IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-530

Lower Tribunal Consolidated Case Nos. 3D01-662 and 3D01-665

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

Petitioner,

-vs-

THE CITY OF MIAMI, et al.

Respondents.

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

ANSWER BRIEF OF RESPONDENT KATHERINE FERNANDEZ RUNDLE, STATE ATTORNEY OF THE ELEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Respondent, Katherine Fernandez Rundle, State Attorney of the Eleventh Judicial Circuit, was the recipient of a public records request from Post-Newsweek, Post-Newsweek Stations Florida, Inc., d/b/a WPLG Channel 10 (Post-Newsweek) while prosecuting Respondent Joseph Carollo for battery in Case No. M01-6692 before the Honorable Judge Carroll J. Kelly. Respondent, the City of Miami, received a similar request and was named as a defendant/respondent in a petition for writ of mandamus filed in the circuit court by Petitioner to compel production of the requested documents. Both Joseph Carollo and the City of Miami filed notices of appeal challenging the order granting Petitioner's request. These cases were consolidated by the Third District Court of Appeal and Katherine Fernandez Rundle was granted permission to intervene.

In this brief, the Katherine Fernandez Rundle will be referred to as "the State" or "the State Attorney's Office;" Joseph Carollo will be referred to as "Mr. Carollo" or "the defendant;" the City of Miami and the City of Miami Police Department will collectively be referred to as "the City;" and Petitioner will be referred to as "Petitioner" or "Post-Newsweek."

The following symbols will be used:

“R.”	Record on Appeal in Consolidated Case Nos. 3D01-662 and 3D01-665
“T.1”	Transcripts March 6, 2001
“T.2”	Transcripts March 8, 2001
“Ex.”	Exhibits in Appendix this Answer Brief on the Merits
“A.”	Appendix to Petitioner’s Initial Brief on the Merits

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On or about February 7, 2001, the police were called to the home of Joseph and Maria Carollo in reference to a claim of domestic battery. Joseph Carollo was arrested on that date and charged with simple battery. This misdemeanor charge was set before the Honorable Carroll Kelly in Case No. M01-6692.

On or about February 26, 2001, Mr. Carollo filed a written demand for discovery pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure. This demand was orally withdrawn by Mr. Carollo on March 5, 2001. A written notice of withdrawal was filed on or about March 6, 2001. No action was taken as a result of the request and no records were provided to Mr. Carollo as a result of the request. The trial court with jurisdiction over the pending criminal matter allowed Mr. Carollo to withdraw his demand for discovery, relieving both the Office of the State Attorney and Mr. Carollo of any obligations imposed by Rule 3.220 of the Florida Rules of Criminal Procedure.

On February 27, 2001, Post-Newsweek, pursuant to Chapter 119 of the Florida Statutes, requested copies of any and all photographs taken of Mrs. Carollo on February 7, 2001, and copies of all documents reflecting any statement made by Mrs. Carollo to any law enforcement personnel, including any recorded statements, from both the Office of the State Attorney ("the State") and the

City of Miami Police Department ("the City"). The City responded to the Post-Newsweek's Chapter 119 request by asserting that the items requested were exempt pursuant to section 119.07(3)(b) of the Florida Statutes. The State responded to the request with the assertion that the items requested were simply not in the possession of the State Attorney and that the requested items would be provided to Post-Newsweek once obtained and provided to Mr. Carollo during the discovery process.[1] (Exhibit 1).

On February 28, 2001, the Post-Newsweek filed a Complaint for Writ of Mandamus to Enforce Provisions of Florida's Public Records Act against the City of Miami Police Department and Raul Martinez in the Circuit Court. (R. 1-37). On the same day, the Post-Newsweek filed an Emergency Motion to Intervene and For Access to Public Records in the County Court.[2] (Exhibit 2). Both pleadings claimed entitlement to the requested documents on the theory that there was no valid exemption available to either the City or the State. The State responded to the Post-

[1] Copies of some of the items requested by Post-Newsweek were obtained by the State in the ordinary course of the proceedings after the State responded to the Post-Newsweek's initial requests for production.

[2] This motion was heard by Judge Kelly on March 13, 2001. At that time, Post-Newsweek suggested that the motion had been rendered moot by the order issued by Judge Shapiro on March 12, 2001.

