IN THE SUPREME COURT OF FLORIDA

JAMES ALLEN ROESCH,

Appellant,

v.

CASE NO. 79,937

STATE OF FLORIDA,

Appellee.

_____/

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

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

TABLE OF AUTHORITIES
(Continued)

CASES — PAGES

CONSTITUTIONS AND STATUTES — PAGES

STATEMENT OF THE CASE AND FACTS

On December 4, 1989, James Allen Roesch was charged in a three-count Information with residential burglary, auto burglary and grand theft of personal property and motor vehicle belonging to Barry E. Cohen and Laurie S. Cohen. (TR 1-4). Following a bench trial, Roesch was convicted on all counts and sentenced as a habitual offender to fifteen years imprisonment on Count I, five years consecutive imprisonment on Count II, and five years concurrent imprisonment on Count III. (TR 286-289). Roesch appealed the convictions and sentences, and on November 22, 1991, in Roesch v. State, a per curiam affirmance was rendered by the Second District Court of Appeal.

On or about January 29, 1992, Roesch filed a motion to compel in the Tenth Judicial Circuit in and for Polk County, Florida (Appellee's Appendix A), asserting that (a) he was indigent; (b) that during his trial of May 7, 1990, it was revealed that the State had misrepresented what evidence it had with regard to the State's discovery response; (c) that Roesch believed that there exists "in the sought-after file more evidence that was not revealed which would constitute extensive Brady violations", and (d) despite Roesch's efforts, the State Attorney had not responded to his public records request. The trial court, on February 4, 1992, denied the motion to compel, stating: "The Court has considered the motion to compel filed in this matter and notes that this matter has long since been tried and sentence imposed. The motion to compel is not an appropriate way to accomplish the objectives of the defendant." (See

Appellee's Appendix B). Roesch pro se, filed an appeal in the Second District Court of Appeal on or about March 8, 1992, praying for the following relief: "Based on the authorities cited and arguments presented the Appellant prays this Honorable Court will reverse the order dated February 4, 1992, denying motion to compel and provide instructions that the State Attorney's files be copied and turned over to Appellant for purposes of post-conviction proceedings without cost." (Appellee's Appendix C). On April 8, 1992, in Roesch v. State, 596 So.2d 1214 (Fla. 2d DCA 1992), that court treated Roesch's appeal as a petition for writ of certiorari and held:

> Because the motion to compel in this case is related to a motion for post-conviction 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 POST-CONVICTION RELIEF?

596 So.2d at 1215.

On September 3, 1992, this Court granted Roesch's motion for reinstatement of his appeal and postponed its decision on jurisdiction. The Court thereafter set forth a briefing schedule and the District Court of Appeal was ordered to transmit the original record on or before November 2, 1992.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal erroneously certified that a question of great public importance has arisen regarding whether unrepresented inmates are entitled to free public records, specifically what method of disclosure is required.

Since Chapter 119, Florida Statute requires neither reason nor personal status to access public records, unrepresented inmates have no greater right than any other citizen seeking public information. Consequently, no matter a person's status or need, copying or reproduction costs may properly be assessed pursuant to §119.07(1)(a), Florida Statutes.

POINT ON APPEAL

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 RECORD IN CONJUNCTION WITH A MOTION FOR POST-CONVICTION RELIEF

The Second District Court of Appeal certified the above-cited question as one of great public importance as a result of Roesch's appeal to that court. The trial court summarily denied Roesch's motion to compel the State Attorney to provide files pursuant to a public records, Chapter 119, Fla.Stat., request. The Second District Court, relying on State v. Kokal, 562 So.2d 324 (Fla. 1990); Mendyk v. State, 592 So.2d 1076 (Fla. 1992); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990), and Campbell v. State, 593 So.2d 1148 (Fla. 1st DCA 1992), concluded that Roesch was entitled to access to the public records. Roesch v. State, 596 So.2d at 1215. The court additionally observed, that "a defendant is not entitled to receive copies of documents without paying for them in either of these circumstances" 596 So.2d at 1215, citing Yanke v. State, 588 So.2d 4 (Fla. 2d DCA 1991), and Campbell v. State, supra. Without ordering any response from the State as to this case, the court certified the aforenoted question as being one of great public importance. This was so in spite of the fact that Roesch, like any other citizen making a public records demand, ultimately paid for and received the files he sought.

(A) Whether a question of great public importance exists

The Second District concluded that albeit Roesch was entitled to "access to public records", he was "not entitled to receive copies of the documents without paying for them", citing Yanke v. State, 588 So.2d 4 (Fla. 2d DCA 1991), and Campbell v. State, 593 So.2d 1148 (Fla. 1st DCA 1992). The court, without explanation or demonstration that any "issue" existed, certified the question of great public importance as to "what the appropriate method of disclosure of public records should be" where an unrepresented prisoner seeks same.

