SUPREME COURT OF FLORIDA

CASE NO. 78,915
4TH DCA NO. 91-2550

POST-NEWSWEEK STATIONS, FLORIDA, INC., THE MIAMI HERALD PUBLISHING COMPANY, NEWS AND SUN-SENTINEL COMPANY, AND NBC SUBSIDIARY (WTVJ-TV), INC.,

Petitioners,

vs.

JOHN DOE, et al.,

Respondents,

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
CERTIFYING QUESTIONS TO BE OF GREAT PUBLIC IMPORTANCE

PETITIONERS' AMENDED INITSAL BRIEF

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STATEMENT OF THE CASE

On August 7, 1991, the State of Florida filed a three-count information in Broward County Circuit Court against Jeffrey and Kathy Willets (the "Willetses"), charging Kathy Willets with prostitution (Count 111), her husband Jeffrey with living off of the earnings of prostitution (Count I), and both with the unlawful interception of telephone conversations (Count II). In a search of the Willetses' home, where the alleged criminal activity occurred, the State had seized tapes, business cards, a rolodex, and other papers which identified alleged prostitution customers of Kathy Willets. The Willetses filed a discovery request pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure on August 30, 1991, seeking a list of the names and addresses of the persons with information relevant to the charges against them, as well as the materials described above.

Even before the Willetses filed their discovery demand, certain of the alleged customers of Kathy Willets (referred to in the trial court and district court only as the "John Does") filed motions seeking orders precluding press and public access to those portions of the discovery materials which identified them. The Willetses also filed a motion asking that the trial court prohibit the release of any discovery documents until after the trial court determined the Willetses' fair trial rights would not be violated. Petitioners, which are various news organizations reporting to the public about these criminal proceedings, were granted leave to

intervene and filed papers opposing the motions filed by the Willetses and by the John Does.

On September 4, 1991, the trial court denied the Willetses' and the John Does' motions, and the John Does' motion for a stay of release of the discovery materials. The court limited its order to release of the Does' names and addresses; the court ruled it would review the other information in camera. To date no decision on that other material has been made. The John Does (but not the Willetses) sought review in the Fourth District Court of Appeal (the "district court") by petition for a writ of common law certiorari (the "Petition") and a stay of the trial court's order. On September 9, 1991, the district court granted the stay, pending full briefing of the issues. On September 27, 1991, the district court denied the Petition, but continued the stay and certified two questions to this Court as questions of great public importance. The district court denied rehearing on October 25, 1991, but, at the request of the John Does, on November 13, 1991, it delayed issuance of its mandate and thus continued its stay of the trial court's order pending this Court's resolution of the certified questions.

Petitioners filed their notice invoking this Court's jurisdiction on November 1, 1991. One John Doe filed a "Cross Notice" on November 6, 1991. On November 15, 1991, this Court entered its Order Postponing Decision On Jurisdiction And Briefing Schedule.

STATEMENT OF FACTS

In the summer of 1991, acting on an anonymous tip, the Broward County Sheriff's Office began an investigation into allegations that Deputy Sheriff Jeffrey Willets and his wife Kathy were operating a prostitution business out of their Tamarac home. Appendix to Petition for a Writ of Certiorari ("Does' Appendix") at 4-18.[1] On July 23, 1991, police officers searched the Willetses' home and Jeffrey's police car, and seized, among other things, a tape recorder connected to the Willetses' telephone, various cassette tapes containing 300 minutes of taped conversations between one of the Willetses and other persons over a nine-month period, appointment books, a rolodex, a notebook, and other documents containing names, addresses and other lists purporting to contain the names of prostitution customers, amounts paid and other notations about the persons listed.[2] Id. Thereafter, on August 7, 1991, the Broward County State Attorney filed a three-count information charging Kathy Willets with prostitution, Jeffrey Willets with living off of the proceeds of prostitution, and both of them with illegal wiretapping. Does' Appendix at 1-3.

Beginning on August 19, 1991, one of the John Does filed the first of several closure motions (the "Closure Motions") in the

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[1] Petitioners filed and served a copy of the Does' Appendix with their Initial Brief on December 10, 1991.

[2] The litigants, including the John Does, the trial court, and the district court all used the words "client list" or "customers list" as a shorthand way of referring to the papers seized.

Willetses' criminal case, asking the trial court to: (i) prohibit disclosure of "any and all business cards, notes, journals, lists and/or tape recordings" seized from the Willetses so as to prevent disclosure of the Does' identities; (ii) enter a protective order under Rule 3.220(l) of the Florida Rules of Criminal Procedure to "protect the identity of victims and/or witnesses in this matter"; and (iii) require "all pre-trial documents" be submitted to the court in camera in accordance with Rule 3.220(m) of the Florida Rules of Criminal Procedure. August 19, 1991 Motion for Order Denying Access to Pretrial Proceedings and Incorporated Memorandum of Law ("August 19 Motion") at 1-2; A.23-24.[3/] The Closure Motions asserted a multitude of grounds for entry of the closure order they sought, most of which the John Does abandoned in the district court.[4/] One week later, the Willetses filed their Motion to Control Prejudicial Pretrial Publicity to Prevent Public Disclosure which also sought to keep from public view any discovery material.

On August 26, 1991, the trial court refused to release the public records before the Willetses had requested discovery,

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[3/] References to pages in the Amended Appendix to this Amended Initial Brief will be shown by "A." followed by the appendix page number, as in "A.1."

[4/] One such closure motion included brief references to infringement on the Does' rights to association and equal protection under the laws. August 19 Motion at 5-6; A.27-28. Other Does sought protection under Rules 3.220(m) as "any person" and 3.220(e), Addendum to John Doe's Motion for Order Denying Access to Pretrial Proceedings at 1-2; under the trial court's power to ensure a fair trial, Witnesses' Motion to Restrict Disclosure at 2; and under the "active criminal investigative information" exemption of Chapter 119, One John Doe's Response to Media/Intervenors' Motion to Intervene at 3-4.

claiming they were exempt from the disclosure requirements of the Public Records Act as criminal investigative information. Transcript of Proceedings Before Judge Frusciante, August 26, 1991 (the "August 26 Transcript") at 71; A.103. On August 30, 1991, the Willetses filed a discovery request under Rule 3.220 of the Florida Rules of Criminal Procedure asking the State to turn over all of the material, including the papers and other materials identifying the John Does, seized at the Willetses' home in July. Specifically, the discovery request asked for, among other things:

> 1) The names, addresses and telephone numbers of all persons known to the State to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> * * *
>
> 4) All written or recorded statements and the substance of any oral statements made by an accomplice or co-defendant together with the name, address and telephone numbers of each witness to the statement.
>
> * x *
>
> 6) Any tangible papers or objects which were obtained from or belonged to the Defendant [sic] whether in actual or constructive possession, regardless of whether the State intends to use them at trial.
>
> * * *
>
> 16) Complete criminal history of all persons listed in Paragraph 1 above, and the complete criminal history records of Defendant [sic], if any.