Newsweek's emergency motion by asserting the exemption set forth in section 119.07(3)(b). (Exhibit 3).

A hearing on Post-Newsweek's complaint against the City was held on March 6, 2001. At that time, both the City and the State informed the Court that the demand for discovery had been withdrawn by Mr. Carollo and asserted that the items requested by Post-Newsweek were exempt from disclosure pursuant to section 119.07(3)(b). The State further argued that in the absence of a pending demand for discovery by Mr. Carollo, complete with the corresponding discovery obligations, Post-Newsweek's reliance on section 119.011(3)(c)5 was misplaced. (T.1 20-30).

Motions to intervene in the action against the City were filed by both the State and Mr. Carollo on March 7, 2001. (R 103-114, 115-146). Although not formally granted permission to intervene, both the State and Mr. Carollo were given an opportunity to address the Court at a hearing held on March 8, 2001, to address the propriety of service and the jurisdiction of the court. (T.2 18-25, 29-34; R. 179).

On March 12, 2001, Miami-Dade Circuit Court Judge Bernard S. Shapiro granted Post-Newsweek's petition to enforce the provisions of Chapter 119 of the Florida Statutes by ordering the City of Miami to produce any and all photographs of the victim, Maria Carollo, in the possession, custody or control of the City.

(R. 183). The City was also ordered to produce any and all statements made by Mrs. Carollo in the possession, custody or control of the City. (R. 183). This ruling was apparently based upon the conclusion that because a discovery demand in the underlying criminal case, later withdrawn with the permission of County Court Judge Carroll J. Kelly who was presiding over the criminal case, was pending at the time of the initial request, the request was wrongfully denied. (R. 182). Both the State and Mr. Carollo filed motions in the circuit court to stay Judge Shapiro's order. (R. 158-161, 162-167). These motions were denied. (R. 177). Rather than moving for a stay of the order, the City filed a notice of appeal that same day. (R. 149-157).

Following the denial of a stay by the trial court, the State filed an emergency motion to intervene in the City's appeal with a request for a stay of the trial court's order. The request to intervene was granted and the request for a stay of the trial court's order was denied. Mr. Carollo filed a notice of appeal, a motion to intervene in the City's appeal and a request for a stay of the trial court's order pending appellate review. The request for a stay was denied and Mr. Carollo's appeal was consolidated with the City's appeal.

On October 9, 2002, the Third District Court of Appeal held that because Mr. Carollo had withdrawn his discovery demand with

the consent of the judge presiding over his criminal case, the State Attorney was relieved of any obligation to provide the requested materials to Mr. Carollo and that the materials retained their exempt status at the time the circuit court issued its writ of mandamus improperly ordering the City to disclose the materials requested by Post-Newsweek. *City of Miami v. Post-Newsweek Stations Florida, Inc.*, 837 So. 2d 1002, 1004 (Fla. 3d DCA 2002). On Post-Newsweek's motion for rehearing, rehearing *en banc*, and/or certification, the Third District denied rehearing, but certified the following question to be 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?

This brief follows.

QUESTION PRESENTED

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?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal properly held that where a criminal defendant withdraws his written demand for discovery filed pursuant to Florida Rule of Criminal Procedure 3.220 before the State actually complies with the request and before the expiration of the fifteen days allowed by the rule for compliance by the State, the materials and documents requested retain their exempt status under section 119.07, Florida Statutes (2000). Where an accused withdraws his demand for discovery with the permission of the criminal court before the demand is enforceable by the accused and before disclosure has been made, materials and documents that would otherwise be produced during discovery in the criminal proceeding are not "required by law or agency rule to be given to the person arrested." The public's right to access to active criminal investigative information as set forth in section 119.011(3)(c)(5) is derivative of the rights afforded to the accused. The conclusion that the public has an enforceable right to disclosure of otherwise non-public records pursuant to section 119.011(3)(c)(5) before actual disclosure or before the accused has any enforceable right is contrary to law and logic.

