IN THE SUPREME COURT OF FLORIDA
CASE NO. SC03-530

LOWER TRIBUNAL CONSOLIDATED CASE
NOS. 3D01-662, 3D01-665
CIRCUIT COURT CASE NO. 01-05039 CA 11

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

Petitioner,

v.

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On February 7, 2001, Miami police responded to an early morning 911 call from the Coconut Grove home of then-Miami Mayor Joe Carollo. During an argument, the Mayor reportedly had struck and injured his wife with what the police report described as a "hard object" (R.76),[1] later characterized as a tea canister. According to the report, the Mayor's wife sustained a "golf size ball [sic] hematoma on the left side of her temple" and she described the incident to the arresting officer as a "fight" "she got into . . . with her husband". R.76. In the 911 call, the couple's daughter told the dispatcher her father was hurting her mother. R.79. Upon arriving at the couple's home, Miami police documented Mrs. Carollo's injuries using a still camera (the "Injury Photo") and also taped a statement from Mrs. Carollo recounting the incident (the "Statement"). R.71.

Miami police arrested the Mayor and charged him with misdemeanor battery. R.76. That prosecution was assigned to the Honorable Carroll J. Kelly, Case No. M016692, in Miami-Dade County

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[1] For this Court's convenience, references to the record on appeal before the Third District Court of Appeal will be shown by "R. ____". References to pages in the Appendix to this Initial Brief will be shown by "A. _____".

Court (the "Criminal Case").

Later that day, Post-Newsweek made both oral and written requests under Florida's Public Records Act (the "Act") to the Miami Police Department (the "City") to inspect and copy the 911 recording. R.99. The City produced it along with the arrest report. R.180. The contents of the recording and arrest report first appeared in numerous broadcast news reports that day, in the newspaper the following morning, and in published reports in the days immediately following. See, for example, "Carollo spends the night in jail", *The Miami Herald*, Thursday, February 8, 2001. R.77-81. The substance of Mrs. Carollo's injuries, the object which caused them, and contemporaneous accounts of what had happened thus became public shortly after the altercation at the Mayor's home.

The following day, February 8, Post-Newsweek made both oral and written requests under the Act for the Injury Photo. R.97. The City failed to respond to these requests and withheld the Photo without citing any provision of the Act or any other statutory basis for doing so. Post-Newsweek also made oral requests under the Act to inspect and copy the Statement, as well as any other statements to law enforcement Mrs. Carollo may

have given in connection with the incident. As with the Injury Photo, the City refused to produce the Statement (collectively, the "Public Records" or "Records") and cited no statutory provision exempting such Records from public inspection.

In the meantime, the Mayor proceeded with his defense in the Criminal Case. On February 26 the Mayor's counsel served a notice of appearance, entered a written plea of not guilty and sought additional time to file defensive motions. R.116. A. 25-26.[2] He also served notice of the Mayor's "intent to participate in discovery and request[ed] production of all information **required** to be disclosed" (emphasis added) (the "Discovery Notice"). R.116, 180. A.27-28.[3] The Mayor filed his Discovery Notice the next day, February 27, 2001. A.27-28.

On February 27, after several further unsuccessful

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[2] For the Court's convenience, a copy of the actual "Notice Of Appearance, Written Plea Of Not Guilty, And Request For Additional Time To File Defensive Motions" (which was included in the Appendix to Post-Newsweek's Consolidated Answer Brief filed with the Third District Court of Appeal) also is included in the Appendix here at A.25-26.

[3] For the Court's convenience, a copy of the actual Discovery Notice (which was included in the Appendix to Post-Newsweek's Consolidated Answer Brief filed with the Third District Court of Appeal) also is included in the Appendix here at A.27-28.

attempts to secure the City's compliance with the Act, Post-Newsweek's counsel submitted another written request for the Injury Photo, Statement and related public records. R.100-101. Pursuant to the Act, that letter also asked the City to state with particularity the reasons supporting any exemption it might assert. R.100-101. Later that day – nearly three weeks after Post-Newsweek's first request and despite the already public nature of the information -- the City for the first time claimed the Injury Photo and Statement were exempt from disclosure as active criminal investigative information under Section 119.07(3)(b), Florida Statutes. R.102. The City did not set forth with particularity its reason for concluding the Records were exempt, although Post-Newsweek had asked it to do so. R.102.

As a result of the City's refusal to produce the Public Records, on February 28 Post-Newsweek filed a complaint against the City in Miami-Dade County Circuit Court seeking a writ of mandamus to enforce the Public Records Act (the "Public Records Lawsuit"). R. 1-37. In the Criminal Case pending in county court, Post-Newsweek also moved to intervene to compel the State, another custodian of the Records, to produce what it

had. R. 130-134.[4]

On March 5, the circuit court judge scheduled a hearing for the following day on the relief requested. Also that day and unknown to Post-Newsweek, the Mayor orally withdrew his Discovery Notice at his arraignment in the Criminal Case. Transcript of March 6, 2001, hearing before the Honorable Bernard Shapiro (the "March 6 Transcript")[5] at 22; R.121, 180-181.