Defendants' Notice for Discovery at 1 and 4 (emphasis added); A.117, 120. The State had until September 16 under the Rules to

provide these materials (the "Discovery Materials") to the Willetses' counsel, which it subsequently did.

At a lengthy hearing on September 4, **1991**, the trial court heard argument on both the Willetses' and the Does' Closure Motions. In support of their motion, the Willetses offered no evidence save for a joint affidavit signed by the Willetses attesting to the high publicity surrounding their case, and contending vandals had attacked their home and hecklers had harassed them. Affidavit of Jeffrey Willets and Kathy Willets, His Wife [sic] at 1-2. The court, first orally and then in a written opinion, denied the Willetses' motion. See September 11, **1991** Order Granting the Press and Public Access to Pretrial Proceedings ("September 11 Order"); **A.123-130.** The Willetses did not appeal, and that issue was not **before** either the Fourth District Court of Appeal or this Court.

In support of the Does' Closure Motions, the Does' counsel produced the following at the hearing: (1) the testimony of psychologist Dr. Stephen Koncsol regarding the purported strain this case has had on one of the Does and acknowledging that Doe had sexual relations with Kathy Willets, (2) various John Doe affidavits[5/] asserting privacy interests, and (3) an audiotaped

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5/ **Six** such affidavits appear in the Does' Appendix to their Petition. Does' Appendix at 33-42 and **234-35; A.131-142.** They are identical in form and content, except for one which adds a paragraph admitting the affiant sent a letter and his business card to Kathy Willets and spoke to her on the telephone, while claiming the affiant did not "meet Kathy Willets, travel to her house, or engage or attempt to engage in any illegal activity with **her."** Affidavit of John Doe dated August 19, 1991 (Does' Appendix at **42);** (continued...)

plea by one John Doe asking the judge not to release his name.[6] Transcript of Proceedings Before Judge Frusciante, September 4, 1991 ("September 4 Transcript") at 74-90, 72-73; A.216-232, 214-215. Neither the John Does who supplied affidavits nor the John Doe who appeared via audiotape[7] made themselves available for cross examination by Petitioners, even by remote audio hookup which could have preserved their anonymity. Neither the affiants nor the person on the audiotape were identified other than by the pseudonym "John Doe". The affidavits made identical conclusory recitations relating to the Does' asserted privacy interests, their status as "private" individuals, and their opinions that release of their names would embarrass them. Does' Appendix at 33-42 and 234-35; A.131-142. None of the affiants denied he was a customer of Kathy Willets in her prostitution business, and none denied he committed the criminal act of paying Kathy Willets for her services, except for one who admitted sending a letter and his business card to

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[5] (...continued) A.139-140. The record does not reflect and Petitioners do not know which John Doe filed that affidavit, which of the Discovery Materials relate to that John Doe or any of the Does, or even whether that John Doe in fact will be a witness in the case.

[6] It is not clear whether these seven Does (the six affiants and the one voice on the audiotape) are the only Does who had asked the court to protect their identities. Since that hearing and since the appellate process began, at least two attorneys have entered appearances on behalf of an unidentified number of additional John Does.

[7] In fact, save for an assertion by counsel for the Does, it was never established that the voice on that audiotape (which was electronically garbled, presumably to hide his identity) indeed belonged to a "John Doe." See September 4 Transcript at 72-73; A.214-215.

Kathy Willets while asserting he did not meet "Kathy Willets, travel to her house, or engage or attempt to engage in any illegal activity with her". Does' Appendix at **42; A.139-140.** Dr. Koncsol testified the Doe who consulted him had sexual relations with Kathy Willets; he did not know if the Doe paid Kathy Willets for her services. September **4** Transcript at **79-81;** A.221-223. At **no** time were any of the Does denied the opportunity to introduce any evidence they thought might support their claims.

The trial court orally denied the Does' Closure Motions and denied the Does' request for a stay. September 4 Transcript at **146-150; A.288-292.** The court limited its order to release of the Does' names and addresses; the court ruled it would review the other information in camera. The Does then applied to the district court for a stay on September 9, 1991 which the district court granted pending full briefing of the issues. On the same day the Does[8] filed their Petition. In the Petition, the Does argued they had established "good cause" under Rule 3.220 of the Florida Rules of Criminal Procedure sufficient to prevent release of the Discovery Materials. Petition at **7-17;** A.310-320. The Does further argued they have a privacy interest which the court's order

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8/ Although the Petition states it is on behalf of only one of the Does, several other Does formally have adopted the arguments taken in the Petition. In addition, because their interests are aligned, both before the trial court and the district court the parties generally referred to the Does in the plural. Nevertheless, none of the Does ever clarified which John Doe (either one of the affiants, the voice on the audiotape, the one who consulted Dr. Koncsol, or some other "John Doe") is the John Doe on whose behalf the Petition was filed.

refusing to prohibit release of the Discovery Materials violated." Petition at **12-17; A.315-320.**

Although the district court denied the Petition, finding the Does had not shown the trial court departed from the essential requirements of law in denying their Closure Motions, it continued the stay and certified the following two questions to this Court as being of great public importance:

> **1.** In a criminal proceeding charging a defendant with prostitution, does a non-party who claims a right of privacy in documents held by the state attorney as criminal investigative information have standing to seek an order of the trial court which would deny the public and the press access to evidence revealing names of the defendant's clients when pursuant to the defendant's discovery motion the state is prepared to deliver said evidence to the defendants as required by Florida Rule of Criminal Procedure 3.220 and which upon delivery would otherwise render them public records pursuant to Bludworth v. Palm Beach Newspapers, Inc., **476 So.2d 775** (Fla. **4th** DCA 1985), rev. denied, **488** So.2d **67** (Fla. 1986)?
>
> 2. In a criminal proceeding charging a defendant with prostitution, does the trial court abuse its discretion under Section

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9/ The Does subsequently argued that Section 119.011(3)(c)5, Florida Statutes ("(C)5"), exempting from disclosure information which would be "defamatory to the good name" of a victim or witness, prevents disclosure of the Discovery Materials. In response to the district court's **sua sponte** request that the parties comment on the legislative history of Section **119.011(3)**(c)**5,** the Does asserted their Closure Motions had raised the issue of (C)5 protection by stating that Chapter 119 barred disclosure. **See** John Doe's Comments Regarding Judicial Notice of Legislative History Per Court Order Dated September 18, **1991** at **3: A.324.** Petitioners also filed comments in response to the district court's order, and in so doing emphasized that the Does had not demonstrated that the (C)5 exemption applied to them. **See** NSS, MHPC and WTVJ's Response to Court's Order Seeking Comment on Legislative History; A.328-352.

