Co., 450 So. 2d 341, 343 (Fla. 5th DCA 1984)(citing Shevin). The notes at issues here may fall into this category; even if never circulated as inter-office memoranda, the notes at issue were made part of the state attorney's file on Mr. Atkins' case. Further, the inclusion of these notes into the State Attorney's files evinces the intent of the attorney preparing them to perpetuate their existence.

If, on the other hand, the notes are "mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded," or "rough drafts," or "notes to be used in preparing some other documentary material," then the prosecutor's notes are not public records. Shevin; Kokal. However, the determination of whether a record is a public record is a factual determination that can be made only when the party claiming the exemption provides the court with the document claimed to be merely preliminary, and thus not a public record, and the document supplying the final evidence of the knowledge contained in the notes or draft, thus a public record. Only by comparing the draft/notes with final version can the court make the determination that the draft or notes are not public records. In this case, the State did not provide the court with the final version of these notes in order to make the

comparison and determine whether the notes were indeed simply "preliminary guides intended to aid the attorneys when they later formalized the knowledge." Shevin; Kokal. Likewise, the court did not permit Mr. Atkins to call witnesses to establish the factual basis for his claim that the withheld records were public records. Without such final document(s) or at least testimony regarding such document(s), the court is, by definition, unable to make the determination of whether the notes are public records.

In this case, if the "prosecutor's notes to himself" were never formalized into a final version, then the notes themselves are "the final evidence of knowledge obtained in connection with the transaction of official business." Shevin at 640; Kokal at 327. In Shevin, the Court held that the party's handwritten notes made during or shortly after interviews were not public records because the party later formalized the knowledge gained during the interview. Shevin at 641. Here, if the State never formalized the notes into a final form, the notes themselves are the final form, and are public records. If the notes were formalized into some final document, the State must provide that document to the court so that it may conduct an adequate in camera inspection to determine whether the notes claimed exempt are public records.

Further, this Court should reject any contention by the State Attorney that the pleading and evidence it presented in court constitutes the formal agency statement on the subject

matter and all else is merely preliminary or preparatory and, therefore, not a public record. Hillsborough County Aviation Authority v. Azzarelli Construction Company, 436 So. 2d 153 (Fla. 2d DCA 1983); **See also** Bay County School Board v. Public Employees Relations Commission, 382 So. 2d 747 (Fla. 1st DCA 1980)(concluding that school board budget work sheets were materials prepared in connection with official agency business and tended to perpetuate, communicate, or formalize knowledge of some type and thus were public records); Op. Att'y Gen. Fla. 85-79 (1985)(concluding that interoffice memorandum, correspondence, inspection reports, and other documents maintained by county public health units are public records).

The identical analysis should be used in this case to determine whether the remaining records claimed to be exempt by the State are public records. In order to determine whether the State Attorney's notes are public records, the court must be provided with both the notes and the final document that formalized the knowledge contained in the notes. At an evidentiary hearing, the court may take testimony regarding the documents. See Walton v. Dugger, 634 So. 2d 1059, 1063 (Fla. 1993). Thus, if this Court finds that the State Attorney properly asserted and preserved its claim that the withheld materials are not public records, the court has a two-step analysis to conduct: is the record a public record, and if so, is it part of the State's current file relating to the motion for post-conviction relief? This determination may be made after an

evidentiary hearing. Walton v. Dugger, 634 So. 2d at 1059. If the State provides both the draft and final form of the record, and testimony is not needed to establish that a document was later formalized, then the Court may conduct an in camera inspection of both documents to determine whether the draft or notes are public records. Kokal, 562 So. 2d at 327; Mendyk, 592 So. 2d at 1081; Walton, 634 So. 2d at 1062; Shevin, 379 So. 2d at 640-41; Fritz v. Norflor Construction Co., 386 So. 2d 899, 901 (Fla. 5th DCA 1980); Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487, 491 (Fla. 2d DCA 1990); Tribune Company, 493 So. 2d at 484. Likewise, if the State claims a document is work product relating to current post-conviction litigation and not the trial and appeal, the State must provide that record for an in camera inspection. Walton, 634 So. 2d at 1062; Lopez v. Singletary, 634 So. 2d 1054, 1057-58 (Fla. 1993); Tribune Company, 493 So. 2d at 484. If the record is a public record, and does not relate to a current motion for post-conviction relief, the record must be disclosed.

The burden of establishing a right to withhold a record falls on the agency. Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985). At this time, the State Attorney has failed to prove the existence of a work product exemption or that the withheld materials are non-public records. Simply stated, the record in this case is completely devoid of the factual predicates which would permit this Court or the trial court to withhold these materials as work

product or as non-public records. Nor was the Appellant given the opportunity to call witnesses to probe the validity of the State's claimed exemptions.