On March 6, the circuit court held an hour-long hearing on the Public Records Lawsuit (the "March 6 Hearing"). See March 6 Transcript. That same day, in the Criminal Case the Mayor served the State with a "Notice Of Withdrawal Of Discovery Request", claiming his Discovery Notice served and filed more than a week before was "filed prematurely and in error". March 6 Transcript at 22; R.121, 128-129, 180-181; A.29-30. The county court judge in the Criminal Case accepted

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[4] Believing the State also might have copies of the Records in connection with its battery prosecution, Post-Newsweek had submitted a public records request to it as well. However, the State produced nothing.

[5] The March 6 Transcript is included as "Exhibit A" in the "Appendix to Motion of Intervenor Mayor Joe Carollo For Stay Pending Appeal Or For Review Of Order Denying Stay Pending Appeal" which the Mayor filed with the Third District Court of Appeal on or about March 14, 2001.

that withdrawal. R.121, 181. At the March 6 Hearing, counsel for Post-Newsweek appeared, as did two attorneys on behalf of the City, and one attorney on behalf of the State. See March 6 Transcript. Although not reflected by the transcript itself, counsel for the Mayor did appear during the course of that hearing, as his counsel later acknowledged. See Transcript of March 8, 2001, Hearing before the Honorable Bernard Shapiro (the "March 8 Transcript")[6] at 18.

At the March 6 Hearing the City argued the police department was not the proper party and challenged service on the police chief. Both the City and the State argued the Mayor's oral withdrawal of his Discovery Notice the day before provided a basis for non-disclosure. March 6 Transcript at 18-23. The State also claimed release of the Records would prejudice its on-going case against the Mayor because it would permit him to obtain the same information without obligating himself to the discovery process. March 6 Transcript at 26. The parties' fair trial rights under this Court's opinion in

[6] The March 8 Transcript is included as "Exhibit B" in the "Appendix to Motion Of Intervenor Mayor Joe Carollo For Stay Pending Appeal Or For Review Of Order Denying Stay Pending Appeal" which the Mayor filed with the Third District Court of Appeal on or about March 14, 2001.

Florida Freedom Newspapers, Inc. v. McCrary[7] were also addressed. March 6 Transcript at 35. After concluding the Mayor's Discovery Notice – despite his subsequent attempt to withdraw it – triggered "an obligation by the State to provide the materials" and therefore that the Public Records should be released, the trial court nevertheless granted the City's motion to dismiss with leave to amend for Post-Newsweek to add the City of Miami as a party. March 6 Transcript at 40, 44, and 45.

That afternoon, the county court in which the Criminal Case was pending advised Post-Newsweek's counsel that Judge Kelly was out of town at a conference in Tallahassee until Friday, March 9, would not be able to entertain Post-Newsweek's motion to compel, and would "hold [the] motion until Friday". See also March 8 Transcript at 15. On Friday, March 9, the Mayor served a notice of unavailability in the Criminal Case advising the county court that none of his attorneys would be available the following Monday, March 12, thereby postponing any hearing in the Criminal Case on the issues until at least March 13. See "Notice Of Parties' Unavailability For Hearing".[8]

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[7] 520 So.2d 32 (Fla. 1988).

[8] A copy is included in the Appendix to Post-Newsweek's Consolidated Answer Brief filed with the Third

After the March 6 Hearing, upon agreement with the City and in order to facilitate a prompt resolution of the public records issues, Post-Newsweek served its Amended Complaint substituting the City of Miami for the police department and voluntarily dismissing the police chief. R.70-102, 147-148. The City responded to the suit the next day, March 7, repeating the arguments it had made at the March 6 Hearing. See "Respondent's Answer To Amended Complaint And Memorandum Of Law". That day both the State and the Mayor formally moved to intervene to oppose the Records' release, each citing their respective arguments made the day before at the March 6 Hearing: the withdrawn discovery demand, the assertedly exempt status of the Records, and the alleged prejudice to fair trial rights. R.103-114, 115-146. The Mayor also asked the circuit court to transfer Post-Newsweek's mandamus action to the county court hearing the Mayor's battery prosecution. R.123-125.

At the next hearing set by the trial court for March 8, three attorneys appeared on behalf of the City, two on behalf of the State, and two on behalf of the Mayor in addition to counsel for Post-Newsweek. During that 35-minute hearing, the

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District Court of Appeal.

City and the State made the same substantive arguments against disclosure each had made twice before (March 8 Transcript at 10-11, 18-19), a point the trial court acknowledged and the State conceded: "I think we touched on all this, [sic] the other day." March 8 Transcript at 31. The State also argued its right to intervene (March 8 Transcript at 31), as did the Mayor,[9] who also repeated his earlier arguments against disclosure. See March 8 Transcript at 19-23. With respect to his fair trial argument, the Mayor presented no evidence to support it as McCrary requires. After giving all concerned an opportunity to be heard, the trial court reserved ruling pending its further review of the extensive briefs opposing disclosure the City, State and Mayor had filed. March 8 Transcript at 34.

