IN THE SUPREME COURT OF FLORIDA

JAMES ALLEN ROESCH, :

Petitioner, :

vs. : Case No. 79,937

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

AMICUS CURIAE BRIEF OF FLORIDA PUBLIC DEFENDERS ASSOCIATION

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

Indigent inmates are entitled to free access to the records of police agencies, state attorneys, and clerks in their own case, if they are preparing to file post-conviction motions. Providing access to these materials only at agency headquarters and yet simultaneously confining the inmates in prison does not provide the reasonable access required by the Public Records Act and due process of law. Not providing meaningful access to these materials for poor inmates when probationers and wealthy inmates can obtain meaningful access to them violates the equal protection doctrine. Florida's indigent court cost statute requires clerks and sheriffs to provide inmates with free copies of their records to prepare for post-conviction motions. This Court has substantial authority over court records, which are public even without the Public Records Act. This Court has substantial authority over prosecution records because it has for twenty-five years required prosecutors to provide extensive discovery at no charge to the defense.

To obtain free access to their files, prisoners should only have to say that they are in prison, are indigent, and are preparing to file post-conviction motions. This Court should request suggestions on proper procedure from the Criminal Rules Committee. Agencies can satisfy their disclosure obligations in several ways. Defense counsel might provide depositions and transcripts, clerks might be responsible for court documents, and state attorneys might be responsible for previously undisclosed and unfiled records. Procedures might be devised to exclude routine documents that pri-

soners seldom if ever need to inspect. Special arrangements can be made if necessary for unusual records not reasonably susceptible to being copied.

ARGUMENT

ISSUE

IF NEEDED TO PREPARE FOR POST-CONVICTION MOTIONS, INDIGENT INMATES ARE ENTITLED TO FREE COPIES OF THE RECORDS OF POLICE AGENCIES, STATE ATTORNEYS, AND CLERKS OF THE COURT AS A MATTER OF (1) REASONABLENESS AND DUE PROCESS, (2) EQUAL PROTECTION OF THE LAWS, (3) SECTION 57.081, AND (4) FAIR PROCEDURE.

A. Introduction

State v. Kokal, 562 So. 2d 324 (Fla. 1990), held that a state attorney's trial file becomes a public record and open for inspection under Florida's Public Records Act (hereinafter Act) when the defendant's appeal is over. Consequently, defendants may request inspection of these public records in preparation for a post-conviction motion. Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). Although the defendant below had not yet filed a post-conviction motion, his request was related to this motion. As both the court below and the first district found, "there [was] no legitimate reason for precluding the appellant from pursuing his request for the records." Campbell v. State, 593 So. 2d 1148, 1149 (Fla. 1st DCA 1992); Roesch v. State, 596 So.2d 1214 (Fla. 2d DCA 1992).

Campbell and Roesch held that a right to inspect a prosecutor's files did not include a right to free copies of these files for indigent inmates. Campbell and Roesch, however, asked this Court to determine how prosecutors and clerks of the court should disclose public records to an unrepresented prisoner who wants them for a post-conviction motion. The Florida Public Defenders Asso-

ciation (hereinafter Association) seeks a comprehensive answer to this issue and would broaden it to include the records of defense counsel and police agencies as well as of prosecutors and clerks.

The Association argues that indigent inmates seeking to file post-conviction motions have the right to free actual inspection of the clerk's, state attorney's, and police agency's files in their own case. These agencies can satisfy this right in various ways, usually by sending free copies of the file to the inmate or by sending the actual file to the prison for controlled inspection. This right is founded on (1) due process of law and the Act's provision for reasonable access, (2) the constitutional right to equal protection of the law, (3) a statutory right under section 57.081, Florida Statutes (1991), to free assistance from clerks and sheriffs in court actions, and (4) this Court's power and authority to establish fair procedures. The Association will also suggest procedures to effectuate this right to free access.

B. Constitutional due process and the Act's requirement for reasonable access mandate free access to an indigent inmate's own files for post-conviction motions.

According to section 119.07(1)(a), Florida Statutes (1991), "[e]very person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee." Both the second district below and the first district in Campbell implicitly interpreted these reasonableness requirements to require the custodian only to provide a place with adequate lighting condi-

tions, times for inspection, and the like. The Association agrees that, in most instances, the Act requires nothing more.

This Court has held, however, that the Act's reasonableness requirements "ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review." Wait v. Florida Power & Light Co., 372 So. 2d 420, 425 (Fla. 1979). The records custodian cannot provide a place to inspect the records and simultaneously and unreasonably prevent persons from coming there, at least if the records are the persons' own and needed for a legal action to release them from the same constraints that prevent them from coming there. The decision below violated this principle. In cases like the present one, the State unreasonably and unfairly subjects indigent inmates to physical constraints which preclude meaningful access. Contrary to the Act, the State physically prevents them from viewing their records by confining them far away from the place where it provides the records for inspection. By confining them, the State also prevents them from earning the funds needed to pay for copies. Accordingly, permitting them either to pay for copies or to come to the prosecutors' offices to inspect the records is a meaningless privilege.

