IN THE SUPREME COURT OF FLORIDA

Case No. SC 03-530
Lower Case No. 3D01-662 & 3D01-665

POST-NEWSWEEK STATIONS FLORIDA, INC., d/b/a WPLG CHANNEL 10,

Petitioner,

-vs-

CITY OF MIAMI et al.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT
CERTIFYING A QUESTION TO BE OF PUBLIC IMPORTANCE

RESPONDENT'S BRIEF ON THE MERITS

ALEJANDRO VILARELLO,
CITY ATTORNEY,
CHARLES C. MAYS, and
REGINE MONESTIME,
ASSISTANT CITY ATTORNEYS
Counsel for Respondent,
CITY OF MIAMI
444 S.W. 2nd Avenue,
Suite 945
Miami, Florida 33130
Tel. (305) 416-1800

Fax. (305) 416-1801

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INTRODUCTION

The Petitioner, POST-NEWSWEEK STATIONS, FLORIDA, INC., was the Appellee below, and the Respondent, CITY OF MIAMI, was the Appellant below. In this brief, the parties will be referred to as they stood in the proceedings below or by “Post-Newsweek” and “City” respectively. The symbol “R” will refer to the record on appeal before the Third District Court of Appeal.

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STATEMENT OF THE CASE AND FACTS[1]

This appeal originally stems from an order of the Eleventh Judicial Circuit Court compelling the City of Miami Police Department to produce to the media as public records active criminal investigative materials developed in connection with the domestic battery charge against City of Miami Mayor, Joe Carollo, when the materials were neither provided to the Mayor nor discoverable by him in the criminal case.

On the morning of February 7, 2001, the City of Miami Police Department responded to a 911 emergency call from the home of Miami Mayor Joe Carollo and his wife Maria Carollo regarding a domestic dispute at the Mayor's home. (R. 76-79). Dispatched officers arrived on the scene, and upon investigation of the incident, arrested Mayor Carollo, charging him with simple battery. (R. 76).

The City of Miami Police Department received numerous public records requests from various media agencies and interested individuals, seeking to copy or inspect items they believed had been compiled by the department during its investigation. (R. 97-99). On February 7, 2001, Petitioner/Appellee, Post-Newsweek

[1] Although the City accepts the recitation of facts as outlined by the lower court, it nonetheless includes a more detailed statement of facts for this Court's consideration.

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Stations Florida, Inc. d/b/a WPLG Channel 10 ("Post-Newsweek") made a public records request for a number of items, including a photograph taken of Mrs. Carollo, the identified victim of the domestic dispute. (R. 97). On February 27, 2001, Post-Newsweek repeated its public records request for any photographs or videotapes of Mrs. Carollo and also for any documents reflecting any statements given by Mrs. Carollo to any law enforcement personnel. (R. 100-101).

At the time Post-Newsweek made its public records requests, the misdemeanor charge against the Mayor was pending in Miami-Dade County Court before the Honorable Carroll J. Kelly in Case No. M01-6692. (R. 116).

By written response dated February 27, 2001, the City Police Department refused to make available for inspection or copying any existing photographs and/or witness statements on grounds that such items were part of an active criminal investigation as defined by section 119.011(3)(b) and (d), Florida Statutes, and were, therefore, exempt under section 119.07(3)(b). (R. 102). Post Newsweek's Complaint for Writ Of Mandamus to enforce provisions of Florida's Public Records Act was filed on February 28, 2001. (R. 1-37). By its complaint, as amended on March 7, 2001 (R. 70-102), Post-Newsweek asserted entitlement to the

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materials as non-exempt public records. *Id*. Initially, on February 27, 2001, Mayor Carollo filed a written demand for discovery in the criminal case, noticing his intent to participate in discovery and requesting production of all information required to be disclosed. (R. 116). However, on March 5, 2001, before the fifteen-day response period under Rule 3.220(b), Fla. R. Crim. P., had run and before any discoverable information had been released to him, Carollo orally withdrew his demand for discovery. He filed a written withdrawal on March 6, 2001. (R. 121). Carollo's withdrawal of the discovery demand was accepted by Judge Kelly. No action was taken as a result of the demand and no discoverable information was disclosed to Mayor Carollo. Judge Shapiro was advised of these events in the mandamus proceeding.