While not unmindful of this Court's decisions in In re T.W., 551 So.2d 1186 (Fla. 1989), or Knight v. Dugger, 574 So.2d 1066 (Fla. 1990), or Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), that mootness of a claim does not automatically cease appellate review, the question sub judice, has no rational relationship to the issue presented to the lower court regarding whether Roesch was denied public records access. While also not unmindful that this Court will entertain an issue if it is capable of repetition, yet evading review, it is submitted that no great question of public interest has been presented. Roesch has received the public records file he sought from the State Attorney's Office. Because Roesch was a prisoner or preparing a Rule 3.850, places him in no different stead than any other citizen seeking public records information.[1] This is so because under the public records law, specifically §119.07, Fla.Stat.:

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[1] In State v. Kokal, 562 So.2d 324 (Fla. 1990), the Court stated that defendants were entitled to the public record files of a State Attorney's Office once the criminal proceedings were complete.

> . . . Every 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. (emphasis added).

Specifically, it does not matter the circumstances an individual finds himself or the need for said records for making a public records demand. Anyone can make a demand for any public record.

In Yanke v. State, 588 So.2d at 5, the Second District observed:

> The question remains as to whether Yanke is entitled to the documents free of charge under applicable principles of due process relating to a criminal proceeding. In Carr v. State, 495 So.2d 282 (Fla. 2d DCA 1986), we held that, although an indigent defendant has a right to transcripts without payment of costs for a direct appeal, there is no right to free transcripts for use in preparation of a post-conviction motion. . . .

Likewise, in Campbell v. State, 593 So.2d at 1149-1150, that court held:

> Several cases have held that a prisoner is entitled to no greater relief than other persons requesting relief pursuant to Chapter 119, Fla.Stat. Wootton v. Cook, 590 So.2d 1039 (Fla. 1st DCA 1991); Yanke v. State, 588 So.2d 4 (Fla. 2d DCA 1991). The prisoner, therefore, would not be entitled to copies of the records without paying reasonable copying costs (Wootton, supra; Yanke, supra), nor would the prisoner be entitled to a list of documents (Wootton, supra), nor would the custodian be required to provide the original file to the prisoner at the place of incarceration (see §119.07(1)(a), Fla.Stat. (1991), which provides that inspection shall be permitted at a reasonable time and under reasonable conditions).
>
> It would appear that the appropriate relief would be for the trial court to enter an order that the prisoner not be denied access

> to the records pursuant to Chapter 119, Fla.Stat. The prisoner then must make appropriate accomodations to secure the records.

593 So.2d at 1150.[2]

Roesch candidly admits in his brief on the merits that not only has he paid for the files requested, but he has also received the files requested pursuant to his public records request. [Attached hereto as Appellee's Appendix D are copies of the correspondence which demonstrate same]. No question of great public importance exists in the instant case and therefore the jurisdiction of this Court has been improvidently granted.

(B) Whether Roesche is entitled to free records pursuant to his public records request

Thus far no court in this state has determined that a previously declared indigent, incarcerated individual is entitled to free records pursuant to an otherwise valid public records request. As previously noted, Section 119.07, Fla.Stat. makes no specific provision or caveat as to the circumstances or the standing a person "must" possess with regard to a public records request. Public records may be requested by anyone for any reason. As observed in Tribune Co. v. Cannella, 458 So.2d at 1077-1078:

> To literally place the records on the public table would be unrealistic. The Legislature thus provide a procedure for making the records available for inspection.

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[2] In Campbell v. State, supra, the First District Court of Appeal certified, as one of great public importance, the same question as raised sub judice. Neither party in Campbell filed an appeal therein.

> §119.07(1)(a) mandates that '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 records or his designee.' §119.07(2)(a) provides that if the custodian believes certain items are statutorily exempted, he 'shall produce for inspection and examination' the record with the asserted exemption material deleted.' §119.11 provides for an accelerated court hearing when, inter alia, the party seeking to inspect a record challenges the exemption asserted by the custodian under §119.07(2)(a). The effect of these cited sections of the act is to provide for timely inspection of the records, with the exception of statutory exemptions asserted by the custodian, which may be challenged by an accelerated court hearing. In essence, the custodian is mandated to place any non-exempt requested record 'on the table' for inspection, at reasonable times and under reasonable conditions.

458 So.2d at 1077-1078.

In Tribune Co. v. Cannella, supra, the issue was whether a brief delay to allow an employee to be present during the inspection of employees' personnel records was permitted. The court opined that the Legislature had not provided for an individual whose records were being inspected to be present. The court further noted:

> As to the argument that an automatic delay is necessary to allow an employee time within which to raise a constitutional challenge, we can only say that the time when the record is requested is not the time to raise such a challenge. The only challenge permitted by the act at the time a request for records is made is an assertion of a statutory exemption pursuant to §119.07. The only person with power to raise such a challenge is the custodian. The employee therefore has no statutory right at the time a request for inspection is made. When the records are on the table, the purpose of the act would be

> frustrated if, every time a member of the public reaches for a record, he or she is subjected to the possibility that someone will attempt to take it off the table through a court challenge. Likewise, an automatic delay, no matter how short, impermissibly interferes with the public's right, restrained only by the physical problems involved in retrieving the record and protecting them, to examine the records. The Legislature has placed the books on the table; only it has the power to alter that situation.