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

A. Introduction

Section 119.07(3)(b) of the Florida Statutes provides that "active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution." "'Criminal investigative information' means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including but not limited to information derived from laboratory tests, reports of investigators or informants, or any type of surveillance." Section 119.011(3)(b), Florida Statutes. "Criminal intelligence and criminal investigative information shall be considered 'active' while such information is directly related to pending prosecutions or appeals." Section 119.011(3)(d), Florida Statutes. "Criminal investigative information" does not include

"[d]ocuments given or required by law or agency rule to be given to the person arrested." Section 119.011(3)(c)5, Florida Statutes (2000).

There can be little debate that the statements made by Mrs. Carollo to the police and the photographs of Mrs. Carollo's injuries taken by the police during the investigation following the 911 call on February 7, 2001, qualify as "information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission." There is also little debate in the instant case that the criminal charge of simple battery resulting from the February 7 incident was pending against Mr. Carollo in Case No. M01-6692 on February 27, 2001, when Petitioner requested the statements and photographs from the City and the State, and on March 12, 2001, when the trial court granted Post-Newsweek's request for production. The only real debate in the instant case is whether the documents were "required by law" to be given to Mr. Carollo at the time of the request or at any time thereafter.

B. The Third District Properly Reversed The Trial Court Order

In granting Post-Newsweek's request for production, the trial court concluded that the items requested from the City were

items “required by law or agency rule to be given to the person arrested” and thus were excluded from the definition of “criminal intelligence information” or “criminal investigative information” pursuant to section 119.011(3)(c)5 of the Florida Statutes. (R. 182). In reaching this conclusion, the trial court relied on the fact that Mr. Carollo’s demand for discovery was still pending at the time Petitioner requested production of the documents and held that as a result, “the materials requested were in such a posture that their release was mandated and they should have been and presumably would have been released accordingly.” (R. 182). The Third District Court of Appeal disagreed and ruled that because there was no obligation to give the defendant the documents until the expiration of the fifteen days allowed for production by the criminal rule of discovery, the documents retained their exempt status when Post-Newsweek made its request. *City of Miami v. Post-Newsweek Stations Florida, Inc.*, 837 So.2d 1002, 1004 (Fla. 3d DCA 2002). The Third District is correct.

Rule 3.220 of the Florida Rules of Criminal Procedure provides that the State has fifteen days after service of the notice of discovery by the accused to provide the accused with a written discovery exhibit disclosing to the defendant and permitting the defendant to inspect, copy, test, and photograph, *inter alia,* the names and addresses of all persons known by the

prosecutor to have information relevant to any offense charged, the statement of any such person, and any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant. Fla.R.Crim.P. 3.220(b). Absent a request pursuant to rule 3.220(k) by the defense to abbreviate the time period established by rule 3.220(b), the State has "absolutely no obligation to provide discovery in less time than the rule allows." *Moore v. State*, 697 So.2d 569, 570 (Fla. 3d DCA 1997) (argument that the prosecution "'improperly' availed itself of all 15 days afforded by the rule" offered in support of claim of speedy trial violation rejected with "little comment" by the appellate court). *See also State v. Miller*, 672 So.2d 855, 856 (Fla. 5th DCA 1996) (speedy trial dismissal reversed where appellate court held that it "is inappropriate to penalize the State for not voluntarily waiving its *right* under rule 3.220(b) to the fifteen days for compliance")(*original emphasis*).

In the instant case, Mr. Carollo filed his discovery notice on or about February 26, 2001. Because the State has the right to avail itself of the full fifteen days allowed by the rule, the State was not obligated or required to respond to Mr. Carollo's discovery notice until March 13, 2001. Mr. Carollo could not have enforced his demand for discovery by requesting production

on February 27, 2001, the date Post-Newsweek requested production from both the City and the State. For this reason, the trial court's conclusion that the request "at the time it was made ... was wrongfully denied" is clearly erroneous. (R. 182).

