IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN WESLEY HENDERSON,

Petitioner,

CASE NO. 92,885

v.

STATE OF FLORIDA,

Respondent.

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* *

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT IN AND FOR BAY COUNTY, FLORIDA

* *

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUBMITTED IN SUPPORT OF PETITIONER, MR. HENDERSON

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PRELIMINARY STATEMENT

In this brief, the Petitioner, **JOHN WESLEY HENDERSON,** will be referred to as **"Mr. Henderson."** The Respondent, State of Florida, will be referred to as the "state" or the "government."

II
FACTS

The Florida Association of Criminal Defense Attorneys adopts the facts as set forth within **Mr. Henderson's** brief on the merits.

III
SUMMARY OF THE ARGUMENT

Mr. Henderson and Mr. Adams were charged separately for their alleged involvement in the death of Lawrence Pinkard. Mr. Adams participated in discovery, **Mr. Henderson** did not. The state's position is that Chapter 119 and Rule 3.220 should overlap and mirror one another. The First District Court of Appeal agreed "interpreting" Section 119.07(8) in such a way that it, in effect, amended (through construction) Rule 3.220--although Chapter 119 by its very wording does not impact Rule 3.220. Unless this court re-writes the statute (which it obviously cannot do), the district court's ruling cannot stand.

What is equally troubling to the FACDL is the following language contained in the district court's opinion:

> We presume attorneys will follow the rules of professional conduct, so that if a defendant or his attorney obtains such public records related to that defendant's pending criminal case **from any source other than the media,** the defense attorney will notify the State of such receipt and comply with the reciprocal obligations in rule 3.220. We are also confident that the State will not seek to compel reciprocal discovery by surreptitiously making any unsolicited material available to the defendant.

Henderson v. State, 708 So.2d 642, Lexis 3211 at 9 (Fla. 1st DCA 1998) (emphasis added).

This language is disconcerting since it can be interpreted to mean that the submission of a public

records request to any government entity (by the accused) acts to automatically incur reciprocal discovery obligations under Rule 3.220. **Mr. Henderson's** attorney was creative. Rather than being condemned for using those legal resources available to defend his client (who the government is attempting to execute), he should be commended for mounting a strong defense to the government's accusations. The district court's opinion is an emotional reaction to what it considers to be an unfair situation. However, should the court re-write the law simply because the accused acquired information about the government's case--without undertaking reciprocal obligations under Rule 3.220. The FACDL thinks not.

It is an age old judicial maxim that the courts will not re-write rules or statutes through construction. The rules of statutory construction prevent the courts from doing so.

V
ARGUMENT

A. MR. HENDERSON'S LAWYER SHOULD BE COMMENDED (RATHER THAN CONDEMNED) FOR USING THE LAW TO THE ADVANTAGE OF HIS CLIENT WHO THE GOVERNMENT IS SEEKING TO EXECUTE

Mr. Henderson's lawyer did what lawyers are trained to do--specifically to use the law to the advantage of his client. The courts cannot create law from thin air. There is no precedent for the district court's opinion. That is why the district court did not cite any authority for its ruling but, rather relied upon the language embodied in Section 119.07(8). However, as cogently explained by **Mr. Henderson** in his initial brief, this statutory language does not limit or expand Rule 3.220. In other words, it has no impact upon Rule 3.220. It is legal gymnastics to argue that it does. The FACDL is equally concerned with the following language contained within the district court's opinion.

> We presume attorneys will follow the rules of professional conduct, so that if a defendant or his attorney obtains such public records related to that defendant's pending criminal case **from any source other than the media**, the defense attorney will notify the State of such receipt and comply with the reciprocal obligations in rule 3.220. We are also confident that the State will not seek to compel reciprocal discovery by surreptitiously making any

unsolicited material available to the defendant.

Henderson v. State, 708 So.2d 642, Lexis 3211 at 9 (Fla. 1st DCA 1998) (emphasis added).