458 So.2d at 1078-1079 (emphasis added).

Likewise sub judice, the Legislature has created a Public Records Act which provides the means and methods by which any member of the public (including an incarcerated inmate) may retrieve files from a given agency. No provision has been made for free access to the public records information. Rather, the Legislature has set forth procedures within which all state agencies must operate. Just as in Tribune, where an individual whose records are being inspected has no constitutional right to protect his rights, similarly, an incarcerated inmate has no greater right than any other citizen to access of those records once a request is made.[3] Simply because an individual has been

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[3] No greater constitutional right attaches to an individual incarcerated verses an average citizen seeking public records information. The Amicus brief prepared by the Florida Public Defenders Association can point to nothing to the contrary. Indeed they note "the Association does not argue here that all indigent persons have a right to free copies of public records." (Amicus brief p.6) Instead, the Association opts for a system where a defendant is only entitled to his own records to "prepare post-conviction motions...." (Amicus brief p.7) This conclusion is premised on the idea that "a person's liberty is a sufficiently compelling reason to justify free access to public records...," citing Art. I, §9, Florida Constitution. Unfortunately that would be the reason for every record request. That is also why no reason or person's status is required for a public records request. Anyone can ask to seek public records for good or no reasons.

declared indigent for trial or appellate purposes, does not justify a carte blanche right to free public records. There is no due process or equal protection rights given an incarcerated individual greater than the average citizen who may make the same public records request and who will be left to their own devices as to how they access said information once that request has been made. See McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969) (equal protection provisions of the Fourteenth Amendment in failing to provide a means to vote absentee for inmates awaiting trial who were either charged with a non-bailable offense or unable to post the bail imposed was not violated). See also Bull v. State, 548 So.2d 1103 (Fla. 1989) (indigent defendant has no right to an appointed counsel for the purposes of contesting attorney fees and costs -- the assessment of fees and costs and the imposition of a lien is a civil proceeding which is reduced to a civil judgment. Further enforcement of the lien is also a civil proceeding by the county, not a criminal prosecution by the State). Hoffman v. State, ___ So.2d ___ (Fla. 1992), 17 F.L.W. S741 (public records provisions should be followed for requests with "respect to agencies outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney" . . .)

To suggest here that judicial rectification is necessary to correct a legislative "omission" is baseless. However, that is exactly what Roesch's plea of indigency or desire to file collateral litigation suggests. In spite of a clear public

records statute that sets forth all procedures for obtaining said records, without exceptions, Roesch urges an exception in his case and others similarly circumstanced because, at some point in time, pre-trial or pre-appeal he was declared indigent for trial or appellate purposes. Roesch's indigency is irrelevant to any public records demand, just as is his perceived need.

The Legislature, in crafting the public records law, may or may not have taken into account a variety of circumstances regarding a persons' ability to pay for requests. They did however, fashioned not one single exception. This Court would embark on a long list of exceptions should it decide to take that unnecessary first step and fashion a judicial remedy where none is mandated[4] and where the Legislature has elected not to address. Will all welfare recipients demanding a public records request be permitted free copies of files? Must a declaration of indigency be made within five years or some period of time prior

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[4] To the extent the Amicus brief prepared by the Public Defender's Association suggest on equal protection argument, to-wit; discriminating between rich and poor, said argument fails. The decision relied upon by Amicus deal with criminal prosecutions or appellate litigation. Note Ross v. Moffitt, 417 U.S. 600 (1972); Pennsylvania v. Finley, 481 U.S. 551 (1987) and Murray v. Giarratano, 492 U.S. 1 (1989).

Likewise, Amicus review of Florida caselaw fails to support a conclusion that a violation of equal protection exists. While no issue can be meaningfully taken with the argument that an indigent defendant at trial and on appeal stands in the same posture as a non-indigent defendant. Yanke or Campbell, supra, do not tip or weigh the scales of justice against a "previously declared" indigent defendant. This is so because as noted by Amicus, "... 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. DCA 1986)." (Amicus brief p.15)

to a public records request? Will declared bankruptcy eliminate the need for a requester to pay for public records in civil cases? The answers to all these questions and others is no. A public records demand does not deny access to any right or to the courts - it simply permits access to public information. It does not prevent a defendant from filing an appeal; Cassoday v. State, 237 So.2d 146, 147 (Fla. 1970), or from prosecuting a Rule 3.850 motion for post-conviction relief, see, State v. Kokal, 562 So.2d 324 (Fla. 1990). And albeit any person including an incarcerated inmate has a right to the public information, "access" is not the functional equivalent to "free". Terminally, the fees assessed are not for any purpose other than to satisfy the cost incurred for reproduction. Cf. Florida Institutional Legal Services, Inc. v. Florida Department of Corrections, 579 So.2d 267 (Fla. 1st DCA 1991). To suggest that such an assessment is wrong or odious is incorrect. See Davis v. McMillan, 38 So. 666 (Fla. 1905) (public information, as a general rule, must be open for public inspection without charge unless otherwise expressly provided by law). See §119.07, Fla.Stat.