Later that day, in response to the Mayor's assertion the county court judge hearing the Criminal Case would hold a hearing Tuesday, March 13, on Post-Newsweek's motion to compel

[9] Although the Mayor and State had not scheduled their motions to intervene for hearing, the trial court nevertheless gave each an opportunity to argue their respective positions and "reviewed and considered" their "extensive written and oral argument". R.179. See also March 6 and March 8 Transcripts. In fact, the Mayor referred to himself as an "intervenor" when he filed his notice of appeal with the trial court. R.168.

the State to comply with Chapter 119, Post-Newsweek contacted Judge Kelly's chambers who advised that the judge would hold a status conference that afternoon but would entertain no motions. See March 8, 2001, letter from Isaac Mitrani and Scott Trell to the Honorable Bernard Shapiro.[10]

On Monday, March 12, the trial court issued its "Order on Amended Complaint To Enforce Provisions Of Chapter 119" (the "Order"), granting Post-Newsweek the relief it sought. R.178-184; A.17-23. In the Order the trial court found that much of what happened the morning of February 7, including the nature of Mrs. Carollo's injuries, had already been made public, both by the police department's release of the arrest report and 911 tape, and the parties' various interviews to "provide their version of the incident to whomever will listen". R.180; A.19. The Order also concluded Post-Newsweek filed its Public Records Lawsuit "after earlier requests for release of records under the Florida Public Records Act were not complied with". R.180; A.19.

Additionally, the trial court declined to determine

[10] A copy is included in the Appendix to Post-Newsweek's Consolidated Answer Brief filed with the Third District.

whether any criminal investigation was "active", because the language of Chapter 119 was clear: when the Mayor made his discovery demand, "the State Attorney's Office was **required by law** to provide him with the materials now being sought herein and those materials became subject to release" pursuant to Section 119.011(3)(c)5 ("3c5") (emphasis added). R.182; A.21. According to the court, it was "immaterial" that the State had not yet produced any discovery materials to the defense because 3c5 expressly excludes from the definition of "criminal investigative information" materials "required by law or agency [rule] to be given" to the person arrested. R.182; A.21 (emphasis in original). The Mayor's subsequent discovery demand withdrawal (whose timing the court characterized as "not . . . coincidental") "cannot be used to defeat [Post-Newsweek's] request". R.181-182; A.20-21. The Public Records "requested were in such a posture that their release was mandated". R.182; A.21.

With respect to the Mayor's and the State's fair trial arguments, the trial court acknowledged they had "presented [the court] with extensive written and oral argument . . . and provided . . . caselaw, all of which" the trial court "reviewed

and considered" prior to ruling. R.179; A.18. The court concluded that given the parties' "willingness . . . to try their case in the press", among other things, the Records' disclosure would not "impair[]" the ability of the parties to receive a fair trial in the criminal matter. R.182-183; A.21-22.

The Order then directed the City to release the Records by 4:30 p.m. March 14, and reserved jurisdiction to award Post-Newsweek its fees and costs under the Act. R.183; A.22. The City filed its Notice of Appeal later that day. R.149-157.

Post-Newsweek immediately advised the county court judge of the Order, which had rendered Post-Newsweek's motion for access in the Criminal Case moot. See "Suggestion of Mootness Regarding Post-Newsweek's Motion For Access To Public Records" served March 12, 2001.[11] On March 13 the county court, not believing the issue to be moot but acknowledging the Order "has been noticed for appeal", deferred ruling on Post-Newsweek's motion for access and the Mayor's request for an

[11] See also the State's "Emergency Motion To Intervene And Motion For Stay Of Trial Court Order Pending Appellate Review" at 3, n.2, filed with the Third District Court of Appeal on or about March 14, 2001.

evidentiary hearing and in-camera inspection. See "Order On Post-Newsweek's Emergency Motion To Intervene And For Access To Public Records And Suggestion Of Mootness" at 1 and 4.[12]

On March 13, the Mayor and the State each asked the trial court to stay its order pending appellate review (R.158-161, 162-167), repeating the same arguments each had made several times previously and the court had rejected. The trial court denied those motions the following morning. R.177. The Mayor, characterizing himself as an "intervenor", filed a Notice of Appeal. R.168. The Mayor and State then turned to the Third District Court of Appeal for a stay, which it denied on the authority of Section 119.011(3)(c)5. A.24.

While the State's and Mayor's requests for a stay before this Court were pending, the trial court's deadline for the City to produce the Public Records passed. Despite the Order and the absence of any stay, the City continued to refuse to produce the Records. It finally released them at 6:00 p.m. March 14, one and one-half hours after the court-ordered deadline and 45 minutes after the Third District's order

[12] A copy appears as "Exhibit A" to "Motion Of Mayor Carollo To Intervene" filed with the Third District Court of Appeal on or about March 14, 2001.

refusing to block the Records' release. Once the City finally complied with the Order, various news organizations, including Post-Newsweek, published the Records' contents.

The City, State and Mayor timely filed their notices of appeal. On October 9, 2002, the Third District issued a 2-1 panel decision reversing the trial court's grant of a writ of mandamus under Chapter 119, Florida Statutes (the "Decision"). A.3-16. Post-Newsweek timely moved for rehearing, rehearing *en banc*, and/or certification of questions as being of great public importance, certification of the panel decision as expressly affecting a class of constitutional or state officers, and certification of the panel decision as expressly and directly conflicting with decisions of other district courts of appeal and of this Court on the same question of law. Among the various types of relief requested in that motion, Post-Newsweek asked the Third District to certify the following questions as questions of great public importance:

1. Does criminal investigative or intelligence information lose its exempt status under Section 119.011(3)(c)5, Fla. Stat., only when it is actually given in discovery to the person arrested?

2. May a criminal defendant control the public's access to otherwise non-exempt

> discovery material by withdrawing his election to participate in discovery?