Furthermore, inmates typically seek access to the prosecution's records in order to file post-conviction motions for release from custody based on newly discovered evidence. Because they have no meaningful access to the prosecution's records, however, they cannot use these records to provide the evidentiary basis necessary to support their post-conviction motions and thereby gain release from custody so that they can have meaningful access to these

records. The State here gives with one hand what it unfairly takes away with the other. The conditions it imposes on indigent prisoners violate the Act and constitutional due process of law because the conditions unreasonably and unfairly make meaningless the right in Florida to have access to public records useful to challenge the prisoners' incarceration. Allowing such constraints to prevent meaningful access to the records in this manner is an unreasonable, unfair, and classic Catch-22 because the same physical constraints are simultaneously the subject of the legal action and the reason why it cannot succeed.

The Association does not argue here that all indigent persons have the right to free copies of public records. The Act's reasonableness requirements do not mandate the Tampa City Commission to give free copies of its records to all poor persons in Miami who ask for them. Telling persons free to travel that they must come to the place where the records are stored is not unreasonable.[1]

Second, the Association does not argue that indigent inmates have the right to free copies of all public records. The Act's reasonableness provisions do not require the Tampa City Commission to give free copies of its records to all poor inmates who ask for them. Although inmates cannot travel to the Commission's offices,

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[1] By this reasoning, probationers would generally not be entitled to free copies of state attorneys' records, because they would be able like everybody else to inspect the records at the state attorneys' offices. In some instances, however, the probationers might need to substantiate their post-conviction motions by attaching actual copies of their records. Because probationers have a compelling liberty interest, they should be able to obtain copies upon a showing that the copies will be attached to their post-conviction motions for release from supervision.

they also do not have a reason sufficiently compelling to justify free copies of the Commission's records. Because they do not have a sufficient reason, neither due process of law nor the Act's reasonableness provisions require free copies of these records.

Third, the Association does not necessarily argue that indigent inmates are entitled to free copies of their own files for any or no reason. The Association argues instead that due process of law and the Act's reasonableness provisions at least require the State to provide free access to inmates' own records to help them prepare post-conviction motions for release or decide whether to file them. A person's liberty is a sufficiently compelling reason to justify free access to public records under the federal and state constitutions and the Act's reasonableness provisions. "No person shall be deprived of life, liberty, or property without due process of law." Art. I, § 9, Fla. Const.

Fourth, the Association does not even argue that inmates are necessarily entitled to free copies of their own records to file post-conviction motions. The Association argues instead that inmates are entitled to free and reasonable access to their own records. Rather than copy the records, the State can, if it so chooses, mail the records to the inmates at the prison, where they can inspect the records under controlled supervision as the Act requires. When the inspection is complete, the prison can mail the records back. In this case, because the cost for postage is $5.45 (document A6 of Petitioner's appendix to the brief on the merits),

the total cost for postage both ways is $10.90.[2] By any standard, this sum is not a great burden on the State of Florida. Of course, if the records custodian prefers to make copies of the records for inmates rather than release the original records temporarily from its custody, it may do so.

The due process right at issue here is closely akin to inmates' rights to access to the courts, guaranteed by the fourteenth amendment and Article I, section 21, Florida Constitution. "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Id. (emphasis added). Just as inmates have the due process right to free law libraries and pen and paper because they are confined in a place without outside access to these services, Bounds v. Smith, 430 U.S. 817 (1977), so also Florida cannot create a right to use public records to challenge confinement and simultaneously confine inmates in a place without meaningful access to these records. Once the State grants a general right to inspect public records, neither the Act nor our constitutions allow it unfairly to place unreasonable restrictions on the ability of inmates to inspect and use them to obtain relief from incarceration.

C. Under the equal protection doctrine, poor inmates are entitled to the same meaningful access to relevant legal instruments that wealthy persons have.

Under the second district's decision below and the first district's decision in Campbell, all persons except indigent prisoners

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[2] This amount does not include the cost of supervising the viewing of the record, but this cost will exist no matter where the records are viewed and is provided for in the statute.

have meaningful access to the prosecution's public records to help them obtain release from supervision. Accordingly, these decisions violated the equal protection doctrine by discriminating between rich and poor. These decisions relied on Yanke v. State, 588 So. 2d 4 (Fla. 2d DCA 1991), which held that, because free transcripts are not required for the preparation of post-conviction motions, free copies of the prosecution's trial files are also not required. Understanding why Yanke was wrongly decided requires an analysis of both federal and Florida constitutional law.

1. Federal law

The federal constitution guarantees equal treatment for both rich and poor in the criminal realm. In Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1963), the Court required states to provide free transcripts and counsel to all indigents on their first appeal of right. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19.

> [A] State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. . . . [T]he issue is whether or not an indigent shall be denied the assistance of counsel on appeal. . . . [T]he evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of appeal a man enjoys "depends on the amount of money he has."