(C) What remedy is warranted

It is respectfully submitted that the remedy, if at all necessary, is not that urged by Roesch. To suggest a given agency on a given day mail its files to Florida State Prison or any other place for inspection is ludricrous. First and foremost the purpose of public records is to provide access to all. The suggestion of mailing records to an inmate for review results in

a denial of access to anyone else who chooses to review the records. Agencies are mandated under Chapter 119, Fla.Stat., to maintain files. Since an agency cannot impose a rule or condition of inspection which operates to restrict or circumvent a persons's right of access, Davis v. Sarasota County Public Hospital Board, 480 So.2d 203 (Fla. 2nd DCA 1985); nor limit who may see said records; nor require a special need, Lorie v. Smith, 464 So.2d 1330, 1332 (Fla. 2nd DCA 1985); or deny access because a request is overbroad, State ex rel Davidson v. Couch, 156 So. 297, 300 (Fla. 1934); or impose a waiting period, Tribune Company v. Cannella, supra; or require a request be in writing and a host of other restrictions, it would be untoward to suggest that an agency at a person's whim must box up its files and send them somewhere for personal inspection in lieu of payment, thus preventing every other person from having access. Of course, "free" records is also not a suitable alternative unless and until the Legislature decides that option should be created.

To fashion a court rule or court procedure will serve no purpose. For every rule created, an exception or additional exemptions will arise.[5] For all intense purpose public records are free with the exception of reproduction costs, see, §119.07(1)(a), Florida Statutes. Until such time as the legislature determines, exceptions should be created regarding

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[5] For example - not every incarcerated inmate is indigent or every ex-inmate able to pay. Clearly, Amicus recognizes the dilemma which will result.

payment of costs, no further judicial determination need be taken.[6]

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[6] To suggest as Amicus has, that §57.081(1) Florida Statutes, requires free copying for public records requests by the Clerk's and Sheriff's offices is error. First, no litigation reposes in the Circuit Courts therefore said section does not apply. Second, the purpose of requiring a pleading be filed prior to obtaining free services from the Clerk's and Sheriff's is bottomed upon the principle that a litigant should not be thwarted by an inability to pay for litigating his case. Where no litigation exists, no duty attaches. Moreover, a complete reading of §57.081(1) Florida Statute reveals that it is the responsibility of the indigent to demonstrate indigency. And in fact, said indigency declaration must be sworn to and state that "the applicant is . . . unable to pay the charges otherwise payable by law. . . ." Moreover, if the applicant prevails, cost shall be taxed . . . and when collected, shall be applied to pay costs which otherwise would have been required and which have not been paid." §57.081(3), Florida Statutes.

Terminally, Amicus argues "prisoners should not have to file a post-conviction motion first before requesting public records." (Amicus brief p.23) Since there is no relationship between prisoners, public records and post-conviction litigation, one is hard pressed to understand such a statement in light of earlier pronouncements of Amicus that not all indigents are entitled to free public records or have any right to free public records.

Public records access requires neither reason nor standing. Since anyone can obtain records simply by requesting same, it makes no difference whether that person is rich or poor or has a compelling reason for requesting same. To confuse access to the courts and the wherewithal to perfect a defense or an appeal, with obtaining public records is error. A public records request may have nothing to do with collateral litigation and it cannot be presumed that "but for" the public records sought a given defendant is entitled to release from incarceration.

CONCLUSION

Based on the foregoing, it is urged that the jurisdiction of this Court has been improvidently granted to entertain a question which is not of great public importance. Moreover, this Court should not embark on a course of judicial rectification where no constitutional right has been violated and the Florida Legislature has thus for elected not to legislate any exceptions to §119.07(1)(a), Florida Statutes.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

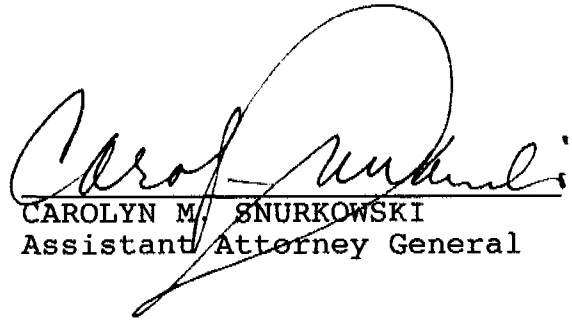
CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-1778

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. Bruce Rogow, Esquire, 2441 S.W. 28th Avenue, Ft. Lauderdale, Florida 33312; Ms. Beverly Pohl, Esquire, 350 S.E. 2nd Street, Suite 200, Ft. Lauderdale, Florida 33301; Mr. Stephen Krosschell, Esquire, Polk County Courthouse, Post Office Box 9000, Drawer PD, Bartow, Florida 33830; Ms. Susan A. Maher, Esquire, Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500, this 30th day of December, 1992.



CAROLYN M. SNURKOWSKI
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

JAMES ALLEN ROESCH,

Appellant,

v. CASE NO. 79,937

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO APPENDIX

APPENDIX "A"

IN THE TENTH JUDICIAL CIRCUIT COURT IN AND FOR
POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. CF89-5532A1-XX

JAMES ALLEN ROESCH,

Defendant.
_____/

MOTION TO COMPEL

COMES NOW, James Allen Roesch, pro se, Defendant herein, and now hereby moves this Honorable Court to compel State Attorney, Mr. Jerry Hill, to comply with his request to turn over the contents of the file in the above styled cause in accordance with the holdings of State v. Kokal, 562 So. 2d 324 (Fla. 1990) and Hoffman v. State, 571 So. 2d 449 (Fla. 1990). Since the conviction is final in this cause (appeal affirmed Nov. 22, 1991) the portions of the State Attorney's file designated as public record (see Kokal, supra. for detailed description) are available to a defendant upon request. As further grounds Defendant would assert:

1. Defendant is an indigent as defined by law and was represented by the Public Defender at trial and by court appointed counsel on appeal. The financial condition of Defendant has not changed.

