IN THE SUPREME COURT OF FLORIDA

JAMES ALLEN ROESCH,

Petitioner,

-vs-

Case No: 79-937

STATE OF FLORIDA,

Respondend.

_____/

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

AMICUS CURIAE OF LEONARD W. YANKE

Respectfully Submitted,

Leonard Yanke

Leonard W. Yanke, Pro.se.,
D.O.C. 110134 / E-46
Glades Correctional Institution
500 Oarnge Ave Circle
Belle Glade, Florida 33430-5222

TOPICAL INDEX TO BRIEF

CITATIONS OF AUTHORITY

SUMMARY OF THE ARGUMENT

Indigent inmates are entitled to free access to the records of police agencies, state attorneys, and clerks in their own cases, whether or not prior post conviction pleadings have been filed in the past. Providing access to these materials only at agency headquarters and yet simultaneously confining the inmate 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 the 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. 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 be required to state that they are in prison, are indigent, and desire the records to determine if the State Attorney has withheld evidence from their trial attorney pertinent to their case. Whether or not prior post conviction pleadings have been filed in the past, should be second nature to this court. Once convicted and sentenced an indigent defendant seeking discovery violations or newly discovered

evidence that occur under **Brady** [1/] are only discoverable under successive motions for post conviction relief since this Court determined error coram nobis is no longer the applicable procedure.

Petitioner has adopted the suggestion of the amicus Florida Public Defender's Association claiming a prerequisite to obtaining the state attorney's public record files would be that the indigent must be **"preparing to file a post conviction motion."** This was also the axiom given by the Second District Court in **Yanke v State, 588 So.2d 4 (Fla. 2nd DCA 1991)**, wherein the court determined that since **". . . Yanke has already prosecuted his post conviction motions and the related appeals and is not seeking the transcripts of his case but merely the files of the state attorney. We hold that there is no right to free copies of the criminal investigation files of the state attorney under these circumstances."** Id. This principle is fundamentally flawed for a number of reasons. Claims of newly discovered evidence or; claims that the state attorney withheld something from the trial counsel that would be pertinent to defense counsel should not be limited to initial filings. Indigent defendants, whether or not they have filed prior Rule 3 motions should still be permitted to procure, under the Florida Public Records Act, their State Attorney's files and records.

[1/] **Brady v Maryland, 373 U.S. 83, S.Ct. 1194, 10 L. Ed 2d 215 (1963).**

ARGUMENT

ISSUE

INDIGENT INMATES ARE ENTITLED TO FREE COPIES OF THE RECORDS OF POLICE AGENCIES, STATE ATTORNEYS, AND CLERKS OF THE COURT WHETHER OR NOT THEY HAVE SUBSEQUENTLY FILED AND PROSECUTED PRIOR POST CONVICTION PLEADINGS AS A MATTER OF (1) REASONABLENESS AND DUE PROCESS, (2) EQUAL PROTECTION OF THE LAWS, (3) SECTION 57.081, AND (4) FUNDAMENTAL FAIRNESS.

James Allen Roesch appealed the denial of a motion to compel the State Attorney for Polk County (10th Judicial Circuit) to "turn over" the contents in his case file pursuant to the Florida Public Records Act.

The Second District Court of Appeal reversed the Trial court's denial of Roesch's Motion to Compel. Roesch v State, 596 So.2d 1214 (Fla. 2nd DCA 1992). However, troubled by the tension caused by case law denying free copies of records to indigent prisoners, and the clear right to access public records, the District Court of Appeal certified to this Court the question of what procedures are to be employed to provide those records to unrepresented prisoners seeking them in conjunction with post conviction relief. Id. 596 So.2d at 1215.

This Court appointed counsel to represent Mr. Roesch who appeared pro.se.. The Florida Public Defenders Association along with the Department of Corrections, have filed Amicus Curiae Briefs on Mr. Roesch's behalf.