On February 26, 2003, the Third District denied Post-Newsweek's motion, but 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 [R]ule 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?

A.12. Post-Newsweek timely filed its notice to invoke this Court's discretionary jurisdiction. This Court subsequently postponed its decision on jurisdiction but directed Post-Newsweek to serve its initial brief on the merits by May 19, 2003.

SUMMARY OF ARGUMENT

This Court should answer the certified question by holding criminal investigative or intelligence information ceases to be exempt the moment a criminal defendant serves and files his discovery notice, thus invoking his right to participate in discovery under Rule 3.220 of the Florida Rules of Criminal Procedure, irrespective of whether the defendant later may withdraw that discovery notice. In clear and unambiguous language the Public Records Act identifies two alternative avenues by which criminal discovery material becomes available for public inspection and copying: either it is given – or "required by law" to be given – to the defendant. The moment a defendant elects to participate in discovery, the state is under compulsion of law to produce the material to the defense. While Rule 3.220 permits a defendant to withdraw his discovery notice under certain circumstances, that withdrawal can have no effect on the public's right of access. Answering the certified question in the manner Post-Newsweek urges here is consistent with accepted rules of statutory construction and furthers the Act's overarching policy in favor of disclosure. Such a response also is consistent with this Court's prior

holdings and would avoid a constitutional clash between the courts and legislative branch.

ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION BY HOLDING CRIMINAL DISCOVERY MATERIAL CEASES TO BE EXEMPT AS CRIMINAL INVESTIGATIVE OR INTELLIGENCE INFORMATION THE MOMENT A CRIMINAL DEFENDANT INVOKES HIS DISCOVERY RIGHTS UNDER RULE 3.220 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE, IRRESPECTIVE OF WHETHER THE DEFENDANT SUBSEQUENTLY WITHDRAWS HIS DISCOVERY NOTICE.

A. Once A Criminal Defendant Serves And Files His Discovery Notice Pursuant To Rule 3.220 Of The Florida Rules Of Criminal Procedure, Criminal Discovery Material Ceases To Be Exempt As Criminal Investigative Or Intelligence Information Under Section 119.011(3)(c)(5), Fla. Stat.

Once a criminal defendant invokes his right to participate in discovery by serving and filing his discovery notice, the state is under compulsion of law to provide the defendant with the material Rule 3.220 identifies. Fla. R. Crim. P. 3.220(b). As described more fully below, that singular act renders such previously exempt criminal discovery material immediately available for public inspection and copying under Chapter 119.

1. The defendant's discovery notice triggers the state attorney's legal obligation to produce <u>its discovery material to the defense.</u>

In clear and unambiguous language, the Act describes the circumstances under which criminal investigative[13] information (all public record,[14] yet usually exempt from disclosure under Section 119.07(3)(b), Florida Statutes) is **not** exempt and must be disclosed:

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

Section 119.011(3)(c)5, Fla. Stat. (2003) (emphasis added).

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[13] In refusing to produce the Public Records at issue here, the City relied only on the "investigative" aspect of Section 119.07(3)(b). The analysis would be identical, however, were the information to have constituted "criminal intelligence information". <u>See</u> Section 119.011(3)(c), Fla. Stat. (2003).

[14] To the extent the certified question, in inquiring whether "the materials and documents so requested [are] subject to a Public Record[s] request", somehow suggests the materials in question are not "public records" as Chapter 119 defines them, then the certified question is in error. Clearly, all documents or other materials "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency" are "public records" under the Act, Section 119.011(1), Fla. Stat. (2003), and thus "subject to a Public Record[s] request". The only issue is whether such records are exempt and thus unavailable for public inspection.

Under that section, criminal investigative information can lose that label – and thus its exempt status – in one of two ways: either it is "given" to the defendant or it is "required by law"[15] to be given to the defendant.

Under Rule 3.220, the service and filing of a "Notice of Discovery" constitute a defendant's "elect[ion] to participate" in the criminal discovery process, and "bind[s] both the prosecution and defendant to all discovery procedures contained in" the Rules. Fla. R. Crim. P. 3.220(a). The language of the Rule is mandatory: within 15 days "the prosecutor **shall** serve a written Discovery Exhibit which **shall** disclose to the defendant" certain enumerated information. Fla. R. Crim. P. 3.220(b)(1) (emphasis added). The defendant incurs a reciprocal obligation, and, within 15 days of receiving the state's discovery disclosures, "**shall**" provide the state with certain enumerated information. Fla. R. Crim. P. 3.220(d)(1)(emphasis added).

Here, on the same day the Mayor's counsel entered his written appearance, not-guilty plea and request for additional time to file defensive motions, he also filed a separate

[15] The "agency rule" language is not at issue here.