C. Rule 3.220 And Active Criminal Investigative Information

Active criminal investigative and intelligence information loses its exempt and confidential status during the discovery process unless subject to a protective order or other lawful limitation by the court. Absent an enforceable demand for discovery by the accused in the underlying criminal case, criminal investigative and intelligence information remains privileged and non-public record. *See Henderson v. State*, 745 So.2d 319 (Fla. 1999) (defendant in criminal proceeding could not obtain records from Sheriff's Department via chapter 119 request without invoking discovery obligations because "but for codefendant Adams' participation in discovery, the requested documents would have remained privileged under section 119.07(3)(b)"); *Post-Newsweek Stations, Florida Inc. v. Doe,* 612 So.2d 549, 551 (Fla. 1992) (criminal investigative information developed for the prosecution of a criminal defendant "will not be accessible to the public until the information is given or required by law or agency rule to be given to the accused, ...

once the state gives the requested information to the defendant, pretrial discovery information attains the status of a public record"); *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988) (once the state gives the requested information to the defendant, pretrial discovery information attains the status of a public record); *Tribune Co. v. Public Records*, 493 So.2d 480, 485 (Fla. 2d DCA 1986) ("all information given or required to be given to defendants is disclosable to the public when released to the defendants or their counsel ... whatever information is discoverable becomes a public record when released to arrested persons, defendants, or their counsel.").

Petitioner contends that once a criminal defendant files a demand for discovery pursuant to Florida Rule of Criminal Procedure 3.220 all materials subject to that discovery demand **immediately** lose their previously exempt status and **immediately** become available for public inspection and copying pursuant to Chapter 119 of the Florida Statutes. In support of this contention, Petitioner relies on the use of the word "shall" in rule 3.220, arguing that the demand for discovery triggers the State's mandatory obligation to provide discovery material to the accused and reasoning that as a result, the materials are "required by law ... to be given to the person arrested" as contemplated by section 119.011(3)(c)5. The conclusion that a

request or demand for discovery by an accused, without more, is enough to render the information requested public and non-exempt is contrary to law and logic. As was clearly stated in *Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So.2d 549, 551 (Fla. 1992) and *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988), criminal investigative and intelligence information attains the status of public record **when provided to the defendant during discovery**. *See also Bludworth v. Palm Beach Newspapers, Inc.* 476 So.2d 775, 779 (Fla. 4th DCA 1985) (once access documents has been given to the criminal defendant the legislature did not intend that they be withheld from others); *Satz v. Blankenship*, 407 So.2d 396, 398 (Fla. 4th DCA 1981) (Section 119.011(3)(c)5 "reveals that once documents are released, the Legislature believed there is no longer a need for secrecy.").

The suggestion that the demand for discovery, without more, creates an immediate obligation for production and an immediate right to inspection and copying ignores the fact that rule 3.220 allows the State fifteen days to comply with a defendant's request. The rights asserted by Post-Newsweek in reliance on section 119.011(3)(c)5 are rights derived from the rights afforded to the persons arrested in a criminal case. *See, e.g., Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 383 -384

(Fla. 1987) (non-parties do not possess discovery rights and cannot compel the disclosure of information). In other words, only after an arrested person asserts his or her right to discovery and the documents are provided during the course of discovery do they become public record. In the absence of such an assertion and disclosure, the documents remain non-public and exempt from disclosure.[3] Where, as in the instant case, the accused withdraws his or her request for discovery with the permission of the court presiding over the criminal case before any documents are provided, the accused has no enforceable right to compel production of the criminal investigative or intelligence information compiled in relation to his arrest. It defies logic to conclude that Post-Newsweek or any other member of the public, whose rights relating to criminal investigative or intelligence information directly flow from the rights of the accused to discovery in criminal cases, has the right to compel production of the information that the accused is powerless to obtain. Taken to its logical end, the assertion that a demand for discovery by the accused, without more, renders criminal intelligence and investigative information public record which

[3] Absent an extension of time pursuant to rule 3.220(k) for compliance with the accused's demand for discovery, the media could arguably seek to compel production of the discovery materials when they become due upon the expiration of the fifteenth day even if the accused fails to asserts his or her rights at that time.

