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IN THE
SUPREME COURT
OF FLORIDA

Case No. 79,937

JAMES ALLEN ROESCH,

Petitioner,

v.

STATE OF FLORIDA,

Defendant.

DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
SUMMARY OF THE ARGUMENT	1
STATEMENT OF THE CASE AND THE FACTS	2
ARGUMENT	
THE APPROPRIATE METHOD OF DISCLOSURE OF PUBLIC RECORDS HELD BY A STATE ATTORNEY OR COURT CLERK TO AN INDIGENT PRISONER IS TO HAVE THOSE RECORDS MAILED TO THE PRISON FACILITY FOR SUPERVISED INSPECTION AND REVIEW BY THE PRISONER, AND COPYING BY THE PRISON AUTHORITIES.	3
A. Traylor v. State Sets The Stage For Requiring The State To Provide Equal Access To Indigent Prisoners Seeking Public Records	5
B. Move The Mountain To Mohammed	5
CONCLUSION	7
CERTIFICATE OF SERVICE	8
APPENDIX	9-11

TABLE OF CITATIONS

PAGE

Campbell v. State
593 So.2d 1148
(Fla. 1st DCA 1992) 3, 4

Knight v. Dugger
574 So.2d 1066 (Fla. 1990) 2

Provenzano v. Dugger
561 So.2d 541 (Fla. 1990) 4

Roesch v. State
596 So.2d 1214
(Fla. 2nd DCA 1992) 3, 4, 9

State v. Kokal
562 So.2d 324 (Fla. 1990) 4

Traylor v. State
596 So.2d 957 (Fla. 1992) 5

Tribune Co. v. Canella
458 So.2d 1075 (Fla. 1984) 2

Yanke v. State
588 So.2d 4
(Fla. 2nd DCA 1991) 4

OTHER

Florida Public Records Act 2

Florida Statutes, §119.07(1)(a) 3, 4, 5, 6

Amicus Curiae Brief of
Public Defenders Association 5

SUMMARY OF THE ARGUMENT

The only difference between indigent and non-indigent prisoners seeking access to public records to which they are entitled is their ability to pay. Where a viable alternative is available which would give meaning to the promise of the Florida Public Records laws, and minimize needless copying expenses, that alternative should be utilized.

The reasonable alternative is to have the relevant custodian (if he or she is not willing to bear the copying cost) send the records to the prison authority where, in a supervised setting, the prisoner can determine what documents are relevant to his or her claims. Those documents, if not already available to the prisoner from his or her attorney should then be copied at the prison, and the original file returned to its custodian.

STATEMENT OF THE CASE AND THE FACTS

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. 2d 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 to 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 undersigned counsel to represent Mr. Roesch who had appeared pro se. The Florida Public Defenders Association has filed an Amicus Curiae Brief on Mr. Roesch's behalf.[1]

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[1]/ Subsequent to their appointment undersigned counsel learned that Mr. Roesch had borrowed or been given the $66.83 required for payment for his file, and had received the file. Nevertheless, the certified question must still be decided because this case is a classic example of the "capable of repetition yet evading review doctrine." Knight v. Dugger, 574 So.2d 1066,1068 (Fla. 1990); Tribune Co. v. Canella, 458 So.2d 1075,1076 (Fla. 1984).

ARGUMENT

THE APPROPRIATE METHOD OF DISCLOSURE OF PUBLIC RECORDS HELD BY A STATE ATTORNEY OR COURT CLERK TO AN INDIGENT PRISONER IS TO HAVE THOSE RECORDS MAILED TO THE PRISON FACILITY FOR SUPERVISED INSPECTION AND REVIEW BY THE PRISONER, AND COPYING BY THE PRISON AUTHORITIES.

The Second District Court of Appeal has certified this 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 POST-CONVICTION RELIEF?

Roesch v. State, 596 So.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 So.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 times, under reasonable conditions, and under supervision by the custodian of the records 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 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. 1990).

Two questions are embodied in the certified 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 records to be inspected and examined" when the person seeking access is incarcerated?

The Second District has 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 the related appeals...." Yanke v. State, 588 So.2d 4,5 (Fla. 2nd DCA 1991). The First District has held that a prisoner "would not be entitled to copies of the records without paying reasonable copying costs, 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) (citations omitted). Unsure of itself, the Campbell court certified the same question echoed by the Roesch court. Thus this Court must face the conundrum: Are §119.07(1)(a) and Kokal empty promises to empty pocketed prisoners?

