IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-530

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

Petitioner,

versus

THE CITY OF MIAMI, et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL CERTIFYING A QUESTION OF GREAT PUBLIC IMPORTANCE

ANSWER BRIEF ON THE MERITS OF RESPONDENT FORMER MAYOR JOE CAROLLO

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STATEMENT OF THE CASE AND FACTS

A. Certified Question.

The Third District Court of Appeal certified the following question as a matter 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), are the materials and documents so requested subject to a Public Record request or do they retain their exempt status under section 119.07, Florida Statutes (2000), as active criminal investigative information?

City of Miami v. Post-Newsweek Stations Florida, Inc., 837 So. 2d 1002, 1008 (Fla. 3d DCA 2002) (on rehearing). The certified question arose from a television station's public records request for criminal investigative information maintained by law enforcement officials in an ongoing misdemeanor case. The circuit court ordered production of the requested materials. The Third District disagreed, concluding the requested materials were not public records. *Id*.

The Third District's opinion contains a comprehensive recitation of the relevant facts and procedural history, and thus are reproduced below. Before setting out the appellate court's factual foundation, a point of caution is in order regarding the factual narrative contained in petitioner's initial brief on the merits. That recitation is both

argumentative and inconsistent with the Third District's factual summary. It is contrary to the letter and spirit of the rule requiring a full and fair statement of the facts in an appellate brief. Fla.R.App.P. 9.210(b)(3); *Thompson v. State*, 588 So. 2d 687 (Fla. 1st DCA 1991) (omission of critical facts is contrary to rule).

B. Procedural and Factual Recitation.[1]

On February 7, 2001, a 911 emergency call prompted the City of Miami Police to respond to a domestic dispute between Mayor Carollo and his wife at the Carollos' residence. The police incident report notes that Mrs. Carollo had a golf-ball size hematoma on her left temple, and states that Mrs. Carollo said her husband struck her with a hard object. Mayor Carollo was subsequently arrested and charged with misdemeanor battery. The police took photographs of Mrs. Carollo's injury and obtained a written statement from her.

On February 27, 2001, Mayor Carollo filed a written request for discovery in county court pursuant to Rule 3.220(a), Florida Rules of Criminal Procedure. On the same day, Post-Newsweek Stations Florida, Inc. requested the injury photograph and Mrs. Carollo's statement from the City of Miami Police Department pursuant to the Public Records Act, § 119.07, Florida Statutes (2000). The City responded that the

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[1] The facts are derived from the appellate opinion.

requested documents were exempt from disclosure under § 119.07(3)(b) as "part of an active criminal investigation as defined by [§] 119.011(3)(b), (c) and (d)."

The next day, Post-Newsweek filed a complaint for writ of mandamus in circuit court to compel the City to provide the requested documents. At the same time, Post-Newsweek sought the same materials in the pending county court action through a motion to intervene and for access to public records. The State Attorney responded that it did not have possession of the requested materials, but would produce them once obtained and provided to the defendant Mayor Carollo during the discovery process. In the meantime, Mayor Carollo and the State Attorney moved to intervene in the civil action to oppose disclosure of the materials.

At his arraignment on March 5, 2001, Mayor Carollo orally withdrew his discovery request and submitted a written withdrawal the next day. The county court with jurisdiction over the battery case authorized the withdrawal of the discovery request. The State Attorney's Office never provided any discovery to the defendant or his counsel at any time before or after the request was withdrawn.

Before the county court judge could rule on Post Newsweek's motion for access to public records, the circuit court, on March 12, 2001, issued a writ of

mandamus ordering the City to comply with Post-Newsweek's request.[2] The circuit court held that when Mayor Carollo requested discovery, the State Attorney's Office was then required by law to provide him with the documents. Because the Public Records Act, § 119.07(3)(b), Florida Statutes (2000), does not exempt documents which are required by law to be provided to the defendant, the court determined that the injury photograph and Mrs. Carollo's statement were not exceptions to the Public Records Act.[3] We disagree that a discovery request alone removes exempt status.

SUMMARY OF THE ARGUMENT

Documents and other materials maintained by the police in the course of an active criminal investigation and prosecution do not become public records until those materials are disclosed in connection with the criminal case or the case is closed. The Third District correctly recognized that important public policy considerations compel

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[2] Although Post-Newsweek has already received the injury photograph and Mrs. Carollo's statement, the case is not moot because the issue is capable of repetition, yet evading review. *See Roesch v. State,* 633 So.2d 1, 2 n. 1 (Fla.1993); *Craig v. State,* 804 So.2d 532, (Fla. 3d DCA 2002).

