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IN THE
SUPREME COURT
OF FLORIDA

Case No. 79,937

JAMES ALLEN ROESCH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

original

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

PETITIONER'S REPLY BRIEF

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I.

MEANINGFUL ACCESS TO STATE ATTORNEYS' FILES FOR INDIGENT PRISONERS MAY BE ACCOMPLISHED WITHOUT GIVING INDIGENTS AS A GROUP *CARTE BLANCHE* UNDER FLORIDA'S PUBLIC RECORDS LAWS

The question certified by the Second District Court of Appeal is quite limited. It does not ask whether all indigents should have a *carte blanche* right to free public records, whatever their nature. (See Respondent's Brief p. 10). It does not ask whether indigent prisoners should have such a right. It does ask whether there should be a procedure in Florida to provide meaningful access to concededly public records which may hold the key to liberty for the imprisoned requestor, who has documented his or her inability to pay for those records.

The State's response[1] refuses to acknowledge the liberty aspect of the request made by Petitioner James Roesch, and instead classifies him as any man on the street who would make any public records request:

> 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.

Respondent's Brief p. 5.

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[1] Although the Court granted leave to the Department of Corrections and to the Florida Prosecuting Attorneys Association to file *amicus curiae* briefs, neither organization submitted a brief. Counsel for the Florida Prosecuting Attorneys Association informed Petitioner that his group adopts the Brief of the Attorney General.

> Roesch's indigency is irrelevant to any public records demand, just as is his perceived need.

Id. at 11.

The question in this case arises not so much because of Roesch's indigence, but because he is categorically not a man on the street, who could review the requested records at their ordinary custodial location. His liberty has been restrained. If the State's public records would help Roesch or any indigent prisoner establish that his or her conviction was wrongful, access to those records must not be conditioned upon the ability to go to the custodian, or to pay for the critical document.

Unfortunately, Petitioner or any indigent prisoner cannot conclusively establish his or her particular need for a previously undisclosed record unless real access to those records is provided. The argument for access is not frivolous, and the stakes are high. The State argues that:

> [T]here is no relationship between prisoners, public records and post-conviction litigation....

Respondent's Brief p. 14 n.6. The reality is that public records requests may be crucial to a post-conviction remedy.[2] Thus, the

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[2] Compare the experience of John Purvis, who spent 10 years imprisoned for a murder he did not commit. In 1985, after the mentally handicapped man confessed to various crimes under the questioning of detectives, he was tried and convicted by a jury. Two months later, the Broward State Attorney's office received information about a possible hired killer in the case, but the investigation was dropped. Only after Purvis' attorney filed a public records request in 1992 was the post-trial investigation reopened, and the actual killer was found. As a direct result of that public records request, Purvis was free. Joseph Williams and

State's unswerving reliance upon the text of Florida's public records law, which admittedly contains no provision for a waiver of fees, should not foreclose the access to records which is the heart of Roesch's request.

Our research has revealed few cases addressing the issue, and none by state supreme courts. The few available cases come to differing conclusions.[3] See, e.g. Hamm v. Donley, ___ N.E.2d ___, 1992 WL 50035 (Ohio Ct. App. 1992) (state public records law does not require a clerk of courts to provide an indigent defendant with free copies of public records relating to arrest and conviction for as-yet unfiled postconviction motion). A lower New York court also concluded that an indigent seeking public records from the District Attorney was not entitled to the 649 pages of documents free of charge under that state's public records law. Whitehead v. Morgenthau, 552 N.Y.S.2d 518 (Sup. Ct. N.Y. 1990). However, the court noted that (unlike this case) Whitehead had filed both state and federal habeas proceedings, and by virtue of those pending cases was "not necessarily foreclosed from obtaining, free of charge, the documents that he has demanded." Id. at 521. Thus, even in denying his request, that court left the door open.

Trish Power, Anatomy of a Wrong Conviction, The Miami Herald, January 16, 1993, p.1A.

[3] Under the federal Freedom of Information Act, at least one court has held that a federal prisoner's indigent status "...does not ipso facto require the waiver of search fees"). Rizzo v. Tyler, 438 F.Supp 895, 900-901 (S.D.N.Y. 1977)

Petitioner's suggestion in the instant case--that the State should provide meaningful access to the records by sending them to the place of incarceration--may obviate the need to reach the fee issue. If no exculpatory documents are located there would be nothing to be copied. A prisoner who found previously undisclosed potentially exculpatory documents should have little difficulty in obtaining free copies of those, under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). If the same prisoner merely wanted free copies of documents that he had found, but which were not potentially exculpatory, no liberty interest would be affected, and the State's demand for copying fees would be more defensible. Access is the threshold issue; the need to impose copying costs may be avoided if access reveals nothing useful. Complete and unlimited access and copying are provided to the free and the funded under the Public Records Law. Access and narrow demands for copying should be available for the imprisoned and the impecunious.

The compromise position presented in our Initial Brief--provide an opportunity for a prisoner to review public records at the place of incarceration--has been adopted by at least one federal Court. United States v. Davidson, 438 F.Supp. 1253 (N.D. Ind. 1977). Davidson sought copies of documents which had been provided to trial and appellate counsel, as well as previously undisclosed records. The court ordered him to preliminarily obtain what he could from prior counsel, then stated the procedure to be followed:

> When the defendant has satisfactorily complied with the preliminary steps as ordered here, the court now establishes the additional procedure as follows:
>
> 1. Under the United States District Court for the Northern District of Indiana, Rule 18 and using the Circuit Rule 5(c), order that the United States Clerk for the Northern District of Indiana deliver by certified mail the record and transcript as may still be required by the defendant to the Warden of the Federal Penitentiary at Leavenworth, Kansas.
>
> 2. That the court direct the Warden to maintain custody and control of the record and transcript for a period of time of 30 days or such other period as the court deems necessary and proper; following which said period the warden would be required to return the record and transcript by certified mail to the Clerk of the Court.
>
> 3. That the Warden allow the defendant Davidson access to the records and transcript only under the direct supervision of an official of the prison and at such times, places and other circumstances as the Warden would deem necessary to insure that record and transcript would remain intact without alteration, destruction or other change.

