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December 3, 1993

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: **LEE MAX HYDER v. STATE OF FLORIDA**
CASE NO. 82,601

Dear Mr. White:

As you requested, enclosed are seven copies of the adopted answer brief in the case of James Allen Roesch v. State of Florida.

Sincerely,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Michele Taylor

MICHELE TAYLOR
Assistant Attorney General

/cs

Enclosures

COPY

FILED
SID J. WHITE
DEC 6 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

82,601

JAMES ALLEN ROESCH,

Appellant,

v. CASE NO. 79,937

STATE OF FLORIDA,

Appellee.

_____/

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

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.

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 seeking any response from the State, 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. This is so because under the public records law, specifically §119.07, Fla.Stat.:

> . . . 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.[1]

Roesch candidly admits in his brief on the merits before this Court 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 E 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 privision 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. §119.07(1)(a) mandates that 'every person who has custody of public records shall permit the records to be inspected and examined by

[1] 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.

> 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. Simply because an individual has been 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 request and will be left to their own devices as to how they access said information once that request has been made. See McDonald v. Bordaved 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), __ F.L.W. S___ (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 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 but fashionednot 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 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 to a public records request? Will declared bankruptcy eliminate the need to pay for public records in civil cases? The answers to all these questions 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 erroneous. 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 persons' whim must box up its files and send them somewhere for personal inspection in lieu of payment. Of course, "free" records are also not a suitable alternative unless and until the Legislature decides that options should be created.

To fashion a court rule or court procedure will serve no purpose. For every effort an exception or additional exemption will arise. Either all public records should be free to the requestor or none. For all intense purpose the records are free

with the exception of reproduction costs. To suggest a rule or procedure is necessary in such a circumstance is unnecessary imposes a burden of agencies which is cumbersome for no real purpose. Who and how will an agency decide whether a requestor is indigent? Certainly not all persons imprisoned are without funds.