IN THE SUPREME COURT OF FLORIDA

JAMES ALLEN ROESCH,
Petitioner,

V

CASE No. 79,937

STATE OF FLORIDA,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Tenth Judicial Circuit, In and For Polk County, Florida, and the Appellant in the Second District Court of Appeal. Respondent was the prosecution in the circuit court and the appellee in the District Court of Appeal.

In this brief, the parties will be referred to as Petitioner and Respondent.

The following symbols will be used:

R = Record on Appeal

A - Followed by a number refers to Appendix, the number representing the particular exhibit.

STATEMENT OF THE CASE

Petitioner and Michael James Dunne are charged with grand theft (auto) in Saint Johns County, Florida, Case # 89-2120 for the theft of a 1982 BMW motor vehicle property of Barry E. Owen on September 25, 1989. (R-229)

Petitioner is charged in a three count information as follows: Ct. I: Burglary (dwelling)

Ct. II: Burglary (conveyance

Ct III: Grand theft auto

The owner alleged in the information, Case # CF89-5532, dated December 4, 1989, was Barry Cohen. The forgoing charges were brought in the Tenth Judicial Circuit Court, Polk County, Florida as a result of the charges above in the Seventh Judicial Circuit, Saint Johns County. (R1-R4)

Petitioner was unrepresented in the Saint Johns County charge and filed a Motion For Discharge on right to speedy trial w/o demand pursuant to Rule 3.191 (i) (4) Fla. R. Crim. P. on March 22, 1990 (R-227) Petitioner urged counsel, Mr John Kilcrease, in several letters, to file a motion as stated above in reference to the Polk County charges. (A-1, A-2, A-3, A-4)

Petitioner was tried before the court on May 7, 1990 and found guilty as charged. Petitioner was tried in an orange jail jump suit with Polk County Jail stencilled boldly across the back and front. (R44 - R45) No witnesses are presented for the defense. Seven witnesses appear for the State each identifying Petitioner as being the man wearing orange jail clothes (R-60, R96, R-104, R-110, R-123).

Petitioner was sentenced on June 15, 1990 to: Ct. I - 15 years State Prison; Ct. II - 5 years State Prison, Ct III - 5 years State Prison. Counts I and II are consecutive. Count III is concurrent to I and II. Total sentence: 20 years State Prison as a habitual offender pursuant to 775.084 F.S. (1989)

Notice of appeal is timely filed and counsel is appointed. On July 30, 1990 Petitioner received information that was learned of during trial testimony, from Mr Richard D. Mars, Esquire and Ms. Tanya Comparetto, in the form of a police report filed by Florida Highway Patrol trooper R.L. Kelley (A-5 pgs 6-9) The report was not listed in State's discovery return. It was divulged by State witness David Hamm that the auto theft and accident were investigated by Florida Highway Patrol (R-61, R-64, R-77). It was learned that no investigation was performed by any of the persons testifying regarding the automobile, the accident, or surrounding events (R-78, R-79).

Petitioner files an "Application for leave to seek post conviction relief per Fla. R. Crim. P. 3.850 requesting new trial on newly discovered evidence" August 28, 1990 (A-5 16 pages). State responded on September 26, 1990. (A-15) On the 5th October, 1990 the Court (2nd DCA) denied leave from the direct appeal, Case #90-1788. (A-13)

Petitioner's direct appeal was filed and affirmed in a per curiam opinion on November 22, 1991. (A-14)

Petitioner sought the files of the State Attorney to search for further exculpatory evidence but was refused.

Petitioner filed a Motion To Compel in the trial court seeking an order directed to the State Attorney to turn over his file in Petitioner's case. On February 4, 1992 the Hon. E.R. Bentley, denied the motion and Petitioner appealed. The Second District Court treated the appeal as a Petition For Writ of Certiorari and granted it on April 8, 1992, quashing the order denying motion to compel.

In the interim, Petitioner was transferred from Sumter Correctional Institution on March 30, 1992. Petitioner arrived at Holmes Correctional Institution on April 7, 1992, but due to mail forwarding delays did not receive the Second DCA opinion until April 20, 1992. Petitioner vigorously fought for access to legal materials, which caused further delay, and finally filed his Motion For Certification on May 26, 1992.

Petitioner now seeks review of the question certified by the Second District Court as follows:

> 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 IN CONJUNCTION WITH A MOTION FOR POST CONVICTION RELIEF?