The Second District Court of Appeal certified the following question as one of great public importance:

> **WHAT IS THE APPROPRIATE METHOD OF DISCLOSURE OF PUBLIC RECORD HELD BY THE STATE ATTORNEY OR CLERK OF THE COURT WHERE THE RECORDS ARE REQUESTED BY AN UNREPRESENTED PRISONER WHO SEEKS THE RECORDS IN CONJUNCTION WITH A MOTION FOR POST-CONVICTION RELIEF?**

Roesch v State, 596 S.2d 1214, 1215 (Fla. 2nd DCA 1992). The issue is a recurring one; the First District Court of Appeal certified the same question in **Campbell v State, 593 S.2d 1148, 1150 (Fla. 1st DCA 1992).**

The question is the product of the mandate of §119.07(1)(a), Florida Statutes and a series of cases in this Court giving the statute content in the context of post-conviction prisoner petitions seeking disclosure of public records. The Statute provides, in pertinent part:

> **§119.07(1)(a) Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable time, under reasonable conditions, and under supervision by the custodian of the record or his designee. The custodian shall furnish copies of the records upon payment of fees as prescribed by law or, if fees are not prescribed by the law, upon payment of the actual cost of duplication of the copies.**

There is no dispute that Roesch, and other similarly situated prisoners, are entitled to public records access to a state attorney's criminal investigation file after their conviction and judgment have become final. State v Kokal, 562 So.2d 324 (Fla. 1990): Provenzano v Dugger, 561 So.2d 541 (Fla. 541 1990); Engle v State, 576 So. 2d 696 (Fla. 1991).

Two questions are embodied in the certification question: (1) Are prisoners entitled to copies of the files without payment if they are indigent and (2) if not, how is the custodian of records to discharge his or her responsibility to "permit the record to be inspected and examined" when the person seeking access is incarcerated?

The Second District Court of Appeal has held "that there is no right to free copies of the criminal investigation files of the state attorney" when the prisoner had "already prosecuted his post-conviction motion and related appeals. . ." Yanke v State, 588 So.2d 4,5 (Fla. 2nd DCA 1991). The First District Court of Appeal has held that a prisoner "would not be entitled to copies of the records without paying reasonable copying cost, nor would the prisoner be entitled to a list of documents, nor would the custodian be required to provide the original file to the prisoner at the place of incarceration. . ." Campbell v State, 593 So.2d 1148, 1149 (Fla. 1st DCA 1992)(citation ommitted). Unsure of itself the Campbell court certified the same question echoed by the Roesch court. Thus, this Court must face the dilemma: Are §119.07(1)(a) and Kokal empty

promises to empty pocketed prisoners and; can the investigative files of the State Attorney; Police Agencies and the Clerk be obtained without costs by an indigent prisoner if he has already litigated a post conviction motion and the related appeals?

Under the Second District's decision in **Yanke** and the First District's decision in **Campbell**, all persons except indigent prisoners have meaningful access to the prosecutions public records to help them obtain release from supervision. Accordingly, these decisions violate equal protection and due process principles by discriminating between rich and poor. The decisions above relied on **Yanke v State, 588 So.2d 4, (Fla. 2nd DCA 1991)**, which held that, because free transcripts are not required for preparation of post-conviction motions, free copies of the prosecution's trial files are also not required. Florida's post-conviction procedure and the form found in Florida Rules of Criminal Procedure 3.987 do not require precise pleadings. Petitioners need only allege a prima facie case in order to obtain evidentiary hearing, at which point their motion will be more fully heard and transcripts provided if necessary. **Carr v State, 495 So.2d 282 (Fla. 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 file to prepare such motions were by the same reasoning also disallowed. **Yanke** was wrongly decided for a variety of reasons.

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 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 Rules of Criminal Procedure.

In the present situation and unlike Carr, 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.

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 whether or not prior post-conviction motions have been litigated. 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, and similar transcript cases was also wrong in another respect. The context of the transcripts cases was 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 record 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 indigent prisoners who need them most. The transcript cases are not pertinent to this issue because nonexistent transcripts are not public records.

The Second District's decision in Yanke was wrongly decided for yet an additional reason. The Second District in Yanke held: ". . . **that there is no right to free copies of the criminal investigation files of the state attorney"** where the prisoner had **"already prosecuted his post-conviction motions and related appeal.'** Plainly, the Second District Court's decision prevents indigent inmates who have already prosecuted one post-conviction motion and it's related appeal to file successive motions predicated on new evidence or Brady material.