What does this language mean? The FACDL is concerned that it could be interpreted to mean that a public records request submitted to any government agency automatically triggers reciprocal discovery obligations. In fact, that is what the chief assistant state attorney for the Ninth Judicial Circuit stated to this attorney (over the telephone) while discussing the Henderson case. This language is either dicta or, in the alternative, a frightening contortion of the law. For the reasons set forth herein, the FACDL would request that the court vacate the district court's opinion in its entirety.

B. IT IS BEYOND DISPUTE THAT THE SHERIFF'S DOCUMENTS CONSTITUTED PUBLIC RECORDS UNDER CHAPTER 119 AND THEREFORE ANY CLAIM THAT MR. HENDERSON SHOULD BE COMPELLED TO PARTICIPATE IN CRIMINAL DISCOVERY UNDER THE FLORIDA RULES OF CRIMINAL PROCEDURE IS UNFOUNDED

Everyone agrees that the sheriff's documents were public records under Chapter 119, Fla.Stat. As acknowledged by the state, once the documents were released to Mr. Adams, the sheriff's records became public record under Florida law[1]. Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988); WESH Television, Inc. v. Hon. Thomas G. Freeman, Circuit Court Judge, 691 So.2d. 532 (Fla. 5th DCA 1997); Downs v. Austin, 522 So.2d 931, 935 (Fla. 1st DCA 1988); Tribune Co. v. Public Records, 493 So.2d 480 (Fla. 2d DCA 1986), rev. denied, Gillum v. Tribune Co., 403 So.2d 327 (Fla. 1987); Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 779 (Fla. 4th DCA 1985), rev. denied, 488 So.2d 67 (Fla. 1986); Satz v. Blankenship, 407 So.2d 396, 398 (Fla. 4th DCA 1981), rev. denied, 413 So.2d 877 (Fla. 1982).

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[1]As explained by the district court, counsel for Henderson merely submitted a public records request but never actually received the documents. The trial court treated the request as a notice of intent to participate in reciprocal discovery and filed the documents under seal. Under these circumstances and at a minimum, Mr. Henderson should be allowed to withdraw his request since he never received the documents. See Henderson, 708 So.2d 642, Lexis 3211 at 3-4.

Mr. Henderson made a strategic decision not to participate in discovery. Rather, he sought public records from the local sheriff. As set forth below, the trial court's order is erroneous since the Florida public records law does not implicate rules of procedure. In other words, rules of procedure are subordinate to substantive-legal entitlements.

C. THE PUBLIC RECORDS LAW, CHAPTER 119, FLORIDA STATUTES IS A SUBSTANTIVE RIGHT WHICH DOES NOT IMPLICATE RULES OF PROCEDURE

The law is well settled that Chapter 119 is a substantive right granted to the citizenry by the Florida legislature and does not implicate rules of procedure. This point has been addressed by the Florida courts on several occasions. The district court, in its opinion, attempts to transpose Chapter 119 onto Rule 3.220, Fla.R.Crim.P.--but without citation to any dispositive authority. The district court's opinion is in direct contravention to the following authorities.

For instance, in Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979), this Court addressed whether the Florida Power Corporation was foreclosed from using Chapter 119 to obtain documents in its litigation before the United States Nuclear Regulatory Commission--which had its own set of discovery procedures. The court held that Florida Power did not give up its substantive rights simply because it was involved in litigation before the Commission.

> Turning from the construction of Chapter 119 to its application, New Smyrna argues that, when Florida Power & Light chose to litigate before the United States Nuclear Regulatory Commission, it submitted to the **discovery procedures** of that forum and waived any rights it might otherwise have had under Chapter 119. We find no authority to support the argument that Florida Power & Light, by engaging in litigation before a federal forum, has somehow given up its independent statutory rights to review public records under Chapter 119. The fact that Florida Power & Light simultaneously engaged in litigation before a federal agency **does not in any way prevent its use of Chapter 119** to gain access to public documents.

Wait at 424 (Emphasis added).

The second issue presented was whether Florida Power & Light, by submitting a public records request, was required to **reciprocally disclose** documents to New Smyrna. The court reiterated that Chapter 119 was a substantive right and did not require reciprocal disclosure under any judicially created rules of procedure.

