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 REPLY BRIEF ON THE MERITS

MITRANI, RYNOR, ADAMSKY &
MACAULAY, P.A.
Karen Williams Kammer, P.A.
Fla. Bar No. 771200
2200 SunTrust Int'l Center
Miami, Florida 33131
305/358-0050
305/358-0550 (facsimile)
Attorneys for Petitioner Post-Newsweek
Stations Florida, Inc., d/b/a WPLG Channel 10

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SUMMARY OF ARGUMENT

The prosecution is under compulsion of law to provide the defense with discovery the very moment the defendant serves and files his discovery notice, irrespective of whether the defendant wishes to object to public disclosure or later withdraw his discovery notice. Thus, at the instant the defense invokes its discovery rights, otherwise exempt criminal discovery material ceases to be exempt under Chapter 119 and becomes available for public inspection. A criminal defendant is not entitled to an automatic delay in the records' public release to permit him to object. A defendant concerned about alleged trial prejudice should move for a protective order prophylactically under Florida Freedom Newspapers v. McCrary prior to invoking his discovery rights. While a defendant is entitled to withdraw his discovery notice, that withdrawal has no effect on the public's access to criminal discovery material under Chapter 119. 'Deferring' disputes over requests for criminal discovery material under Chapter 119 to the court hearing the pending criminal matter not only would improperly limit the public's right of access, but also run counter to the Act's text, legislative history and underlying policy.

ARGUMENT[1]

I. THE STATE IS UNDER COMPULSION OF LAW TO PROVIDE THE DEFENSE WITH DISCOVERY THE MOMENT THE DEFENDANT SERVES AND FILES HIS DISCOVERY NOTICE, IRRESPECTIVE OF WHETHER THE DEFENDANT MAY WISH TO OBJECT TO PUBLIC DISCLOSURE OR LATER WITHDRAW HIS DISCOVERY NOTICE.

Despite the clear language of Chapter 119 and the prior rulings of this Court, Respondents persist in arguing that persons asking to inspect public records[2] must wait until the defendant actually receives them.

[1] The Mayor unfairly criticizes Post-Newsweek's statement of facts. Mayor's Brief at 1-2. With all due respect to the Majority panel below whose factual summary the Mayor claims to have adopted here, the Mayor's truncated version is far from a full and fair representation of the record. In contrast, Post-Newsweek's statement of facts in its Initial Brief is a complete and accurate recitation. Post-Newsweek commends the entire record below to this Court.

[2] Respondents err repeatedly by calling the records at issue here – documents in the custody of the Miami Police Department – not "public records". State's Brief at 17-18; Mayor's Brief at 5, 8, 10, 14. However, the Injury Photo and Statement fall squarely within the definition of "public records" under the Act. Section 119.011(1), Fla. Stat. The City is an "agency", Section 119.011(2), Fla. Stat., and the Injury Photo and Statement are documents received in connection with the transaction of official agency business, specifically, the business of the Miami Police Department in investigating the altercation between the Mayor and his wife. The only question is whether such records are available for public inspection. Respondents' imprecision, while presumably inadvertent, is nevertheless misleading.

Without any textual or historical support, Respondents suggest that under Section 119.011(3)(c)(5) (“3c5") the state is not “required” to provide the defense with discovery until the expiration of the 15-day period under Rule 3.220 because the defendant has “no enforceable” discovery right until then. Thus, they reason, criminal investigative or intelligence information remains exempt until such time. State’s Brief at 13-16. While the state may avail itself of the full 15 days before actually giving the material to the defense (and Post-Newsweek never has contended otherwise), the state nevertheless comes under compulsion of law – is “required by law” – to provide the defendant with discovery at the moment the defendant invokes that right, just as a subpoenaed witness is “required” to appear once subpoenaed and U.S. citizens are “required” to pay income taxes once earning above a certain threshold. All are “required” to perform the act or acts the law prescribes, regardless that the deadline for such performance may be at a future point in time. The restrictive reading of the word “required” Respondents urge here is a strained one, and is inconsistent with its plain meaning, the Act’s legislative history and this state’s overarching policy in favor of the

broadest access possible. See Initial Brief at 24-36.[3]