Discovery Notice. R.116, 180; A.27-28. Thus, as the trial court correctly concluded, the Mayor's Discovery Notice triggered the State's obligation under the Rule to produce all materials in its custody, which would have included the Injury Photo and the Statement.[16] R.181-182; A.20-21. In the Discovery Notice the Mayor himself acknowledged this obligation by asking for "all information **required** to be disclosed" (emphasis added). A.27. As of February 27 (the date the Mayor filed his Discovery Notice after serving it on the prosecution the previous day), the State here was under compulsion of the criminal discovery rules to produce the information, regardless of the 15 days it had in which to do so or that it might have sought a protective order with respect to any or all of the information. The State could have produced the records immediately upon receipt of the Discovery Notice, up to the 15th day thereafter, or at any time in between. In all instances, however, it was under compulsion – that is, "required by law" – to produce them. Certainly, had

[16] It is unclear exactly when the State had the Records physically in hand, although Post-Newsweek contends the State always had the ability to obtain at least copies of the Records from the City at any time. The State did admit below, however, it had obtained the materials sometime "after" Post-Newsweek's public records requests, but did not specify when. R.104-105.

the State hinted to the defense prior to the expiration of the 15-day period that it may refuse to produce any of the materials, the Mayor could have moved to compel the State's compliance.

The state's obligation in this regard is analogous to that of a witness subpoenaed to give testimony at a specific date and time. Such person is under coercion of the law to appear at the appointed time unless he obtains an order from the court (or agreement of the subpoenaing party) extending the time or excusing his appearance altogether. No one can dispute that a subpoenaed witness is "required" by law to comply with the subpoena once served with it, regardless that the deadline for compliance may be at some future time.[17] Here, as of the service and filing of the Discovery Notice, the State had a similar legal duty: to produce the material by a date certain unless the defense agreed to an extension or the criminal court issued an

[17] Indeed, such a witness has a duty to appear even if he has filed a motion for protective order. See, for example, Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257, 269 (9th Cir. 1964) (holding, under federal civil rule virtually identical to Florida state rule concerning depositions, a witness has a continuing "duty" to appear unless he obtains on order excusing his appearance); Hepperle v. Johnston, 590 F.2d 609, 613 (5th Cir. 1979).

order preventing or limiting the production. That the State had not yet produced the material directly to the Mayor (and never did because the Mayor withdrew his Notice) did not eliminate the requirement that it do so. R.182; A.21. See also State v. Meggison, 556 So.2d 816 (Fla. 5th DCA 1990)(recognizing "result" of defense discovery demand is to "**require** the State, under Florida Rule of Criminal Procedure 3.220(a), to disclose" the discovery) (emphasis added).

2. A criminal defendant's subsequent withdrawal of his discovery notice has and can have no effect on the public's access to public records.

Once a criminal defendant elects to participate in discovery (as the Mayor did here), the state is obligated to produce the material it has. Fla. R. Crim. P. 3.220. While the defendant certainly may withdraw his discovery notice under the constraints Rule 3.220 imposes, as this Court has recognized in similar contexts the defendant's actions can have **no** effect on the public's access to those public records as a matter of law. To permit a defendant to control the public's right of access runs counter not only to the express language of 3c5 but also to the well-reasoned line of decisions from this Court

rejecting efforts by anyone other than the Legislature to regulate that access.

Nearly 25 years ago this Court held only the Legislature may exempt records from public view. Wait v. Florida Power & Light, Co., 272 So.2d 420, 424 and 425 (Fla. 1979). Five years later this Court expressly rejected the argument that the records' custodian may delay production of public records to afford the records' subject the opportunity to challenge their release. Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984). This Court reasoned then:

> The only challenge permitted by the Act at the time a request for records is made is the assertion of a statutory exemption pursuant to Section 119.07. The person with the power to raise such a challenge is the custodian.[18] The

[18] Since Cannella, this Court has, in limited circumstances and under particular fact patterns, permitted a non-custodian to obtain a protective order with respect to the release of public records. In McCrary, this Court held a criminal defendant may obtain a protective order pursuant to Rule 3.220 to prevent the release of public records only if he produces evidence to satisfy the test this Court identified in Miami Herald Publishing Co. v. Lewis. Florida Freedom Newspapers v. McCrary, 520 So.2d 32, 35 (Fla. 1988)(citing Lewis, 426 So.2d 1, 6(Fla. 1982)). In so holding, this Court recognized the Lewis test strikes the proper balance between the public's statutory right of access and a defendant's fair trial and due process rights. Id. at 36. In Post-Newsweek Stations Florida, Inc. v. Doe, this Court held a non-party witness claiming a right to privacy in criminal discovery

> employee [the records' subject there] therefore has no statutory right at the time a request for inspection is made. When the records are on the table the purpose of the Act would be frustrated if, every time a member of the public reaches for a record, he or she is subjected to the possibility that someone will attempt to take it off the table through a court challenge.

Cannella, 458 So.2d at 1078-1079. The following year this Court reiterated the Legislature's exclusive role in regulating access to public records, City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 219-220 (Fla. 1985), a point echoed more recently in Post-Newsweek Stations Florida, Inc. v. Doe, 612 So.2d 549, 553 (Fla. 1992) ("recogniz[ing]" and reiterating principle that "this state's open government policy requires that information be available for public inspection

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material may obtain a protective order if he satisfies the evidentiary test this Court identified in Barron v. Florida Freedom Newspapers, Inc. Doe, 612 So.2d 549, 552 (Fla. 1992) (citing Barron, 531 So.2d 113, 118 (Fla. 1988)). And, in Times Publishing Company v. A.J., this Court held that in the unique circumstances presented by the exemption for child abuse records and the overwhelming state interest in protecting minor victims, such records' minor subjects have standing to assert the exemption to disclosure. A.J., 626 So.2d 1314, 1315-16 and n.1 (Fla. 1993) (reiterating limited nature of Court's holding, noting "unique problem" of child abuse investigations) (answering certified question by finding minor children can assert statutory exemption to non-disclosure provided subject is member of class statute designed to protect).

unless the information fits under a legislatively created exemption") (emphasis added).