> Another argument presented by New Smyrna is that section 119.07(1) should be construed to provide for reciprocal disclosure by Florida Power & Light. In essence, New Smyrna contends we should hold that, if Florida Power & Light is to have access to traditionally privileged documents possessed by New Smyrna, then it should have comparable access to Florida Power & Light's files. New Smyrna cites the language of section 119.07(1), which provides that disclosure be permitted only "under reasonable conditions" and maintains that reciprocal disclosure by Florida Power & light is not only **equitable** but is also a reasonable condition for disclosure of sensitive, litigation-related documents. **We find no merit** in New Smyrna's argument because we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially-created **rules of procedure** and because **we simply cannot construe** the language of section 119.07(1) in the fashion suggested by New Smyrna.

Wait at 425 (Emphasis added).

This same issue was addressed by the Fifth District Court of Appeal in Orange County v. Florida Land Co., 450 So.2d 341, 343-344 (Fla. 5th DCA 1984)[2]. Florida Land sued Orange County. Florida Land sought disclosure of a number of documents under Chapter 119. The Circuit Court ordered the documents disclosed as public records. Orange County sought certiorari relief arguing that the documents should not be disclosed since they were work product privileged under the Florida Rules of Civil Procedure. The court held that the public records law is a substantive right and takes precedence over rules of procedure.

The same result was reached by the Second and Third District Courts of Appeal in Hillsborough

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[2]Surprisingly the Fifth District failed to follow its precedent in finding that Mr. Cabral was compelled to participate in criminal rule discovery when this attorney submitted a public records request to the state attorney's office for its office file. Cabral v. State, 699 So.2d 294 (Fla. 5th DCA 1997), rev. denied Case Number 91,613. Like Henderson, the Cabral panel cited no authority supporting its position, but rather interpreted the rule to require the result.

County Aviation v. Azzarelli Const., 436 So.2d 153 (Fla. 2d DCA 1983) and Tober v. Sanchez, 417 So.2d 1053 (Fla. 3d DCA 1982), rev. denied 426 So.2d 27 (Fla. 1983). See also Duncan v. City of Ocoee, et al, Case Number 95-667-CIV-ORL-18, (M.D. Fla. 1996) [order entered by Honorable Magistrate Judge David Baker holding that Florida public records law is a substantive right independent of the Federal Rules of Civil Procedure], **Tab A**.

Judge Prather's opinion in State v. Serio, 5 Fla.L.Weekly Supp. 67 (Fla. 9th Jud. Ct. 1997), cert. denied #97-2861 (Fla.5th DCA 1998), reh. den. March 5, 1998, which also addresses this subject is worthy reading. There, attorney Jim Russ represented Serio who was charged with vehicular homicide. Mr. Russ's defense strategy was not to participate in criminal rule discovery. Rather, he submitted public records requests to the medical examiner's office and to the Florida Highway Patrol for autopsy reports, communication tapes, witness and police statements. The state also complained that Russ used the court's subpoena power to circumvent the rules. In response, the state filed a motion to compel Mr. Serio to participate in reciprocal discovery. Judge Prather, in denying the request, stated in part:

> Defendant claims that his request for these public records does not constitute engaging in discovery. The defendant relies upon the Supreme Court's decision in Wait v. Florida Power and Light Co., 372 So.2d 420 (Fla. 1979), for the well-established position that judicially-created procedural rules, like the reciprocal discovery obligation under Rule 3.220, cannot infringe upon legislatively-created substantive rights, like a person's right to public records under Chapter 119. The court does not intend to abrogate defendant's substantive rights under Chapter 119. He is entitled to the same consideration as any other member of the public with regard to public documents. As such, Defendant is entitled to that information deemed public record. Conversely, like any other public citizen, he is not permitted to obtain or view information that is not public record, that is, falls under a statutory exemption.