[3] We are concerned that the circuit court judge issued the writ when there was a motion pending before the county court for release of these same materials. Although there is no rule or statute to prevent the circuit court from exercising jurisdiction, it would seem better form to allow the criminal court judge to be the first to visit the issue, as that is where the charges would ultimately be tried and the criminal court judge would be in a better position to determine whether any criminal investigation or prosecution would be compromised by the publication of these materials.

adherence to the precise language used by the Legislature when defining Florida's Public Records Act. Since the Act exempts "active criminal investigative information" from public disclosure, discoverable material in a criminal case remains confidential until the information is disclosed to the defense, or the prosecution has otherwise delayed production beyond the required disclosure date.

The fundamental value of this rule in a criminal case is to equate public disclosure with a defendant's receipt of the discoverable materials. This bright line standard not only promotes the fair operation of the criminal justice system, but it also guarantees that those persons investigated for or accused of criminal activity will receive the benefits of reasoned access to evidence. The public's right to know, as decreed by Article I, § 24 of the Florida Constitution, and as implemented by Chapter 119, Florida Statutes (2000), is incorporated into the fabric of the procedural rules governing criminal cases, but does not trump those rules.

Even when criminal investigative information is deemed to be a public record, a court is required to conduct an evidentiary hearing before disclosure is ordered so as to balance a defendant's constitutional right to a fair trial by an unbiased jury against the First Amendment right to public access. In this case, the circuit court conducted no evidentiary hearing before ordering the disclosure of evidence in a pending criminal case. Because the evidentiary materials were protected by the law enforcement

exemption to the Public Records Act, that court's premature disclosure was unlawful. Also, without conducting an evidentiary hearing to balance the potential prejudice to the defendant against First Amendment interests, the circuit court's ruling compromised former Mayor Carollo's fair trial rights.

The Third District embraced these public policy considerations, holding that the public's right of access to criminal information is coextensive with a defendant's entitlement to the information in accordance with the discovery rules. Accordingly, this Court should answer the certified question by announcing that discoverable material retains its exempt status until disclosed to the defendant.

ARGUMENT

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 § 119.07, FLORIDA STATUTES (2000), AS ACTIVE CRIMINAL INVESTIGATIVE INFORMATION.

Until disclosed in discovery or otherwise produced to the public, materials compiled by law enforcement personnel in the course of an open and active criminal

investigation are exempt from disclosure under the Public Records Act. This bright line rule advanced by the Third District is consistent with both the letter and the spirit of the Public Records Act (Chapter 119), and is rooted in sound public policy. Law enforcement interests must be able to pursue criminal investigations without concern for compromising a case because of unnecessary public interference or premature disclosure of the fruits of the investigation. Just as fundamentally, while zealous pursuit of First Amendment interests by the media is to be embraced, the premature disclosure of evidence in a criminal case carries the real and present danger of seriously jeopardizing the fairness of court proceedings, potentially compromising a defendant's right to a fair trial.[4]

For these very reasons, Florida's otherwise broad Public Records Act provides a specific exemption from disclosure of "active criminal investigative information." § 119.07(3)(b), Fla. Stat. (2000). So long as "a criminal justice agency [is engaged] in the course of conducting a criminal investigation of a specific act[,]" the Act defers public disclosure. *Id*. An investigation remains "active" so long as it is "related to pending prosecutions and appeals." § 119.07(3)(d), Fla. Stat. (2000); *News-Press*

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[4] The Florida Legislature has recognized that blind pursuit of the sensational in criminal investigations is potentially adverse to the public interest, as when the Legislature recently created an exemption for autopsy photographs. *See* Ch. 2001-1, Laws of Fla. (amending § 119.02, Fla. Stat.).

Pub. Co., Inc. v. Sapp, 464 So.2d 1335 (Fla. 2d DCA 1985). Only when "given or required by law or agency rule to be given to the person arrested" does the information lose its exempt status. § 119.07(3)(c)5, Fla. Stat. (2000).

As announced by the Third District, a court order disclosing case-specific material in the possession of the police department is inconsistent with the Public Records Act, because a withdrawn discovery demand does not automatically convert all potential discovery documents into public records, as petitioner contends.[5] Any contrary ruling not only compromises the integrity of criminal investigations and adversely affects the fairness of pending criminal trials, but also infringes on the

