IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

GERALD DELANE MURRAY
Petitioner,
v.

STATE OF FLORIDA
Respondent(s).

A Writ of Mandamus and/or Prohibition Filed Pursuant Rule 9.100(f) of the Florida Rules of Appellate Procedure

Case No.: _____

Lower Tribunal No: 1992-CF-3708
4th Judicial Circuit, Duval County Florida

INITIAL BRIEF OF PETITIONER

THE SICHTA FIRM, LLC

_____
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PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

Petitioner, by and through his undersigned counsel, respectfully petitions the Court to Grant a Writ of Mandamus and/or Prohibition pursuant to Rule 9.100 of Florida Rules of Appellate Procedure, to require the state attorney's office to disclose its sealed records in this case, and to stay Mr. Murray's post-conviction proceedings until such disclosure is made. In support thereof Mr. Murray states as follows:

BASIS FOR INVOKING JURISDICTION

The Florida Supreme Court has subject matter jurisdiction to rule on the merits of this Petition pursuant to Florida Rules of Appellate Procedure 9.030(b)(2)(b). Additionally, this Court has authority to review an interlocutory order(s) in capital post-conviction proceedings pursuant to Fla. Const. Art. V § 3(b)(1); Trepal v. State, 754 So. 2d 702, 705 (Fla. 2000).

STANDARD OF REVIEW

One seeking a writ of mandamus must show a clear legal right to the performance of a clear legal duty by a public officer, and that he has no other available legal remedies. See Hatten v. State, 561 So. 2d 562, 563 (Fla. 1990); Milanick v. Town of Beverly Beach, 820 So. 2d 317 (Fla. 5th DCA 2001). When a petitioner proceeds in mandamus, the date of any order below is academic. Board

of Trustees – City Supplemental Pension Fund for Firemen and Policemen in City of Miami v. Mendelson, 601 So. 2d 594, 596 (Fla. 3rd DCA 1992).

STATEMENT REGARDING ORAL ARGUMENT

Petitioner Gerald Murray respectfully requests that this Court set this Petition for oral argument. Petitioner submits that the law authorizing this Court to requiring the state to disclose certain documents in post-conviction to the defense is directly on point with his case, but in the event this Court would like any clarification on the legal issues presented, he would request oral argument.

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PRELIMINARY STATEMENT

This Petition is filed on behalf of Petitioner, Gerald Delane Murray, seeking to compel the production of documents from the Florida Fourth Judicial Circuit Office of the State Attorney that directly relate to his 3.851 claims involving ineffective assistance of counsel, Brady and Giglio violations, and newly discovered evidence.

Petitioner shall be referred to as "Petitioner" or "Murray," the trial judge shall be referred to as "the trial court," and the State of Florida will be referred to as, "the State". Murray's post-conviction counsel will be referred to as "the undersigned."

References to the Appendix will be listed as (__ App __.) with the first number listed denoting the appropriate appendix, and the second indicating the page number where available.

STATEMENT OF THE CASE AND FACTS

On February 11, 2010, the trial court appointed undersigned to represent Mr. Murray in his post-conviction proceedings. Murray has been tried four times for the instant case. Murray v. State, 3 So. 3d 1108 (Fla. 2009). Two of those trials resulted in convictions and death sentences that were subsequently reversed by the Florida Supreme Court ("FSC"). The FSC reversed Murray's case the first time because the trial court erroneous admitted DNA evidence that did not meet the Frye standard for admissibility. Murray v. State, 692 So. 2d 157 (Fla. 1997). The FSC reversed Murray's case again because the DNA testing was "sloppy," and thereby improperly admitted, and because Murray met his burden of showing the probability of evidence tampering with respect to a bottle of lotion placed in the same evidence bag as a white garment. Murray v. State, 838 So. 2d 1073, 1081-1083 (Fla. 2002).

Upon review of the records from each of Murray's trials and receipt of the state attorney's records from the Records Repository,[1] undersigned filed multiple discovery requests, alleging that the review of the transcripts indicated the state's witnesses were improperly changing testimony to conform with the FSC opinions,

[1] The State Attorney's Office of the Florida Fourth Judicial Circuit submitted material relating to Mr. Murray's case to the Records Repository under seal, pursuant to the records exemption rules enumerated under Fla. R. Crim. Pro. 3.852(f) (1). The material is contained in containers 4614 and 4615. (1 App 11-18)

that multiple Brady and Giglio violations occurred in Murray's latest trial, and that numerous state witnesses, reports, and evidence were never disclosed to the defense. (3, 4, 5, 6, 7, App).

Additionally, undersigned noted that 163 exemptions, as claimed by the state in Murray's case, was an unusually high volume never seen before in his practice. (5 App 1.) Undersigned also pointed out that the state's descriptions of documents for which it claimed privilege were insufficient to warrant exemption; that the state cited non-existent statutes as the basis for exemption; or the state cited statutes that required disclosure of non-privileged portions of documents after redaction. (5 App 10-100)

Undersigned also repeatedly asked permission to inspect the state attorney's case file prior to filing any discovery motions, but received no response from the state. (4 App 2)

Because undersigned was unable to obtain records from the state attorney's office, he filed a Motion for In-Camera Inspection, a Motion for Post-Conviction Discovery, two Motions for Production of Documents, and a Motion to Proffer evidence with the trial court. (5, 3, 4, 6, 7 App) In Murray's first Motion for Production of Documents, he requested that the court grant a supervisedvisit at the Office of the State Attorney to review its Murray files. (4 App 3)

All the motions and requests necessary to prove Murray's 3.851 ineffective assistance of counsel, Brady, Giglio, and newly discovered evidence claims were denied by the trial court in turn. (9, 10 App)

In the trial court's order denying Murray's first Motion for Production of Documents, the court opined that Murray was not entitled sealed detective notes, because "it is clear that the requested documents are either documents (such as crime scene diagrams) that were previously furnished to the defense or they are notes of law enforcement officers that were incorporated into the previously furnished police reports. (10 App 1) No explanation was given as to why post-conviction counsel was not entitled to these documents, if the documents had been tendered to Murray's trial counsel in the past, pursuant to Fla. Stat. § 119.011(3)(d)(2) and Downs v. Austin, 522 So. 2d 931 (Fla. 1st DCA 1988).