must be immediately disclosed upon demand by a person other than the accused, leads to the absurd result that the media or any other citizen could compel production of pretrial discovery related to a pending criminal prosecution the moment a demand for discovery is filed by the accused, while the accused would have to wait a minimum of fifteen days, the time allowed for production by Rule 3.220 of the Rules of Criminal Procedure, before he or she could attempt to compel production of the very same information. Not only does this absurd conclusion ignore the proposition that the information is provided to the accused to allow the accused an adequate opportunity to investigate a defense and otherwise prepare for trial, it would deprive the accused of an opportunity to object to the disclosure as allowed by law. *See, e.g., Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32, 34 (Fla. 1988) (defendant in a criminal proceeding has standing to assert a constitutional right to a fair trial through a motion to control prejudicial pretrial publicity). If the media were granted access to pretrial discovery information before the accused, the accused could not assert his constitutional right to a fair trial through an attempt to control prejudicial pretrial publicity until the information has already been published or broadcast and the damage resulting from

disclosure has already been done.[4] Where the defendant's right to receive a fair trial conflicts with the media's statutory right of access to public records which are part of a court file, the media's right to access must yield. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 380 (Fla.), *cert. denied,* 484 U.S. 954, 108 S.Ct. 346, 98 L.Ed.2d 372 (1987); *WESH Television, Inc. v. Freeman*, 691 So.2d 532, 534 (Fla. 5th DCA 1997). Petitioner's interpretation of section 119.011(3)(c)5 and rule 3.220 requiring immediate release of the discovery materials to the public which have not yet been made part of the court file would deprive the accused of an opportunity to even ask the trial court to balance his or her rights to a fair trial against the media's right of access and to consider whether there is a conflict between the two.

The suggestion that the demand for discovery requires immediate disclosure also ignores the fact that rule 3.220 allows the State an opportunity to file a motion for a protective order and allows a defendant to withdraw his or her request before compliance by the State. Immediate disclosure to the media would

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[4] The suggestion that Post-Newsweek's interpretation of the rules would result in disclosure without an opportunity to object having been afforded to the accused is not entirely speculative. In the instant case, Mr. Carollo noted in his attempts to intervene in the circuit court, that neither the State nor the accused were given actual notice of Post-Newsweek's attempt to enforce its public records request against the City. (R. 19-20).

deprive both the State and the accused of the rights clearly set forth in rule 3.220.

Petitioner compares the demand for discovery filed by the defendant to a subpoena served on a witness, arguing that just as a witness under subpoena is under coercion or compulsion to appear at the designated time and place unless he obtains a court order extending the time or excusing his appearance altogether, the State is compelled by a defendant's demand for discovery to produce the requested materials and is accordingly "required" to give the materials to the defendant the moment the demand is made. Assuming only for the sake of argument that a demand for discovery can be compared to a witness subpoena, the defendant's withdrawal of the demand **with the court's approval** must be considered the same as a court order excusing the witness from appearing at the designated time and place. By allowing the accused to withdraw his demand for discovery before the State has complied and before the expiration of the time allowed for compliance, the trial court relieves both the State and the accused of any obligation pursuant to the rules of discovery just as if the court had granted a witness' motion for protective order and relieved the witness of any obligation to appear as requested by the subpoena. Moreover, while it is true that absent a court order or agreement of the subpoenaing party the

witness must appear at the designated time and place, it is equally true that the witness cannot be held in contempt or otherwise sanctioned for failing to appear until the designated time has arrived. Until the designated hour arrives, the witness is not required or obligated to do anything. Similarly, until the fifteen days allowed by rule 3.220 (or other time period set by the court) has expired the State is not required or obligated by law to provide the materials contemplated by the rule. *See Moore v. State*, 697 So.2d 569, 570 (Fla. 3d DCA 1997); *State v. Miller*, 672 So.2d 855, 856 (Fla. 5th DCA 1996). Until the time period established by the rule or by the court pursuant to 3.220(k) has expired the criminal investigative information that would otherwise be given to the accused during discovery retain their non-public and exempt status.

Petitioner relies on *State v. Meggison*, 556 So.2d 816 (Fla. 5th DCA 1990) to suggest that the result of a defense discovery demand is to "require" the State to disclose the discovery established by rule 3.220. This reliance is misplaced. In *Meggison*, the defendant invoked his right to discovery and fully participated in the discovery process through the declaration of a mistrial in the defendant's first trial and the completion of a second trial. When the second trial was reversed and the case remanded for a third trial, the defendant changed counsel and

attempted to withdraw his demand to participate in the discovery process. Because the result of the initial demand “was to require the State, under Florida Rule of Criminal Procedure 3.220(a), to disclose much information the State would otherwise not be required to disclose throughout the first jury trial and, after a mistrial was declared, throughout the second jury trial,” the appellate court ruled that the defendant was committed to the disclosure process during successive trials. Clearly, the question in *Meggison* was not whether the defendant’s demand alone created an enforceable obligation by the State to produce the discovery materials. Nor was the question addressed in *Meggison* whether the discovery materials became public and non-exempt once the demand was filed. The question was whether the defendant could withdraw his demand for discovery after requiring the State to fully participate in the discovery process throughout two trials.