Mayor Carollo and the State Attorney of the Eleventh Judicial Circuit ("the State") both moved to intervene in the proceedings before Judge Shapiro to contest the production of the items to Post Newsweek, also asserting that the information requested was exempt. (R. 103-114; 115-146).

On March 12, 2001, the trial judge ordered the City to produce the materials requested. (R. 178-184). Motions for stay pending review were denied. (R. 177).

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The City timely complied with the trial court's order and produced the requested items to Post-Newsweek. Thereafter, the City, the State and Mayor Carollo appealed to the Third District Court of Appeal. The Third District reversed the trial court's grant of the writ of mandamus, and certified the following question as one of great public importance:

> When a criminal defendant files a written request for discovery pursuant to Florida Rule of Criminal Procedure 3.220 and subsequently withdraws that request before the State responds to the request and before the expiration of the 15 days prescribed in rule 3.220(b), the materials and documents so requested retain their exempt status under section 119.07, Florida Statutes (2000), as active criminal investigative information?

Subsequently, Post-Newsweek filed its notice to invoke this Court's discretionary review. Although this Court has postponed jurisdiction, it has ordered the parties to file their respective brief on the merits. The City's brief follows.

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POINTS ON APPEAL

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND HOLD THAT WHEN A CRIMINAL DEFENDANT FILES A WRITTEN REQUEST FOR DISCOVERY PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 AND SUBSEQUENTLY WITHDRAWS THAT REQUEST BEFORE THE STATE RESPONDS TO THE REQUEST AND BEFORE THE EXPIRATION OF THE 15 DAYS PRESCRIBED IN RULE 3.220(B), THE MATERIALS AND DOCUMENTS SO REQUESTED RETAIN THEIR EXEMPT STATUS UNDER SECTION 119.07, FLORIDA STATUTES (2000), AS ACTIVE CRIMINAL INVESTIGATIVE INFORMATION

II. AFFIRMING THE THIRD DISTRICT COURT'S OPINION BELOW AND HOLDING THAT THE DISCOVERY MATERIALS REQUESTED RETAINED THEIR EXEMPT STATUS IS CONSISTENT WITH THE LEGISLATIVE INTENT AND PUBLIC POLICY OF THE RELEVANT PUBLIC RECORDS STATUTES

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SUMMARY OF ARGUMENT

The Third District Court of Appeal properly found that the documents and materials at issue retained their exempt status pursuant to section 119.07(3)(b), Fla. Stat. 2000. That section provides that criminal investigation materials are confidential as long as they are part of an active criminal investigation. Where there is no dispute that the materials and documents in question were part of an ongoing criminal investigation based on Mayor Carollo's battery charge, the materials remained confidential. The fact that Carollo filed a notice of discovery does not change the nature of the confidential materials because Carollo was allowed to properly withdraw his request before the State provided any discovery information to him.

The City agrees with the majority opinion below that once Carollo withdrew his discovery request, the requested information was no longer required to be given to Carollo under section 119.011(3)(c)(5). The City's position finds support in both jurisprudential principles articulated by this Court as well as appellate courts in Florida. Moreover, the rationale employed by the majority opinion is consistent with the legislative history of the statute and with the public policy considerations.

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Therefore based on the prevailing case law and arguments cited herein, this Court should hold with the lower court that the documents in question were exempt and confidential.

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ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND HOLD THAT WHEN A CRIMINAL DEFENDANT FILES A WRITTEN REQUEST FOR DISCOVERY PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 AND SUBSEQUENTLY WITHDRAWS THAT REQUEST BEFORE THE STATE RESPONDS TO THE REQUEST AND BEFORE THE EXPIRATION OF THE 15 DAYS PRESCRIBED IN RULE 3.220(B), THE MATERIALS AND DOCUMENTS SO REQUESTED RETAIN THEIR EXEMPT STATUS UNDER SECTION 119.07, FLORIDA STATUTES (2000), AS ACTIVE CRIMINAL INVESTIGATIVE INFORMATION

The Third District Court of Appeal correctly held that the materials at issue, the photograph of Mayor Carollo's wife and her statement to the police, were protected under Chapter 119 of the Public Records Act. Section 119.07(3)(b), Fla. Stat. 2000, exempts otherwise public records from disclosure where they are part of "[a]ctive criminal information and active criminal investigative information." In this case, the documents in question were clearly part of an active criminal investigation surrounding Carollo's arrest and subsequent misdemeanor battery charge.