The trial court also refused to unseal the state attorney's boxes after in-camera inspection. (11 App 1) The trial court's brief holding on this issue stated:

> With the exception of the items described in paragraph two hereof, both boxes contain materials that are clearly the work product of the state attorney's office. For example, they contain prosecutor's hand written notes dealing with jury selection and the questioning of witnesses. After reviewing the notes, the Court finds they are not discoverable under any of the allegations of the Petition.

(11 App 1-2.) The trial court did not discuss why the police reports, notes, and forensic reports contained in the state's exempted boxes were not discoverable, nor

did the court delineate whether the "work product" dealt with any of the state's witnesses that Murray alleged were Brady and Giglio material.

To date, the state attorney's office has not provided any documentation contained in its sealed boxes to the defense, although some descriptions of the records claimed as exempt indicate there are police and forensic reports contained therein. (1 App 11, 12)

STATEMENT OF RELIEF SOUGHT

Petitioner requests this Court grant the instant Petition for Writ of Mandamus, thereby entering an Order for remand to the trial court to require the state to disclose its records relating to Murray's case, as the records are necessary and relevant to his claims in his 3.851. Without disclosure of this material to the defense, Murray's post-conviction proceedings are incomplete and his appellate review inadequate because he cannot fully litigate his Brady, Giglio, and other claims. Without access to the material to which the state claim privilege, Murray's right to a full and fair post-conviction hearing and discovery necessary to prove his claims and innocence is denied. Furthermore, unless these documents are tendered by the state, the state is acting in violation of Murray's Due Process and Equal Protection rights and his conviction and sentence are arbitrarily and capriciously applied. As such, the actions by the state attorney's office violation Murray's 5th, 6th, 8th, and 14th Amendments to the United States Constitution, as well as the

corresponding state rights under Art. I, Section(s) 2, 9, 16, 17 of the Florida Constitution.

SUMMARY OF THE ARGUMENT

Murray alleges that the state is playing "hide the ball" by claiming exemptions to documents that are routinely provided to the defense and support Murray's 3.851 claims. In the present case, the state has claimed an unprecedented 163 exemptions to various files in its possession. The defense does not know how many hundreds or thousands of documents have been withheld.

The state's rationale for refusing disclosure is illogical. The state provided insufficient reasons for refusal; the state cited non-existent statutes to support the exemptions or insufficiently describe the document they claim as exempt as "proof, "notes," or miscellaneous." Additionally, it is clear from the state's own list of exemptions that it has withheld information that is routinely discoverable in criminal litigation, including police reports, forensic reports, and police officer notes. For instance, in the state's box 8, items 19 and 35, the exempted document states, "forensic reports/notes" (1 App 11) and "proof-Homicide Reports." (1 App 12.) Again in box 8, document 66, the state concedes again more undisclosed police reports exist, labeled "Proof-JSO Homicide Reports, Loose Handwritten Notes" (1 App 12.) There is absolutely no reason or exemption under public records law that would entitle the state to without these documents.

Because of the state's insufficient index of material claimed as exempt, the trial court ordered the state to create a new index. The updated index was requested in order to give the court (and the defense) a better understanding of what exact records the state was claiming as exempt from Murray. The state was ordered to provide a sufficient description of their claimed records, including, if applicable, a description of which state witness or witnesses the record relates to, what matter of proceeding the record pertains to, the author of the record, and from which of Murray's four trials or trial preparation the record originated. (9 App 2-3.) The state never updated the index as ordered by the court, and as such, the contents of the un-disclosed records are unknown to the defense.

During the pendency of the above issue concerning the state's insufficient labeling of its records, the defense discovered (without notification from the state) that a box contained sealed detective notes in Murray's case was held at the 4th Judicial Circuit Clerk of Court's Office.

Murray has filed numerous informal and formal requests for the state's sealed records, as well as sealed detective notes housed at the Clerk's Office. In these motions, Murray stated what documents he was seeking, where the documents are stored, and how they are relevant to his 3.851 claims concerning Brady, Giglio, ineffective assistance of counsel, and newly discovered evidence.

Murray has also both formally and informally requested to inspect the state's file on Murray.

All informal requests made by Murray have been denied or ignored by the state attorney's office, and all motions filed by the defense (save disclosure of some phone records) have been denied by the trial court.

Murray files this Writ of Mandamus to obtain records that the state has illegally exempted from Murray's post-conviction record-gathering process.

ARGUMENT

THE STATE ATTORNEY'S OFFICE IS IMPROPERLY WITHHOLDING HUNDREDS OF MATERIALS FROM THE DEFENSE BY REFUSING TO DISCLOSE OR ALLOW INSPECTION OF SEALED FILES. MURRAY WOULD BE IRREPARABLY HARMED IN HIS POST-CONVICTION PROCEEDINGS AND RENDER HIS APPELLATE REVIEW INADEQUATE SHOULD HE BE MADE TO PROCEED TO AN EVIDENTIARY HEARING WITHOUT THE DISCLOSURE OF THESE MATERIALS.

Introduction

This Writ of Mandamus is Mr. Murray's last resort to obtain relevant documents that the state refuses to disclose to the defense. A cursory review of the records from Murray's four trials strongly suggests the state and its witnesses have systematically altered their testimony to conform to the two Florida Supreme Court opinions reversing Murray's case in order to ensure re-conviction.