> 119.011(3)(c)5 of the Public Records Act in denying closure of discovery documents where an unnamed third party claims that release of such information would be defamatory to him and would invade his right of privacy both [sic] under the Act, Article I, Section 23 of the Florida Constitution and the Federal Constitution, and the trial court finds that release of the information will harm the third party?

Opinion of Fourth District, September 27, 1991 ("Opinion") at 6-7; A. 6-7.

Contrary to the statement at the end of the second question, the trial court never found that the release of the information would harm any John Doe or any other third party to the prosecution. While the trial court expressed concern about the potential for harm, nowhere did the trial court find the Does had **proved** real harm, rather than a fear unsupported by anything tangible. September 4 Transcript at 114-15, 134; **A.256-287, 276.** Accordingly, the certified question should be modified to delete that portion referring to a finding of harm.

The net effect of the district court's opinion and its continuation of the stay is that public records which should have been available for public inspection in mid-September -- nearly three months ago -- remain under seal without any competent evidentiary showing supporting closure.

SUMMARY OF ARGUMENT

Time and again this State has demonstrated its unyielding commitment to open government. With respect to records of a government agency the Legislature has deemed to be available on demand for public inspection, access may be foreclosed only where a statute so directs and only after a specified showing by the **person** seeking closure.

This case arises from the unsuccessful challenge by several unnamed alleged criminal accomplices and other persons involved in the prostitution and wiretapping charges against the Willetses to release of public records containing their identities. Throughout the course of the proceedings these persons identified themselves only as the "John Does". While the Does may have standing to seek relief from the trial court in this case under the rules of criminal procedure, Florida's Public Records Act does not grant that right. The Act permits only the custodian of a public record to challenge its disclosure, and then only by asserting one or more of the enumerated exemptions in the Act or other statutes.

If the Does, who are not custodians of the records at issue here, have any standing at all to obtain the relief they seek, it is through Florida's criminal discovery rules, specifically Rule 3.220. Thus, this Court should answer the first question the district court certified to be of great public importance with a qualified 'yes'. However, this Court should further find, as did the trial court and the district court, that the Does failed to make the proper evidentiary showing the rule

requires, answer the second certified question in the negative, and affirm the trial court order granting Petitioners and the public access to the Discovery Materials.

To succeed under Rule 3.220, the Does had to produce competent evidence of "good cause" why the Discovery Materials should be kept from public view. Because it is the Legislature which has determined the only circumstances under which access to public records may be delayed or denied, the "good cause" showing required here must be one of the exceptions to disclosure enumerated in the Act. Here, the so-called (C)5A exception for defamatory material (referring to a definition in Section 119.011(3)(c)5a, Florida Statutes) is the only one which arguably could apply. The Does bore the burden of proving a reason for nondisclosure and they failed miserably, although the trial court gave them every opportunity to produce such evidence. The 'evidence' the Does did produce in support of their claim that (C)5 requires nondisclosure was incompetent and woefully inadequate: various affidavits flush with conclusions, not facts, and signed only under the pseudonym "John Doe"; an audiotaped plea by another individual identified only as "John Doe" begging the trial court not to release the Discovery Materials; and the testimony of a psychologist on the purported strain this case has had on yet another individual identified only as "John Doe" and affirmatively showing that particular Doe did have sexual relations with Kathy Willets. The Does adduced no evidence whatsoever proving they are victims or witnesses whose "good name" would be defamed by

disclosure of the Discovery Materials. And, they adduced no evidence showing that they are anything other than individuals implicated in a sex-for-hire scheme, some of whom may also be potential codefendants (irrespective of any grants of immunity). Thus, the trial court did not abuse its discretion under Rule 3.220 in directing the release of the Does' names and addresses.

The Does have no state or federal constitutional privacy interest at stake here. Moreover, the Florida Constitution expressly forbids any limitation on access to public records because of an asserted right of privacy. Thus, the trial court acted properly in rejecting the Does' privacy claims.

ARGUMENT

I. UNDER THE UNIQUE RULES REGARDING DISCOVERY IN A CRIMINAL CASE, A NONPARTY TO A PROSECUTION HAS LIMITED STANDING UNDER THE FLORIDA RULES OF CRIMINAL PROCEDURE TO SEEK AN ORDER RESTRICTING DISCLOSURE, WHICH ORDER COULD, GIVEN THE PROPER EVIDENTIARY SHOWING, RESTRICT THE AVAILABILITY TO THE PUBLIC OF CRIMINAL DISCOVERY MATERIAL.

A. Persons Who Are Not Custodians Of Government Agency Records Have No Standing Under The Public Records Act To Seek Delay Or Denial Of Public Access To Records Or To Assert Exemptions To The Act.

Under Florida's Public Records Act (Chapter 119, Florida Statutes), the custodian of a public record must produce the record for immediate inspection upon request, subject only to the reasonable delay in gathering the requested materials. Specifically, Section 119.07(1)(a) of the Act provides in relevant part:

> 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 . . . .

Section 119.07(1)(a), Florida Statutes (1990) (emphasis added). The Act does not require the custodian to give notice to those persons about whom the public records may refer, nor does it permit the custodian to do so. As this Court has previously found, the Act does not permit any delay in the records' release for the purpose of anticipating objections to disclosure by third persons identified in the records. Tribune Co. v. Cannella, 458 So.2d 1075, 1078 (Fla. 2984). Likewise, the Act makes no provision for

any person other than the custodian of a public record to object to the record's release. See Sections 119.07(1)(a) and (2)(a), Florida Statutes (1990). Thus, the legislative scheme does not permit the Does -- not custodians of the records at issue here -- to mount their challenge under the Public Records Act. Their only vehicle in this regard is Rule 3.220 of the Florida Rules of Criminal Procedure, and therefore it is the application of that rule to this case which is the real issue before this Court on the standing question.

B. In The Unique Factual Circumstances Of This Case, If The John Does Have Any Standing To Challenge Release Of The Discovery Materials, It Is Under Rule 3.220 Of The Florida Rules Of Criminal Procedure, And Not This State's Public Records Act.

The criminal justice system already has a mechanism in place -- wholly apart from the Public Records Act -- which may in limited circumstances afford nonparties such as the Does the right to seek relief from the court. For example, Rule 3.220(l), the particular provision upon which the Does relied in their Closure Motions, permits the court to enter a protective order upon a "showing of good cause" to "protect a witness from harassment, unnecessary inconvenience or invasion of privacy." Rule 3.220(l) Fla. R. Crim. P. (emphasis added). Similarly, Rule 3.220(e) permits sua ssonte orders restricting disclosure or on motion of counsel, and Rule 3.220(m) permits "any person" to ask for an in camera determination on regulating disclosure. The Public Records Act provides nonparties no safe harbor.