2. During trial held May 7, 1990 it was revealed that the State had misrepresented what evidence it held as revealed by discovery -that is evidence was listed that in fact did not exist. Further, it was learned later that the State had purposely witheld a Florida Highway Patrol report of the crime which was favorable to Defendant's version of the event. Also, it is known

that evidence gathered by the St. John's County Sheriff's Dept. - the agency to first investigate the crime - was not provided to Defendant in discovery and much of this evidence was exculpatory.

3. Defendant strongly believes that there exists in the sought after file more evidence that was not revealed which would constitute extensive Brady [1] violations.

4. Despite Defendant's numerous letters to Mr. Jerry Hill requesting the materials sought, no response whatsoever has been forthcoming. It has been more than 60 days since Defendant's initial request. Four other requests sent since have went unheeded.

Wherefore, with regard to the forging facts and legal authorities cited, Defendant prays this Honorable Court will issue its' order directed to Mr. Jerry Hill to turn over the aforementioned records forthwith.

Respectfully Submitted,

James Allen Roesch

James Allen Roesch #049547
Sumter Correctional Inst.
P.O. Box 667 A-101
Bushnell, Florida 33513

CERTIFICATE OF SERVICE

I, James Allen Roesch, do hereby certify that a true copy of this motion to compel has been provided to Mr. Jerry Hill, State Attorney, by U.S. Mail this 29th day of January, 1992.

James A. Roesch

James Allen Roesch

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[1] Brady v. Maryland, 83 S. Ct. 1194 (1963) - " Suppression of evidence by the prosecution that is favorable to the accused, if requested in discovery, violates due process where such evidence is material to guilt or to punishment irrespective of good faith or bad faith of prosecution U.S.C.A. Const. Amend 14.

APPENDIX "B"

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. CF89-5532A1

JAMES ALLEN ROESCH,

Defendant.

ORDER DENYING MOTION TO COMPEL

THE COURT has considered the Motion to Compel filed in this matter and notes that this matter has long since been tried and sentence imposed. The Motion to Compel is not an appropriate way to accomplish the objectives of the defendant. It is therefore

ORDERED AND ADJUDGED that the motion is hereby denied.

DONE AND ORDERED at Bartow, Polk County, Florida, this February 4, 1992.

E. RANDOLPH BENTLEY, Circuit Judge

Copies furnished to:
Defendant
State Attorney

FILED AND RECORDED
BOOK _____ PAGE _____
FEB 05 1992
E. D. "BUD" DIXON, Clerk
BY _____

CERTIFIED TO BE A TRUE COPY
Attest: E. D. "BUD" DIXON, Clerk
Circuit Court - Criminal Division
By Donna J. Dell Deputy Clerk
This 2-26-92

APPENDIX "C"

Ms. Michele Taylor, Esq.
Assistant Attorney General
Westwood Center 7th floor
2002 N. Lois Ave
Tampa, Florida 33607

92-b0539

RECEIVED

March 7, 1991

Dear Ms. Taylor:

Please find enclosed a copy of my brief in the matter of obtaining the State Attorney's file in Polk Co.

Are we having fun yet?

Cordially Yours,
James Allen Roesch

Summary 3.850
92-257
N/A - Filed 2/22/92

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

JAMES ALLEN ROESCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO: _____

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT,
POLK COUNTY, FLORIDA

CIRCUIT COURT CASE NO. #CF89-5532A1-XX

JAMES ALLEN ROESCH - PRO SE
INMATE NUMBER #049547
SUMTER CORRECTIONAL INSTITUTION
POST OFFICE BOX 667, E-211
BUSHNELL, FLORIDA 33513-0667

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

On May 7, 1990 Appellant was found guilty during a non-jury trial of Count I - burglary of a dwelling, Count II - burglary of a conveyance, Count III - grand theft auto. A sentence of 20 years as an habitual offender was imposed June 15, 1990. A timely notice of appeal was filed. While awaiting appointment of Counsel, Appellant discovered independantly that the State had withheld substantial exculpatory evidence, i.e. police reports, physical evidence, witness statements. Appellant filed an "Application for Leave to File MOTION FOR POST CONVICTION RELIEF seeking new trial upon newly discovered evidence." This Court denied the Motion on October 5, 1990.

The direct appeal went forth and was ultimately denied in a per curiam opinion on November 22, 1991.

Appellant sought by various means to obtain the portions of the State Attorney's file recognized as Public Record but was denied. Appellant filed a Motion to Compel the State Attorney to turn over the files of Case #CF89-5532-A1-XX citing it's finality and supporting case law. The Circuit Court denied the motion on February 4, 1992. Timely Notice of Appeal was filed February 14, 1992. This appeal ensued.