In Murray's latest trial, defense counsel was "aghast" at the state witnesses' altered, novel testimonies, failed disclosures of statements and witnesses, and

contradictions with the witnesses prior statements under oath. (13 R 738.) Undersigned counsel now states that after a thorough review of the record and an independent investigation there is evidence of the following issues: Witnesses have been coached to eliminate problems with the chain of custody following FSC rulings; Anthony Smith, the state's main witness was promised a sentence reduction for his testimony against Murray as stated in Smith's own 3.850; the chain of custody for critical pieces of physical evidence was never complete as there have been three different names provided by the state for the person responsible for the opening, mounting, and repackaging of the slides allegedly containing Murray's hair; the hair and fiber examiner in Murray's case, Joseph Dizinno was the was subject to the Department of Justice investigation of the FBI hair and fiber lab in the early 1990s because he was the confirmation examiner of Mark Malone, whose test results and testimony in court were later found to be fabricated in State v. Bogle. (15 App 20-21)

No documentation concerning the above has ever been disclosed to the defense. Murray believes the above information is contained in the state attorney's files that it marked "exempt." Murray is proceeding to an evidentiary hearing in his 3.851 proceedings without the opportunity to review **163 documents the state has claimed are exempt**, possibly encompassing thousands of pages of material. (1 App 11-16.) This is an unprecedented amount of claimed exemptions, and despite

this fact, not one shred of documentation has been voluntary provided by the state in these proceedings.

In addition to the hundreds of materials being withheld by the state attorney's office, there are sealed detective notes being held in the 4th Judicial Clerk of Court's Office that were generated for Murray's case that have not been disclosed to the defense.

Without disclosure of these above materials to the defense, Murray's post-conviction proceedings are incomplete and his appellate review inadequate because he cannot fully litigate his Brady, Giglio, and other claims. Murray has been denied the right to a full and fair post-conviction hearing and denied discovery necessary to prove his claims and innocence. Furthermore, without being provided these documents, Murray's conviction and sentence are being arbitrarily and capriciously applied. As such, the actions by the state attorney's office violate Murray's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the U.S. Constitution, and Art. I Sec. 2, 9, 16, 17 of the Florida Constitution,

Murray's request is not overly broad or unduly burdensome; his requests for production of discoverable material relates directly to his 3.851 claim alleging Brady and Giglio violations, ineffective assistance of counsel, and newly discovered evidence. Additionally, through record citations exhibits Murray has

demonstrated that a majority of the requested records exist and are located in the state's files.

I. The state's failure to disclose hundreds of discoverable materials prior to Murray's post-conviction evidentiary hearing would irreparably harm him and render his appellate review inadequate

A. Applicable law

It is well settled that capital post-conviction defendants are entitled record disclosure under Fla. Stat. chapter 119 records disclosure. Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990).

If a capital defendant makes a request under Fla. Stat. chapter 119 to an agency involved in his investigation and prosecution and the refuses to produce public records, an expedited appeal with necessary record attachments to challenge such a denial is warranted, as non-disclosure of materials would irreparably harm a defendant and render appellate review inadequate. See Trepal v. State, 75 So. 2d 702, 707 (Fla. 2000).

Because Murray can establish a clear legal right to the performance of a clear legal duty by the state attorney's office, the records Murray requests should be disclosed to him. See Hatten v. State, 561 So. 2d 562, 563 (Fla. 1990).

B. Murray's repeated requests for records from the state specifically relate to his 3.851 claims concerning Brady, Giglio, Ineffective Assistance of Counsel, and Newly Discovered Evidence

Murray has filed three 3.851 motions, a Motion for In-Camera Inspection, a Motion for Post-Conviction Discovery, two Motions for Production of Documents, and a Motion to Proffer Evidence. (2, 5, 3, 4, 6, 7 App). Collectively, the motions assert that a review of the four-trial record on appeal and documents obtained through public records requests show that the state presented misleading, inaccurate, and altered testimony to support nearly every element of its case-in-chief in Murray's latest trial. Additionally, the record on appeal demonstrates that defense counsel was ineffective in failing to object or investigate various aspects of the case; Brady and Giglio violations occurred; and newly discovered evidence exists, concerning the following issues:

(1) Anthony Smith, the state's main witness, conceded in his 3.850 post-conviction motion that he was coerced into testifying in Murray's case with a state-promised sentence reduction. Absent the offer of a sentence reduction, Smith avers that he would not have testified in Murray's case(s). These negotiations with the state were not disclosed to Murray. (12, 13 App) The state attorney's office also conceded private meetings occurred between them and Smith on "several" occasions, but records of these meetings have never been disclosed to the defense. (14 App)

(2) State witness Joseph Dizinno was responsible for the hair and fiber examination of the only physical evidence connecting Murray to this crime. In

each of Murray's four trials Dizinno testified that a different (first himself, then Paula Frazier, and finally Angie Moore) were responsible for the FBI's chain of custody of this evidence. (5 App 19-25) Dizinno openly acknowledged in Murray's fourth trial that another FBI employee forged his initials on evidence from Murray's case. The state never disclosed this revelation to the defense prior to Dizinno's testimony. (5 App 23-24)

(3) The state tampered with evidence and "fixed" the incomplete chain of custody in Murray's case to obtain a re-conviction following the FSC's reversal which was due in part on a gap in the chain of custody. Specifically, numerous state witnesses testified, for the first time in 13 years, to "facts" that were never disclosed to the defense, contained in any prior sworn testimony, reports or notes.[2] (5 App 27-35)

[2] Murray's 3.851 claims that involve this issue include but are not limited too: Ineffective assistance of counsel for failing to request a Richardson hearing on the faulty chain of custody regarding a lotion bottle; the state committed a Brady violation for failing to disclose DOJ investigation of FBI Analyst Dizinno and FBI lab; the state committed a Brady violation for failing to disclose forgery of Dizinno's initials on evidentiary items; Ineffective assistance of counsel for failing to request Richardson violation regarding forgery of Dizinno's initials on evidentiary items; Newly Discovered Evidence of Anthony Smith's coerced testimony in exchange for a sentence reduction; the state committed a Brady violation for failing to disclose prosecution's deal with Smith in exchange for a sentence reduction; the state committed a Brady violation in failing to disclose analyst Wilson's testimony regarding plastic bag; the state committed a Gigilio violation for eliciting false testimony from various state witnesses; the state committed prosecutorial misconduct in improperly vouching for witness Anthony Smith the state intentionally surprised the defense in correcting holes in the chain-

(4) The state failed to disclose or provide documentation showing that state witness Joseph Dizinno was included in a DOJ investigation of the hair and fiber unit of the FBI, as he was the confirmation examiner of Mark Malone's examination results in State v. Bogle. (15 App 20-21)