This Court's decision in Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), should remain unaffected by the decision in this case. At issue in Cannella was the release of personnel files of Tampa police officers implicated in the shooting death of a suspect. The Tampa Times had requested the files under Chapter 119. The custodian, Tampa's director of administration, initially refused to release them, citing no Chapter 119 exemption but rather a city policy requiring notice to the affected employee before personnel files could be released. Although the city released the files within a few weeks of the initial request, the Second District Court of Appeal (finding the issue not to be moot) heard the case and held that government employee personnel files could be automatically withheld for 48 hours to allow employees identified in the records an opportunity to raise any privacy objections. The district court then certified two questions to this Court:

> 1. May disclosure of nonexempt public records automatically be delayed for a specific period of time for any reason?
>
> 2. [If so], what is the maximum permissible delay period, and for what purpose or purposes may the delay period be invoked?

Cannella, 458 So.2d at 1077. This Court held the Public Records Act contains no provision for the subject of a public record, admittedly an interested party, to cause the withholding of a public record. The "only justification for withholding a record or a portion thereof is the custodian's assertion of a statutory exemption." Id. at 1078. "Delaying inspection to allow an employee to be present during the inspection of his personnel

records is **not within the legislative scheme . . . .** [A]ny delay to allow such presence is therefore **inconsistent with the Act**, which contemplates only the reasonable custodial delay necessary to retrieve a record **and** review and **excise** exempt material." Id. (emphasis added).[10/]

Thus, no issue before this Court in this case requires a result contrary to Cannella or one inconsistent with its reasoning. The issue here is not Cannella-type delay[11/]; rather, it is, what is the proper vehicle with which the Does may assert any interest they may have, and did the Does carry their burden in that regard.

11. THE JOHN DOES DID NOT MAKE THE REQUIRED SHOWING UNDER RULE 3.220 TO RESTRICT DISCLOSURE OF THE DISCOVERY MATERIALS AND THUS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DOES' CLOSURE MOTIONS.

Assuming the John Does have standing to seek an order limiting disclosure of the Discovery Materials, they failed to make the showing required to justify such limitation.

A. In This Context The "Good Cause" Showing Rule 3.220 Requires Is That The John Does Prove An Exception Enumerated In The Act Applies To Release Of The Discovery Materials.

The Does sought a protective order under Rule 3.220(1) of the criminal rules to prevent release of the Discovery Materials.

[10/] Because of the negative response to the first certified question, the Court found the second question moot.

[11/] Petitioners, however, **object** to the delay caused by the Does' repeated futile attempts to forestall resolution of these issues.

August 19 Motion at 1; A.23. Rule 3.220(l) provides in relevant part:

> **Upon a showing** of good cause, the court shall at any time order that specified disclosures be restricted or deferred. . .or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience or invasion of privacy . . . .

Rule 3.220(l), Fla. R. Crim. P. (emphasis added). A protective order is never guaranteed; only if the person seeking one demonstrates "good cause" will a court enter such order **under** the Rules.

What constitutes "good cause" varies depending on the context. If, for example, the person seeking the protective order is a criminal defendant, then the required showing is evidence satisfying the three-part test this Court enunciated in Miami Herald Pub. **Co.** v. Lewis, **426** So.2d 1 (Fla. 1982). Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32, 35 (Fla. 1988) (holding a "finding of cause[12/] to restrict or **defer** disclosure of [public records on behalf of criminal defendants] cannot rest in air" but must be based on a consideration of factors "set out in the three-pronged Lewis test").[13/]

[12/] In **McCrary**, the defendants **had** sought a protective order closing pretrial discovery material under Rule 3.220(h), which, in 1989, was re-lettered (1) and modified to emphasize the use of protective orders to protect witnesses from harassment or intimidation. See Comments to 1989 Amendments, Rule 3.220, Fla. R. Crim. P.

[13/] In Lewis, this Court held **access** could be foreclosed only **when:**

(continued...)

The Legislature has determined that the only circumstances under which public records may be kept from public view are those circumstances set forth in Chapter 119. The Act lists more than two dozen categories[14] of excluded documents, all of which are "public records" but for policy reasons the Legislature has determined may not be available for public inspection.[15] One of those categories is a catch-all: "[a]ll public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt [from disclosure]." Section 119.07(3)(a), Florida Statutes (1990) (emphasis added). This Court has held that the "law" referred to in that exemption is statutory law, not judicially created or common law. Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979). In Wait, Florida Power & Light submitted a public

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[13] (...continued)

(1) it is "necessary to prevent a serious and imminent threat to the administration of justice";

(2) "no less restrictive alternative measures than closure are available for this purpose"; and

(3) "there is a substantial probability that closure will be effective in protecting against the perceived harm."

Lewis, 426 So.2d at 7-8.

[14] The categories are those either specifically enumerated in Chapter 119 or other general or special law the Act incorporates by reference. Section 119.07(3)(a), Florida Statutes (1990).

[15] See Part III.C.

records request to the city of New Smyrna asking to inspect the city's records concerning the planning, operation, and maintenance of the city's electrical system. New Smyrna and the utility were involved in a dispute about the construction and operation of nuclear plants. The city objected to disclosure, claiming non-statutory reasons for some documents. The trial court disagreed and ordered the records released. The First District Court of Appeal affirmed as to that portion of the trial court's order, as did this Court. The Court reasoned that if "the common law privileges are to be included as exemptions, it is up to the legislature, and not this Court, to amend the statute." Wait, 372 So.2d at 424. See also North Miami v. Miami Herald Pub. Co., 468 So.2d 218, 219-220 (Fla. 1985) (in refusing to create judicial exception for privileged communications, finding "the Legislature, not this Court, regulates disclosure of public records"); Neu v. Miami Herald Pub. Co., 462 So.2d 821, 826 (Fla. 1985); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980). The Act does not permit judicially created exceptions, even to accommodate such salutary public policy as the preservation of attorney work-product and attorney-client privileged information. "Good cause", then, must be one of the enumerated statutory categories.

The Does argued below that Section 119.07(4), Florida Statutes, nevertheless permits a court to fashion an exception to disclosure even in the absence of a statutory exception, Petition at 11; A.314. Section 119.07(4) provides in relevant part:

> Nothing in this section shall be construed to exempt [from disclosure] a public record which

> was made a part of a court file and which is not specifically closed **by order of court . . . .**

(emphasis added). **However,** this provision simply recognizes the difference, under our system of separation of powers, between legislatively created entities, their documents and procedures, and judicially created entities, documents and procedures. Thus, the Legislature was merely confirming that its decision to exempt a record from disclosure when the record is in the custody of an agency under the Public Records Act does not affect the status of access to that record when it is part of a court file. Such court records are subject to a standard wholly separate from public records under the Act. See The Florida Bar, 398 So.2d **446, 447** (Fla. 1981); Barron v. Florida Freedom Newspapers, Inc., **531** So.2d 113, **119** (Fla. **1988)** (court records in civil proceeding); Bundy V. State, 455 **So.2d 330, 337** (Fla. **1984)** (court records in criminal proceeding). There is no implication in Section 119.07(4) that a court may fashion a judicial exemption to the Act; indeed, such a construction would squarely contravene Wait and its progeny.