372 U.S. at 355 (citations omitted).

Other cases extended these principles to post-conviction and discretionary proceedings. Burns v. Ohio, 360 U.S. 242 (1959), found unconstitutional a filing fee for discretionary review in the

state's highest court, even though the indigent defendant had already received one full appeal in an intermediate court. Smith v. Bennett, 365 U.S. 708 (1961), found that a state's insistence on filing fees for habeas corpus petitions violated the equal protection doctrine. The Court refused to "quibble as to whether in this context [habeas corpus] be called a civil or criminal action for . . . it is 'the highest remedy in law, for any man that is imprisoned.'" 365 U.S. at 712 (citation omitted).

Lane v. Brown, 372 U.S. 477, 484 (1963), reaffirmed that "the Griffin principle also applie[d] to state collateral proceedings." Brown found constitutional error when a state disallowed appeals of error coram nobis denials without transcripts and would not provide indigents with transcripts without the public defender's approval. Long v. District Court of Iowa, 385 U.S. 192 (1966), disapproved a state's refusal to provide a free transcript of a habeas corpus proceeding for appeal. "[H]aving established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration." Id. at 194. Roberts v. LaVallee, 389 U.S. 40 (1967), found error when, before trial, the state would not transcribe a prior preliminary hearing at no cost. "[D]ifferences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." Id. at 43.

Rinaldi v. Yeager, 384 U.S. 305 (1966), disapproved a statute allowing the State to pay for an inmate's appellate transcript by taking the money he earned while working in prison. This statute violated equal protection because it required repayment only from

prisoners, not from probationers or those sentenced merely to a fine. "[T]he law fastens the duty of repayment only upon a single class of unsuccessful appellants -- those who are confined in institutions." Id. at 308. "[I]t is now fundamental that once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Id. at 310.

The present case is like Rinaldi and its predecessors. Like the petitioners in Rinaldi, only indigent prisoners -- the persons in Florida most in need of meaningful access to the prosecution's files in order to challenge their incarceration -- do not have this meaningful access. Wealthy persons, probationers, and those sentenced to a fine do have this access. The equal protection doctrine does not permit these "differences in access to the instruments needed to vindicate legal rights." Roberts, 389 U.S. at 43.

Long, Rinaldi, and Roberts were decided in the heyday of the Warren Court, and the Burger and Rehnquist Courts have since qualified or distinguished these decisions, but these decisions have never been disapproved. Thus, Britt v. North Carolina, 404 U.S. 226 (1971), held that a defendant claiming the right to a free transcript did not bear the burden of showing how it would be useful or of proving that alternatives to transcripts were inadequate. In the peculiar circumstances of that case, however, the defendant had an adequate alternative to a transcript and hence could not claim error in the failure to provide one at no charge.

Similarly, United States v. MacCollum, 426 U.S. 317 (1976), upheld against an equal protection attack a federal statute requir-

ing a judicial finding of nonfrivolousness before free transcripts could be provided for post-conviction relief. MacCollum's holding, however, rested on (1) the petitioner's waiver of his chance to obtain a free transcript when he did not file a direct appeal, (2) the minimal showing needed to demonstrate nonfrivolousness, and (3) the likelihood that many petitioners would remember the possible grounds for post-conviction relief without needing a transcript. As will be shown later, these three factors distinguished MacCollum from the case at hand.

The Burger and Rehnquist Courts have also not given indigent defendants the right under the equal protection doctrine to free counsel for discretionary appeals, Ross v. Moffitt, 417 U.S. 600 (1972), post-conviction proceedings, Pennsylvania v. Finley, 481 U.S. 551 (1987), or capital post-conviction proceedings. Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion only, see Justice Kennedy's concurring opinion). According to Moffitt, "the question is not one of absolutes but one of degrees." 417 U.S. at 612. A person seeking discretionary review in a state's highest court has already had at the intermediate level the "benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf." Id. at 615. The transcripts, records, and briefs at the intermediate level, supplemented by whatever pro se submissions the petitioner might make at the highest level, are sufficient to satisfy the demands of equal protection for "meaningful access." Id.

Moffitt is distinguishable from the present case in two ways. First, Moffitt involved appointing free counsel while the present

case involves only the provision of meaningful access to documents. Equal protection is a matter of degrees, not absolutes, and the financial burden that providing free counsel places on the State is much greater than that required by the free provision of transcripts. For this reason, the Court has more willingly required free transcripts than it has required the free assistance of counsel. Of course, in this instance, only meaningful access to documents is required, and this access would cost only $10.90, an even smaller burden on the State than preparing transcripts.

Second, unlike Moffitt in which the issues had already been aired in the intermediate court, the present case involves documents that have never been litigated and which the inmate has never seen. As a practical matter, indigent inmates do not receive any access to these documents, much less the "meaningful access" required by Moffitt, Finley, 481 U.S. at 557, and preceding cases. Consequently, this case is more like the federal free transcript cases than the recent free lawyer cases, because, in this case, the "access to the instruments needed to vindicate legal rights" is different for poor inmates than it is for everybody else. This is invidious discrimination which neither Moffitt nor any other federal case condones.