(5) The state committed multiple Giglio violations in knowingly presenting the false testimony of Jacksonville Sheriffs Office Detective O'Steen, FBI analyst Joseph Dizinno, and Jacksonville Sheriff's Office evidence technician Chase to perfect a flawed chain of custody, defend against tampering allegations, and demonstrate that Murray provided incriminating responses in his police interrogation interview with Detective O'Steen. (5 App 27-35, 36)

Murray raised twenty-three claims in his latest 3.851 to present the issues described above. (2 App 3-181). As alleged in Murray's 3.851 motion(s) the failure to disclosed the above information resulted in violations of Brady v. Maryland, 373 U.S. 83 (1963) (2 App 48-55, 62-66, 67-74.) Additionally, the

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of-custody for various evidentiary items with new testimony of FDLE analyst Wilson and the plastic bag; whether the state intentionally surprised the defense with testimony of what new FBI employee was responsible for the chain of custody per from FBI examiner, Dizinno; whether counsel was ineffective in failing to object to the surprise testimony of Wilson and Dizinno; documentation supporting the defense assertion that state coerced Anthony Smith into testifying against Murray and failed to provide the defense with information about the its agreement with Smith and any notes regarding the conceded "several" meetings held with Smith; documentation proving that the state as aware and had meetings and/or conversations with O'Steen, Dizinno, and/or Chase, Laforte pertaining to their altered testimony at Defendant's fourth trial. (4 App 1-180)

presentation of the fabricated testimony described above resulted in a violation of Giglio v. United States, 405 U.S. 150 (1972)(2 App 55-59, 74-79.)

Murray also raised numerous ineffective assistance of counsel claims based upon counsel's failures to object to surprising and false testimony and request Richardson hearing(s) were appropriate. Murray also alleged ineffective assistance of counsel claims for failure to sufficiently investigate Murray's case, file motions to suppress state evidence, and impeach the state's witnesses. (2 App 3-20, 21-26, 27-33, 59-62, 79-84, 85-92, 93-99, 110-113, 118-121, 122-131, 152-170, 170-174.)

Finally, Murray claims newly discovered evidence exists that Anthony Smith, the state's main witness was coerced into testifying against Murray and rendered biased testimony under the assumption that he would receive a sentence reduction if he provided favorable information for the state in Murray's trial. (2 App 33- 48.)

As Murray has demonstrated, the discovery requests were specifically tailored to Murray's Brady, Giglio, ineffective assistance claims, and newly discovered evidence claims. The requests were limited to material relating to the state's witnesses called at trial and to records that the state acknowledges still exist. Despite this fact, Murray had consistently been denied receipt of relevant, critical, discoverable records, notes, and reports in his case. As such, he is proceeding through his post-conviction process blind. He is incapable of fully litigating his

3.851 post conviction claims, establishing Brady and Giglio violations, ineffective assistance of counsel claims, newly discovered evidence, and discovering material that would lead to other 3.851 claims. Murray requests the following documents finally be given to the defense.

C. The state attorney's description of its "exempted" items and claimed statutory authority for such exemptions is insufficient and contrary to case law

The State's index accompanying its submission to the Capitol Records Repository claim that two entire boxes of documents are "exempt" from production to the defense. (1 App 11-16) The state claimed more exemptions in this case than any other in the experience of the undersigned. Specifically, the state claims 90 exceptions in one of its boxes and 73 exemptions on the other box, **for a grand total of 163 exemptions**. Additionally, there is no way to decipher how many hundreds, or thousands, of documents relate to these exemptions.

Equally troubling is that the state gives insufficient and vague descriptions of the materials, and cites incorrect or non-existent statutes as the basis for exempting the majority of the documents. (1 App 11-16.) Many of the exemptions are insufficiently titled, e.g. "proof," "notes," "miscellaneous," rendering it impossible to determine whether the content actually qualifies for an exemption under the law.

1. The state was ordered to give a clearer description of the exempted records by the trial court—this order has not been completed to date

In the trial court's order on Murray's Motion to Unseal or Conduct In-Camera Inspection of Sealed Material, Murray stated that the "records claimed as exempt are insufficiently labeled as to their contents; list inapplicable statutes as the basis for exemption; do not demonstrate which documents were redacted and provided to the defense; are discoverable for impeachment and exculpatory reasons, and contain material establishing Brady, Giglio and Richardson violations." (9 App 1-2) The court agreed and provided the following instructions in its order:

> Upon receipt of the records, the State Attorney's Office shall inspect the exempted records by the Repository and provide the Court an amended index for in-camera purposes sufficiently detailing the contents of the records and documents in Repository boxes 4526 and 4614. For each record claimed as exempt, the State shall provide a sufficient description of their claimed exempted records, including: if applicable, a description of which state witness or witnesses the record relates to, what matter of proceeding the record pertains to, the author of the record, and from which trial of defendant's four trials or trial preparation the record originated. The state will comply with the above requirements, with the understanding that it may be impracticable to sufficiently label all of the documents.
>
> After receipt of an index of materials that more fully identified documents and records of currently marked exempt documents, this Court will conduct an in-camera inspection of the documents and records and issue any appropriate orders.

(9 App 2-3)

Although this order was served upon the state attorney's office, the state attorney failed to comply with the terms of the order. None of the requirements delineated in the order have been completed by the state.

Without an adequate description of the records for which the state claims exemption, the defense will never know whether the records support its current 3.851 claims, find newly discovered evidence, or additional Brady and/or Giglio violations.

These documents are critically important to Murray's appellate process. For instance, the state's "exempt" documents that contain vague descriptions such as "examination questions," and "witness contact" are likely to contain documentation of the state's meetings with state witnesses to coach his/her testimony following FSC reversals. Unless the state informs Murray which witness(es) the "examination questions" in its exempted material were directed to or what witness(es) the state "contacted," the perpetual guessing game and mockery of the criminal justice system continues. Murray has listed every claimed exemption and the reasons for is disclosure and the claims such material would relate to his 3.851 in his prior Motion for In-Camera Inspection. (5 App 36-92.)