Nor does the ability of a criminal defendant to obtain a court order limiting access to public records to protect his Sixth Amendment rights to a fair trial give solace to the Does. See McCrary, 520 So.2d at 34 (finding Court's refusal in Wait to create public policy exceptions to Public Records Act "does not mean that there may not be instances where **orderly court procedures** or a respect for constitutional rights require that court files be closed") (emphasis added In McCrary, it was the criminal

defendants who had **proved** disclosure of discovery material which had attained the status of public records under the Act would jeopardize their Sixth Amendment right to a fair trial. Thus, the court-ordered exception to Chapter 119 exists only when prompted by constitutional concerns or courtroom decorum. Because the Does neither are criminal defendants nor, as more fully described below, have any other constitutionally protected interest,[16/] Section 119.07(4) cannot help them. In addition, no one has demonstrated that disclosure would disrupt "orderly court procedures." The Does thus must look elsewhere for a basis far restricting disclosure; the only other possibilities are the remaining statutory categories listed in Section 119.07, none of which applies on this **record.**

B. The Only Statutory Exception Upon Which The John Does Relied Is Section 119.011(3)(c)5, And That Section Does Not Permit Closure On This Record.

The Public Records Act defines what material constitutes a **"public** record", and explains in clear detail the circumstances under which **"criminal** intelligence information" and **"criminal** investigative **information"** (bath public records, yet usually exempt from disclosure under Section 119.07(3)(d)) may be disclosed:

> (c) "Criminal intelligence information" and "criminal investigative information" shall not include:
>
> * * *
>
> 5. Documents given or required by law or agency rule to be given to the person

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16/ See Part III below.

> arrested, except that the court in a criminal case may order that certain information . . . be maintained in a confidential manner and exempt [from disclosure] if it is found that the release of such information would:
>
> a. Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and[17]
>
> b. Impair the ability of a state attorney to locate or prosecute a codefendant.[18]

Section 119.011(3)(c)5 (emphasis added). Once criminal defendants, such as the Willetses here, make a request for discovery under Rule 3.220 of the criminal rules, such material becomes available for public inspection:

> "[d]ocuments given or required by law or agency rule to be given to the person arrested" are open for public inspection. This provision reveals that once documents are released, the Legislature believed there is no longer a need for secrecy."

Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 779 (Fla. 4th DCA 1985), quoting Satz v. Blankenship, 407 So.2d 396, 398 (Fla. 4th DCA 1981); Downs v. Austin, 522 So.2d 931, 935 (Fla. 1st DCA 1988).

However, the Act further provides certain "exceptions" to this exception. Otherwise publicly available criminal intelligence or investigative information may not be released if

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[17] The legislative history suggests the "and" should be an "or" and that the apparent discrepancy in the final published version of the section is merely the result of a scrivener's error. House of Representatives, Committee on Governmental Operations, Final Staff Analysis & Economic Impact Statement, June 16, 1988, at 2, par. I.B; A.467.

[18] The application of subsection "b" is not in issue here.

the court finds disclosure would be "defamatory to the good name of a victim or witness" (the "reputational aspect") or "jeopardize the safety of such victim or witness" (the "safety aspect"). Section 119.011(3)(c)5a, Florida Statutes ("(C)5A"). The Legislature, however, expressly limited this "exception" to disclosure to discovery material in a criminal case.

In their Closure Motions, the Does claimed disclosure of the Discovery Materials would cause them, among other things, reputational injury, and that the Public Records Act "barred" disclosure of the Discovery Materials. August 19 Motion at 4 and 8-9; A.26, 30-31. Although not expressly referring to it, the thrust of the Does' contention in this regard appears to be the reputational aspect of (C)5A. However, the Does adduced no competent evidence to support either reputational or physical harm and thus the trial court correctly refused to prohibit the Discovery Materials' release. In fact, the trial court did not find the Does had anything other than an unsubstantiated fear. See page 10 above: September 4 Transcript at 114-15, 134.

To rule for any of the Does under the reputational aspect of (C)5A, the trial court had to find that particular Doe was a "victim or witness", he enjoyed a "good name", and disclosure of the Discovery Materials would be "defamatory". The Does had the burden of proof in this regard in that exceptions to disclosure of public records are "in the nature of an affirmative defense" and

thus must be proven by the party asserting them with competent evidence. Donner v. Edelstein, 415 So.2d 830, 831 (Fla. 3d DCA 1982); State ex rel. Davidson v. Couch, 158 So. 103, 104 (Fla. 1934). None of the Does offered competent evidence supporting any basis for nondisclosure.

Assuming the Does are, as they claimed, "victims" and/or "witnesses", they still failed entirely in their burden to justify denial of public access. While counsel for some of the Does argued their clients' names "may" appear in the Discovery Materials only through inadvertence or the act of another,[19/] counsel's argument is not evidence and carries no evidentiary value. Leon shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1017 (Fla. 4th DCA 1982). The simple fact is, no evidence was placed in the record although the Does' counsel were given every opportunity to do so below.

Moreover, assuming the Does' affidavits would be admissible, their content provided no lawful basis for a finding that the Does enjoyed a "good name" which release of the Discovery Materials would jeopardize. As a threshold matter, to be admissible the affidavits had to recite facts, not conclusions. Pino v. Lopez, 361 So.2d 192, 193 (Fla. 3d DCA 1978). However, none did; rather, the affidavits made identical conclusory recitations relating to the Does' asserted privacy interests, their status as "private" individuals, and their conclusion that release

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[19/] See, for examsle, September 4 Transcript at 49-51; A.191-193.

of their names would embarrass them. Does' Appendix at **33-42** and **234-35.** None cited any facts, save for one whose affiant admitted sending a letter and his business card to Kathy Willets while asserting he did not meet Kathy Willets, "travel to her house, or engage or attempt to engage in any illegal activity with her"; even that affidavit was still **flush** with conclusory assertions about the affiant's status and purported harm disclosure would cause. Does' Appendix at **41-42; A.139-140.** Furthermore, all the affidavits are signed only "John Doe" and thus on their face do not show an affiant who is competent to testify.[20/] Miraculously, despite this, all the affidavits were notarized. Even assuming the affidavits to be sufficient as to form, it is impossible to discern from their content whether any of the Does enjoyed a "good name". No one except the Does and their counsel knows these individuals' true identities. Certainly, the trial court, to whom the Does were to produce evidence to support closure, could not have known the Does' true identities, let alone such persons' reputations.[21/] And, neither the psychologist's testimony nor the audiotaped plea ever established the Does' "good name". The Does are implicated in criminal activity and did not produce any evidence, competent or

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[20/] See ~~also~~ CMS Industries, Inc. v. L.P.S. Intern., Ltd., 643 **F.2d 289, 295** (5th Cir. **1981)** (finding court may sua sponte properly **refuse** to credit an affidavit clearly defective on its face).