2. Florida law

This Court reached the same conclusion for discrimination between rich and poor in the criminal context that the federal courts did for the federal constitution.

> The Equal Protection Clause of our state Constitution was framed to address all forms of invidious discrimination under the law, in-

> cluding any persistent disparity in the treatment of rich and poor. We conclude that our clause means just what it says: Each Florida citizen -- regardless of financial means -- stands on equal footing with all others in every court of law throughout our state. Nowhere is the right to equality in treatment more important than in the context of a criminal trial, for only here can a defendant be deprived by the state of life and liberty.

Traylor v. State, 596 So. 2d 957, 969 (Fla. 1992) (citation and footnote omitted). This Court's comments when it required the provision of free transcripts for review of involuntary hospitalization cases were equally applicable to review of criminal proceedings. "Once the State has chosen to establish an avenue of appellate review of orders requiring continued involuntary hospitalization, both our State and the Federal Constitution require that indigents be afforded review commensurate to that available to nonindigents." Shuman v. State, 358 So. 2d 1333, 1337 (Fla. 1978).

In Cassoday v. State, 237 So. 2d 146 (Fla. 1970), this Court held that an indigent prisoner who files a post-conviction motion "is entitled to a free copy of those portions of his trial record that relate to grounds raised in a rule 3.850 motion." Dorch v. State, 483 So. 2d 851, 852 (Fla. 1st DCA 1986). Dorch held that the prisoner must file the 3.850 motion first before receiving the transcripts. Dorch conceded that this holding placed the petitioner "between the proverbial 'rock and a hard place'" but said that he would simply have "to do the best he can from his recollection of the trial." Id. This rule was consistent with the federal rule that movants for post-conviction relief are entitled to free transcripts of their trials if their claims are not frivolous and the

transcripts are needed to decide the issues presented. Thompson v. Housewright, 741 F.2d 213 (8th Cir. 1984); see also Taque v. Puckett, 874 F.2d 1013 (5th Cir. 1989) (indigent defendant entitled to transcript of mistrial in order to prepare for retrial).

If Cassoday is still valid today, it is because all convicted appellants in Florida can obtain free transcripts for their direct appeal, a factor expressly mentioned in MacCollum. In addition, Florida's post-conviction procedure and the form found in Florida Rule of Criminal Procedure 3.987 do not require precise pleadings. Petitioners need only allege a prima facie case in order to obtain evidentiary hearings, at which point their motion will be more fully heard and transcripts provided if necessary. Carr v. State, 495 So. 2d 282 (Fla. 2d DCA 1986).

This is the context for Yanke's holding that, because Carr had disallowed the free provision of transcripts to prepare for post-conviction motions, free copies of the prosecutor's files to prepare for such motions were by the same reasoning also disallowed. The preceding discussion of federal and Florida cases explains why Yanke was wrong. The equal protection doctrine does not allow a State to provide the wealthy with "meaningful access" to "the instruments needed to vindicate legal rights" without providing the poor with the same "meaningful access." Carr was right that, under MacCollum, a Florida court can require a showing of nonfrivolity before providing a free trial transcript for post-conviction petitioners, because petitioners can automatically receive a transcript for their direct appeal, and they may remember enough of the events

at trial to make the minimal prima facie showing required by Florida Rule of Criminal Procedure 3.850.

In the present situation and unlike MacCollum, however, indigent inmates do not waive an opportunity to see the prosecution's files before their appeal is over, because these files are not public at that time. Indigent inmates have never seen these files, could not ever have seen them, and cannot see them because they are in prison and have no money. Moreover, the nature of these files is such that inmates can hardly be charged with knowing their contents. Consequently, the reasoning of MacCollum not only does not rebut the contentions of indigent inmates in this regard but actually supports them. They have not and never have had the meaningful access to these documents required by the equal protection doctrine and cannot obtain meaningful access even upon a showing that their request is not frivolous.[3]

Accordingly, Yanke badly misconceived the equal protection doctrine when it held that documents in prosecution files are like transcripts for purposes of determining if they should be freely provided to indigent inmates seeking to file post-conviction motions. These documents are clearly different from transcripts because inmates have no knowledge of their contents and did not previously have an opportunity to see them.

Yanke's reliance on Carr, Dorch, and similar transcript cases was also wrong in another respect. The context of these transcript

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[3] In any event, a petitioner for post-conviction relief should not have to make such a showing of nonfrivolity, because he does not know what is in the prosecution's files.

cases was that the transcript did not yet exist and a court reporter would have to produce one. Plainly, however, a nonexistent transcript is not a public record, and the Public Records Act has no relevance to records that do not exist. The issue in this case is whether Florida may provide a right of meaningful access to existing public records to everyone except the indigent prisoners who most need them. The transcript cases are not pertinent to this issue because nonexistent transcripts are not public records.