A. **Traylor v. State Sets The Stage For Requiring The State To Provide Equal Access To Indigent Prisoners Seeking Public Records**

In Traylor v. State, 596 So.2d 957 (Fla. 1992) the Court wrote:

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

Id., 596 So.2d at 969 (citations omitted). A literal application of that language could end this case in favor of indigent prisoners.

We do not discourage the Court from invoking the Traylor principle and eradicating poverty, but we doubt the Court will do so. Therefore we suggest an alternative which strikes a fair balance between impecuniousness, empty public records access promises, equal protection and the state's fisc.

B. **Move The Mountain To Mohammed**

The Florida Public Defender's Association Brief provides a helpful survey of alternatives, but one suggestion stands out: 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 reasonable times, under reasonable

conditions, and under supervision by the custodian...or his designee," designating a prison employee as the supervisor is both simple and statutorily sound. Of course, the custodian might decide that it is 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.

Thus, for the cost of postage to an institution (and return postage), §119.07(1)(a) has been met. Concerns about the reliability of the mails should not be an issue. Court files are transmitted by mail by the thousands in state and federal proceedings throughout the country. Of course, the indigent prisoner should be required to attest to his or her inability to pay for postage or copying by executing a simple form.

Should the indigent prisoner, after supervised examination of the documents, desire copies, only one question need be asked. Does the prisoner already have access to the requested documents? If his or her private attorney or public defender has obtained the requested documents _via_ discovery or for the purpose of an appeal, then those copies should be obtained from counsel.

We do 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 those parameters would likely provide sufficient guidance to inmates, custodians, and prison designee supervisors so the majority of questions can be resolved by a simple letter to the prisoner's lawyer.

CONCLUSION

Thus, the common sense answer to the certified question should be this:

(1) A State Attorney or Clerk of the Court who is asked for public records by an unrepresented prisoner seeking those records in conjunction with a motion for post-conviction relief should respond to the prisoner with a letter setting forth the costs of copying and postage for transmittal of those records.

(2) That letter should also inform the prisoner that if he or she is financially unable to pay those costs, an affidavit of such indigency should be sent to the records custodian and upon receipt, the requested records will be transmitted to the warden or superintendent of the facility at which the prisoner is incarcerated, with a copy of the transmitted letter sent to the prisoner. In the alternative, the State Attorney or Clerk is free to decide to copy the file and send it directly to the prisoner.

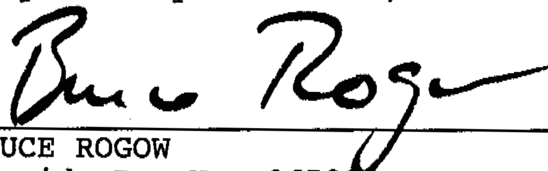
(3) The prison official shall designate an employee to act as custodian of the received file and within 10 days of receipt shall arrange for the prisoner to review the file under the supervision of the designated custodian.

(4) If the prisoner desires copies of any of the contents of the file, then the designated custodian shall either arrange for those copies to be made at the prison, or shall contact the prisoner's former counsel to determine whether those records are in his or her possession or whether they had been previously provided to the prisoner or his or her counsel.

(5) Assuming that satisfactory copying or access via former counsel is completed, the designated custodian shall return the file to the original custodian within 45 days of receipt.

(6) If this process is unsatisfactory and the prisoner believes he or she has been denied reasonable access, then the prisoner may make an appropriate request to the trial court for relief, setting forth the exact nature of his or her complaint about access.

Respectfully submitted,



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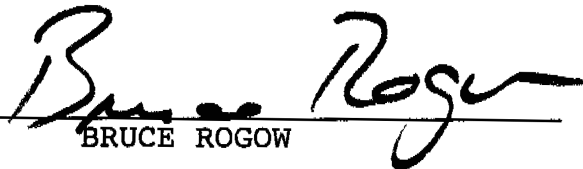
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to (1) MICHELE TAYLOR, Assistant Attorney General, 2002 N. Lois Ave., Suite 702, Tampa, FL 33607; (2) STEPHEN KROSSCHELL, Assistant Public Defender (Attorney for Amicus), Pinellas County Criminal Court Complex, 5100 144th Ave. N., Clearwater, FL 34620, and (3) JAMES ALLEN ROESCH, #049547, Walton Correctional Institution, P.O. Box 1386, DeFuniak Springs, FL 32433, this 10th day of November, 1992.



BRUCE ROGOW

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APPENDIX

Roesch v. State,
596 So.2d 1214 (Fla. 2d DCA 1992)

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.

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-