[21/] The trial court did review the "client list" at the September 4 hearing, yet it was never established which (if any) of the persons whose names appeared there were which affiant. See September 4 Transcript.

otherwise, to dispute it, although they were given every opportunity to do so.

Similarly, the record is devoid of any proof any of the Discovery Materials are "defamatory". For material to be "defamatory", it must, at minimum, contain a false statement of fact concerning the John Doe which tends to expose him to hatred, ridicule or contempt, or tends to injure him in his business, reputation or occupation, or charges him with committing a crime.[22/] Truthful information, then, cannot be defamatory, cannot meet the (C)5A exception to disclosure, and thus cannot form the basis for sealing public records. Because the Does wholly failed to prove the Discovery Materials contained any false information, they cannot claim the (C)5A exception to disclosure.

In effect, the Does seek to expand (C)5A beyond its intended scope. This they cannot do, for Florida's appellate courts consistently have recognized that the Act favors disclosure of public records and exemptions to disclosure must be construed narrowly. Downs v. Austin, 522 So.2d 931, 933 (Fla. 1st DCA 1988) (holding doubts should be resolved " 'in favor of disclosure rather than secrecy' ", quoting Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 780 n. 1 (Fla. 4th DCA 1985)); Tribune Co. v. Public Records, 493 So.2d 480, 483 (Fla. 2d DCA 1986).

[22/] Although the legislative history is silent, presumably the Legislature intended the word "defamatory" to mirror the elements of a common law cause of action for libel, See Layne v. Tribune Co., 108 Fla. 177, 146 So. 234, 236 (Fla. 1933).

Moreover, in 1988 the Legislature amended the Public Records Act to provide that active criminal intelligence information and active criminal investigative information retain their exempt status in certain circumstances even after the State provides the defense with the material in discovery. See **House of** Representatives Committee on Governmental Operations, Staff Analysis and Economic Impact Statement, **CS/HB 650** (companion to **SB** 654), April 26, 1988 **("CS/HB 650** Analysis"); **A.456-459.** Before the amendment, all criminal intelligence and investigative information became publicly accessible under the Act once discovery occurred. Senate Staff Analysis and Economic Impact Statement, **SB** 654, **April 27, 1988; A.446-448.** The amendment was prompted in part by a concern that publication of the "details of victimization [would] interfere[] unnecessarily with a person's right of privacy" and to eliminate the "chilling effect on the willingness of others to **cooperate"** in criminal prosecutions. **CS/HB** 650 Analysis at par. IV.; **A.458-459.**[23/] Clearly, the drafters intended the change in (C)5 primarily to protect "victims" or innocent witnesses, not potential codefendants such as the Does, and then only against "unnecessar[y]" invasions. Following the Does' logic, (C)5A would prohibit access to information even about alleged accomplices to crime merely because the information is asserted to be

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[23/] The Legislature passed **SB** 654 rather than the identical companion bill **CS/HB 650.** Lawmakers amended **SB** 654 on the floor to add an exemption from disclosure for all victims of sexual offenses. Previously, only those records identifying victims under age 18 Were exempt. House of Representatives, Comm. on Governmental Operations, Final Staff Analysis & Economic Impact Statement, June **16, 1988,** at **4,** par. IV; **A.469.**

"defamatory." Surely the drafters did not intend the section to have the absurd meaning the Does would ascribe to it. The Does have proved nothing to contradict the view that they are persons with relevant knowledge of an alleged crime, at least some of whom are also alleged accomplices to a crime. In short, the Does produced no evidence to prove (C)5A applies to them and the trial court did not abuse its discretion in so finding. Thus, this Court must affirm the holdings of the district court and trial court granting Petitioners access to the Discovery Materials, and answer the second certified question in the negative.

C. The Trial Court Properly Refused To Recognize Any Judicially Created Exception To The Statutory Right Of Access To Public Records.

As discussed above, the Public Records Act is a creature of the Legislature; any deletions, additions or modifications must be made by that body. Wait v. Florida Power & Light, Co., 372 So.2d 420 (Fla. 1979); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980); Tribune Co. v. Cannella, 458 So.2d 1075, 1079 (Fla. 1984) (finding only Legislature "has the power to alter" provisions of the Act); North Miami v. Miami Herald Pub. Co., 468 So.2d 218, 219 (Fla. 1985) (finding only the "legislature, not this Court, regulates disclosure of public records"); Neu v. Miami Herald Pub. Co., 462 So.2d 821 (Fla. 1985). The Does ask this Court to write something into the Act that is not there. As harsh as it might seem, neither this Court nor the John Does may amend the Public

Records Act to provide them the relief they seek; only the Legislature may do so and it has not.

III. A TRIAL COURT IN A CRIMINAL PROSECUTION LACKS DISCRETION TO DENY PUBLIC ACCESS TO PUBLIC RECORDS WHERE AN UNNAMED THIRD PARTY ASSERTS AN ALLEGEDLY CONSTITUTIONALLY PROTECTED PRIVACY INTEREST.

The Does have no constitutionally protected interest at stake here and thus this Court must answer the second certified question in the negative. Contrary to the Does' assertions, this matter does not concern a right to privacy, whether such right is protected by the state or federal constitutions. Even so, the Florida Constitution forbids any privacy-based limitation on access to public records.

A. The Privacy Amendment To The Florida Constitution Expressly Excludes Information Contained In Public Records.

Article I, Section 23 of the Florida Constitution, which became effective January 1, 1981, provides as follows:

> Right of Privacy. -- Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall **not be construed to limit the public's right of access to public records** and meetings as provided by law.

Art. I, § 23, Fla. Const. (emphasis added). During the course of these proceedings, while not challenging the Discovery Materials'

status as public records,[24] the Does nevertheless argued they have a privacy interest[25] which protects them against compelled disclosure of the Discovery Materials. However, by its express terms Section 23 explicitly forbids any such construction. The constitution unambiguously prohibits courts from limiting access to public records on the basis of any privacy interest arising from information they contain, whether such privacy interest is real or illusory (as is the situation with the Does). Nothing in the amendment's history[26] contradicts this view: the history, in fact, supports it.[27]

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[24] In fact, before the district court the Does acknowledged that this matter "involves public records". John Doe's Emergency Motion to Stay Proceedings at Lower Tribunal at 5; A.481.