U.S. v. Davidson, 438 F. Supp. at 1256.

The State suggests that only the Legislature can permit exceptions to the requirement for copying costs in § 119.07, Fla. Stat. (Respondent's Brief p. 13). We suggest that in the limited circumstance presented in this case, in which a requestor's liberty is at stake, this Court should construe the statute's promise of allowing access "at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee" to include indigent prisoners, wherever in Florida they are.

II.

THE ULTIMATE FEE ISSUE IS ONE OF EQUAL PROTECTION

Assuming that wholesale free copying of State Attorney records for any indigent prisoner request is not an acceptable choice for the State or for this Court, we have suggested a two-step: first access, then copying pertinent documents. At some juncture the issue of copying fees becomes merely one of dollars. The State says that it is simple: those who can pay, can receive; those who cannot pay, cannot receive. For truly useful documents, no rational basis exists for such a distinction.[4]

Prisoners seeking post-conviction relief are constitutionally entitled to various forms of government assistance, albeit less than that available to prisoners seeking direct appellate review. See Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (establishing a right to access to courts via adequate prison law libraries).[5] The Supreme Court reviewed those post-conviction rights, noting:

> [E]ven as it rejected a claim that indigent defendants have a constitutional right to appointed

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[4] Poverty, standing alone, is not a suspect classification. Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Heightened scrutiny may be appropriate in this case, however, which potentially impacts fundamental rights of prisoners. An additional argument is tied to the state property interest created by the Chapter 119 promise of access to public records. Having given every person the right of access, restricting it based on wealth is particularly invidious.

[5] Florida's constitutional provision guaranteeing access to courts, Article I, § 21, provides further support for the compromise solution proposed in our Initial Brief.

> counsel for discretionary appeals, the Court reaffirmed that States must "assure the indigent defendant an adequate opportunity to present his claims fairly." Ross v. Moffitt, 417 U.S., at 616, 94 S.Ct. at 2447. "[M]eaningful access" to the courts is the touchstone. See id., at 611, 612, 615, 94 S.Ct., at 2444-2446.

Bounds v. Smith, 430 U.S. at 823 (emphasis supplied).

When dollars are the impediment, the Supreme Court has been unwilling to tolerate a total denial of access to courts, and has instead asked the States to be creative in balancing the competing interests:

> Moreover, our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial..., and in appeals as of right.... This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial.

Id. at 824-825 (citations and footnote omitted) (emphasis supplied).

The first question, then, is whether a constitutional right is potentially at stake in the present case. The answer is "yes." Petitioner sought public records from the State Attorney's

office because he reasonably believed that government officials had information tending to implicate another for the crimes for which Petitioner was convicted. Petitioner had, in the first instance, a constitutional right to that information before his trial, and ultimately has a constitutional right to release from prison if he was wrongfully convicted. The next question is whether Petitioner's indigence, and the concomitant expense to the State in providing some records free of charge, can justify a total denial of all records.

Bounds suggests that a total denial is fundamentally unfair, especially when a similarly situated prisoner with adequate funds could obtain the public records. We recognize the distance between a total denial of public records to indigent prisoners and *carte blanche* gifts of such records by the State. The offered compromise seeks to balance the interests and narrow the distance, keeping in mind at all times that there is no justification, no rational basis, for the continued incarceration of persons such as John Purvis (see footnote 2, supra at p.2) whose "public records" files contain information which might set them free.

III.

THIS COURT SHOULD EXERCISE ITS JURISDICTION

The State argues against this Court's exercise of its discretionary jurisdiction, claiming the question presented is not of great public importance, and that Petitioner's individual claim is moot. Neither argument justifies abandoning this case.

Two district courts of appeal have certified the same question as one of great public importance. Roesch v. State, 596 So. 2d 1214 (Fla. 2nd DCA 1992); Campbell v. State, 593 So. 2d 1148 (Fla. 1st DCA 1992). Florida's commitment to open government and to public records is well-established, and the complained of impediment to obtaining otherwise public records presents a serious issue for this Court's review. The fact that the ultimate interest at stake is liberty elevates this case beyond the ordinary public records case, and the continuing and repeated presentation of the question to Florida courts supports the need to resolve the issue despite Roesch have obtained his records.

CONCLUSION

For the foregoing reasons, this Court should reject the arguments of the State, and adopt either Petitioner's answer to the certified question, or some other procedure which will fully protect the important interests at stake.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to (1) CAROLYN M. SNURKOWSKI, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050; (2) STEPHEN KROSSCHELL, Assistant Public Defender (Attorney for Amicus), Polk County Courthouse, 255 N. Broadway -- 3rd Floor, P.O. Box 9000-PD, Bartow, FL 33830 (3) SUSAN MAHER, Department of Corrections, 2601 Blairstone Rd., Tallahassee, FL 32399-2500; (4) ARTHUR JACOBS, P.O. Box 1110, Fernandina Beach, FL 32034-1110 (Florida Prosecuting Attorneys), (5) LEONARD YANKE, D.O.C. # 110134 / E-46, Glades Correctional Institution, 500 Orange Ave. Cir., Belle Glade, FL 33430-5222 (amicus), and (6) Petitioner JAMES ALLEN ROESCH, #049547, Walton Correctional Institution, P.O. Box 1386, DeFuniak Springs, FL 32433, by U.S. Mail this 3rd day of February, 1993.

BEVERLY A. POHL