Because Yanke was wrong, Campbell and the decision below which relied on Yanke were also wrong, and this Court should reverse.

D. Section 57.081 requires clerks and sheriffs to provide public records free of charge for post-conviction motions.

The certified questions in both this case and in Campbell expressly refer to both clerks and state attorneys, ask for guidance on both, and treat them alike. Wootton v. Cook, 590 So. 2d 1039 (Fla. 1st DCA 1991), reached the same result for clerks that Campbell reached for state attorneys. These cases, however, overlooked the effect of section 57.081(1), Florida Statutes (1991).

> Any indigent person who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge.

Although this statute does not specifically apply to state attorneys or to many police agencies, it does squarely apply to clerks and sheriffs. Because post-conviction motions are judicial proceedings, section 57.081(1) means that an indigent person who seeks documents from clerks or sheriffs "with respect to such proceedings" are entitled to their services without charge. In par-

ticular, clerks and sheriffs must provide defendants with copies of their files without the Act's statutory copy fee if these copies are requested in connection with a post-conviction motion.

In Smith v. Department of Health and Rehabilitation, 573 So. 2d 320 (Fla. 1991), this Court said that section 57.081(1) required administrative agencies to provide free appellate transcripts for indigents. The same conclusion applies here. No substantive distinction exists between providing transcripts for administrative appeals and providing copies of file documents for post-conviction motions. Consequently, even if state attorneys are not required to provide free copies of documents, clerks and sheriffs must do so.

The State might argue that section 57.081(1) does not apply unless the inmates have previously commenced their post-conviction motions, because the statute applies only to proceedings already in progress. This argument is wrong for at least three reasons. First, "proceeding" is an encompassing term which includes "all possible steps in an action from its commencement to the execution of judgment." Kleinschmidt v. Estate of Kleinschmidt, 392 So. 2d 66, 67 (Fla. 3d DCA 1981), quoting Black's Law Dictionary, Fifth Edition. Under this interpretation of the statute, an inmate's discovery of sheriff's and court records for purposes of a post-conviction motion should be considered a step in the proceeding which commences or continues it. Second, an inmate's request or motion for copies of court files is itself a judicial proceeding which activates section 57.081. Finally, this Court has clearly contemplated that inmates have a right to meaningful access to public records before filing post-conviction motions. Mendyk v.

State, 592 So. 2d 1076 (Fla. 1992). If they do not obtain this meaningful access, they may file a post-conviction motion solely to obtain it. Id. Consequently, requiring inmates to file a post-conviction motion first before requesting the clerk's and sheriff's documents would accomplish nothing except the necessity for multiple amended motions and the fostering of inefficiency.

E. This Court has substantial power as a matter of procedural fairness and constitutional interpretation to mandate free copies of court and prosecution documents.

Court records are public both because the Act makes them public and because this Court has decided pursuant to its inherent control over these records that they should be public. Thus, on the one hand, this Court said in both Palm Beach Newspapers v. Burk, 504 So. 2d 378 (Fla. 1987), and Florida Freedom Newspapers v. McCrary, 520 So. 2d 32 (Fla. 1988), that court records are subject to the provisions of the Act. Palm Beach Newspapers held that depositions were open for public inspection and subject to the Act when they were officially filed with the court. Similarly, Florida Freedom Newspapers found that discovery materials given to the accused were public records for purposes of the Act. This Court held that these records could be sealed pursuant to the three-prong test of Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1 (Fla. 1982), because the Act specifically allowed court files to be sealed by order of the court and because courts had a constitutional duty to uphold a defendant's right to a fair trial.

On the other hand, this Court has reaffirmed that court proceedings are public events, and it "adhere[s] to the well established common law right of access to court proceedings and re-

cords," because "[p]ublic trials are essential to the judicial system's credibility in a free society." Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 116 (Fla. 1988). "[A] strong presumption of openness exists for all court proceedings, . . . and the filed records of court proceedings are public records available for public examination." Id. at 118.

Accordingly, court records are public not only because the Act says they are but also because this Court has adopted a common law right of access, pursuant to its inherent supervisory power. Because the public right of access to court records stems from this Court's inherent control over its own files, it has substantial power to determine how these files should be disclosed to indigent prisoners. It is not limited to interpreting the statute.

Prosecution and police records are also subject to this Court's authority. Courts have substantial authority to order state attorneys and police officers to comply with rules as they affect the administration of justice in the courtroom. Courts routinely require state attorneys and police officers to produce evidence and documents in court for public inspection by the judge and defendants. Just as this Court is not limited by the Act with respect to its own court files, so also the Act does not limit this Court's power with respect to the files of state attorneys and, by the same reasoning, the files of police agencies.

This Court has long exercised this power over state attorneys and police agencies. In particular, this Court has for twenty-five years required prosecutors to provide substantial discovery to the defense. In 1967, it adopted what was then Rule 1.220 and is now

Florida Rule of Criminal Procedure 3.220, imposing numerous obligations on the prosecutor to provide evidence and tangible documents for the defense. In re Florida Rules of Criminal Procedure, 196 So. 2d 124 (Fla. 1967). Consequently, the duty of state attorneys to facilitate the pursuit of justice by providing relevant tangible documents to defendants in advance of legal proceedings is clearly a matter within this Court's power.