Nevertheless, Respondents argue the 15-day window allows the defendant to object to the records' release. City's Brief at 13; State's Brief at 18; Mayor's Brief. This Court rejected that argument long ago and there is no reasoned basis to revisit that issue. Tribune Co. v. Cannella, 458 So.2d 1075, 1078 (Fla. 1984)(holding delay to allow subject of record to object is "inconsistent with the Act, which contemplates only the reasonable custodial delay necessary to retrieve a record and review and excise exempt material"). The Act also does not require the records' subject be "given actual notice of [the public's] attempt to enforce its public records request", as

[3] The City's reliance on this Court's opinion in State v. Buenoano (City's Brief at 17-18) is misplaced. There the federal government had loaned the criminal discovery at issue to the state attorney's office on the condition the state keep it confidential. The prosecutor inadvertently disclosed the material to the defense. This Court held the federal confidentiality agreement controlled public disclosure, and thus state law could not override it. Buenoano,707 So.2d 714, 718 (Fla. 1998). The Court also found that although the documents were not available through Florida's Public Records Act, they nevertheless were available from the federal government under the Freedom of Information Act. Buenoano,707 So.2d at 718 (holding ruling "facilitates the exchange of important information between federal and state law enforcement agencies, while in no way interfering with the media's access to public documents").

Respondents contend. Id.; State's Brief at 19, n.4. Indeed, here it is disingenuous for any Respondent to suggest this particular criminal defendant did not know of the public records requests for the police photograph of his wife's injury and her statement about it to police.

There certainly is nothing to prohibit any criminal defendant from moving for a protective order prior to serving and filing his discovery notice to preserve any asserted objections to public disclosure he may have. The defendant thus has an opportunity before the discovery material becomes non-exempt to produce the evidence this Court previously has identified for keeping such material from public view (a burden the record shows the Mayor wholly failed to meet here). Florida Freedom Newspapers v. McCrary, 520 So.2d 32, 35 (Fla. 1988), citing Miami Herald Pub. Co. v. Lewis, 426 So.2d 1,7-8 (Fla. 1982).

Respondents also contend the 15-day window allows a defendant to change his mind, withdraw his discovery notice, and thus somehow ensure criminal discovery material remains exempt. Mayor's Brief; State's Brief at 20; City's Brief at 14. Their repeated assertion withdrawal relieves the state of any

discovery obligation under Rule 3.220 and thus criminal discovery material remains exempt is fundamentally flawed. Mayor's Brief; City's Brief at 13-14. While such a withdrawal may relieve the parties of their reciprocal discovery obligations, it nevertheless has no effect on the public's right of access under Chapter 119. As described more fully in Post-Newsweek's Initial Brief, the discovery notice triggers the parties' reciprocal discovery obligations and thus the material becomes available pursuant to 3c5 at that moment for any person to inspect and copy upon request. See Initial Brief at 16-24. To borrow the words of this Court in Cannella, the discovery notice places the records "on the table". Cannella, 458 So.2d at 1078-79. Once there, the defendant cannot push them off by withdrawing his notice. Id. Respondents' assertion the criminal court-approved withdrawal nullifies the original discovery demand (City's Brief at 13) thus clearly misses the point.

A criminal defendant may obtain the state's records by invoking his discovery rights under the Rules; that is his choice. He also later may opt to change his mind by withdrawing the discovery notice. As the record reflects, Post-Newsweek has

never claimed otherwise. The exercise of that choice, however, can have no effect on the public's right of access, beyond the Legislature's determination that electing to participate in discovery in the first instance renders otherwise exempt criminal discovery material non-exempt and thus available to the public. At the time of Post-Newsweek's pending[4] public records request, the State **was** obligated – that is, "required" – to produce the material, regardless of what may have happened later.

