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IN THE SUPREME COURT OF FLORIDA

LEE MAX HYDER,

Petitioner,

-vs- Case No: 82,601

STATE OF FLORIDA,

Respondent.

_____/

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

Respectfully Submitted,

Lee Hyder

Lee Max Hyder, Pro. se.,
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SUMMARY OF THE ARGUMENTS

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; the Florida Constitution, 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 claim. 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
(Course Of The Proceedings Below)

Lee Max Hyder appealed the Circuit Court's Order, granting in part and denying in part, his petition to access the State Attorney for Hillsborough County (13th Judicial Circuit) investigative files and records in Hyder's criminal case pursuant to **Section 119.07, Florida Statutes**, or what is more commonly referred to as the Public Records Act, free of postage and copying costs as he was an insolvent Florida State prisoner.

The Second District Court of Appeal affirmed the trial court's denial of Hyder's petition to access his files and records free of costs. **Hyder v. State, 18 Fla.L.Weekly D2199 (Fla. 2nd DCA October 8, 1993).** However, troubled by the tension caused by case law denying free copies of records to indigent prisoners, and the clear right of access to public records, the District Court of Appeal certified to this Court the question of what procedures are to be employeed to provide those records to unrepresented prisoners seeking them in conjunction with post-conviction relief. Id.

Lee Max Hyder, appearing pro. se., filed a timely notice seeking this Court's discretionary review and his brief on the merits now follows.

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?**

Hyder v. State, 18 Fla.L.Weekly D2199 (Fla. 2nd DCA October 18, 1993). The issue is a recurring one; the Second and First District Court of Appeal certified the identical question in **Roesch v. State, 596 So. 2d. 1214, 1215 (Fla. 2nd DCA 1992), review granted, 617 So. 2d. 320 (Fla. 1993)(Oral Arguments September 1, 1993)** and **Campbell v. State, 593 So. 2d. 1148, 1150 (Fla. 1st DCA 1992).**

This question is the product of the mandate of **Section 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 supervison 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, upon payment of the actual cost of duplication of the copies.**

There is no dispute that Hyder, and other similarly situated prisoners, are entitled to public records access to a state attorney's criminal investigative 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). See Also, Mendyk v. State, 592 So. 2d. 1076 (Fla. 1992)

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 responibility 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 investigative files of the state attorney"** where the prisoner had **"already prosecuted his post-conviction motions and the related appeal...."** 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 **Hyder** and **Roesch** courts. Thus this Court must face the conundrum: Are **Section 119.07(1)(a)** and **Kokal** empty promises to empty pocketed prisoners?

Campbell; **Roesch**; **Yanke**; and now **Hyder**, all hold that a right to inspect a prosecutor's files did not include a right to free copies of those files for indigent inmates. **Campbell**; **Roesch**; and **Hyder**, however, have asked this Court to determine how the prosecutors and clerks of court should disclose public records to an unrepresented prisoner who wants them in conjunction with filing a post-conviction motion.

Here, Hyder seeks a comprehensive answer to this issue and would broaden it to include the records of defense counsel and police agencies as well as prosecutors and clerks.

Hyder argues that as an indigent inmate seeking to file a post conviction motion he has a right to free actual inspection of the clerk's, state attorney's, and police agency's files in his own case. These agencies can satisfy this right in various ways, usually sending free copies of the file to Hyder or by sending the actual file to the prison for controlled inspection. These rights are founded on (1) due process of law and the act's provision for reasonable access, (2) the constitutional right to equal protection of the law, (3) a statutory right under section 57.081, **Florida Statute**, to free assistance from the clerks and sheriffs in court action and; (4) this Court's power and authority to establish a fair procedure.

In cases like the present one, the State unreasonably and unfairly subjects indigent inmates to physical constraints which preclude meaningful access. Contrary to the act, the State is physically preventing Hyder from viewing the records by confining him far away from the place where it provides the records for inspection. By confining him, the State also prevents Hyder from earning the funds necessary to pay for copying and postage. Accordingly, permitting Hyder to pay for the copies or to come to the prosecutor's office to inspect the records is a meaningless priviledge.

Furthermore, Hyder is seeking access to the prosecutor's records in order to file a post conviction motion for release from custody. Because he has no meaningful access to the prosecution's records, however, he cannot use these records to provide the evidentiary basis necessary to support his post conviction motion and thereby gain his release from custody so that he can have meaningful access to these records. The state here gives on one hand what it unfairly takes away with the other. The conditions it imposes upon Hyder violate the act and constitutional due process because the conditions unreasonably and unfairly make meaningless the right in Florida to have access to public records useful to challenge Hyder's incarceration. Allowing such constraints to prevent meaningful access to the records in this manner is unreasonable, unfair, and a classic Catch-22 because the same physical constraints are simultaneously the subject of this legal action and the very reason it should not succeed.

In the present situation, Hyder an indigent Florida prisoner did not waive an opportunity to view the prosection's file before his appeal was over, because those files were not public at the time. Still, Hyder has never seen these files, could not have seen them, and cannot see them because he is in prison and has no money. Moreover, the nature of these files is such that Hyder can hardly be charged with knowing their contents.

The real question in this case arises not only because of Hyder'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 Hyder 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, Hyder 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 extremely crucial and the stakes are high.