2. Incorrect or non-existent statutes cited as basis for state's exemption

The state claims many exemptions under Fla. Stat. 119.07(1)(d), which state: "A person who has custody of a public record who asserts that an exemption

applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying." This statute cited by the state indicates that any redacted material must be disclosed to the defense. However, no indication is given as to whether the defense was provided redacted versions of documents they have exempted, if any. Where a document contains both privileged and non-privileged material, the exempt material must be redacted and the remaining information must be turned over to the defense, pursuant to Fla. Stat. 119.07(1)(d).

3. Titles "proof," "miscellaneous," "notes," insufficient to warrant exemption

Because of the insufficient explanation provided, there is no way to determine what "proof" means and why it is exempted from disclosure, what "miscellaneous" is, or who authored the "notes," what the "notes" pertain to, whether these files pertain to defendant's 1st, 2nd, 3rd, or 4th trial, or whether the "notes" may be relevant to any of Murray's 3.851 claims. The state hides under these vague descriptions and as a result, it is impossible to find which records pertain to the specific witnesses requested information listed in Murray's 3.851 motion. Bryan v. Butterworth, 692 So. 2d 878 (Fla. 1997), provides an example of what a title for exempted material should look like. There, a death-sentenced individual challenged the exemption of documents labeled as "work product." In

denying the defendant's request, the court noted the descriptions of the records being sought:

> (1) Two yellow pad and one white legal pad setting forth the AAG's mental impressions and strategy (used in preparation for state evidentiary hearing/collateral appeals therefrom and pending federal habeas corpus action.) (2) Four stapled yellow sheets, five stapled typed sheets, and six loose typed sheets summarizing psychological reports, etc.

Id. 692 So. 2d at 880. The description of a claimed exemption in Butterworth, which was upheld by the court in that case, is in stark contrast with the state's description, title "notes" in the instant situation. The description in Butterworth clearly states what the exempted item is, why it is subject to the claimed exemption(s), and provides a general description of the information contained therein. The vague title, "proof," "miscellaneous," and "notes," used by the state in the instant case falls short of this necessary descriptive title demonstrated in Butterworth.

Additionally, labeling a document as "work product" does not make exempt from disclosure. The Florida Supreme Court in Roesch v. State, 633 So. 2d 1, 2 (Fla. 1993), held: "there is no doubt that certain portions of the state attorney's *investigation* file are public records under Chapter 119, once a defendant's conviction and sentence have become final." See also, Osorio v. State, 34 So. 3d 98 (Fla. 3d DCA 2010); Clowers v. State, 960 So. 2d 840 (Fla. 3d DCA 2007) (confirming that a D who was preparing a 3.850 was entitled to copies of state

attorney prosecutorial files pursuant to Fla. Stat. § 119.01.). Also a blanket statement that material is "work product" does not provide the necessary authority for exemption; it is for the court to determine whether or not documents are actually work product. Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993). Labeling material "work product" does not excuse the state from providing the material under Brady v. Maryland, 373 U.S. 83 (1963) (exculpatory or impeachment material), Richardson v. State, 246 So. 2d 771 (Fla. 1971), or Giglio v. United State, 405 U.S. 150 (1972).

4. Brady and Giglio material must be disclosed regardless of claimed exemption

As stated above, documents marked as "notes," "proof," "miscellaneous," or even "work product," do not warrant protection from disclosure if the documents are relevant to or constitute Brady or Giglio material, which must always be disclosed to the defense. The state must disclose any exculpatory document (including impeachment information) within its possession or to the state which it has access, even if such document is not otherwise subject to public records law. Walton v. Dugger, 634 So. 2d 1059, 1062; quoting Brady, 373 US 83 (1963). To the extent the files contain any Brady/Giglio information which would support existing or new 3.851 claims, the material must be disclosed to the defense. See Johnson v. State, 44 So. 3d 51 (Fla. 2010) and Malone v. State, 390

So. 2d 338 (Fla. 1980) telling inmate to "listen" to Defendant to hear whether he makes in inculpatory statements not exempt from disclosure.

5. The state concedes in its exemption list that there are police and forensic reports that have never been disclosed to the defense

Interestingly, in the records where the state does give more than a vague description as the basis for exemption, the state admits there are homicide police reports and forensic reports that yet have to be disclosed to the defense. Particularly, in the state's box 8, item 19, the item states "forensic reports/notes" (1 App 11). Also, in box 8, item 35 indicates that a "proof-Homicide Reports" exists that has not been tendered to the defense. (1 App 12.) Again in box 8, item 66, the state concedes more police reports exist, labeled as document "Proof-JSO Homicide Reports, Loose Handwritten Notes," which has not been tendered to the defense. (1 App 12.)

These police and forensic reports are public record and must be disclosed to the defense because there is no active investigation. See State v. Kokal, 562 So. 2d 324, 325-26 (Fla. 1990)(Rejecting state's position that certain files pertaining to the prosecution of the defendant seeking post-conviction relief were exempt from public disclosure under the active criminal investigative information exemption. It held that the term "pending prosecutions or appeals" in section 119.011(3) (d) applied only to ongoing prosecutions or appeals from convictions and sentences which have not become final).

Additionally, prior police and forensic reports have been tendered to the defense, and the state cannot now claim these records are exempt when prior reports have already been made public or disclosed under the rules of discovery. See Fla. Stat. § 119.011(3)(d)(2); Downs v. Austin, 522 So. 2d 931 (Fla. 1st DCA 1988).

D. Murray's prior motions requesting records from the state

The motions filed by the defense to obtain documents relevant to Murray's 3.851 claims are plentiful. However, with the exception of the disclosure of some irrelevant phone records, no documents requested below have been tendered to the defense. This refusal is despite a detailed description of what particular records the defense is requesting, how the records relate to Murray's 3.851 claims, and how the records would lead to additional claims and discovery.

1. Records requested in the Motion for In-Camera Inspection

As previously stated, the state claims that an unprecedented **163 exemptions** apply to its records in Murray's case. Upon this discovery, Murray filed a motion for in-camera inspection, requesting the trial court to view and unseal the material claimed as exempt by the state.