Serio at 68, see **Tab B.**

D. THE TENETS OF STATUTORY CONSTRUCTION EQUALLY APPLY TO PROCEDURAL RULES AND BASED UPON SAME, IT IS CLEAR THAT MR. HENDERSON DID NOT AVAIL HIMSELF OF THE DISCOVERY MECHANISMS LISTED UNDER RULE 3.220

Principles of statutory construction are controlling when determining the intent and purpose of a **rule**

of procedure. Brown v. State, _ So.2d __ (Fla. 1998) [23 Fla.L.Weekly S266, 267, opin. issued May 14, 1998]; State v. Chappel, 308 So.2d 1 (Fla. 1975) [construing Rule 3.160, Fla.R.Crim.P.]; Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981) [analysis of Rule 3.691, Fla.R.Crim.P.]; Lehmann v. Cloniger, 294 So.2d 344, 347 (Fla. 1st DCA 1974).

The tenets of procedural and statutory construction prevent the court from stretching Rule 3.220 or Chapter 119 beyond there intended bounds.

The (applicable) tenets of construction are as follows:

First tenet--Plain and ordinary meaning of words contained within statute/rule control and govern issue. State v. Battle, 302 So.2d 782, 783 (Fla. 3d DCA 1974);

Second tenet--Rule must be strictly construed and all doubt as to its construction must "[b]e resolved in favor of the citizen and against the state." State v. Wershow, 343 So.2d 605, 608 (Fla. 1977); State v. Llopis, 257 So.2d 17, 18 (Fla. 1971);

Third tenet--Courts cannot effectively amend a rule of procedure through construction absent compliance with constitutional law. Yu Cong Eng et al v. Trinidad, 271 U.S. 500, 46 S.Ct. 619, 623, 70 L.Ed. 1059 (1926) (opinion delivered by Chief Justice Taft); State v. Barquet, 262 So.2d 431, 434 (Fla. 1972);

Fourth tenet--"Expressio Unios Est Exclusio Alterius." When a rule lists certain things within its ambit, it must be construed as **excluding** all those things that are not directly or expressly mentioned. P.W. Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976).

The above tenets of statutory construction prevent the trial court from stretching Rule 3.220 and §119.07(8) beyond there legal and elastic bounds.

A similar issue as presented here was addressed by the Third District Court of Appeal in Llanes v. State, 603 So.2d 1294 (Fla. 3d DCA 1992). Sergio Llanes was charged with, among other things, Capital

Sexual Battery on his minor son. He initiated discovery through a parallel administrative investigation being conducted by the Florida Department of Health and Rehabilitative Services. As part of Llanes' discovery preparation, he took depositions in that proceeding. The trial court entered an order compelling Mr. Llanes to participate in reciprocal discovery under Rule 3.220 since it felt that the spirit of the rule required same. The district court, in reviewing Rule 3.220, found that there was no language in the rule that required reciprocal discovery obligations if the accused initiated discovery in a parallel civil or administrative proceeding. In other words, like apples and oranges, the proceedings were distinct--with different rules and guidelines. Although Rule 3.220 references the discovery process including taking of discovery depositions, the rule simply could not be interpreted beyond its jurisdictional bounds to control proceedings in a different forum.

In order for **Mr. Henderson** to be required to participate in reciprocal discovery under 3.220, he must have specifically participated in the process outlined in the rule--not Chapter 119, Fla. Stat. Like Llanes, the trial court's order in **Mr. Henderson's** case should be quashed.

CONCLUSION

The court should not judicially re-write Chapter 119 or Rule 3.220. Rather, the court should reverse and remand this case with instructions that the trial court vacate its order compelling **Mr. Henderson** to participate in criminal rule discovery.

Respectfully submitted this 25th day of June, 1998 at Orlando, Orange County, Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by U.S. Mail and facsimile this 25th day of June, 1998 to **ED HILL, ESQUIRE,** Office of the Attorney General, The Capital, Tallahassee, Florida 32399-1050, facsimile (850) 922-6674; to **RHONDA CLYATT, ESQUIRE**, PO Box 2492, Panama City, FL 32402, facsimile (850) 872-1495; with the original and seven copies (along with a copy on disk formatted in WordPerfect 6.1) being filed with the **CLERK OF THE SUPREME COURT**, Supreme Court of Florida, Tallahassee, FL 32399-1927 via UPS Overnight Delivery.

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