Here, the State – and particularly the Mayor[19] – took exception to the trial court's informed rejection of the Mayor's withdrawal of his Discovery Notice here for what it clearly was: a not-so-veiled but misguided attempt to defeat the public's right of access to public records. R.181-182; A.20-21. Undoubtedly, the Mayor would not have withdrawn the Discovery Notice had he not believed the Notice had the very effect he so desperately sought to avoid – to make available for public inspection under Chapter 119 the photo of the injuries he inflicted on his wife and her statement about it to police. The proper avenue for him or any criminal defendant was to have produced the evidence McCrary requires, a burden the Mayor wholly failed to meet. McCrary, 520 So.2d at 35.

Were this Court to find a criminal defendant could prevent the disclosure of public records by withdrawing his discovery notice before receipt of the material, then this Court would, albeit unwittingly, undertake a legislative function by

[19] The City only noted that the Mayor withdrew the Notice and thus the Records allegedly remained exempt from disclosure.

creating an exemption to access – for discovery notice withdrawals – when the Legislature has chosen not to do so. Such a finding not only would constitute a radical departure from this Court's prior holdings, but also would create an impermissible conflict between the Act and the constitutional authority of the courts. See McCrary, 520 So.2d at 34-35 (holding "when correctly interpreted and applied, there is no conflict" between statute and constitutional authority of courts).

B. Holding Criminal Discovery Material Loses Its Exempt Status Upon A Defendant's Discovery Demand Is Consistent With The Plain Language Of The Act.

It is axiomatic a court must give a statute's language its "plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature." Green v. State, 604 So.2d 471, 473 (Fla. 1992) (citation omitted). If necessary, a court may refer to a dictionary to ascertain the "plain and ordinary meaning" of a word. Id. A court also must presume that lawmakers knew the meaning of the words they chose and expressed their intent by the words they selected. Aetna Casualty & Surety Company v. Huntington National Bank, 609 So.2d 1315, 1317 (Fla. 1992). A court also must presume legislatures

"'do not enact purposeless and therefore useless, [sic] legislation'". Henderson v. State, 745 So.2d 319, 326 (Fla. 1999) (citation omitted).

Here, the Legislature chose two avenues by which a public record otherwise exempt from disclosure as criminal investigative information is subject to the mandatory inspection requirements of the Act: one, the state gives the record to the defendant, or, two, the state is **required** (either by law or agency rule) to do so. Section 119.011(3)(c)5, Fla. Stat. (2003). While the Legislature did not define the phrase "required by law", its intent – as evidenced in the opening phrases of the Public Records Act – is clear. Florida has an unyielding commitment to government in the sunshine: "it is the policy of this state that all state, county, and municipal records **shall** be open for personal inspection by any person." Section 119.01(1), Fla. Stat. (2003) (emphasis added). See also Art. I, Sec. 24, Fla. Const. ("[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state . . . .").

Post-Newsweek is aware of only one reported state court

decision discussing the phrase "required by law" at any length, albeit in a different context. At issue in the Colorado Court of Appeals' opinion in Rios v. Mireles was whether, under the state's garnishment statute, attorney's fees and costs were "required by law to be withheld" and thus deducted from any earnings prior to garnishment. Rios v. Mireles, 937 P.2d 840, 842 (Colo. Ct. of App. 1996). As here, the statute at issue did not define the phrase "required by law". Rios, 937 P.2d at 842. The court looked to the "plain language" and noted that "[r]equire" in its ordinary meaning means "to order or compel". Id., citing *Black's Law Dictionary.* The court there concluded that "required by law", then, means "some kind of direction imposed by the law". Rios, 937 P.2d at 843.

Here, the "direction imposed by the law" is that found in Florida's criminal discovery rules. Once a defendant elects to participate in discovery – as the Mayor did here – the rules (that is, the "law") command (that is, "require") the state to produce the material to the defense. There is no temporal restriction; the legal duty exists whether the act to be performed must be done only by some future date.

Had the Legislature intended that criminal

investigative information remain exempt from disclosure only upon the defendant's actual receipt of the material, it would have said so, excluding from the definition of criminal investigative information only material "given to the person arrested", **not** material "given . . . or required by law" to be given to him. By connecting the two avenues with the disjunctive "or" the Legislature made clear its intent that **either** scenario results in making the record available for public inspection. See Henderson, 745 So.2d at 326 (finding Legislature presumed not to enact "'useless'" legislation) (citation omitted). Any other reading would permit a criminal defendant to manipulate the disclosure provisions of the Act to his own perceived advantage, a tactic the Mayor attempted unsuccessfully here. R.181-182; A.20-21. If the section were read, as the panel below believed, to demand actual transfer of the materials to the defense, then, in addition to withdrawing his demand outright, the defendant could delay picking up the documents or refuse to accept them altogether (hoping to obtain the same information through other means) to control the timing of public inspection. In those circumstances the defense also would obtain a de facto 'protective order' without ever having

to satisfy its evidentiary burden under McCrary. Such a reading is contrary to the clear and unwavering policy underlying the Public Records Act that the records of this state be readily available to any member of the public on request. Section 119.011(1), Fla. Stat. (2003); Art. I, Sec. 24, Fla. Const. See also Cannella, 458 So.2d at 1078. The Third District's refusal – on the authority of 3c5 – to grant the Mayor's and State's requests to block the Records' release inherently recognized this principle. See March 14, 2001, Order of Third District Court of Appeal (holding "[t]he Emergency Motions for Stay . . . filed by said intervenors are hereby denied. See Section 119.011(3)(c)(5), Florida Statutes (2000)."). A.24.