Incipiently, the state attorney files and records would not be discoverable until after trial and direct appeal. Therefore, evidence that may have been withheld from trial counsel would be considered new evidence or at least newly discovered evidence. Newly discovered evidence or evidence withheld from trial counsel contained in the State Attorney files and records must be pursued via

post-conviction procedures and; if discovered many years after the direct appeals has become final and prior post-conviction motions have been litigated, cannot be brought before the court in any other manner other than a successive post-conviction pleading. **Richardson v State, 546 So.2d 1037 (Fla. 1989)(All newly discovered evidence claims be brought in a motion for post-conviction relief and are not cognizable in an application for writ of error coram nobis unless defendant is not in custody).**

Generally, prisoners seeking free copies of or free mailing of public documents in their own case should allege that they are insolvent; they are in prison, and that they seek the State Attorney files and records to determine whether there was evidence withheld from the trial attorney. 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 had 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 probable in the interest of judicial economy for the custodian just to accept an allegation of Insolvency. If the amount of free assistance required is greater, however, the custodian may require the prisoner to obtain an order of insolvency.

Prisoners should not be required to file a post-conviction motion first before requesting public records. As previously argued, Section 57.081 authorizes the free service of clerks and sheriffs for public records requests prior to filing post-conviction motions.

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 the state attorney and police files to make this showing.

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

CONCLUSION AND PROCEDURAL MATTERS

The procedural question in this case asks this Court to determine the procedure under which public records should be disclosed to indigent prisoners. The Amicus Public Defender Association offers several alternatives, however, the one that stands out, and agreed upon by Petitioner and now Amicus Yanke, seems to present the most logical solution, sending **"actual case files to the prison where inmates can view them under supervision before the prison returns them"** Amicus Curiae Brief of Florida Public Defender's Association, p.25.

This approach is most consistent with §119.07(1)(a). Since the custodian must permit **"the records to be examined by any person desiring to do so at a reasonable time, under reasonable conditions, and under supervision by the custodian. . . or his designee,"** designate a prison employee as the supervisor is both simple and statutorily sound. Of course, the custodian might decide that it easier and perhaps even cheaper to copy a given file. In that

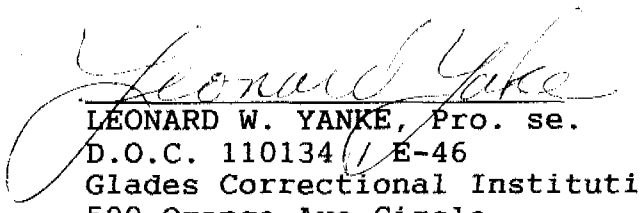
circumstance sending the copied file moots any other issue: the prisoner has obtained access.

Amicus Yanke does not agree with the Florida Public Defenders Association that the Court need refer this to the Criminal Rules Committee. The issues are not so complex. If there has been an appeal then a transcript would have been prepared. If discovery was demanded the file will show what discovery was sent. A simple rule from this Court setting forth the parameters would likely provide sufficient guidance to inmates, custodians, and prison designated supervisors so the majority of questions can be resolved by a simple letter to the prisoner's trial attorney listing documents contained in the state attorney files to determine whether trial counsel received all the documents requested.

While agreeing with Petitioner and Amicus Florida Public Defenders Association that this Court hold that indigent inmates are entitled to free copies of public records in their own case, Amicus Yanke urges this Court not limit access to those inmates who have already filed post-conviction motions and those related appeals.

Indigent inmates whose cases have been decided would then be barred from pursuing **Brady** claims or newly discovered evidence obtained from the State Attorney and Police Agency files.