Under § 119.011(3)(d), Florida Statutes, a criminal investigation is considered "active" when it is "related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future, or is directly related to pending prosecutions or appeals." *See News-Press Pub. Co., Inc. v. Sapp*, 464 So. 2d 1335 (Fla. 2d DCA 1985. It is not until the conviction and sentencing have become final that the criminal investigative information can no longer be considered "active." *See State v. Kokal*, 562 So. 2d 324, 326 (Fla. 1990). In the case *sub judice*, it is undisputed that at the time the trial court ordered the City to disclose the materials to the public, the case pending against Carollo was ongoing and had not yet been closed.

The difficulty arises when Carollo files his written request for discovery pursuant to Fla.R.Crim.P. 3.220 and later withdraws the request before the State Attorney provided him with any discovery. Rule 3.220(a) was added to the Florida Rules of Criminal Procedure to insure reciprocal discovery. *See Henderson v. State*, 745 So. 2d 319, 324 (Fla. 1999). The rule was intended to remove a defendant's ability to escape a reciprocal discovery

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obligation simply by making a public records request. *Id*. at 326-27. Thus, as a result of Rule 3.220, once a defendant files a notice of discovery or participates in discovery, the rule triggers the State's as well as the defendant's obligation to disclose information it may not otherwise be required to disclose. Specifically that rule provides:

> **(a) Notice of Discovery.**
>
> After the filing of the charging document, a defendant may elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, by filing with the court and serving on the prosecuting attorney a "Notice of Discovery" which shall bind both the prosecution and defendant to all discovery procedures contained in these rules.
>
> **(b) Prosecutor's Discovery Obligation.**
>
> (1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control.

Relying on § 119.011(3)(c)5[2], Post Newsweek argues that once Carollo filed his discovery notice, the materials irrevocably and irreversibly became open to the public and no longer exempt under § 119.07(3)(b). However, the Third District found and the City agrees that where the documents at issue were never given to Carollo, the materials retained their exempt status because they were no longer required to be given once the discovery notice was withdrawn. *City of Miami v. Post-Newsweek Stations*, 837 So.2d

[2] § 119.011(3)(c)5 provides that public records are exempted from disclosure and are no longer confidential if the documents are given or required to be given to a person arrested.

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1002, 1004 (Fla. 3d DCA 2002. The question to be resolved by this Court is whether despite the fact that Carollo withdrew his discovery notice, the materials in question were still required to be given to Carollo; thus making them open to the public and no longer exempt under the Public Records law.

Although this Court has never directly defined the phrase "required by law . . . to be given" within the context of Public Records law, it has not left us without some guidance. In *Henderson I*, *amended in part*, *Henderson v. State*, 763 So.2d 274, (Fla. 2000, the trial court ruled that defendant's public records request to the local sheriff constituted participation in the discovery process, thereby triggering a reciprocal discovery obligation. 745 So.2d at 320. Defendant filed a petition for writ of certiorari was which denied by the First District Court of Appeal. On appeal to the Supreme Court, this Court held that the receipt of nonexempt public records regarding pending prosecution against defendant triggers a reciprocal discovery obligation for the defendant. *Id*. at 327. In so holding, this Court examined the means by which the defendant could gain access to the desired information. *Id*. at 326. This Court conveyed that, "only if Henderson acts in his capacity as the 'person arrested' under section 119.011(3)(c)5 and participates in

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discovery will he have access to the requested information." *Id*. at 326-27. Then, in a footnote the Court cites to § 119.011(3)(c)5 as follows:

> Section 119.011(3)(c)(5) provides, in pertinent part, that: "Criminal intelligence information" and "criminal investigative information" shall not include: Documents given or required by law or agency rule to be given to the person arrested....
>
> In other words, a criminal defendant has access to this information if he or she is due such material under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963, or participates in discovery. (*Emphasis added*.).