The trial court ordered the State Attorney to turn over his file on April 17, 1992. On April 20, 1992 Mr Jerry Hill, State Attorney, forwarded a letter to Petitioner showing payment of $66.83 was required to obtain State file. (A-6) Petitioner is an indigent and cannot pay the amount asked.

STATEMENT OF THE FACTS

Petitioner will refer to the Statement of the Case and Facts as presented by appellate counsel in Appellant's Initial Brief for a foundation (A-7 10 pages) with the following additions which were omitted due to their being outside the scope of appellate review:

A. Evidence presented at trial

The State's only conclusive evidence (arguably) was the eye witness testimony of William Alfred Ouzts (R57-R65) and Marcia Bramlitt (R88-R100). Ouzts's testimony placed Petitioner at the scene of the accident and Petitioner was identified in the courtroom (no out of court identification was made by either Ouzts or Bramlitt) as "The gentleman seated at the defendant's table in the orange jump suit" (R-60)

Marcia Bramlitt testified that Petitioner drove a white 1988 BMW up to the door of the motel where she was working as a desk clerk and rented a room for three (3) days using a credit card belonging to Barry Cohen. (R88-R94) The State presented no evidence whatsoever of any credit card. Instead the State presented a copy of a room receipt. The State claimed the original was destroyed (R94)

Bramlitt identified Petitioner as the man presenting himself to be Barry Cohen. The sworn affidavit made by Bramlitt gives a description of a "slim built" tall man with light

brown wavy hair (A-8) The clothes Bramlitt identified Petitioner as having worn differed from that of the officers who arrested him (A-9). The clothes, height, weight, build, hair color and clothes matched Michaeal James Dunne. (A-9). No pre-trial identification of either subject was asked of Bramlitt. Petitioner was identified in court by Bramlitt as he sat wearing an orange jail jumpsuit (R96)

Evidence was presented that counsel did not object to which was clearly not presented in State's response to discovery demands (R69). Counsel for Petitioner did not object to an inadmissable videotape — no authentication — being entered into evidence (R71) Counsel did not object when the State sought to admit copies of documents said to have been destroyed (R94) but argued in Motion For New Trial (R176-178) that making a copy without an original is impossible "the presence and non-existence arguments are inconsistent and mutually exclusive" (R-178)

B. Evidence witheld by State

During the testimony of David Hamm it was revealed that no investigation of the accident nor the auto theft was conducted by his department — Saint John's County Sheriff. (R77 - R79) No explantion was given as to how, or Why, or where, the videotape of the accident was made (R70-R73)

Deputy Hamm testified the entire investigation of the accident and criminal investigation of the auto theft was conducted by Florida Highway Patrol, Trooper R.L. Kelley, report # 89-38-0318727 (R77)

The State, in its response to demand for discovery, failed to mention any investigation by the Florida Highway Patrol (A-10, A-16). The State did not list trooper Kelley as a person having information. The State did not list any report by trooper Kelley. The State did attempt to prove by inference during the testimony of Deputy Ouzts and Deputy Hamm that Petitioner was the driver of the BMW when it was involved in the accident (R58 – R87)

The State listed evidence of use of Barry Cohen's credit cards at several other locations including copies of the signed vouchers, apparently the same person signing the receipts for the motel room, but did not present this evidence at trial.

The State listed a handwriting expert and fingerprint expert in discovery along with "known fingerprints" of Petitioner. During trial held May 7, 1990 the State presented no such evidence or testimony.

The Florida Highway Patrol questioned Michael Dunne, charged him with traffic offenses and obtained verbal and/or written statements from him. The State did not disclose any of this in discovery and in fact gave Petitioner a false address for Dunne. The State knew Dunne was at Florida State Prison, Starke, FL. (A-10, A-5)

SUMMARY OF ARGUMENT

POINT-I This Court has ruled in numerous recent cases that once a conviction becomes final, a person is entitled to access to the Public Records portion of a State Attorney's file, when the materials are to be used in filing a Post Conviction Motion. Inasmuch as these rulings all dealt with prisoners under a sentence of death and represented by able counsel, the question remained concerning indigent prisoners unrepresented by counsel. The question posed by the Second District Court of Appeal, in Petitioner's case, can be answered only one way and remain within the parameters of the 14TH Amendment of the U.S. Constitution regarding equal protection under law; also the 5TH Amendment due process clause. Indigents must be provided at no cost whatever is available to a non-indigent.