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**, this 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 the state.**

Id. **596 So. 2d. at 969 (citations omitted).** A literal application of that language could end this case in favor of Hyder an indigent Florida prisoner.

Equally, the federal constitution and our United States Supreme Court guarantee equal treatment for both rich and poor in the criminal trial realm. In Griffin v. Illinois, **351 U.S. 12 (1956)** and Douglas v. California, **373 U.S. 353 (1963)**, the court required the state to provide free transcripts and counsel to all indigents on their first appeal of right: **"destitute defendants must be afforded an adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19.**

> **[A] State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. . . [T]he issue is whether or not an indigent shall be denied the assistance of counsel on appeal. . . [T]he evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of appeal a man enjoys "depends on the amount of money he has."**

372 U.S. at 355 (citations omitted).

Hyder does not discourage this Court from invoking it's **Traylor** principle and eradicating poverty, but we doubt this Court will do so. Therefore, Hyder suggests 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

Hyder'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 obtaining free copies of those under **Brady v. Maryland, 373 U.S. 83 (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 demands for copying and postage 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 funded under the Public Records Law. Access and narrow demands for copying should be made available for the imprisoned and the impecunious.

The compromise position presented here - - provide an opportunity for Hyder to review public records at the place of incarceration - - has been adopted by at least one federal court. **See, 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 Davidson to obtain what he could from prior counsel then gave him directions on what procedures should be employeed in allowing him to access the additional records he sought. The court held the record should be forwarded to Davidson's place of incarceration where the Warden could act as custodian of those records and return them after Davidson was given a chance to review and copy exculpatory material. **Id. 438 F.Supp at 1256.**

Hyder's suggestion that in the limited circumstances presented in this case, in which requestor's liberty is at stake, this Court should construe the statute's promise of allowing access **"at reasonable times, under reasonable conditions, and under supervision by the custodian of the public records or his designee"** as allowing access to an indigent prisoner wherever in Florida he may be. Additionally, 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 the file. In that circumstance sending the copied file moots any other issue: Hyder has obtained access.

C. Is The Ultimate Fee Issue One Of Equal Protection?

Assuming that free copying of State Attorney records for Hyder is not an aceptable choice for the State or this Court, Hyder has suggested a two-step: first access, then copying pertinent documents. At some juncture the issue of copying fees becomes merely one of dollars. An analysis of the statute suggests 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.[1/]

Diligent research has revealed few cases addressing the issue, and none by State Supreme Courts. The few available cases come to differing conclusions.[2/] **See, e.g., Hamm Donley,**

1/ 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 scrunity may be appropriate in this case, however, which potentially impacts fundamental rights of prisoners. An additional argument is tied to the states property interest created by the Chapter 119 promise of access to public records. Having given every person the right to access, restricting it based on wealth is particularly invidious.

2/ 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 waiver of search fees"). Rizzo v. Taylor, 438 F.Supp. 895.**

___ **N.E. 2d. ___, 1992 WL 50035 (Ohio Ct. App. 1992)(state public records law does not require a clerk of court to provide an indigent defendant with free copies of public records relating to arrest and conviction for as-yet unfiled post conviction motion).** A lower New York 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 Whitehead had filed both state and federal habeas petitions, and by virtue of those pending cases was **"not necessarily foreclosed from obtaining, free of charge, the documents that he damanded."** Id. **at 521.** Thus, even in denying his request, that court left the door open.

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

> [E]ven as it rejected a claim that indigent defendants have a constitutional right to appointed 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. "Meaningful access" to the courts is the touchstone. See Id, 611, 612, 615, 94 S.Ct., at 2444-2446.

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

When dollars are the impedent, 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 costs of protecting a constitutional right cannot justify its total denial.

Id., at 824-25 (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"**. Hyder sought public records from the State Attorney's Office because he reasonably believed that government officials had information that should have been disclosed to him prior to trial. Hyder had, in the first instance, a constitutional right to that information before trial, and ultimately has a constitutional right to release from prison if he was wrongfully convicted. The next question is whether Hyder'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. Hyder recognizes the distance between 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 whose **"public records"** file contains

information which could set them free.[3/]

CONCLUSION

Thus, the common sense answer to the questions presented should be this:

1. A State Attorney or Clerk of 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 insolvency 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

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3/ 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 Trish Power, **Anatomy Of A Wrong Conviction, The Miami Herald, January 16, 1993, page 1A.**

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 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 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.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this 2nd day of November, 1993; to the Office of the Attorney General, Tampa Regional Office, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607.

Lee Max Hyder

APPENDIX

Hyder v. State
18 Fla.L.Weekly D2199
(Fla. 2nd DCA October 8, 1993)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LEE HYDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93-02678

Opinion filed October 8, 1993.

Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Hillsborough County; Diana M. Allen, Judge.

PER CURIAM.

Hyder appeals from an order granting in part and denying in part his motion to compel the State Attorney's Office to provide access to public records. We treat Hyder's appeal as a petition for writ of certiorari. See Roesch v. State, 596 So. 2d 1214 (Fla. 2d DCA 1992), review granted, 617 So. 2d 320 (Fla. 1993).

We deny the petition because Hyder is not entitled to a copy of the State Attorney's files free of charge. See Roesch. However, as in Roesch, we certify the following question:

> 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., DANAHY and CAMPBELL, JJ., Concur.