Id. at 317 n.8. This Court's reading of § 119.011(3)(c)5 clearly demonstrates its understanding of the statute. Although probably not exclusive, it seems to characterize "required . . . to be given" as material that is exculpatory or information negating guilt under *Brady;* or material that is actually given to the defendant. Unlike *Brady* material, which must be shared with the defendant at practically all cost, see *Young v. State*, 739 So.2d 553, 558 (Fla. 1999 ("We have expressly recognized that the State is obligated to disclose to a defendant all exculpatory evidence in its possession.")(*citations omitted*.); the materials at issue in this case, were not in and of themselves required to be disclosed to Carollo. In other words, had Carollo never filed a

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notice of discovery, there would be no question that they would not have become public records through § 119.011(3)(c)5. Moreover, it is incumbent to note that under Rule 3.220(b)(1), once a defendant does file the notice, the State has **fifteen (15) days** to comply with the rule and disclose the information to the defendant. Post Newsweek sought the information at a time, before the fifteenth day, when even Carollo himself did not have access to it.

The general proposition that non-parties do not possess discovery rights and cannot compel the disclosure of information is consistent with the majority opinion below and the prevailing case law in Florida. *See Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 382 (Fla. 1987. Society in general, and the courts specifically, has a substantial interest in preventing abuse of judicially compelled discovery. *Id*. It is axiomatic that compulsory discovery rules are for the benefit of the parties and for the judicial process; they are not a device for information gathering by the press. *See Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 36 (Fla. 1988. Here, however, the press was able to subvert the rules of discovery to its own advantage in disregard of the judicial process. By withdrawing his request for discovery before the expiration of

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the fifteen-day response period under Rule 3.220(b), Carollo gave up his right to demand production of documents from the State. Yet, Post Newsweek was granted immediate access to the information, without being obliged to wait the fifteen-day period and without regard to whether Carollo might have had valid grounds to challenge the release of any discoverable materials in the interest of a fair trial. *See Post-Newsweek Stations, Florida, Inc. v. Doe*, 612 So. 2d at 550-551; Fla. R. Crim. P. 3.220(b)(K)(2) and (3).

In any event, under *Henderson*, the materials at issue were not accessible because Carollo did not participate in discovery since he properly withdrew his notice; nor was the State obliged to produce the information for the same reason. There is no question that had Carollo not given his discovery notice, the press would have been prohibited from gaining access to the documents at issue. In the same vein, once withdrawn, it was as if he never made the request for discovery in the first instance. Moreover, even if Carollo had not withdrawn the notice, it would have been his right to compel the State to comply with the Rule rather than an outside party. Finally, Carollo would have had to wait fifteen days before taking any action in that regard.

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To allow the documents to be open to the public would give no consequence to Carollo's withdrawal. As Judge Ramirez aptly pointed out in the majority opinion below, "[R]ule 3.220(d)(3)[3] seems to envision the withdrawal of a Notice of Discovery." 837 So.2d at 1004. Thus, if a defendant can withdraw his discovery notice prior to the prosecution furnishing the material and not be subjected to reciprocal discovery, then how can the media or any third party have access to documents that the defendant cannot. To hold otherwise, would lead to an illogical result and give no meaning to Rule 3.220(d)(3). *See Beach v. Great Western Bank*, 692 So.2d 146, 152 (Fla. 1997 (reiterating this Court's long standing "assumption that legislatures do not enact purposeless and therefore useless legislation").

In response to the majority opinion, the dissent fails to address the import of Carollo's withdrawal of the discovery notice, but this critical fact must not be ignored by this Court. As the lower court correctly decided "the documents at issue here were never 'given to the person arrested,' nor were they required

[3] Rule 3.220(d)(3) reads in part: The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this subdivision. If a protective order is granted, **the defendant may**, within 2 days thereafter, or at any time **before the prosecutor furnishes the information or material** that is the subject of the motion for protective order, **withdraw the defendant's notice of discovery** and **not be required to furnish reciprocal discovery.**

to be given once the discovery request was withdrawn, they retained their exempt status at the time the circuit court issued its writ of mandamus." 837 So.2d at 1004.