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[5] As the Third District observed, the circuit court should not have entertained the public records request, but should have deferred the matter to the court having jurisdiction over the criminal case, which was the county court. *City of Miami v. Post-Newsweek Stations*, 837 So. 2d at 1003 n. 2. When another court interferes with an ongoing criminal case, the potential for compromising both the case itself and the defendant's right to a fair trial is great. This Court should, in the course of approving the Third District's decision, hold that the criminal court in which the case is pending is the proper forum in which to resolve a Public Records Act request directed to information concerning the criminal case. *See Rose v. State*, 774 So. 2d 629 (Fla. 2000) (trial court to conduct *in camera* inspection to determine if records were properly exempt from postconviction request); *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2001) (trial court presiding over criminal case was proper forum to consider public records request for law enforcement/prosecutor documents); *Johnson v. State*, 769 So. 2d 990 (Fla. 2000) (trial court considered public records litigation during appeal); *Asay v. State*, 769 So. 2d 974 (Fla. 2000) (request for public records pursued before judge in criminal case). *See also Woolling v. Lamar*, 764 So. 2d 765 (Fla. 5th DCA 2000), *rev. denied*, 786 So. 2d 1186 (Fla. 2001) (civil jurisdiction over Public Records Act request when no pending criminal case).

authority of the executive branch to pursue criminal investigations without unwarranted judicial interference. Requiring a police agency to produce for the public photographs of and statements by the alleged victim of a crime, when those materials have not yet been disclosed in an ongoing criminal prosecution, is contrary to the Public Records Act and unwise as a matter of public policy.[6]

When discovery is actually produced in a criminal case, the discovery materials become subject to a public records disclosure absent the entry of a protective order. As correctly noted by the Third District, no discovery was ever produced by the State Attorney's Office, nor was discovery ever required to be served.[7] The defense discovery demand – which former Mayor Carollo's defense counsel described as having been inadvertently filed (R. 116) – was promptly withdrawn before the State Attorney was required to provide discovery. The judge presiding over the criminal case authorized the withdrawal of the discovery notice.[8] Yet, in an obvious but

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[6] Even before ordering disclosure of criminal investigative information, the court is obligated to conduct an evidentiary hearing to balance the potential for prejudice to the defendant's fair trial rights against First Amendment interests.

[7] Rule 3.220(b)(1) of the Florida Rules of Criminal Procedure requires the prosecution to produce discovery within 15 days of a defense request. In this case, the withdrawal of that discovery demand occurred well within the 15-day period.

[8] Not only was the withdrawal approved by the court before the operational deadline for disclosure, but a withdrawal is expressly recognized in Rule 3.220(d)(3) of the Florida Rules of Criminal Procedure. If petitioner's argument is accepted, either

inexplicable interference with that criminal case, a judge in a different division ordered the public disclosure of the state's evidence, totally ignoring the apparent harm likely to result from the premature pretrial disclosure.

Contrary to the position advanced in the dissenting opinion, 837 So.2d at 1006-1007, discovery disclosures in criminal cases are not automatic, but only occur in response to an effective defense request. *See Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999); *Young v. State*, 739 So. 2d 553 (Fla. 1999). A defendant must *elect* to participate in discovery by filing a notice of intent to participate in reciprocal discovery obligations. Fla. R. Crim. P. 3.220(a). Once that election is made, a defendant can revisit that choice within the disclosure period by withdrawing the request, an option expressly authorized by the rule. Fla. R. Crim. P. 3.220(d)(3). The practical effect of this rule is to allow the parties to control their discovery exchange.

Material to this case, until production to the defense is made, discoverable material forms no part of the public record. Discoverable information becomes a public record only when released to persons arrested, to defendants, or to their counsel. *See Post-Newsweek Stations, Florida v. Doe*, 612 So. 2d 549, 551 (Fla.

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criminal defendants could never withdraw a discovery request, or a withdrawn request would enable a defendant to obtain discovery through the Public Records Act without having a reciprocal discovery obligation. Neither option is sensible.

1992) (criminal investigative information developed for prosecution not accessible by public until given or required to be given by law or agency to accused); *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988) (pretrial discovery attains public record status once state provides it to defendant); *Tribune Company v. Public Records*, 493 So. 2d 480 (Fla. 2d DCA 1986), *rev. denied*, 503 So. 2d 327 (Fla. 1987) (all information given or required to be given is disclosable when released to defendant or counsel); *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985), *rev. denied*, 488 So. 2d 67 (Fla. 1986) (once documents given to criminal defendant, the legislature did not intend it to be withheld from others); *Satz v. Blankenship*, 407 So. 2d 396 (Fla. 4th DCA 1981), *rev. denied*, 413 So. 2d 877 (Fla. 1982) (only at point of disclosure does information become public).

Failure to adhere to this obvious reading of the discovery rule and the Public Records Act results in precisely the conflict which occurred in this case. A judge other than the judicial officer presiding in the criminal case ordered the public disclosure of evidence in a criminal case, even though the defendant did not want that evidence and the State never produced it in the criminal case. The disclosing judge was totally oblivious to the adverse impact public production could have on the defendant's right

to a fair trial.[9] Even more disconcerting is the reality that the court's premature action would have given the defense the benefit of discovering the State's evidence without having to comply with the rule's reciprocal discovery obligation. *Compare State v. Meggison*, 556 So. 2d 816 (Fla. 5th DCA 1990) (defendant had benefit of *three* trials before attempting to avoid reciprocal discovery by not filing notice of intent to participate in subsequent case); *Henderson v. State*, 763 So. 2d 274 (Fla. 2000) (defendant who did not file notice but received exculpatory *Brady* material and other court file information triggered reciprocal discovery obligation by requesting public records after codefendants obtained full discovery).