POINT-II Petitioner's case deserves special consideration in light of the flagrant "Brady" violations, discovery violations, use of testimony known to be misleading/false and other prosecutorial misconduct. Petitioner presents ample evidence of witheld evidence in the form of a Florida Highway Patrol report and investigation which was not listed in the States' response to Petitioners demand for discovery. Other misconduct by the State is mentioned herein and will be substantiated at an evidentiary hearing before the trial court. The facts of Petitioners case warrant a special judicial instruction to appoint counsel for Petitioner once a Post Conviction Motion is filed, as Petitioner has made a colorable showing of misconduct.

ARGUMENT

POINT I

PUBLIC RECORDS AVAILABLE TO CRIMINAL DEFENDANT AFTER CONVICTION BECOMES FINAL PURSUANT TO CHAPTER 119, FLORIDA STATUTES, NAMELY STATE ATTORNEY'S FILE, SHOULD BE PROVIDED TO INDIGENTS WITHOUT COST WHERE RECORDS ARE ESSENTIAL TO FILING POST CONVICTION MOTION.

Pursuant to Chapter 119 "Public Records", Florida Statutes (1991) a person is entitled to access to files of State Attorney once a conviction is final, i.e. Provenzano v. Dugger, 561 So 2d. 541 (Fla. 1990); State v. Kokal, 562 So 2d 324 (Fla. 1990); Mendyk v. State, 592 So 2d. 1076 (Fla. 1992).

This Court decided the above cases which all involved prisoners under sentence of death, who were represented by the Office of the Capital Collateral Representative, or other able counsel. The above cases did not reach the question posed by Second District Court in Roesch v. State, ____ So 2d ____, 17 FLW D926 (April 8, 1992) and First District Court in Campbell v. State, 17 FLW D490 (Feb. 11, 1992):

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

Petitioner maintains that the 14th Amendment, U.S. Constitution,

Equal Protection Guarantee, mandates that whatever is available to a person who can pay must be provided to an indigent at no cost.

How great a burden should there be on the government to satisfy the appearance of justice?

"When an indigent asks for anything that may aid him in seeking relief, a judge should ask himself the question 'Could a non-indigent have such an aid?' If the non-indigent could, then a judge should hesitate to deny it to an indigent."

O'Sullivan, Post Conviction Remedies, 33 F.R.D. 493, at 496 (1963)

The U.S. Supreme Court has long held that the 5TH and 14TH Amendments require that indigents cannot be denied a direct appeal of a criminal conviction, nor a state habeas corpus petition, solely because inability to pay docketing fees or pay for transcripts of proceedings, e.g. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Eskridge v. Washington Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed. 2d. 1269 (1958); Florida Constitution Article I, Section 9, (due process of law) also supports the above.

If the persons holding office as State's Attorneys and their assistants upheld their oaths of office and fulfilled their duties as officers of the Courts it might not be necessary to provide the public access to their files. However, as it has been shown time and again in recent cases,

certain individuals have ignored their oaths, the Canons of Ethics, the U.S and Florida Constitution, and even common sense, in gaining a conviction. One of the most tragic cases involved a perfectly innocent teenager, Todd Patrick Neely, Neely v. State, 565 So 2d. 337 (Fla. 4 DCA 1990). Witheld evidence caused an unjust conviction in Neely's case and cost his family over four hundred thousand dollars (400,000.00) in legal fees to obtain justice. And even then justice would've been denied had not a conscientious Assistant Attorney General — Diane Leeds — came forward with seven (7) canvas sheets containing exculpatory information which was intentionally suppressed by Assistant State Attorney Peter M. Neil.

Another incident in the case Richardson v. State, 546 So 2d 1037 (Fla. 1989) caused an innocent man, also indigent to spend many years in prison. This same prosecutor Mr Schaub, was not content with witholding evidence, but also became so tyrannical in the courtroom that this Court was compelled to reverse a conviction solely on his overbearing and overzealous courtroom demeanor Nowitzke v. State, 572 So 2d 1346 (Fla. 1990).

What has happened to our justice system? Is nothing sacred? Is our Constitution so outdated that the current trend of evading its provisions is warranted? This humble pro se Petitioner would hope — literally pray - it is not.