STATEMENT OF THE FACTS

On September 24, 1989 Mrs. Lorie Cohen reported the theft of her 1982 BMW 528E and a burglary to her husbands Ford Taurus. No entry to her home was reported at that time. On September 25, 1989, in Saint Augustine, Florida Michael J. Dunne was arrested while driving the stolen BMW after being involved in an accident with a Saint John's County deputy sheriff. Dunne was charged with grant theft auto. Later in the day, Appellant was arrested at a nearby motel and also charged with grand theft auto. Charges were nolle prossed on December 6, 1989.

On December 4, 1989 Appellant was charged in an information with burglary of a dwelling - Ct. I, burglary of a conveyance - Ct. II, grand theft auto - CT. III. Discovery provided to Appellant, including a request for exculpatory evidence, contained no mention of an investigation by the Florida Highway Patrol of the crime, and subsequent report filed by Trooper Kelly. Further, there was no mention of canvass reports of several places where victim's stolen credit cards were used. These reports indicated a person, other than Appellant, being the user and possesser of the credit cards and stolen BMW. Also, it was not mentioned that burglary to the dwelling was not reported until October 31, 1989 during an interview with a detective. No explanation was given why these crucial facts were omitted from discovery.

After learning of the State's wilfull withholding of exculpatory evidence Appellant sought to review the file of case #CF89-5532A1-XX. Requests for a copy of the contents of the file went unheeded, and a Motion to Compel was denied. Appellant desires to inspect this file for purpose of filing a Motion for Post Conviction Relief citing prosecutorial misconduct as one claim, hence this Appeal.

SUMMARY OF ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO COMPEL STATE ATTORNEY TO TURN OVER PUBLIC RECORDS PORTION OF FILE ONCE CONVICTION BECAME FINAL?

Pursuant to Florida Statute Chapter 119 "Public Records" a Defendant is entitled to inspect those portions of a criminal file deemed Public Record once the conviction becomes final. In the case sub judice, Appellant filed a Motion to Compel in the Circuit Court citing valid case law and provided facts supporting a favorable ruling. The Court erred in summarily denying the Motion.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT"S MOTION TO COMPEL STATE ATTORNEY TO TURN OVER PUBLIC RECORDS PORTION OF FILE ONCE CONVICTION BECAME FINAL?

It is well established through numerous rulings of the Supreme Court of Florida that once a conviction in a criminal matter becomes final (appeal is ruled upon) a Defendant has a right to access those portions of the file known as Public Record - see Florida Statute Chapter 119. The conviction in the matter sub judice became final November 22, 1991. Appellant sought access to State's file citing known acts of prosecutorial misconduct. The acts Appellant alleges - withholding of exculpatory evidence - would constitute grounds for a new trial as the evidence would probably have produced an acquittal had they been divulged at trial.

In the Motion to Compel filed January 29, 1992, Appellant listed, albeit briefly, the acts of withholding evidence and what the evidence sought in the file might consist of. Appellant cited State v. Kokal, 562 So. 2d. 324 (Fla. 1990) as being supportive of his position. Also, Hoffman v. State, 571 So. 2d. 449 (Fla. 1990). There was no need for extensive discussion of the evidence believed to have been withheld in said Motion nor is there any such need in this appeal. Clearly, Appellant is entitled to access to these files and the trial court erred in denying the Motion to Compel.

Provenzano v. Dugger, 561 So. 2d. 541 is yet another case by the Supreme Court in Appellant's favor.

Further, since Appellant is not on a "fishing expedition" but rather **knows** of withheld exculpatory evidence, coupled with the fact that Appellant is an indigent and is filing his first Motion for Post Conviction Relief pro-se, this Court should order that said State Attorney's file be provided without cost. After all, these are materials which should properly have been provided in Discovery by the State. The State's wilfull misconduct in withholding discoverable evidence should not be rewarded by charging Appellant with fees for obtaining them.

The Motion to Compel must be reversed with directions to provide the copy of the file without charge.

CONCLUSION

Based on the authorities cited and argument presented the Appellant prays this Honorable Court will reverse the order dated February 4, 1992 denying Motion to Compel and provide instructions that the State Attorney's file be copied and turned over to Appellant for purpose of Post Conviction proceedings **without cost**.

Respectfully Submitted,

James Allen Roesch

JAMES ALLEN ROESCH #049547, E-211
SUMTER CORRECTIONAL INSTITUTION
POST OFFICE BOX 667
BUSHNELL, FLORIDA 33513-0667

CERTIFICATE OF SERVICE

I, James Allen Roesch, pro se, Appellant herein, do hereby certify that a true copy of this "Appellant's Brief" has been provided to Counsel for Appellee, Michele Taylor, Assistant Attorney General at Westwood Center, 7th floor, 2002 North Lois Avenue, Tampa, Florida, 33607, by U.S. Mail this 8th day of March, 1992.