In its brief, Post-Newsweek rests their entire argument that Carollo's withdrawal has no effect on the public's access to public records, on a fatally flawed premise. Post-Newsweek contends that "[o]nce a criminal defendant elects to participate in discovery (as the Mayor did here), the state is obligated to produce the material it has." (*Post-Newsweek's Brief* at p. 20). However, the plain language of Rule 3.220(d)(3) allows a defendant to withdraw his notice of discovery and not be required to furnish reciprocal discovery. Therefore as a result of the defendant's withdrawal, the State would not be obligated to produce the material it has as well. If the State is not obligated to give the documents to the defendant, it is certainly not obligated to give it to the media. Consequently, Post-Newsweek's argument falls like a house of cards. The City's position also finds support in well-grounded jurisprudential principles articulated by this Court in *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987. In that case, this Court was confronted with the certified questions of whether the press is entitled to notice and the opportunity and right to attend

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pretrial discovery depositions in a criminal case, and whether the press entitled to access to pretrial discovery depositions in a criminal case which may or may not have been transcribed but which have not been filed with the clerk of court or the judge. Answering both questions in the negative, this Court held that that the press does not have a qualified right under the First Amendment, under rules of criminal and civil procedure, or under the Public Records Law to attend pretrial discovery depositions in a criminal case or to obtain copies of unfiled depositions. *Id*. at 382. In so holding, this Court recognized that:

> Discovery rules permit extensive intrusion into the affairs of both parties and non-parties and discovery may be judicially compelled. Liberal discovery produces information which may be irrelevant to the trial and which, if publicly released, would be damaging to the reputation and privacy of both parties and non-parties. The parties are granted discovery rights as a matter of legislative or judicial grace. Non-parties do not possess discovery rights and cannot compel the disclosure of information. There is no independent right outside the trial process to the information sought. Society in general, and the courts specifically, has a substantial interest in preventing abuse of judicially compelled discovery. *Id*

With regard to Chapter 119, the Public Records statute, the Court went on to say that “nothing in chapter 119 which would point toward the blanket access to unfiled depositions advocated by petitioners.” *Id*. at 384. In a footnote, this Court pointed to § 119.011(3)(c)(5) and stated that once documents are ***required*** to be given to an arrested person, the disclosed documents become "public in a sense." *Id*. at 384, n.2. Although not defining the term “required”, this Court nonetheless stated that the phrase

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was to be "narrow and specific . . . ." in accord with the analysis employed in *Willis.*[4] *Id*

Analogizing the reasoning in *Burk* to the instant case dictates the conclusion that the documents requested by Post Newsweek, because of Carollo's withdrawal of the discovery notice, were no longer required to be given and not public. *See also Satz v. Blankenship*, 407 So. 2d 396, 398 (Fla. 4th DCA 1981 ("In order to give effect to this policy, courts have held that the language of section 119.011(3)(c)5 that '[d]ocuments given or required by law or agency rule to be given to the person arrested' indicates that once the documents are **released** to the person arrested, the documents become public records, as there is no longer a need for secrecy). Thus, the *Satz* court's holding contemplates that "once the documents are released, the Legislature believed there is no longer a need for secrecy as it loses its efficacy in deterring criminal activity. *Id*. at 398.

In *State v. Buenoano*, 707 So.2d 714 (Fla. 1998, documents of the nature of criminal intelligence or investigative information were inadvertently given to the defendant by the State Attorney. This Court held that despite the fact that the documents "were given" to the defendant under § 119.011(3)(c)5, did not change the nature of the confidentiality of the documents. In that case, this Court placed substance over form to correctly find that confidential documents must remain protected. Likewise, this Court must not, as Post-Newsweek would suggest, put form over substance in the case at bar. The nature of the documents remained confidential as a result of Carollo's withdrawal.