Since it is no longer prudent to accept at face value

a prosecutors claim that no "Brady" materials are known to him, what is an indigent criminal defendant to do? Once his conviction becomes final he may now ask for the State's file but, if he cannot pay the costs, it is as unavailable to him as if Chapter 119 did not exist. Is the small cost and inconvenience of copying a file and mailing it to a defendant worth denying a prisoner a chance at arriving at the truth?

Petitioner would submit that the words of the Honorable Justice Terrell in Ex Parte Welles, 53 So2d 708 (1951) are valid today:

> "Due process and equal protection are governed by rule of court, the criteria by which it is determined being fairness, reasonableness, and justice. When one is faced with a five year sentence to the penitentiary for a crime he did not commit, his conviction being due solely to mistaken identity, this court should not quibble over trifles and devising a formula to correct the injustice. The strength of our jurisprudence is due to the fact that it readily accomodates itself to all classes of controversies. Justice is its dominating purpose and we are led to that by rules of procedure. They are not sacrosanct, in fact, when they fail to lead to justice, the time for change has arrived."
>
> Welles, at 711-712

Petitioner asserts that the time for change has arrived

in respect to the rule requiring indigent defendants to pay costs when obtaining Public Records pursuant to Chapter 119, as held by the lower courts in Yanke v. State, 588 So 2d 4 (Fla. 2 DCA 1991); Cambbell, supra., and Roesch, supra.

An indigent defendant is already at a distinct disadvantage when challenging the State with its awesome power and resources. The generous rulings toward prisoners in Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed 2d. 72 (1977); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed 2d. 718 (1969); Hooks v. Wainwright, 536 Fed. Supp 1330 (M.D. Fla. 1982) are being generally ignored by Department of Corrections officials who face a financial shortfall that is beyond anyone's predictions.

The certified question posed by the First and Second District Courts should be the impetus to move this Court to bring indigent's rights back into an increasingly plutocratic judicial system. Indeed, the Hon. Justice Felix Frankfurter wrote:

"[i]n law also the right answer usually depends on putting the right question".[1]

The question is now before this Court and wisdom dictates the answer. The pursuit of justice demands it in our egalitarian system.

Justice Frankfurter: "[wisdom too often never comes, and so one ought not reject it merely because it comes late".[2]

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1. Estate of Rogers v. Elvering, 320 U.S. 410, 413 (1943) Franfurter, J.

2. Henslee v. Union Planters National Bank and Trust Company, 335 U.S. 595, 600 (1949) (Both quotes from Florida Bar Journal, Mar. 1992.)

POINT II

FACTS OF PETITIONER'S CASE PRESENT A COLORABLE CLAIM OF PROSECUTION'S KNOWINGLY WITHOLDING "BRADY" MATERIALS SUFFICIENT TO WARRANT FURTHER PROCEEDINGS INCLUDING EVIDENTIARY HEARING AND APPOINTMENT OF COUNSEL

Petitioner obtained a copy of a Florida Highway Patrol Report concerning the accident occuring between the stolen BMW and Deputy Ouzts' vehicle, from Mr Richard Mars, Attorney At Law, and former Assistant State Attorney, Tanya Comparetto. This report, and the investigation which produced it, was witheld by the State in discovery. Information in this report was contrary to the theory asserted by the State that Petitioner was the driver and sole possessor of this vehicle. The statements made by the driver of the BMW, as listed in the report, Michael James Dunne, were also omitted from discovery. Moreover, the State also gave an address for Dunne in discovery – 299 Pizzaro Rd., St. Augustine, FL – that it knew was false. Dunne was incarcerated at Florida State Prison and his statement was exculpatory to Petitioner. (A-5 pages 9,10,11)

Upon demand, a prosecutor is required to divulge any exculpatory evidence known – Brady v. Maryland, 373 U.S. 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) to the defense. Petitioner made his demand but the State listed none.

The State did not list in it's discovery return any mention of the F.H.P. report or investigation. Nor did the State divulge the existence of statements by Dunne to law enforcement officers which were exculpatory to Petitioner.

Since Petitioner has not reviewed the entire file of the State, he will not comment on other exculpatory evidence he has good reason to believe is contained therein. Petitioner will address only the F.H.P. report and investigation.

The law to be applied to this situation is found in U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed 2d. (1985) and U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d. 342 (1976).