The court-permitted withdrawal of an inadvertent or premature demand for discovery should not be seen as an attempt to "defeat" a media's request for discovery material. Rather, it should be respected as a thoughtful response to charges when the parties do not intend to pursue discovery responsibilities, a fact that occurs frequently in cases which are not expected to be contested or in which the parties covet confidentiality as a strategy.[10] Because defendant former Mayor Carollo was no

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[9] While being the first to publish may promote a competitive advantage to the media, the Third District's ruling does not withhold publication in perpetuity. Rather, all records become accessible to the public at the close of the case.

[10] By comparison, discovery in federal criminal cases is far more restrictive, so defendants have little choice when electing their defensive strategy. Fed.R.Crim.P. 16.

longer entitled to discovery of the investigative materials, the investigative exemption of the Public Records Act remained in place.

As the Third District discussed, the Public Records Act promotes a balance between the public's right to know and the fair operation of the criminal justice system. When a defendant's right to a fair trial conflicts with the media's statutory right to obtain access to public records which are part of the court file, the media's access must yield. *Wesh Television, Inc. v. Freeman*, 691 So. 2d 532, 534 (Fla. 5th DCA 1997) (three-prong test to balance access versus fair trial contemplates *in camera* review and evidentiary hearing); *State v. Rolling*, 1992 WL 236932, *2 (Fla. Cir. Ct. Alachua County 1992) (substantial protections available to guard against compelling prejudice associated with disclosure of materials deemed public records).

This Court's seminal cases on public access to criminal court proceedings are *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), and *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988). Both support the Third District's practical balance between the criminal rules and the right of public access. *Lewis* adopted a three-prong standard for courts to apply when determining whether to close a pretrial hearing, *Lewis*, 426 So. 2d at 6, and remanded the case for an evidentiary hearing on the closure issue. In considering whether the trial court in a criminal proceeding has the authority to exclude the media and the public from a

pretrial hearing, the court observed: "we must delicately balance competing yet fundamental rights of an accused to a fair trial by an impartial jury, and of the free press guaranteed by the first amendment." *Id.*

Another factor to be considered is the inherent power and interest of the court in guaranteeing the Sixth Amendment right to a fair trial to all litigants. The freedom of the press, while a basic right, is weighed in the balance when fair trial rights are analyzed. *Id*. at 3. *See also Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378, 380 (Fla.), *cert. denied*, 484 U.S. 954 (1987) (right to access must yield to right to fair trial); *Bundy v. State*, 455 So. 2d 330, 338 (Fla. 1984), *cert. denied*, 476 U.S. 1109 (1986) (court must apply balancing test between access and fair trial); *Wolfinger v. Sentinel Communications Co.*, 538 So. 2d 1276 (Fla. 5th DCA 1989) (in view of state objection to disclosure, remand ordered in light of *McCrary* to balance statutory right to access against right to fair trial and due process); *Wesh Television, Inc. v. Freeman*, 691 So. 2d 532 (Fla. 5th DCA 1997) (remand for evidentiary hearing on media access to discovery in criminal case).

The Legislature specifically defined public records as not including criminal case-specific materials that have not been disclosed to the defense or are not otherwise

required to be made public.[11] This Court should defer to the Legislature's prerogative to make that public policy decision, especially when that policy has sound factual and philosophical support.

The Public Records Act means exactly what the Third District understood it to mean: criminal case-related investigative materials become public records when they are disclosed to the defense. When a defendant declines the opportunity to request discovery (either by not invoking discovery or by timely withdrawing a discovery request), the investigative materials remain exempt until produced in court or at the conclusion of the case. That bright line ruling promotes the fair operation of the criminal justice system and is consistent with the legislative pronouncement concerning public records. Accordingly, this court should approve the decision of the Third District and answer the certified question by holding that the records remain exempt from disclosure.

CONCLUSION

The Third District correctly balanced the Public Records Act with the Florida Rules of Criminal Procedure in holding that investigative materials which have not been disclosed to the defense in a criminal case do not become public records.

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[11] For example, a 911 call for emergency service is not exempt from disclosure. § 365.171(15), Fla. Stat. (2000).

Accordingly, this Court should approve the decision of the Third District and hold that a timely withdrawn request for discovery in a criminal case does not convert criminal investigative information into public records.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 9.210 of the Florida Rules of Appellate Procedure in that it is printed in Times New Roman 14-point proportional font.

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