James Allen Roesch

JAMES ALLEN ROESCH, PRO SE

APPENDIX "D"

PUBLIC RECORDS REVIEW REQUEST

Review requested by: James Allen Roesch

Sumter Correctional Institution P.O. Box 667 A-101 Bushnell, Fl 33513

Date letter of request received: Never Case Number: CF89-5532A1-XX

File reviewed by Administration (date/person): Chip Thullbery, AASA

August 10, 1992 Date/time set for review: N/A

Date person advised of appointment time: N/A

Time of reviewee's arrival: N/A Time of departure: N/A

File reviewed in the presence of: N/A

Number of copies requested: 394 Payment arrangements: mail

Date bill mailed: April 20, 1992 Date payment received: August 8, 1992

NOTES (telephone conversation, further correspondence)

Date	Notes
4/17/92	Chip Thullbery (AASA) called asking me to come to his office to discuss Motion to Compel. After reviewing request record it showed we had never received a letter of request from requestor. Mr. Thullbery stated we needed to send copies of expense to requestor and give copy to Judge Randolph Bentley showing we were responding to requestor's request. Invoice was given to Terri Cassano for mailing to requestor.
4/30/92	Received letter from requestor asking to remove from request any items that he may have.
5/1/92	Letter was mailed to requestor stating invoice of expenses did not include items in question.
8/3/92	Received money order for cost of copying. Along with money order was a note requesting that copies be held until further notified as requestor would be changing addresses.
8/10/92	Received letter from requestor advising that he would not be moving and would like to have copies mailed at this time. Took file to Chip Thullbery to re-review it and pull anything not public record. Brandi Freeze, Records Clerk, counted copies. File was copied by Brandi Freeze, Records Clerk. Copies mailed to requestor. Money order given to Terri Cassano, Fiscal Director.

Date review complete: 9/9/92

Records Manager

Office Of The State Attorney
attn: Mr. Arley Smith, Records Admstr.
P.O. Box 9000 Drawer SA.
Bartow, Florida 33830-9000

In Re: Case #CF89-5532A1-XX (Roesch v State)

August 5, 1992

Dear Mr Smith:

By now you have received payment for the file in the above referenced case, please send the file. I will not be transferring any time soon as I first thought.

Also, I've had problems over possessing the Public Defender's file provided by Mr. Moorman and had to get a letter authorizing the matter directed to the Superintendent, Mr Lester Beaird. To circumvent any similar occurence please include a letter stating that by virtue of a court order I have authorization to have these files.

Your assistance is greatly appreciated,

Sincerely
James A. Roesch
Holmes Cor. Inst.
P.O. Box 190 C-108
Bonifay, Fla.
32425-0190

James A. Roesch #049547
Holmes Correctional Institution
P.O. Box 190 C-108
Bonifay, Florida
32425

Legal Mail

Office Of The State Attorney
Attn: Mr Arley Smith - Records
P.O. Box 9000 Drawer S.A.
Bartow, Florida 33830-9000

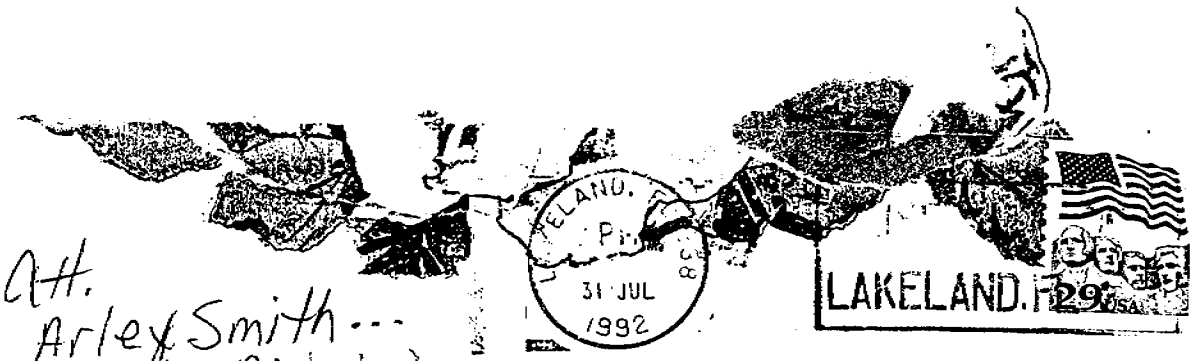
STATE ATTORNEY

'92 AUG 10 AM 9 36

Mr Gabby Smith:

Please hold the records asked for, until being notified, it may be transferred to a different address I will contact you soon.