The records requested in this motion were the following:

(1) Records of the state's conferences with lead witness, Anthony Smith. Smith alleged in post-conviction proceedings that the state coerced him into

testifying in Murray's fourth trial. Prior to Murray's fourth trial, Smith informed the state that he would not testify against Murray again. The state proposed a sentence reduction for Smith upon conclusion of his testimony to remedy Smith's stage fright. In Smith's post-conviction proceedings, the state acknowledged secret meetings with Smith occurred,[3] yet no records of such have ever been tendered to the defense for Murray. (5 App. 10-15.)(14 App)

(2) Analyst Wilson's records concerning his surprise testimony in Murray's fourth trial concerning the handling of a plastic bag;[4]

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[3] In attendance at these meetings with Smith were assistant state attorney Bernie De la Rionda, Officer Farhat, and state attorney investigator Welch. (14 App)

[4] The lotion bottle had become infamous over the course of Murray's four trials; his third trial was reversed due, in part, to the inability of the state to produce a complete chain of custody for the bottle and nightgown. Murray v. State, 838 So. 2d 1073 , 1083 (Fla. 2002). These documents are relevant to Analyst Wilson's testimony as to impeachment, and could constitute Brady and Giglio violations. Analyst Wilson testified for the first time in four trials (including depositions and known reports) that he was the officer who in fact placed the plastic bag on the lotion bottle. This change to Wilson's intended testimony was not disclosed to the defense by the state. In fact, defense counsel was caught "aghast" by the sudden change in testimony[4], as counsel's defense at trial focused on the perceived lack of chain of custody, using the plastic bag as one of his main supporting facts. Wilson's testimony was directly contrary to the defense's theory of the case that nobody could explain the appearance of a plastic bag on said bottle, and therefore the evidence lacked a proper chain of custody. No documentation has been disclosed by the state attorney's office or the JSO showing who planned, had conversations with, and was responsible for Analyst Wilson's altered testimony that, for the first time in four trials, he was the officer who placed the plastic bag on the lotion bottle.[4] None of Wilson's earlier reports, depositions, or testimony indicate he had anything to do with a lotion bottle. (5 App 16-18)

(3) Records demonstrating the mechanics of the state's marked alterations of testimony in Murray's four trials in response to the FSC's holdings reversing Murray's convictions, including Anthony Smith, [5] analyst Wilson, [6] Joseph Dizinno, [7] Chester Blythe, [8] Angie Moore, [9] Paula Frazier, [10] Detective Chase, [11]

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[5]Murray requested documents concerning Smith's allegations in 3.850 proceedings that he lied under oath in Defendant's fourth trial, was coerced into testifying, was promised a sentence reduction in exchange for his testimony by the state, and any documentation which shows meetings and/or conversations regarding these allegations (5 App 11)

[6] Murray requested documentation concerning whether Wilson had knowledge of a plastic bag prior to trial, a point which was used by the state to close the troublesome chain of custody issue which formed the basis of the Florida Supreme Court's reversal on direct appeal. Murray v. State, 838 So. 2d 1073 , 1083 (Fla. 2002). Murray also requested documentation of meetings or contact between any assistant state attorneys, their investigators, and Analyst Wilson, discussing Wilson's trial testimony. (5 App 16-18)

[7] Murry requested documentation concerning the DOJ's investigation during the time of Dizinno's analysis of the evidence in the Murray's case, as the entire FBI laboratory was under investigation by the Justice Department, including one employee in the FBI Hairs and Fibers Unit, for falsifying reports. Interestingly, Dizinno's testimony regarding the chain of custody of *both known hair samples from Murray and unknown samples from the crime scene* sent to the FBI has changed dramatically over four trials, starting with him alone being responsible for the chain of custody (Q-20, debris from white garment and Q-42, debris from victim's body) to currently somebody forging his initials on the evidence and he not at all responsible for the chain of custody of the evidence, including the opening, mounting, and resealing of slides. At least four different people, including Dizinno himself, per his own sworn testimony, have now been alleged to be the person(s) responsible for the chain of custody of the only alleged physical evidence against Murray in this case. Currently, according to Dizinno's testimony in defendant's fourth trial, the person responsible for these tasks was Angie Moore, a person never disclosed by the state attorney nor discussed by Dizinno or contained in any of the discovery documents ever provided to the defense. (5 App 19-25)

[8] Blythe's initials appear on numerous portions of the evidence sent to the FBI crime lab. Interestingly, in Defendant's fourth trial, Agent Dizinno testified that Blythe did not work on the case. However, in Murray's third trial, Dizinno stated that Blythe was the person who opened the physical evidence in this case. (5 App 24)

[9] For the first time in thirteen years and three prior trials, Agent Dizinno stated in defendant's fourth trial that his initials on the evidence received by the FBI were forged, and not placed there by him. Additionally, Dizinno completely changed his testimony as to the chain of custody of this evidence, and stated that Angie Moore (a previously undisclosed and unmentioned person in Murray's first three trials) was responsible for the chain of custody, which included: opening the box containing the known hair of Murray and the unknown debris collected from the crime scene; mounting the debris onto the slides for microscopic examination. No documentation concerning Moore's involvement in defendant's case has been tendered to the defense. No records such as her proficiency testing (1989-2003), bench notes from work conducted on defendant's case, test results, personal file and disciplinary records, and/or information as to whether she was mentioned in the DOJ investigation, has been released to the defense. (5 App 23)

[10] During Defendant's third trial, Agent Dizinno altered his testimony prior testimony, stating that he thought Ms. Frazier was the analyst responsible for the chain of custody and handling of the physical evidence in Defendant's case. No documentation concerning Frazier's involvement in defendant's case has been tendered to the defense. No records such as her proficiency testing (1989-2003), bench notes from work conducted on defendant's case, test results, personal file and disciplinary records, and/or information as to whether she was mentioned in the DOJ investigation, has been released to the defense. (5 App 21-22)