The judicial power over state attorney's files extends to the providing of free copies to the defense. Of particular interest to the issue in this case was this Court's adoption in 1967 of Rule 1.220(i) (now Rule 3.220(o)), which then and now provides that "[a]fter a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county." The rules committee's reasoning for including this provision in the rules was illuminating.

> This [rule] is new and although it will entail additional expense to counties, it was determined that it was necessary in order to comply with the recent trend of federal decisions which hold that due process is violated when a person who has the money with which to resist criminal prosecutions gains an advantage over the person who is not so endowed. Actually there is serious doubt that the intent of this sub-section can be accomplished by a rule of procedure; a statute is needed. It is recognized that such a statute may be unpopular with the legislature and not enacted. But, if this subsection has [sic] not given effect there is a likelihood that a constitutional infirmity (equal protection of the law) will be found and either the entire rule with all sub-sections will be held void, or confusion in application will result.

In re Florida Rules of Criminal Procedure, 196 So. 2d at 155.

Without commenting on this committee note, this Court adopted Rule 1.220(i) "pursuant to the power vested in this Court by Article V of the Florida Constitution." Id. at 124. Thus, this Court expressly chose to require state attorneys to provide discovery documents to defendants free of charge. This Court made this choice pursuant to its inherent Article V rule-making power to insure the orderly pursuit of justice in judicial proceedings, as well as the necessity to insure the performance of these proceedings in a constitutional manner.

In similar situations and for similar reasons, this Court has since 1967 often compelled the expenditure of public funds on behalf of indigent defendants. "Every court has the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction." Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978) (court had inherent power to order payment of nonstatutory fees to indigent defense witnesses). "[T]he inherent power of courts is sufficient to afford us the remedy necessary for the protection of rights of indigent defendants charged with crimes." In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1133 (Fla. 1990) (quoting an unpublished order requiring counties to pay for appellate counsel for indigent appellants); see also Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986) (court had inherent power to assure adequate representation for indigent defendants by awarding attorney fees in excess of the statutory maximum for appointed counsel).

In this instance, requiring meaningful access to judicial, prosecution, and police agency files for post-conviction motions is not different from requiring free copies of prosecution files for pre-conviction trials. If this Court had the inherent power in 1967 to mandate the latter, then it now has the inherent power to insist on the former. The relevant considerations in 1967 are the same today because requiring meaningful access to judicial, prosecution, and police agency files for post-conviction motions promotes the cause of fairness and preserves the Act's constitutionality. Accordingly, this Court should make the same decision in this case that it made in 1967 when it approved Rule 1.220(i).

F. Indigent inmates seeking meaningful access to public records should not have to file a post-conviction motion first or show why they want access to the records.

Generally, prisoners seeking free copies of or free mailing of public documents in their own case should allege that they are insolvent, that they are in prison, and that they are preparing to file a post-conviction motion. If they have previously been found insolvent, they should not have to obtain a new order of insolvency, because persons in prison presumptively remain insolvent. If they have not previously been found to be insolvent and the amount of free assistance required is small (such as the $10.90 involved in this case), it is probably simpler and cheaper for the custodian just to accept an allegation of insolvency. If the amount of free assistance required is great, however, the custodian may require the prisoner to obtain an order of insolvency.

Prisoners should not have to file a post-conviction motion first before requesting public records. As previously argued, sec-

tion 57.081 authorizes the free services of clerks and sheriffs for public records requests prior to filing post-conviction motions. Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), contemplated that public records would normally be obtained before filing post-conviction motions. Moreover, for state attorney and police records, prisoners do not and cannot know what is in them and hence can hardly file the requisite post-conviction motion first. Wealthy persons do not have to file their motions first.

Prisoners also should not have to make a particularized showing of why these documents will help them. Once again, they often will not have enough knowledge of what is in state attorney and police files to make this showing. In addition, Britt v. North Carolina, 404 U.S. 226 (1971), held that an indigent defendant claiming the right to a free transcript did not bear the burden of showing how it would be useful or of proving that alternatives to transcripts were inadequate. A similar holding should apply here because wealthy persons would not have to make a showing of need.

G. Procedural matters

The certified question in this case asks this Court to determine the procedures under which public records should be disclosed to indigent prisoners. In what follows, the Association discusses some of the procedures that might be necessary. The relevant considerations here are complex, however, and undersigned counsel doubts that he thought of everything that should be considered. Consequently, this Court would benefit from the recommendations of the Criminal Rules Committee before making a final decision. The Committee might also devise a standard form to be used by prison-

ers. Accordingly, the Association recommends that this Court ask the Rules Committee to produce a form and propose permanent rules to replace any temporary rules that this Court promulgates now.