D. Effect Of Withdrawal On Public Access

Petitioner argues that a criminal defendant cannot be allowed to “defeat the public’s right of access to public records” by withdrawing his demand for discovery and suggests that treating discovery materials as non-public and exempt

because the demand for discovery is withdrawn before the materials are produced would create an exemption not authorized by statute. This argument ignores the fact that a defendant charged with a crime is under no obligation to demand discovery pursuant to rule 3.220 and that but for the rule of discovery in criminal cases, the criminal investigative or intelligence information would remain non-public and exempt until introduced at trial or, if not introduced at trial, the conclusion of the criminal proceedings. *See State v. Kokal,* 562 So.2d 324, 326 (Fla. 1990). Allowing a defendant to withdraw his demand for discovery before the parties to the criminal litigation have detrimentally relied on the demand is permitted by the rule of discovery and places the parties in the position they were before the demand was filed. By allowing a defendant to withdraw his or her demand for discovery and treating the demand as if it had never been made, the court does not "create" an exemption to access pursuant to chapter 119 of the Florida Statutes. Section 119.07(3)(b) of the Florida Statutes clearly provides that "active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution."

Petitioner's attempt to obtain the discovery materials despite the withdrawal of the discovery demand by the accused is

not unlike the media's attempt to attend discovery depositions and compel the production of depositions not yet filed with the clerk's office nor made part of the court file in *Palm Beach Newspapers, Inc. v.* Burk, 504 So.2d 378 (Fla. 1987). When asked to consider whether the press was entitled to notice and opportunity to attend discovery depositions in a criminal case and whether the press could compel production of depositions not yet filed with the clerk's office, this Court clearly held that non-parties to a criminal action simply do not have an independent constitutional right to the discovery process. *Id.* at 382-383. Quoting *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271 1281, 14 L.ed.2d 179 (1965), this Court held "The 'right to speak and publish does not carry with it the unrestrained right to gather information.'" Id. at 383. In reaching this conclusion, this Court noted that the purpose of the criminal rules of discovery is to assist the parties in the preparation of trial and transformation "of the discovery rules into a major vehicle for obtaining information to be published ... would subvert the purpose of discovery and result in the tail wagging the dog." Id. at 383-384.

E. Statutory Construction

Petitioner correctly states that this Court must give the language of the statute its plain and ordinary meaning unless the words are defined by statute or the clear intent of the legislature. Relying on this general proposition of law, Petitioner focuses on section 119.01(1) which states that "it is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person" and argues that the term "required by law" in section 119.011(3)(c)5 must be read to mandate the immediate disclosure of the materials which would ordinarily be provided during discovery in a criminal case regardless of whether the demand for discovery is lawfully withdrawn before compliance with the demand. This position is without merit. Rather than myopically focusing on the legislative intent of chapter 119, which without doubt encourages open government, this Court must look to chapter 119 together with rule of discovery set forth in Florida Rule of Criminal Procedure 3.220. The obligation, if any, to give criminal investigative information to the person stems from Florida Rule of Criminal Procedure 3.220.

Petitioner acknowledges on pages 16-17 of its Initial Brief that criminal investigative information is exempt from disclosure under section 119.07(3)(b) of the Florida Statutes unless the information is "required ... to be given" to the person arrested.