[11] Detective Chase admitted on the record in Defendant's fourth trial that he changed his testimony from collecting two hairs from the victim's body to collecting to *samples* of hairs from the victim's body. Chase admitted he changed his testimony after "another testimony that it was brought out possibility of possibly more hairs. However, no documentation has been disclosed to the defense as to who Chase discussed his change of testimony with. Any state attorney or JSO reports, notes, phone logs, or other documentation that pertain to this issue should be tendered to the defense. (5 App 28-29)

Detective O'Steen and Analyst Powers,[12] FBI analyst Douglas Deedrick,[13] DOJ investigation into the FBI lab.[14]

[12] For the first time over the course of three trials, sworn statements, a co-defendant's trial, and depositions, O'Steen and Powers testified at a pretrial hearing of Murray's fourth trial as to the initial separating of the nightgown and lotion bottle, which had originally been packed by an evidence technician in a single bag. This startling breakthrough in testimony occurred thirteen years after the crimes despite the fact that neither O'Steen nor Powers had any notes or reports to refresh their memories. (5 App 29-30)

Additionally, O'steen's notes concerning any documented interview, whether transcript or video recording, would show that defendant was on prescription medication, Thorazine, that affected his ability to undergo the interview. Notes or a transcripts would reflect that defendant invoked his right to counsel early on in the interview, and that the detective in court presented defendant's answers to questioning completely out of context and misrepresented the substance of the interview.

[13] Due to the problems uncovered by the DOJ concerning former FBI analyst Michael Malone, today's protocols require that microscopic analysis must be reviewed by a second qualified examiner. Mr. Dedrick's name was mentioned as the alleged second examiner of hairs in this case. However, no documents, such as bench notes, test results, proficiency testing in hair and fiber analysis, personal file and disciplinary record, and whether or not Mr. Dedrick was targeted in the DOJ investigation have been provided to defendant. (5 App 34)

[14] No information or documentation concerning Agent Dizinno, Angie Moore, Paula Frazier, Douglas Dedrick, Chester Blythe, and/or the DOJ's investigation into the FBI hair and fiber lab was ever provided to defense. In fact, the state filed a motion denying the defense the ability to discuss this investigation as it pertains to Dizinno, which was granted by the court. Any material contained in the sealed boxes concerning this issue should be disclosed to the defense.

After the trial court ordered an in-camera inspection as to the state's plethora of exemptions, the court devoted only a paragraph to explaining the state's 163 claimed exemptions, effectively foreclosing the defense from obtaining any information supporting his 3.851 claims. (11 App. 1-2) The court failed to discuss or even mention what witnesses these records pertained to, what trial the records were generated from, whether there were notes, reports, or materials concerning the listed witnesses Murray claimed to have Brady, Giglio, or Newly Discovered Evidence.

2. Records requested in the Motion to Allow Limited Post-Conviction Discovery

In this motion, Murray claimed the record of Petitioner's four trials demonstrated that: state witness Dizinno requested that someone within his FBI unit forge his initials on slides (or that somebody from the FBI forged Dizinno's initials without telling him) containing the only alleged physical evidence connecting Murray to the crime scene; Dizinno has provided three different names over three different trials for the person responsible for the slides and thereby the chain of custody, while initially deceiving the parties in Petitioner's first trial into believing he was responsible for the opening, handling, and mounting of the slides; that state witness Smith filed a sworn 3.850 motion stating he had secret meetings with the state and was promised a sentence reduction in exchange for testifying in Murray's fourth trial; state witnesses Wilson changed his trial testimony in

Petitioner's fourth trial, thereby "remembering" new facts first time in 13 years as there are no corresponding notes to spur this change; by stating he (Wilson) was responsible for the then-unaccounted for plastic bag that contained the lotion bottle that was scrutinized by the Florida Supreme Court in its last reversal, in part, for the incomplete chain of custody in Petitioner's case. See Murray v. State, 838 So. 2d 1073, 1081-1083 (Fla. 2002).

3. Records requested in First Motion for Production of Documents

In this motion, Murray made numerous of the trial court. Murray requested that the court tender the sealed notes of held in the 4th Judicial Circuit Felony Clerk's Office (4 App 3) of detectives and police officers in Murray's case. Murray requested that the court order disclosure of material regarding Analyst Wilson's surprise trial testimony concerning the handling of a plastic evidence bag that was subject to the Florida Supreme Court's latest reversal in Murray due, in part, to the incomplete chain of custody (4 App 4);[15] disclose the numerous conversations with the state's main witness, Anthony Smith, that the state admitted to having in an affidavit (along with Officer Farhat and State Attorney Investigator Welch), as Smith alleged in a later 3.850 the state coerced and eventually promised

[15] Wilson testified for the first time in four trials (including depositions and known reports) that he was the individual responsible for the plastic bag found on the lotion bottle, thereby cleaning up the state's perceived chain of custody problem. Defense counsel was caught "aghast" by this novel statement, as the defense's theory at trial was the faulty chain of custody required an acquittal. (13 R 738, 12 R 396).

him an undisclosed sentence reduction for his testimony against Murray (4 App 5-6).

Murray requested that the court order the state to turn over reports and other documentation of conversations concerning the state's witnesses whose testimonies have changed and/or evolved to fit with the evidence over Petitioner's four trials, including state witnesses Anthony Smith, FDLE Analyst Wilson, FBI Analyst Joseph Dizinno, FBI employee Chester Blythe, FBI employee Angie Moore, and FBI employee Paula Frazier. (4 App 11-15.)

Murray requested that the court order the disclosure of lead detective T.C. O'Steen's notes concerning his interview with Murray post-arrest, as to date, no interview notes have been disclosed to the defense (4 App 15-16) and disclose materials demonstrating how numerous state witnesses "remembered" certain testimony in Murray's fourth trial that were not testified to in 13 years of prior litigation. (App 16-21.)

4. Records requested in Second Motion for Production of Documents

In this motion, Murray attached record evidence that Joseph Dizinno, the state's FBI expert and individual responsible for examining the hairs found at the crime scene said to have "matched" Murray, was subject to the DOJ investigation, despite the state's repeated assertion Mr. Dizinno was not subject to the notorious investigation. (6 App. 2-4). Murray requested documentation from the state

concerning the DOJ's investigation and FBI employee materials (including employees Paul Fraizer and Angie Moore, who at different points in time, Dizinno said where responsible for the FBI's chain of custody).