[25] Curiously, the Does initially claimed a "First Amendment right to privacy" in their closure motion before the trial court. August 19 Motion at 4; A.26. Of course, there is no such right in the First Amendment. Elsewhere in the motion the Does asserted a right protected by Article I, Section 23. August 19 Motion at 8; A.30.

[26] The history of the earlier proposed constitutional amendment in 1978 is generally relied upon for interpretation of the amendment which ultimately passed in 1981. See Stall v. State, 570 So.2d 257, 265 n.11 (Fla. 1990) (dissent of Kogan, J.).

[27] The history of Section 23 reveals the amendment was proposed "in direct response to the United States Supreme Court's challenge . . . in [Katz v. United States, 88 S.Ct. 507, 510-11 (1967)]" that

> . . . the protection of a person's general right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States.

Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 Fla. St. U.L. Rev. 671, 740 (1978), citing Katz. In 1978 Florida voters rejected an earlier attempt to revise the state constitution (continued...)

The route for change -- if change is required -- lies not with the courts in this regard; rather, it is for the Legislature to decide whether, if at all, to amend or restructure Florida's Public Records Act, or for the people of the State of Florida to amend the constitution. Accordingly, this Court cannot provide the Does with the relief they seek when the Florida Constitution expressly proscribes it.

B. At Least Twice Before In Forsberg V. Housing Authority And Michel V. Douglas This Court Found No State Or Federal Constitutional Right Of "Disclosural Privacy" And Those Decisions Control Here.

What the Does seek to accomplish is to prevent disclosure of public records on the ground they have a constitutionally-protected right against public disclosure. Not only does the state constitution expressly forbid such a result but also this Court has repeatedly found no Florida or federal constitutional right of "disclosural privacy" to exist. Before Florida's privacy amendment, Article I, Section 23, became effective in **1981**, this Court rejected attempts to carve out a privacy exception to the Public Records Act. Shevin v. Byron, Harless, Schaffer, Reid &

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[27] (...continued)
to add separate provisions providing for a right of privacy and a constitutional imprimatur on public records and government meetings. But that proposal did not explain how **the** two competing constitutional rights -- the right to be let alone and the public's right to inspect public records -- would or could be reconciled in the event of conflict. See Dore, Of Rights Lost and Gained, 6 Fla. St. U.L. Rev. **609 (1978).** The Section **23** adopted in **1981** did resolve the conflict: the right to be let alone must yield to the Public Records Act.

Associates, Inc., 379 So.2d 633 (Fla. 1980). Since adoption of Section 23, this Court has continued to reject such attempts, most recently in Forsberg v. Housing Authority of Miami Beach, 455 So.2d 373 (Fla. 1984), and Michel V. Douglas, 464 So.2d 545 (Fla. 1985).[28/] Those decisions control here, and require this Court to find no abuse of discretion by the trial court and to answer the second certified question in the negative.

The Shevin case came to the Court before Florida's Constitution expressly recognized a right to privacy. In Shevin, the Jacksonville Electric Authority ("JEA") hired an independent consulting firm to interview candidates for the position of JEA managing director. The firm, Byron, Harless, Schaffer, Reid & Associates, Inc., conducted a nationwide search, assuring each person interviewed that the information he or she provided was confidential. A local news organization sought access to the consultant's papers, claiming they were public records under Chapter 119. The trial court agreed and issued a writ of mandamus. Shevin, 379 So.2d at 635. The consultant appealed to the First District Court of Appeal, contesting, among other things, whether the lower court should have issued the writ in light of the consultant's promise of confidentiality to the job applicants. Id.

[28/] See also Williams V. Minneola, 575 So.2d 683 (Fla. 5th DCA 1991) (following Forsberg and Michel in finding subject of a public record cannot claim constitutional privacy right to bar inspection of public record; Public Records Act "does not impose a secrecy requirement" on public records); Mills V. Doyle, 407 So.2d 348, 351 (Fla. 4th DCA 1981) (finding adoption of Article I, Section 23 "has no adverse effect" on Public Records Law and does not limit public's access to public records).

The district court found the papers made and received by the consultant, despite their form, were public records. However, the district court further found that the applicants, the subject of the records, had a right of disclosural privacy with respect to the personal information they gave to the consultant under a promise of confidentiality, which privacy right was protected by the United States and Florida constitutions. Id. at 636.

This Court disagreed. The Court examined the interests protected by the federal constitutional right of privacy: the interest in being secure from unwarranted government intrusion; the interest in decisional autonomy regarding reproductive matters and personal relationships; and the interest in protecting against disclosure of personal matters, the latter being the interest asserted by the applicants. Id. at 636, citing Whalen v. Roe, 97 S.Ct. 869 (1977), and Id. at 637. Relying on the United States Supreme Court's decision in Paul v. Davis, 96 S.Ct. 1155 (1976), this Court found no privacy interest at stake, because the applicants sought to bar the release of information concerning official acts of government which they contended were damaging to them. Id. at 638. The applicants in Shevin had applied for a government position, and thus had no claim of privacy. ***See*** also Plante v. Gonzalez, 575 F.2d 1119, 1135 (5th Cir. 1978) (in upholding constitutionality of Florida's financial disclosure requirements for public officials, finding no expectation of privacy with respect to public matters).

The Court also rejected claims of a privacy interest protected by Florida's Constitution, finding that the due process clause (Article I, Section 9) and the search and seizure clause (Article I, Section 12) could not form the basis for protection against the dissemination of public information. Id. at 639.

While at the time of the Shevin decision the electorate had not adopted the privacy amendment to Florida's Constitution, such amendment was in place when the Court decided Forsberg and Michel. In Forsberg, tenants in a public housing project operated by the Miami Beach Housing Authority (the "Authority") filed a class action against the Authority seeking to block public access to Authority files. The files contained information tenants and prospective tenants submitted to the Authority when applying for housing, including detailed information concerning their family status, income, employment and medical history, among other items. The plaintiffs alleged public disclosure would humiliate and embarrass them, and "needless{ly] inva[de] their personal privacy", all in violation of their right to privacy implicit in Article I, Section 2[29/] of the Florida Constitution, and the federal

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[29/] Article I, Section 2 read in relevant part:

> Section 2. Basic rights. -- All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . . .

While plaintiffs' appeal of the trial court's dismissal of their lawsuit was pending before the Supreme Court, the Florida (continued...)