C. Holding Criminal Discovery Material Loses Its Exempt Status Upon A Defendant's Discovery Notice Is Consistent With The Relevant Legislative History Of 3c5.

The legislative history from the time the Legislature added the criminal investigative and intelligence information exemption[20] to Chapter 119 sheds no light on this issue. However, a subsequent amendment in 1988 illustrates how the Legislature chose not to eliminate the "required by law" route to inspection when given the opportunity to do so, apparently believing no explanation or clarification of the section's language was necessary. At that time, law enforcement led a concerted push to broaden the exemption for criminal investigative and intelligence information, principally by deleting paragraph 5 of Section 119.011(3)©). The state house and senate each proposed changes to delete that paragraph, excluding from the definition of criminal investigative or

[20] The Legislature added the exemption in response to this Court's 1979 opinion in Wait. Before Wait, law enforcement records were confidential not by statute but by virtue of the common law 'police secrets rule'. After Wait, for such records to remain confidential, the Legislature had to amend the Public Records Act to include it. Id. See, for example, Senate Staff Analysis & Economic Impact Statement, SB 1316 and HB 1531. A.31-34.

intelligence information documents given or required to be given to the person arrested, thereby broadening the exemption to disclosure. See Senate and House Staff Analyses & Economic Impact Statements regarding CS/HB 650 and SB 654. A.35-58. Then-Brevard County State Attorney Norman Wolfinger supported the proposed change to, in his view, encourage public cooperation with law enforcement. Submission of Brevard State Attorney included in House of Representatives Committee on Governmental Operations Staff Analysis & Economic Impact Statement for CS/HB 650 and Companion Bill SB 654 ("Wolfinger Submission"). A.49-50. Significantly, in defining the "Present State Of The Law" in a written statement supporting the house bill, Wolfinger wrote that a defendant's invocation of his discovery rights under the criminal rules was sufficient for such law enforcement material to lose its exempt status:

> [o]nce the defendant **invokes** his [d]iscovery rights under Rule 3.220, Florida Rules of Criminal Procedure, criminal intelligence or investigative information **ceases to be exempt under the present interpretation** of the Public Record law [sic].

Wolfinger Submission (emphasis added). A.49.

Rather than eliminating the "given or required by law . . .to be given" language, the Legislature kept it. In light

of the existing sentiment to broaden the then-current exemption, had the Legislature believed Wolfinger's interpretation to be an incorrect statement of the statute it had written, presumably it would have taken that opportunity to disabuse him and anyone else of the notion that "given" and "required by law . . . to be given" mean two separate things. Instead, the Legislature merely added language to 3c5 which excludes from public inspection material whose release the court finds would "be defamatory to the good name of a victim or witness" or would impair the state's ability to prosecute a co-defendant. House of Representatives Committee on Governmental Operations Final Staff Analysis & Economic Impact Statement, June 16, 1988. A.35-58. That section survives intact today. See Section 119.011(3)(c)5.a. and b., Fla. Stat. (2003).

Not surprisingly, then, this Court consistently and explicitly has recognized the two-pronged nature of 3c5 and the import of Rule 3.220. For example, in McCrary, this Court held criminal discovery material was:

> not . . . accessible to the public until such time as the information is **given, or required by law . . . to be given**, to the accused. The pretrial **discovery information at issue falls into this latter category of public records, which is available to the press and the public**.

McCrary, 520 So.2d at 34 (emphasis added). A short time later in Doe, this Court wrote:

> [p]ursuant to the statute [Chapter 119], such information 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, § 119.011(3)(c)(5). Rule 3.220 **requires the state to turn over the discovery information** to the defendant.

Doe, 612 So.2d at 551 (emphasis added). Similarly, nowhere in either of the two later opinions from this Court in Henderson v. State did the Court hold the only avenue for public inspection of otherwise exempt criminal investigative information is after the state delivers the material to the defense. See Henderson v. State, 745 So.2d 319 (Fla. 1999) ("Henderson I"), and Henderson v. State, 763 So.2d 274 (Fla. 2000) ("Henderson II").[21]

As far as Post-Newsweek is aware, no one has litigated the meaning of 3c5 before now, perhaps because the matter is self-evident. However, Post-Newsweek is aware of at least two

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[21] In Henderson I, the defendant had attempted to avoid reciprocal discovery by making a public records request for material made non-exempt by his co-defendant's election to participate in discovery under Rule 3.220. This Court said the defendant's doing so constituted an election on his own behalf to participate in discovery. Henderson I, 745 So.2d at 326-327. This Court then amended the Rule to eliminate that apparent loophole. Henderson II.

reported decisions whose text indicates the courts and parties there apparently proceeded as if the discovery demand itself did, as the statute's language makes clear, render the records at issue available for public inspection. In Cerabino v. Bludworth, 18 Med.L.Rptr. 1687 (Fla. 15th Jud. Cir., November 30, 1990), although the defense had not obtained the discovery material at issue but was entitled to it, the court assessed attorneys' fees under the Act against the county sheriff for his wrongful refusal to permit public inspection of that material. And in McCrary, the text of this Court's opinion suggests that although the defendants there had invoked discovery under Rule 3.220, the state had not yet produced it to them as of the time their motions to block public access arose. See McCrary, 520 So.2d at 33 (reciting that defendants sought orders, among other things, "preventing public disclosure of certain pretrial discovery information which **was to be furnished to** the two defendants by the state attorney's office under Florida Rule of Criminal Procedure 3.220") (emphasis added).