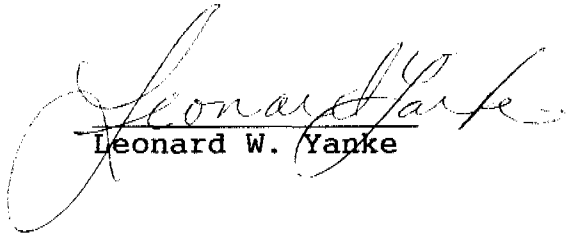
Respectfully Submitted,



LEONARD W. YANKE, Pro. se.
D.O.C. 110134 / E-46
Glades Correctional Institution
500 Orange Ave Circle
Belle Glade, Florida 33430-5222

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy hereof has been furnished to (1) MICHELLE TAYLOR, Assistant Attorney General, 2002 N. Lois Avenue, Suite 702, Tampa, Florida 33607; (2) STEPHEN KROSSCHELL, Assistant Public Defender (Attorney For Amicus) Office of the Public Defender, Tenth Judicial Circuit, Post Office Box 9000, Drawer P.D., Bartow, Florida 33830-9000; (3) SUSAN A MAHER, Deputy General Counsel (Attorney for Amicus) Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500; (4) RICHARD DORAN & CAROLYN SNURKOWSKI, Assistant Attorney General, Attorneys for Respondent, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050; (5) BRUCE ROGOW, Attorney for Petitioner, 2441 S.W. 28th Avenue, Fort Lauderdale, Florida 33312 and; (6) JAMES ALLEN ROESCH, Inmate No:049547, Walton Correctional Institution, Post Office Box 1386-A2-114, Defuniak Springs, Florida, 32433 on this ____day of January 1993.



Leonard W. Yanke

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

ney's criminal investigation file, made after defendant's conviction and sentence but before he moved for postconviction relief, was appropriate vehicle for defendant to determine whether state attorney had possession of evidence favorable to defendant which it failed to disclose. West's F.S.A. § 119.01 et seq.

PER CURIAM.

James Allen Roesch appeals the denial of his motion to compel the state attorney to "turn over" the contents of the file in his case pursuant to Chapter 119, the Public Records Act. We treat this matter as a petition for writ of certiorari. *See Yanke v. State*, 588 So.2d 4 (Fla. 2d DCA 1991).

The direct appeal from the appellant's conviction and sentence was final at the time he filed the motion to compel. In his motion to compel, the appellant alleges that the state attorney has refused access to his file. Although the appellant has not yet filed a motion for postconviction relief, he alleges that the file will reveal that the state attorney had possession of evidence favorable to the appellant which it failed to disclose. The trial court denied the motion to compel, finding it was not the appropriate vehicle to accomplish the appellant's objectives. We disagree.

[1-5] After a conviction and sentence become final, the defendant is entitled to the portions of the state attorney's criminal investigation file that are subject to the Public Records Act. *State v. Kokal*, 562 So.2d 324 (Fla.1990). While a motion for postconviction relief is pending, the defendant may request public records as part of that criminal proceeding. *Mendyk v. State*, 592 So.2d 1076 (Fla.1992); *Provenzano v. Dugger*, 561 So.2d 541 (Fla.1990). When a motion for postconviction relief has not yet been filed, but the request for public records is related to such a motion, the defendant is entitled to access to the public records. *Campbell v. State*, 593 So.2d 1148 (Fla. 1st DCA 1992). A defendant is not entitled to receive copies of the documents without paying for them in either of these circumstances. *See Campbell; Yanke.*

Because the motion to compel in this case is related to a motion for postconviction relief, we find that the trial court should have considered the merits of the request for disclosure of the state attorney's file. Accordingly, we grant the petition for writ of certiorari and quash the trial court's order denying the motion to compel, but certify, as was certified in *Campbell v. State*, the following question as one of great public importance:

WHAT IS THE APPROPRIATE METHOD OF DISCLOSURE OF PUBLIC RECORDS HELD BY THE STATE ATTORNEY OR CLERK OF THE COURT WHERE THE RECORDS ARE REQUESTED BY AN UNREPRESENTED PRISONER WHO SEEKS THE RECORDS IN CONJUNCTION WITH A MOTION FOR POSTCONVICTION RELIEF?

RYDER, A.C.J., and DANAHY and PATTERSON, JJ., concur.

Joyce C. RUPERT and Charles Rupert, husband & wife, Appellants,

v.

STATE AUTO PROPERTY AND CASUALTY INSURANCE COMPANY, an insurance company authorized to do business in the State of Florida, Appellee.

No. 91-02302.

District Court of Appeal of Florida, Second District.

April 8, 1992.

Insured brought action to recover uninsured motorist benefits under automo-