Constitution. **Forsberg**, 455 So.2d at 375. The trial court granted the Authority's motion to dismiss, finding that Florida's Public Records Act, Chapter 119, Florida Statutes, was not unconstitutional, either under the state or federal constitutions. This Court affirmed, finding the Authority's files -- includingthe allegedly sensitive and detailed personal tenant information -- to be public records under the Act. **Forsberg**, 455 So.2d at 374. Because neither any statutory exemption nor any state or federally protected privacy right prevented the records' disclosure, the tenant files had to be made available for public inspection. Id. Most importantly, the Court emphasized that even the then-recently effective privacy amendment to the Florida Constitution afforded the tenants no relief because it expressly excepted public records and meetings; the Court reaffirmed its previous holdings that any changes must be made by the Legislature. Id.

Similarly, in Michel **v.** Douglas, **464** So.2d 545 (Fla. 1985), this Court rejected attempts to shield public records from public view simply because they may contain personal or otherwise sensitive information. At issue there was access to personnel records of a county hospital district, which, according to testimony adduced below, in part contained information of prior felony convictions, drug and alcohol abuse, results of physical and mental examinations, and information from third persons who

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[29] (...continued)
Legislature proposed, and the electorate adopted, the constitutional provision expressly recognizing a Florida citizen's right of privacy which became effective January 1, 1981. See Article I, Section 23.

believed their communications were confidential. Douglas v. Michel, 410 So.2d 936, 939 (Fla. 5th DCA 1982) (appellate opinion certifying questions to Florida Supreme Court). The Court found the documents to be public records under Chapter 119, and further found -- based on the express wording of the privacy amendment -- that the subjects of **those** records had no right of privacy protected by either the federal Constitution or Florida's privacy amendment. Michel, 464 So.2d at 546.[30]

There is no reason for this Court to retreat from its previous holdings. Accordingly, this Court should affirm the trial court's order directing release of the Discovery Materials and answer the second certified question in the negative.

C. It Is The Public Policy Of Florida That There Be Unimpeded Access To Public Records Except **In** Narrowly Prescribed Circumstances, **None** Of Which **Applies** Here.

Time and again Florida has demonstrated its unyielding commitment to conducting the public's business in public: recognizing a presumptive right of access to both criminal[31] and civil[32] court proceedings and records; permitting electronic

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[30] The Court, while noting in dictum that the public's right of access to an agency's personnel records "is not the right to rummage freely through public employees' personal lives", nevertheless acknowledged that "whatever is so kept [by an agency] is public record and **subject** to being **published**." Michel, 464 So.2d at 547 (emphasis added).

[31] Miami Herald Pub. Co. v. Lewis, 426 So.2d 1 (Fla. 1982).

[32] Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988).

media coverage of judicial proceedings;[33] requiring meetings of public officials to be held in the open;[34] compelling public officials to completely and publicly disclose certain financial information;[35] and allowing public inspection on demand of public records.[36] This commitment finds express sanction in the text of today's statute:

> It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person.

Section 119.01, Florida Statutes (1989) (emphasis added).

The policy of openness is a salutary one. An agency's or public official's documents are the permanent record of a government's activity, the means through which citizens can learn of their government's conduct and hold their officials accountable. Access lends credibility to the judicial system, assuring participants and observers alike that the government does not espouse one position in public while taking a contrary position in secret. And, in the Willets case in particular, access permits the

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[33] In re Petition of Post-Newsweek Stations, Inc., 370 So.2d 764 (Fla. 1979). In Post-Newsweek this Court acknowledged that the "prime motivating consideration prompting our conclusion [opening Florida court proceedings to still and video cameras and audio equipment] is this state's commitment to open government." Post-Newsweek, 370 So.2d at 780.

[34] Section 286.011, Florida Statutes (1989).

[35] Article 11, Section 8, Florida Constitution (the so-called Sunshine Amendment). The Fifth Circuit found the Sunshine Amendment did not violate the constitutional right against compelled disclosure of personal matters in Plante v. Gonzalez, 575 F.2d 1119, 1136 (5th Cir. 1978).

[36] Chapter 119, Florida Statutes (1990).

public to learn why the state chose to bring charges against a public official and his wife, whether there was a proper basis for doing so, and what evidence -- a good portion of which was lawfully seized from the Willetses themselves -- the state has amassed against them, including the identity of potential witnesses and the roles those witnesses may have played in the saga.

The Public Records Act is a creature of the Legislature and it is that body which has enumerated the permissible exemptions from disclosure. Section 119.07(3), Florida Statutes (1990), lists more than two dozen categories of excluded documents, all of which are "public records" but for policy reasons the Legislature has determined may not be available for public inspection. Among the excluded material are documents reflecting, for example: communications between state employees and personnel in state agencies' employee assistance programs for substance abuse and other disorders;[37] examination answers of applicants for admission to the Bar;[38] active criminal intelligence information and active criminal investigative information;[39] the identity of a victim of a sexual offense;[40] a criminal defendant's confession;[41] the work-product of an attorney representing a

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[37] Section 119.07(3)(b), Florida Statutes (1990), referencing Section 110.1091, Florida Statutes (1990).

[38] Section 119.07(3)(c), Florida Statutes (1990).

[39] Section 119.07(3)(d), Florida Statutes (1990).

[40] Section 119.07(3)(h), Florida Statutes (1990), referencing, among other chapters, Chapter 794, Florida Statutes.

[41] Section 119.07(3)(m), Florida Statutes (1990).

government agency or officer during the pendency of adversarial proceedings;[42] and "[a]11 public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law."[43] No provision authorizes the exception to disclosure the Does propose here: protection for persons with knowledge of, and alleged co-participants in, a crime who have proved no basis for secrecy.

As shown more fully above, the Does have not demonstrated any reason for nondisclosure. Because the State Attorney, the custodian of the Discovery Materials here, asserted no statutory exemption, and in fact expressed no objection to complying with any public records requests, Petitioners must have immediate access to the Discovery Materials. As discussed above, the only permissible route the Does could take to seek relief from disclosure was a protective order under the criminal discovery rules: because the Does wholly failed to carry their burden of proof in that regard, the Discovery Materials must be released.

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[42] Section 119.07(3)(n), Florida Statutes (1990).

[43] Section 119.07(3)(a), Florida Statutes (1990).

CONCLUSION

For the foregoing reasons, this Court should (i) answer the first certified question as modified in the manner described above with a qualified yes, and answer the second certified question in the negative; and (ii) affirm the judgment of the trial court directing the State Attorney to make the Discovery Materials immediately available to the public for inspection and copying.

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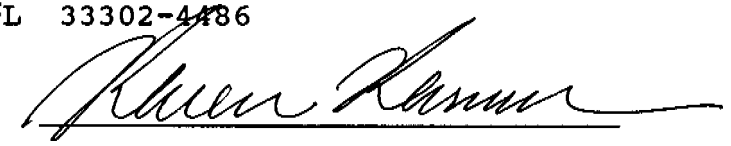

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