None of the reported decisions relied upon below by proponents of the so-called delivery rule stands for the proposition the public may inspect discovery material **only** after

the defense receives it in discovery. Indeed, in those cases the state already had delivered the discovery material at issue to the defense. See Satz v. Blankenship, 407 So.2d 396, 397 (Fla. 4th DCA 1981) (state had produced tape recording at issue to defense in discovery) (affirming trial court order directing disclosure of tape); Bludworth v. Palm Beach Newspapers, 476 So.2d 775 (Fla. 4th DCA 1985) (state had produced records at issue to defense in discovery) (affirming trial court order requiring public access under Act); WESH Television v. Freeman, 691 So.2d 532(Fla. 5th DCA 1997) (state had produced undercover tapes to defendant in discovery) (quashing order denying public access and remanding for hearing in conformance with this Court's opinions in McCrary and Miami Herald Publishing Co. v. Lewis).

D. Holding Criminal Discovery Material Loses Its Exempt Status Upon A Defendant's Discovery Notice Is Consistent With the Act's Policy Of Favoring Access.

Answering the certified question by finding criminal discovery material loses its exempt status upon a defendant's discovery notice regardless of any subsequent withdrawal is consistent with not only the letter but also the spirit of the Public Records Act. R.178-184; A.17-23. Time and again Florida

has demonstrated its unyielding commitment to conducting the public's business in the open, recognizing a presumptive right of access to court proceedings and records,[22] permitting electronic media coverage of judicial proceedings,[23] requiring meetings of public officials to be held in the open,[24] and allowing public inspection on demand of public records.[25] The Act's text expressly sanctions this commitment:

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

Section 119.01(1), Fla. Stat. (2003) (emphasis added). The Legislature has an exclusive role in regulating access to public records, and has set the tone for agencies and the courts by attempting to ensure the broadest possible public access. The Legislature has defined what constitutes a "public record", and

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[22] Lewis, 426 So.2d 1; Barron, 531 So.2d 113.

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

[24] Section 286.011, Fla. Stat. (2003).

[25] Chapter 119, Fla. Stat. (2003).

has chosen the most inclusive definition. See Section 119.011(1), Fla. Stat. (2003). The Legislature also has identified those limited circumstances under which members of the public may not see those records -- more than two dozen categories of excluded documents, all of which are "public records" but for policy reasons the Legislature has determined the custodian may withhold from public inspection. The categories are those either specifically enumerated in Chapter 119 itself or other general or special law the Act incorporates by reference. Section 119.07(2)(a), Fla. Stat. (2003). The **only** permissible exemptions are those the Legislature creates. Wait, 372 So.2d at 424. Even when a court believes it is serving some salutary policy in limiting access to public records by, for example, trying to protect privileged information, this Court has emphasized that, however well meaning, it cannot. City of North Miami, 468 So.2d at 219-220.

The policy of openness is a salutary one. An agency's or public official's documents are the permanent record of a government's activity, the means through which citizens can learn of their government's conduct and hold their officials accountable. Access lends credibility to the judicial system,

assuring participants and observers alike the government does not espouse one position in public while taking a contrary position in secret. And, in the battery prosecution against the Mayor in particular, access allowed the public to learn what the City did to investigate the altercation, why the State chose to bring charges against this public official, whether there was a proper basis for doing so, and what evidence – including that provided by the Mayor's wife herself – the State had amassed against him.

Like the trial court's Order below, answering the certified question in the manner Post-Newsweek urges here also is consistent with the well-established principle that courts must construe the Act liberally in favor of access, while narrowly construing any exemptions to disclosure. See, for example, Bludworth, 476 So.2d at 779; Miami Herald Publishing Co. v. City of North Miami, 452 So.2d 572, 573 (Fla. 3d DCA 1984). Answering the certified question in the manner suggested by the panel Decision below effectively broadens the reach of the criminal investigative information exemption far beyond the limits the Legislature set. Further, notwithstanding the very clear text of 3c5, were this Court to entertain any doubt as to

the status of such records upon a defendant's election to participate in discovery, then it must err in favor of access, not secrecy. Section 119.01(1), Fla. Stat. (2003); Art. I., Sec. 24, Fla. Const.; see also Downs v. Austin, 522 So.2d 931, 933 (Fla. 1st DCA 1988), quoting Bludworth, 476 So.2d at 780 n. 1.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question by holding that criminal investigative or intelligence information loses its exempt status when a criminal defendant invokes his discovery rights under Rule 3.220, irrespective of whether the defendant may subsequently withdraw his discovery demand.

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CERTIFICATE OF COMPLIANCE

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

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