The analogy to a witness subpoena is an apt one, the State's disagreement notwithstanding. State's Brief at 20-21. The State equates the discovery notice withdrawal with a protective order relieving a subpoenaed witness from the obligation to testify. Id. Yet, what the State chooses to ignore is that at the time the witness is subpoenaed, he **is** under compulsion of the court to appear at the appointed time; that the court later may relieve him of that obligation is of no

[4] The State incorrectly claims that February 27, 2001, is "the date Post Newsweek [sic] requested" the Public Records. The record affirmatively establishes Post-Newsweek began making repeated public records requests for the material nearly three weeks earlier. February 27 was merely the latest among the station's repeated requests. See Initial Brief at 2-3.

moment. The prosecution is under a similar compulsion at the moment of service and filing of the defendant's discovery notice – to provide the defense with discovery – regardless that it later may be relieved of its duty.

The City claims this Court has suggested in the past the phrase "required by law" should be limited to the type of exculpatory or impeachment material discussed in Brady v. Maryland, 373 U.S. 83 (1963). City's Brief at 11-12, citing Henderson v, State, 745 So.2d 319 (Fla. 1999) ("Henderson I"). Yet the City misreads Henderson. Rather than "characterize 'required . . . to be given' as material that is exculpatory or information negating guilt under *Brady*; [sic] or material that is actually given to the defendant" (City's Brief at 11-12), this Court actually wrote:

> [A] criminal defendant has access to this information if he or she is **due such material** under *Brady v. Maryland* . . .**or participates in discovery**.

Henderson I, 745 So.2d at 326, n.8 (emphasis added) (citation omitted). Clearly, then, this Court has recognized the state's Brady obligation may be but one method in which criminal discovery material is "required by law" to be given to the defense. Significantly, it also recognized a defendant's

"**participat[ion]** in discovery"[5] – that is, by serving and filing a discovery notice – is another.[6]

In arguing for a restrictive reading of 3c5 Respondents characterize the pertinent legislative history Post-Newsweek proffered to this Court as "irrelevant". State's Brief at 27. On the contrary, such history – coming from a time when the overwhelming sentiment was to broaden the then-current exemption for criminal investigative or intelligence information – unmistakably illustrates the two-pronged nature of 3c5,

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[5] Rule 3.220(a) provides a defendant's service and filing of a "Notice of Discovery" constitutes his "elect[ion] to **participate**" in the criminal discovery process. Fla. R. Crim. P. 3.220(a) (emphasis added).

[6] Interestingly, the Legislature added the criminal intelligence and investigative exemptions nearly 16 years after Brady in response to this Court's 1979 opinion in Wait v. Florida Power & Light Co. See Wait, 372 So.2d 420, 424 (Fla. 1979). Had the Legislature intended to exclude from the definition of criminal intelligence or investigative information only Brady material and material actually given to the defendant, the Legislature would have said so rather than use the broader phrase "required by law . . . to be given". See Aetna Casualty & Surety Company v. Huntington National Bank, 609 So.2d 1315, 1317 (Fla. 1992) (holding court must presume lawmakers knew meaning of words chosen and expressed their intent by such words); Henderson I, 745 So.2d at 326 (holding court must presume legislatures "'do not enact purposeless and therefore useless, [sic] legislation'")(citation omitted).

specifically that one way in which such material "ceases to be exempt" is "[o]nce the defendant **invokes** his [d]iscovery rights under Rule 3.220". 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 (emphasis added); see Initial Brief at 29-30. Significantly, Respondents have not proffered any contrary history.

It is ludicrous to suggest, as the City does here, that persons seeking access to public records somehow "subvert the rules of discovery[7] to [their] own advantage in disregard of the judicial process" (City's Brief at 13). The City further confuses the issue by arguing non-parties have no discovery rights. City's Brief at 12. Yet, as this Court has made clear repeatedly:

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[7] The City's reliance on McCrary for its contention the discovery rules "are not a device for information gathering by the press" (City's Brief at 12-13) is out of context. In rejecting any entitlement to a constitutional right of access to the discovery at issue in McCrary, this Court merely reiterated the Court's prior holding in Palm Beach Newspapers v. Burk, 504 So.2d 378 (Fla. 1987), that the press and public have **no federal constitutional right** of access to discovery procedures or to the information developed through them. McCrary, 520 So.2d at 36.