1. The Association notes initially, as it has already argued, that clerks, police agencies, and state attorneys can respond to public records requests from indigent inmates in various ways. First, they might mail copies of the records to the inmates. This method may be the most convenient, although it might often be more expensive than the alternatives. Second, they might bring the inmates to the place where the records are stored. This choice might not be unusual for inmates still in a county jail across the street from the state attorney's office or if the case file contains massive amounts of material.[4] Third, these agencies might send their actual case files to the prison, where inmates can view them under supervision before the prison returns them. This last choice might in many cases be the least expensive, because the only additional costs would be a few dollars for postage plus the cost of supervision time at the prison. (The Act requires the State to incur the latter cost in any event.) Many agencies might decline to exercise this last choice, not wanting to lose temporary control of the original case file. The Association does not care what choice an individual agency makes, as long as indigent prisoners have the same meaningful access to materials that might help them challenge their confinement that wealthy persons have.

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[4] Bringing inmates from the state prison system back to the state attorney's office might deter public records requests, because the inmates would lose gain time while in transit and while at the county jail.

2. Woodson v. Durocher, 588 So. 2d 644 (Fla. 5th DCA 1991), said that public defenders are subject to the act, but Woodson was clearly wrong on this point. Although a public defender's personnel or fiscal records may be subject to the Act, a public defender's trial files are not. A public defender characteristically opposes the State and as such is not a state agency for purposes of the Act because it performs a private function "in furtherance of its representation of an indigent client." Kight v. Dugger, 574 So. 2d 1066, 1069 (Fla. 1990); Polk County v. Dodson, 454 U.S. 312 (1981). Certainly, allowing journalists and state attorneys to inspect the trial files of public defenders would chillingly affect the candor of attorney-client communications, as well as unfairly favoring those defendants wealthy enough to hire private lawyers.

3. This does not mean that public defenders and the private defense bar have no part to play in providing materials to indigent defendants in prison. The source of defense lawyers' obligations to their clients is not the Act but rather Kight's holding that records in defense counsels' possession are not public because they belong to the clients. This holding was consistent with other cases directing defense counsel to provide their clients with documents in their case files, such as depositions and appellate transcripts. Thompson v. Unterberger, 577 So. 2d 684 (Fla. 2d DCA 1991); Dubose v. Shelnutt, 566 So. 2d 921 (Fla. 5th DCA 1990); Bermed v. Tacher, 565 So. 2d 833 (Fla. 3d DCA 1990); Dennis v. Brummer, 479 So. 2d 857 (Fla. 3d DCA 1985); see also Fla. Bar R. Prof. Cond. 4-1.16(d) ("Upon termination of representation, a

lawyer shall . . . surrender[] papers and property to which the client is entitled.").

On the other hand, defense counsel need not provide clients with the contents of an "office file relating to matters involving professional services performed for a particular client as to a particular matter." Dowda and Fields, P.A. v. Cobb, 452 So. 2d 1140, 1142 (Fla. 5th DCA 1984); Woodson. The distinction between documents "relating to professional services" and other documents such as depositions and transcripts is less than clear, but it is perhaps similar to the distinction in Kokal between official documents (which are publicly accessible) versus trial preparation materials, notes, and drafts (which are not). 562 So. 2d at 327.

Woodson, Dubose, and Thompson held that indigent public defender clients are entitled to receive transcripts and depositions previously provided at public expense, but they must pay postage for these documents and are not entitled to other documents without paying copying costs. The third district in Bermed and Dennis, however, appeared to hold or imply that indigent public defender clients were entitled to all documents at no charge. The resolution of this possible conflict among the district courts depends in part on how responsibilities are allocated among clerks, defense counsel, and the state attorney. To the extent that inmates are entitled to free access to public records, however, they should not have to pay postage.

4. Under a broad interpretation of the right to public access, a prisoner could receive multiple free copies of the same document (such as a search warrant) from the police agency, state

attorney, public defender, and court clerk. A governing principle should be that prisoners are not entitled to multiple free copies of the same documents. Consequently, this Court and the Criminal Rules Committee may need to determine how responsibilities will be allocated among the various agencies.

The Association suggests that prisoners need not have free access to or free copies of documents previously provided at no charge to their appointed counsel. For this reason, defense counsel should be responsible for providing indigents with depositions, other discovery items, transcripts, and appellate records.

Besides these records already provided to defense counsel, the prosecution's files consist of records filed in court and records not filed in court. State attorneys could be responsible for those undisclosed public records not filed in court, because court clerks have a statutory duty to provide free copies of official court documents that are filed. In addition, unlike state attorneys, clerks will know what court documents have already been provided the defendant as part of a record on appeal. Prosecution documents not filed in court probably have the greatest interest to inmates and have the greatest justification to be provided at no charge, precisely because the prosecutors did not previously disclose them. Providing free access only to those documents in their files that were not previously disclosed would substantially reduce the expense to state attorneys.