II. AFFIRMING THE THIRD DISTRICT COURT'S OPINION BELOW AND HOLDING THAT THE DISCOVERY MATERIALS REQUESTED RETAIN THEIR EXEMPT STATUS IS CONSISTENT WITH THE LEGISLATIVE INTENT AND PUBLIC POLICY OF THE RELEVANT PUBLIC RECORDS STATUTES

Next, the City maintains that the majority's opinion below is consistent with the legislative intent of the Public Records

[4] *See Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st DCA 1979 (holding that a transcribed deposition is not open to public inspection until is filed with the court pursuant to Rule 1.400 Fla.R.Civ.P.)

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statute. Contrary to Post-Newsweek's position, the fact that the legislature has kept the language: "given or required to be given" in the statute is not inconsistent with the City's position. The two are not mutually exclusive. The City does not dispute that the statute means what it says, documents given or required to be given to a person arrested are no longer confidential. Rather, it is the City's contention that here, the documents were not required to be given because Carollo withdrew his discovery notice. The meaning of "required to be given" is simply not applicable to the facts in the instant case.

Moreover, the majority opinion is harmonious with this Court's interpretation of the Public Records statutes as well as public policy. *See Post-Newsweek Stations v. Doe*, 612 So. 2d 549, 551 (Fla. 1992 (holding the Supreme Court of Florida has construed Section 119.011(3)(c)5, Fla. Stat., in the only manner consistent with state policy, which is to balance the public's statutory right of access against the constitutional rights of defendants to a fair trial and to due process); *McCrary*, 520 So. 2d at 34-35. As the Court noted in *McCrary,* "[t]he United States Supreme Court has characterized the right to a fair trial as the most fundamental of all freedoms and one which must be preserved at all costs." *McCrary*, at 34 (*citing Estes v. Texas*, 381 U.S.

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532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)). “[W]here a defendant’s right to a fair trial conflicts with the public’s right of access, it is the right of access which must yield.” *Burk*, 504 So.2d at 380; *Bundy v. State,* 455 So.2d 330, 338 (Fla. 1984 (a balancing test between the right of public access and a defendant's right to a fair trial must be applied so as to recognize the weightier considerations of the defendant); *Miami Herald Pub. Co. v. Gridley*, 510 So.2d 884 (Fla. 1987 (holding unfiled discovery materials in civil case are not accessible to public and press).

CONCLUSION

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Based upon the arguments and authorities cited herein, the Respondent, City of Miami, respectfully requests this Court answer the certified question in the negative and hold that when a criminal defendant files a written request for discovery pursuant to Florida Rule of Criminal Procedure 3.220 and subsequently withdraws that request before the State responds to the request and before the expiration of the 15 days prescribed in rule 3.220(b), the materials and documents so requested retain their exempt status under section 119.07, Florida Statutes (2000), as active criminal investigative information and affirm the Third District's opinion under review.

Respectfully Submitted,

ALEJANDRO VILARELLO,
CITY ATTORNEY,
CHARLES C. MAYS, and
REGINE MONESTIME,
ASSISTANT CITY ATTORNEYS
Counsel for Respondent,
CITY OF MIAMI
444 S.W. 2nd Avenue,
Suite 945
Miami, Florida 33130
Tel. (305) 416-1800
Fax. (305) 416-1801

_____
REGINE MONESTIME
Assistant City Attorney

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Florida Bar # 0097357

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served by U.S. mail this 5th day of June 2003, to KAREN WILLIAMS KAMMER, Mitrani, Rynor, Adamsky & Macauley, P.A., 2200 Suntrust Int'l Center, Miami, Fl. 33131; and ANGELICA D. ZAYAS, State Attorney's Office, 1350 N.W. 12th Avenue, Miami, Fl. 33126; and BENEDICT KUEHNE, Sale & Kuehne, P.A. 100 S.E. 2nd Street, Miami, Fl. 33131.

REGINE MONESTIME
Assistant City Attorney
Florida Bar # 0097357

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in 12 point Courier New Font.

REGINE MONESTIME
Assistant City Attorney
Florida Bar # 0097357

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