Therefore, this Court should vacate the trial court's Order Resulting from the In Camera Inspection of State Attorney Records and order the immediate release of withheld documents because the work product exemption does not apply, Kokal, Walton, and the State failed to properly assert, preserve, and/or prove that the withheld records are non-public records. Alternatively, this Court should remand this case for an evidentiary hearing in this matter in order to allow the Appellant an opportunity to investigate the factual predicates necessary to support the exemptions claimed by the Appellee.

C. THE STATE ATTORNEY AND TRIAL COURT FAILED TO DISCLOSE SEGREGABLE PORTIONS OF WITHHELD MATERIALS PURSUANT TO § 119.07(2)(a) OF THE FLORIDA STATUTES.

Pursuant to § 119.07(2)(a), where a public record contains some information which is exempt from disclosure, the custodian of that document is required to delete or excise only that portion or portions of the record for which an exemption is asserted and to provide the remainder of the record for examination. **See** Op. Att'y Gen. Fla. 91-74 (1991)(stating that if a crime or incident report contains material which qualifies as active criminal investigative information, the exempt information may be deleted from the report, but the remainder of the report must be disclosed).

In this case, the State Attorney withheld numerous records and failed to sift through the withheld materials and disclose non-exempt material. Except for the two-page interoffice memorandum between an attorney and investigator, the Appellant has not received any handwritten notes from the State Attorney's office.[17] Remarkably, the State Attorney did not disclose one scintilla of information from his notes. Such a result suggests the State Attorney failed to conduct the segregability analysis and disclosure required under § 119.07(2)(a) of the Florida Statutes.

The significance of this failure cannot be overstated. For example, in item number 9, the State Attorney claimed a work product exemption for:

> Handwritten notes re: summarizing my office interviews with witnesses William Gary Powell, James Dixon, Samuel Hazell, Kevin Marler.

(R. 23). Surely, the State Attorney made notes concerning his personal knowledge of these witnesses. Any personal knowledge of these witnesses recorded by the interviewing State Attorney should therefore be disclosed. They represent facts known by witnesses, not impressions, conclusions, and opinions of an attorney. To the extent these facts are couched in commentary by

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[17] The two-page memorandum was released to Appellant by the trial court after it's <u>in camera</u> review (R. 38-44). Inexplicably, the trial court released memorandum from the attorney to the investigator, but failed to release memorandum from the investigator to the attorney. Both memorandum are equally intra-office in nature and public records subject to disclosure.

an attorney, that commentary should be excised and the facts disclosed.

The trial court's order does not mention whether that court considered whether the State Attorney disclosed segregable portions.

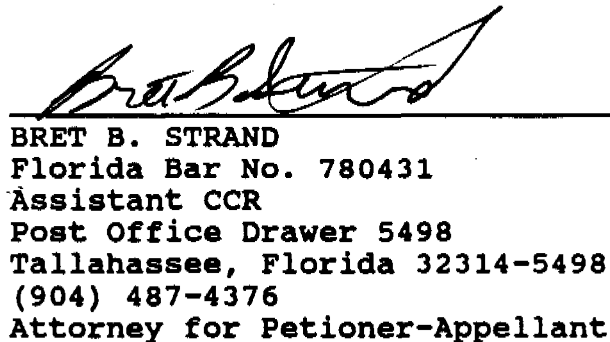
Therefore, this Court should order the immediate release of withheld materials. Alternatively, this Court should conduct its own <u>in camera</u> inspection of the withheld materials sealed in the record (R. 35) and release all segregable portions; or, in the alternative, this Court should remand this case with instruction that the State Attorney disclose segregable portions, after which, the trial court should conduct another <u>in camera</u> review.

CONCLUSION

The trial court's Order finding a work product exemption applicable to the State's withheld materials was erroneous as a matter of law and had no basis in fact. This Court should order the immediate release of all sealed documents. Alternatively, (1) this Court should conduct an independent <u>in camera</u> review to determine the extent to which the limited work product exemption applies to the withheld materials, whether any segregable portions have not been disclosed, and finally, this Court should order the release of all otherwise non-exempt and segregable materials; or, (2) this Court should remand this case to the trial court with instructions that the trial court conduct an immediate evidentiary hearing for further factual development. Further, if this Court remands this case for an evidentiary

hearing, this Court should instruct the trial court to allow Appellant the opportunity to examine witnesses from the state attorney's office possessing personal knowledge relating to the adequacy of the State's search for and production of documents, including examination of assistant state attorney Hardy Pickard.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by facsimile transmission and by Federal Express, to all counsel of record on November 22, 1995.



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