Clerks could be responsible for documents in the court file in accordance with their statutory duty under section 57.081. They need not provide depositions and transcripts that are defense coun-

sel's responsibility. An argument could be made that defense counsel typically receive many other official court documents which should not be provided again. Determining exactly which documents defense counsel received, however, will often be difficult. Some public defender offices, for example, do not receive written judgments and sentences or do not receive them in every case. Moreover, only the clerk's copies show the dates of filing, which are often significant. Consequently, the clerk should be responsible to indigent inmates for providing free copies of official court documents. If the clerk has previously provided an indigent appellant with records as part of an appeal, these records need not be provided again.

Undersigned counsel does not know much about police agency files and hence cannot make recommendations about providing free access to these files. Police agencies might be made responsible for anything not given to the prosecutor.

5. Many public records in court, prosecution, and police files concern routine matters which are hardly ever of interest to indigent defendants. It may be possible to devise procedures to exclude these documents unless the inmate makes a particularized showing of need. For example, a non-exhaustive list of routine court documents of this sort includes those relating to pre-trial release, orders and motions to detain, sureties, bond, bail, powers of attorney, hearing or court dates, status conferences, division transfers, continuances, notices to appear, written pleas of not guilty, subpoenas, praecipes, non-appearance of deponents, witness transportation, payment of costs, expenses, expert witness fees,

money receipts, evidence and property receipts, and capiases. For obvious reasons, the clerk also need not provide copies of pro se documents. In undersigned counsel's experience, excluding the routine documents would alone eliminate fifty percent or more of the copies necessary.

6. Public records include "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), Fla. Stat. (1991). The statutory language, "other material . . . received . . . in connection with . . . official business," is broad enough to include contraband and other unusual items, such as bales of marijuana, short-barreled shotguns, blood-stained clothing, or videotapes. For unusual items that might not reasonably be copied or sent to the prison for inspection, the custodians might fairly require a showing of particularized need. If the custodians of these items have doubts, they can request a judge in camera to rule on the request, as permitted in Kokal. 562 So. 2d at 327.

CONCLUSION

This Court should hold that indigent inmates are entitled to free copies of the public records in their own case, if they are preparing to file post-conviction motions to challenge their incarceration.

APPENDIX

District Court of Appeal of Florida, First District, 569 So.2d 439 (Fla.1990). A defendant states a colorable claim of ineffective assistance with allegations that he made a timely request for an appeal, and that counsel failed to honor it. *Dortch v. State*, 588 So.2d 342 (Fla. 4th DCA 1991); *Smith v. State*, 592 So.2d 1208 (Fla. 2d DCA 1992). These cases do not require that the motion show or allege that reversible error occurred at trial, and at least one court has affirmatively held that entitlement to a belated appeal in a criminal case is not dependent on a preliminary showing on the merits. *Viqueira v. Roth*, 591 So.2d 1147 (Fla. 3d DCA 1992).

Based on the foregoing authorities [1], we reverse the trial court's order summarily denying Hudson's motion, and remand for further proceedings on that motion.

JOANOS, C.J., and ERVIN and WIGGINTON, JJ., concur.

James Allen ROESCH, Appellant,

v.

STATE of Florida, Appellee.

No. 92-00757.

District Court of Appeal of Florida, Second District.

April 8, 1992.

Criminal defendant whose conviction and sentence was final filed motion to compel disclosure of state attorney's criminal investigation file, which he alleged would reveal that state attorney had possession of evidence favorable to defendant which it failed to disclose. The Circuit Court, Polk County, E. Randolph Bentley, J., denied motion to compel, finding it was not appropriate vehicle to accomplish defendant's objectives. Defendant's appeal was treated as petition for writ of certiorari. The District Court of Appeal held that when motion for postconviction relief was not yet filed, but request for public records was related to motion, defendant was entitled to access to public records.

Petition granted; order quashed; question certified.

1. Records ⇐60

After conviction and sentence become final, defendant is entitled to portions of state attorney's criminal investigation file that are subject to Public Records Act. West's F.S.A. § 119.01 et seq.

2. Records ⇐52

While motion for postconviction relief is pending, defendant may request public records as part of that criminal proceeding. West's F.S.A. § 119.01 et seq.

3. Records ⇐52

When motion for postconviction relief has not yet been filed, but request for public records is related to such motion, defendant is entitled to access to public records. West's F.S.A. § 119.01 et seq.

4. Records ⇐68

Defendant seeking public records in relation to motion for postconviction relief is not entitled to receive copies of documents without paying for them. West's F.S.A. § 119.01 et seq.

5. Records ⇐62

Defendant's request under Public Records Act for portions of state attor-

1. Although our decision may technically be in conflict with the *Milligan* decision cited by the trial court, we believe that that case has been effectively overruled by the authorities cited herein.

A1

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michelle Taylor, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, and to James Allen Roesch, Inmate No. 049547, Walton Correctional Institution, P. O. Box 1386-A2-114, Defuniak Springs, FL 32433, on this 14th day of October, 1992.

Respectfully submitted,

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