Murray also requested the state's file on Anthony Smith, its main witness against Murray, who conveniently testified that Murray "confessed" some of the details of the crime. As previously stated, Smith later stated that he was coerced into giving this testimony. The state also conceded that several meetings with Smith, Jacksonville Sheriff's officer Farhat, and investigator Welch occurred but records of such meetings have never been disclosed to the defense despite numerous requests. (6 App 5-10.)

5. Records requested within the 3.851 (Claim #23 of latest motion)

In the body of Murray's latest 3.851 Motion, he requested the state and the Jacksonville Sheriff's Office provide him with information relevant and material to his 3.851 claims. (2 App 176-180.) To date, despite the breadth of the requests, nothing has been tendered to the defense. The request included:

Jacksonville Sheriff's Office – Property Room

- Evidence control logs from 1990 through 2003 when evidence from Defendants case was logged into property room.
- Evidence control cards of all evidence submitted to the property room regarding Defendant's case.

- Protocols and/or internal operating procedures for submitting and releasing evidence from 1990 to 2003.
- Investigative report(s) related to improper handling of J.S.O. property, specifically, but not limited to, a report issued after 2003 that was ninety pages long and dealt with the property room's mishandling of evidence.

Jacksonville Sheriff's Office Evidence Technicians

- Personnel files of the evidence technicians involved in Defendant's case, specifically Chase, Powers, and Laforte.
- Protocol and/or internal operating procedures for the handling of evidence.
- List of collection tools that are provided for collecting evidence from the crime scene. Specifically, Chase stated for first time in thirteen years that he turned in tweezers into the property room with the evidence that was submitted. Defendant will submit evidence that Chase's testimony about the tweezers involved in this case was false and misleading. Defendant needs whatever documentation that reveals whether a crime scene technician is provided a new pair of tweezers for each new crime scene.
- Defendant also requests evidence handling procedures for handling of evidence once it is submitted to another lab for processing.

State Attorney Files

- From co-defendant, Steven Taylor's case to review for Brady or Giglio material.
    - These files have never been turned over to the defense and may have relevant information to Defendant's case.
- From Thomas Hood, Thomas Hood, Jr., and Smith's mother.
    - Evidence has been withheld from Defendant regarding criminal charges against Smith's family and was part of the reason he testified in Defendant's case.
    - This information is relevant or may lead to relevant information related to Defendant's claims and may also be Brady, Giglio, Richardson, and Fraud on the court claims.
- All State Attorney files and/or detective notes on suspect, Rudolph Holton, who was a suspect in this case as well as a copy of the polygraph results of Holton and any Brady or Giglio material.
- All file folders that have writing on them. The State has turned over notes to the court that the State claims are exempt, but Defendant is specifically requesting all file folders that have writing on them be turned over.
- All phone logs and/or phone messages of the State Attorneys involved directly or indirectly to Defendant's case.

- Specifically, Thomas Hood testified that someone from the State Attorneys Office phoned him and stated that if his son, Anthony Smith, did not testify in Defendant's case, prior charges that were dropped would be re-charged. This information would have been used by the Defendant to impeach Smith had Defendant knew of the "threats" used to secure Smith's testimony at Murray's four trials.

- All notes, phone logs, and/or internal memos of all investigators who worked for the State Attorneys office involved in Murray's cases. The repository does not have these records and these records may lead to relevant information related to Defendant's claims in his 3.851 motion.

F.B.I. Documents/Discovery

- F.B.I. documents have still not been disclosed, specifically, but not limited to personnel files of Dizinno, Malone, Blyth, Frazier, Moore, Deedrick, and an "unknown" person with the initials "RO" or "RS"
- F.B.I. Manual of Administrative Operating and Procedures for Hair and Fiber Section for the years 1991 through 2003.
- Documentation of the training and qualifications of the principal examiners and auxiliary examiners involved in Murray's case.
- Documents/index of all hair and fiber cases that Dizinno has testified in.
- All cases in which Dizinno confirmed false microscopic matches of Malone.

- All cases in which Dizinno claimed to have a microscopic match that was later determined to be wrong.
- All proficiency test results of Dizinno from 1991 through 2003.
- Documentation as to who trained Dizinno within the hair and fiber section.
- Documentation as to who was Dizinno's lab supervisor in 1991.
- Documentation as to who uses the coded initials "RO" or "RS"
- Any other impeachment material relevant to Defendant's claims raised within 3.851 motion.
- All investigations related to Dizinno and any misleading or false testimony and/or false matches by him.

Other

- Any information not listed herein that may be relevant to Defendant's claims raised within the 3.851 motion, pursuant to Brady or Giglio material and also pursuant to Fla. Rules of Court 3.220(J).

CONCLUSION

It is next to impossible that the majority of the records Murray requests do not exist. The records requested are made in the state and Jacksonville Sherriff's Office ordinary course of business, and have routinely been disclosed in prior cases. Murray has rights under the United States and Florida Constitutions to fair and complete post-conviction proceeding to guarantee his conviction and sentence

are not carried out in an arbitrary and capricious manner. The state's attempt to hide certain records from Murray by prohibiting Murray from inspecting its file on Murray, citing non-existent statutes to claim "exemptions," or by insufficiently delineating what records it has in its possession violates these Constitutional rights. It is unheard of that a state, with 163 claimed exemptions consisting of hundreds or even thousands of documents, would not tender *something* to the defense. Unfortunately, such is the case here.

In Murray's case, the above information exists, is relevant to Murray's 3.851 claims listed above, and would demonstrate the improper systematic changing of testimony and evidence to obtain a conviction.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by hand to Bernie De LaRionda of the State Attorney's Office and sent via U.S. Mail, to Assistant Attorney General, Steve White. Office of the Attorney General, PL-01 The Capitol, Tallahassee FL 32399 this ___ day of April, 2012.

_____

A T T O R N E Y

CERTIFICATE OF COMPLIANCE AND AS TO FONT

The undersigned certifies that the forgoing was typed using Times New Roman, font size 14.

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A T T O R N E Y