Petitioner argues that a discovery demand pursuant rule 3.220 of the Florida Rules of Criminal Procedure triggers the obligation to provide the ordinarily exempt criminal investigative materials thereby removing the materials from the exemption as materials "required ... to be given to the person arrested." The term "require" means: "[t]o direct, to order, to demand, instruct, command, request, need, exact." *Black's Law* Dictionary 1304 (6th ed. 1990). "Require" has also been defined to mean: "to impose a compulsion or command one" (*Webster's Ninth New Collegiate Dictionary* 1002 (1991)); "to place under an obligation or necessity" (*Webster's Encyclopedia Unabridged Dictionary* 1219 (1996)); or "to impose an obligation on" (*American Heritage Dictionary* 1050 (2d Coll. 3d 1982)). Because the State has "absolutely no obligation to provide discovery in less time than the rule allows" the term "required ... to be given to the person arrested" cannot be read to mean that the discovery demand, without more, removes the criminal investigative information ordinarily provided during the criminal discovery process from the exemption set forth in section 119.07(3)(b). *See Moore v. State*, 697 So.2d 569, 570 (Fla. 3d DCA 1997). Instead, the term must be read to mean that once the obligation to provide the materials to the person arrested becomes enforceable, the materials lose their exempt and non-public status.

In support of its claim that the demand for discovery alone triggers the obligation to provide the criminal investigate information to the accused, Petitioner relies on Brevard County State Attorney Norman Wolfinger's interpretation of chapter 119 offered in support of amending section 119.011, arguing that had Wolfinger's interpretation been incorrect, the legislature would taken the opportunity "to disabuse him and anyone else of the notion that 'given' and 'required by law ... to be given' mean two separate things." (Initial Brief 29-30). Not only is the situation addressed by Wolfinger factually distinct from the question presented because in that case the accused was provided with the requested discovery instead of withdrawing his demand with the permission of the court before compliance with the demand, Wolfinger's interpretation is irrelevant to the question to be addressed by this Court. Moreover, Petitioner's focus on that one paragraph ignores the fact that the Senate Staff Analysis noted that the "courts have held that criminal investigative and criminal intelligence information are no longer exempt from public disclosure pursuant to Section 119.07(3), F.S. once it is provided to the defense pursuant to Rule 3.220." (A. 35). Petitioner also ignores the opinion expressed by the Florida Department of Law Enforcement that "[u]nder the present law once "active" criminal information is given to the defense

through discovery, the information is no longer exempt from disclosure to the public, newspapers, etc. ...” (A. 38). Just as the Legislature “declined” the opportunity to “correct” Wolfinger’s interpretation of the effect of a demand for discovery, the Legislature “declined” to “correct” the opinion of FDLE and the author of the Senate Staff Analysis.

F. Public Policy

Petitioner contends that public policy favoring public access to government and the judicial system requires this Court to find that the demand for discovery, without more, removes the exempt status conferred on criminal investigative and intelligence information pursuant to section 119.07(3). As noted previously, the right of the accused to a fair trial must give way to the public right to know and the media’s right to publish. *See, e.g., Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 380 (Fla.), *cert. denied,* 484 U.S. 954, 108 S.Ct. 346, 98 L.Ed.2d 372 (1987); *WESH Television, Inc. v. Freeman*, 691 So.2d 532, 534 (Fla. 5th DCA 1997). To adopt the position urged by Petitioner would not only place the media’s rights above the rights of the accused, it would interfere with the orderly procedure established by the criminal rules. The position taken by Petitioner would illogically take advantage of the criminal rule

of discovery to obtain access to criminal investigative and intelligence information while abrogating the rights afforded to the parties in the criminal action pursuant to the same rule.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Respondent, Katherine Fernandez Rundle, State Attorney of the Eleventh Judicial Circuit, respectfully requests that this Court answer the certified question by holding that where 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 complies with the request and before the expiration of the 15 days prescribed in rule 3.220(b), criminal investigative and intelligence information retains its exempt status under section 119.07, Florida Statutes (2000). Respondent further requests that the decision of the Third District Court of Appeal in the instant case be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was mailed to Karen W. Kammer, Esq., Counsel for Post-Newsweek, One Southeast Third Avenue, Suite 2200, Miami, Florida 33131; Benedict P. Kuehne, Counsel for Joseph Carollo, 100 S.E. 2nd Street, Suite 3350, Miami, Florida 33131-2150; and Regine Monestime, Assistant City Attorney, City of Miami, 400 N.W. 2nd Avenue, Room 420, Miami, Florida, 33128 on this ____ day of June, 2003.

____
ANGÉLICA D. ZAYAS
Assistant State Attorney

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief is printed in Courier New 12 point font and thus complies with the font requirements of Rule 9.210.

____
ANGÉLICA D. ZAYAS
Assistant State Attorney