The determing factor in weighing evidence found to be witheld by the prosecution is materiality. This court held:

> "Standard by which constitutional error in failure by prosecution to disclose information favorable to defendant is materiality, and undisclosed evidence must be viewed in context of entire record."
>
> Thompson v. State, 553 So 2d 153 (Fla. 1989)

In the case sub judice, the evidence presented at trial, viewed in the light most favorable to the State, was extremely weak. The only link was the

testimony and in-court identification of Petitioner by Deputy Ouzts and Marcia Bramlitt. This in court identification was tainted by the unnecessary suggestability caused by the Court in forcing Petitioner to be tried in jail clothes. There was no prior identification of Petitioner made by either witness. A substantial length of time passed between the incident and the identification. The conditions and opportunity to view the suspect were less than ideal in at least one witness' situation. The description given by Marcia Bramlitt in a sworn statement the day of the incident differed radically (clothes, build, hair color) from Petitioner.

The forgoing factors affecting an identification, along with undue suggestibility (jail clothes), are all in violation of the principles of Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed. 2d 401 (1972).

Since all of the evidence presented consisted of inferences derived from circumstantial events that did little more than appear suspicious toward Petitioner, the existence of the F.H.P. report, the investigation and Dunne's statements were all material.

By any stretch of the imagination, the State cannot explain away the suppression of the report and investigation by the agency solely responsible. The witnesses testifying admitted they did not conduct the criminal investigation. No physical evidence whatsoever

was presented trial, though the State listed a number of items. Petitioner maintains that this direct evidence — fingerprints, handwriting examples, expert's reports, stolen property, documentation of stolen vehicle, etc. — was not presented for the same reason that Michael Dunne's whereabouts were concealed. The State knew this evidence contradicted the testimony of Marcia Bramlitt and Deputy Ouzts. The State was fully aware of Bramlitt's identification being mistaken toward Petitioner but allowed the false testimony to go on uncorrected. The handwriting samples clearly did not match the motel room receipt nor the credit card vouchers. Petitioners handwriting is evident throughout this Brief. The court may compare it itself to the motel room receipt (A-11 page1).

The prosecution overzealously pursuing a conviction has been criticized even in cases where defendants are clearly guilty. Bertolotti v. State, 476 So 2d. 130 (Fla. 1985)

Withholding material evidence from the defense has earned reversals in myriad cases before this Court. Arango v. State, 497 So 2d 1161 (Fla. 1986) — after the case was sent back by U.S. Supreme Court, Florida v. Arango 105 S. Ct. 41, 88 L. Ed 2d 34 (1985).

A very similar situation was addressed in Swafford v. Dugger, 569 So 2d 1264 (Fla. 1990) whereby material gleaned from the State's files was subjected to the criteria established in Agurs, supra. and Bagley, supra. holding materiality was the standard by which evidence is judged.

One very alarming factor involving Petitioner's case is the State's admission concerning the destroyed original documents which contained statements (Dunne's) and documents said to have been signed by Petitioner.

> "Jencks Act calls not only for timely disclosure of statements, but also for preservation of statements for future disclosure"
>
> 18 U.S.C.A. Section 3500
>
> (U.S. v. Lieberman, 608 F.2d. 889, cert den. 100 S.Ct. 673, 444 U.S. 1019, 62 L.Ed2d 649 (1982))

The U.S. Court of Appeals has held likewise:

> "Government has a responsibility to try in good faith to preserve important material and disclose it once a defendant moves for discovery"
>
> U.S. v. Nabors, 707 F.2d 1294, reh. den. 714 Fd2d 1294 (C.A Ga. 1983)

The Florida case which best illustrates the law on prosecutors withholding material evidence favorable to the defense, which was decided in Federal Court, is Troedel v Wainwright, 667 F. Supp 1456 (S.D. Fla. 1986). In Troedel the tenets of Bagley, supra. were applied. Another case is Brown v. Wainwright, 785 F.2d. 1457 (11 circ. 1986) whereby Bagley and Agurs, was applied.

Since the State's entire case was built around the testimony of Marcia Bramlitt and Deputy Ouzts, any confidence in the reliability of the conviction is severely undermined in view of the utterly suggestive in-court identification (Petitioner tried in orange jumpsuit stencilled with "Polk County Jail" boldly) and this type situation was found to be sufficient to require a new trial. U.S. v Harper, 680 F.2d 731 cert. den. 103 S.Ct. 229, 459 U.S. 916, 74 L.Ed.2d 182 (1983).