Thank you,
James A. Roesch
CF89-5532

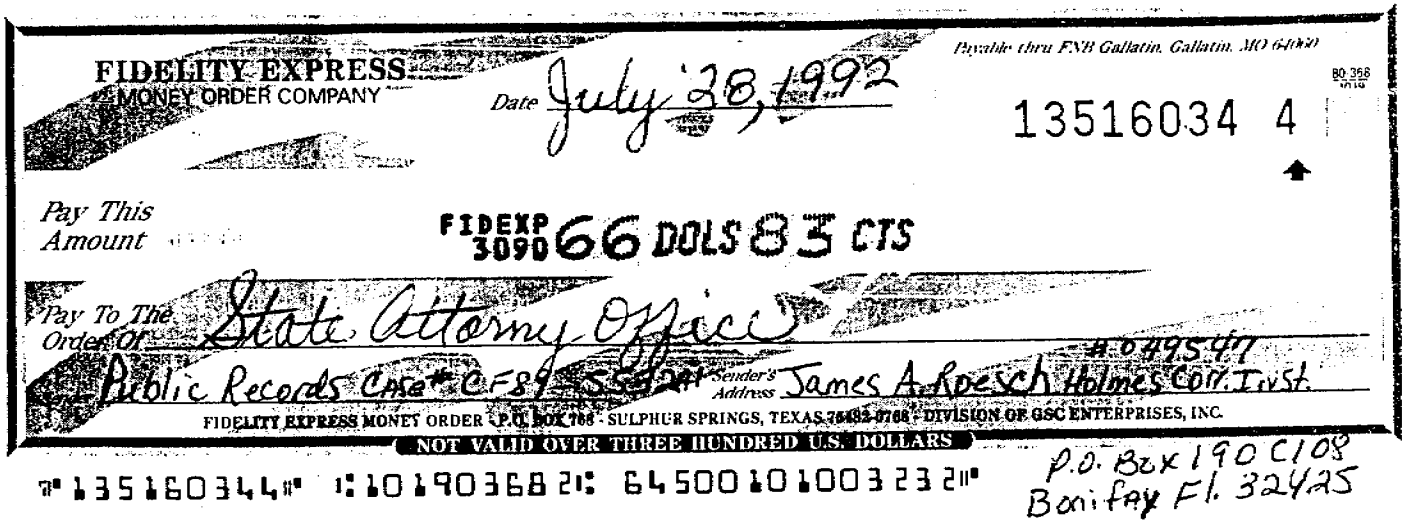


Att.
Arley Smith...
Records Division

Main Office
Drawer SA
P.O. Box 9000
Bartow - Fl. 33830

STATE ATTORNEY
'92 AUG 3 PM 1 41

James A. Roesch #049547
Holmes Corr. Inst.
Bonifay Fl. 32425



FIDELITY EXPRESS
MONEY ORDER COMPANY

Payable thru FNB Gallatin, Gallatin, MO 64668

Date July 28, 1992

13516034 4

Pay This Amount

FIDEXP 3090 66 DOLS 83 CTS

Pay To The Order Of State Attorney Office

Public Records Case # CF89-55[illegible]

#0495417

Sender's Address James A. Roesch Holmes Corr. Inst.

P.O. Box 190 C108
Bonifay Fl. 32425

FIDELITY EXPRESS MONEY ORDER - P.O. BOX 788 - SULPHUR SPRINGS, TEXAS 75483-0788 - DIVISION OF GSC ENTERPRISES, INC.

NOT VALID OVER THREE HUNDRED U.S. DOLLARS

⑈135160344⑈ ⑆101903682⑆ 64500101003232⑈

OFFICE OF STATE ATTORNEY
TENTH JUDICIAL CIRCUIT, FLORIDA
Polk, Highlands, and Hardee Counties

Drawer SA, P.O. Box 9000
Bartow, FL 33830-9000 (813) 534-4800

Jerry Hill
State Attorney

Lakeland Branch Office
109 N. Kentucky Avenue
Lakeland, FL 33801 (813) 687-4549, Ext. 241

Winter Haven Branch Office
150 4th Street, N.W.
Winter Haven, FL 33881 (813) 299-1294

May 1, 1992

James Allen Roesch
Sumter County Correctional Institution
P.O. Box 667, A-101
Bushnell, FL 33513

Dear Mr. Roesch,

I am responding to your letter of April 27, 1992. The three hundred ninety-four pages which Ms. Cassano referred to do not include the transcript of the trial which was a part of the record on appeal.

If you have further questions about this matter, please do not hesitate to call me.

Sincerely,

Arley Smith
Records Manager

AS/bf

Office of The State Attorney
Attn: Arley Smith - Records Division
P.O Box 9000 Drawer S.A.
Bartow, Florida 33830

April 27, 1992

Dear Mr. Smith:

Having received a letter dated April 20th from Mrs. Teri Cassano concerning my request for Public Records related to Case #CF89-553241-XX advising me of a total $66.83 for the 394 page record, I would like to know if the transcript of the "Record On Appeal" (appellate case #90-1788) is included in the 394 pages? I do not need a copy of this transcript because I was provided one by the Public Defender. All other material except this transcript I would want.

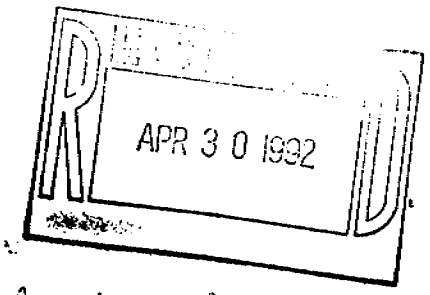
Please advise me of the amount required if the appeal transcript is subtracted — it was 320 pages approx. Otherwise, if the 394 pages is exclusive of this Transcript I will remit the amount forthwith.

Very truly

James A. Roesch

James A. Roesch #049547
Holmes Correctional Institution
P.O. Box 190 C-108
Bonifay, Florida 32425

James A. Roesch #049547
Holmes Correctional Institution
P.O. Box 190 C-108
Bonifay, Florida
32425



Office Of The State Attorney
attn: M. Arley Smith - Records Division
P.O. Box 9000 Drawer S.A.
Bartow, Florida
33830-9000

Legal Mail

Legal Mail