In the court below, the presiding judge made reference to Petitioner filing a "demand for speedy trial" (R-211, R-234, R235 R-237, R-241) when in fact, after more than 175 days had elapsed, and Petitioner had apprised counsel fully (A1-A4). Petitioner told counsel that he wished to move for discharge. However, Petitioner had advised counsel repeatedly to interview alibi witnesses, inspect evidence and otherwise prepare for trial. Petitioner urged his court appointed, assistant Public Defender, Mr John Kilcrease, to be prepared for trial and assurances were given that everything was done properly. Though counsel had 73 days, he did absolutely nothing.

In anticipation of the State's argument that it was Petitioner's fault in filing demand for speedy trial that evidence, including Dunne's whereabouts, the FHP report, the FHP investigation, etc. was not uncovered — Petitioner states simply, "it aint so". Yes, counsel has an obligation to investigate Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986) ("A criminal defense counsel has a duty to investigate, but this duty is limited to reasonable investigation" at 1450) but Petitioner asserts that no reasonable investigation would

have uncovered the evidence knowingly suppressed by the State. Counsel for State was the "architect of a proceeding that does not comport with standards of justice" as in Brady v. Maryland, supra:

> " We now hold that to the suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle of Mooney v. Holohan, is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of jurisprudence suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: " The United States wins it's point whenever justice is done it's citizens in the Courts." A prosecutor that withholds evidence on demand of an accused which, if made available, tends to exculpate him or reduce the penalty helps shape a trial that bears heavily on the accused. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though as in the present case, his action is not "the result of guile" to use the words of the Court of Appeals, 226 Md., at 427, 174 A.2d., at 169 "
>
> (emphasis added)

The prosecution in the case sub judice not only witheld evidence contrary to it's theory of the case, and therefore favorable to Petitioner, it also allowed testimony and evidence it knew to be false, to go uncorrected. This is violative of the U.S. Supreme Court holdings in Napune v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed 2d 1217 (1959).

The court below, having authority over the trial court, which is Second District Court of Appeal, has held that use by the prosecution of evidence known to be false is grounds alone for relief: Bogan v. State, 211 So 2d 74, 77 (Fla. 2 DCA 1968).

When Petitioner sought leave from his direct appeal to present the trial court with the witheld F.H.P. Report and the letter from Michaeal Dunne (A-5 9-11) the State responded only that the evidence was not "newly discovered" since the existence of it was inadvertantly revealed at trial, (though the contents and substance of the report was not made known). Also, the State argued that Petitioner failed to demonstrate prejudice. (A-15)

Neither of the above arguments deserved consideration as all of that was properly a matter for the trial court to decide. The appellate process was not being unduly interupted as the State urged. Nonetheless, the ruling was unfavorable to Petitioner. This time Petitioner is well prepared and in the forgoing has demonstrated why this cause must be returned to the trial court. Counsel is requested to represent Petitioner.

CONCLUSION

WHEREFORE, with regard to the forgoing facts, law and argument with respect to the question certified as being of great public importance posed by Second District Court of Appeal, Petitioner prays this Honorable Court will answer that an unrepresented prisoner, whom is indigent, must be provided Public Records necessary to file a Post Conviction Motion at no cost.

Further, as to Point II, Petitioner has demonstrated to this Court a colorable showing of the State wilfully withholding material evidence favorable to Petitioner. Moreover, Petitioner has shown where counsel for State allowed false evidence and/or testimony to go uncorrected. For these reasons a special instruction, upon remand, is warranted directing the trial court to appoint counsel for Petitioner, and to conduct a full evidentiary hearing to explore these claims and others once Petitioner files his Motion For Post Conviction Relief.

CERTIFICATE OF SERVICE

I, James A. Roesch, Petitioner herein, do hereby certify that a true copy of "Petitioner's Brief on the Merits" w/appendix has been provided to Counsel for State of Florida, Ms. Michele Taylor, Asst. Att. Gen. 2002 So. Lois Ave, Suite 702, Tampa, Fl 33602 this day of June, 1992.

Respectfully Submitted,

James Allen Roesch

JAMES ALLEN ROESCH