> '[W]e do not equate the acquisition of public documents under Chapter 119 with the rights of discovery afforded a litigant by judicially-created rules of procedure. . . .'

Henderson I, 745 So.2d at 323 (rejecting such "strained argument out of hand"), quoting Wait v. Florida Power & Light Co., 372 So.2d 420, 425 (Fla. 1979).[8] Indeed, the right of access under Chapter 119 is no impediment to the defense and prosecution's ability to enjoy reciprocal discovery if they so choose. The reverse is also true.[9]

The State asserts a novel but utterly baseless argument, claiming the public's right of access here is somehow "derived from" the rights of the criminal defendant. State's Brief at 17 - 18. On the contrary, such access is a direct right granted by the Legislature, via Chapter 119, and the electorate of this state, via Art. I, Sec. 24, of the Florida Constitution. Nor is that right dependant upon the acts or whim

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[8] In Wait, the city of New Smyrna tried to rebuff FPL's public records request for the city's records relating to its electrical system by arguing that then-Section 119.07(1), Fla. Stat. (1975) required reciprocal disclosure by FPL.

[9] As this Court has recognized, Chapter 119 and the criminal discovery rules serve separate functions: ensuring open government and facilitating the fair conduct of trials, respectively. Henderson I, 745 So.2d at 324.

of any litigant, save for the legislative determination that when a criminal defendant demands[10] discovery or receives it, such public records no longer constitute criminal investigative or intelligence information and thus lose their exempt status. Contrary to Respondents' unsupported assertions, there is nothing "absurd", "illogical" or unfair about the result here. State's Brief at 18; City's Brief at 14; Mayor's Brief. The trial court's order correctly applied the statutory scheme as it exists and has functioned without difficulty for years. If any Respondent is unhappy with the result, it should seek either a revision of the criminal rules by this Court (as in Henderson) or an amendment to Chapter 119 by this state's Legislature.

II. RESPONDENTS' DEFERENCE ARGUMENT RUNS COUNTER TO THE ACT AND ITS UNDERLYING POLICY.

The Mayor, as well as the Majority below in dictum, suggests the circuit court hearing Post-Newsweek's mandamus action should have "deferred [sic] the matter to" the court hearing the criminal case. Mayor's Brief at 8, n.5. The Mayor claims the circuit court somehow "interfere[d]" with the

[10] Or is "required by law" in some other fashion as with Brady material. See pages 7-8.

criminal case by entertaining Post-Newsweek's mandamus action and ordering the City to release the public records in its custody. Id. Aside from the obvious difficulty that the criminal court here happened to be a forum (county court) without jurisdiction to entertain a mandamus action,[11] the Mayor's proposed 'rule' is fundamentally flawed. It would result in a radical abridgement of the public's ability to enforce compliance with the Act. This Court never has adopted such a position and should not do so now.

Such a proposal finds no support in the Act's text, legislative history or underlying policy. First, the Act expressly permits any member of the public to bring an original "civil" action to "enforce [its] provisions", and neither

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[11] See Art. V, Sec. 5, Fla. Const.; Section 26.012, Fla. Stat. See, for example, Mills v. Doyle, 407 So.2d 348, 350 (Fla. 4th DCA 1981) (holding mandamus is "appropriate vehicle to remedy" custodian's refusal to disclose public records) (affirming issuance of writ). Although mandamus is one means to enforce compliance with the Act, it is by no means the only one. Actions to enforce the public's right of access under the Act can be styled simply as an action to enforce Chapter 119. Therefore, even had Post-Newsweek not styled the complaint initially as seeking mandamus relief, the suit was still cognizable in circuit court. See Sections 34.01 and 26.012, Fla. Stat. Post-Newsweek filed suit in the forum having jurisdiction over the agency with custody of the records at issue and with jurisdiction to grant the relief requested.

prescribes nor limits the choice of forum for relief. See Sections 119.11(4) and 119.11(1), Fla. Stat. That means nothing prevented Post-Newsweek from seeking the Records at issue here from any and all agencies having custody of them, including the prosecution itself by way of moving to intervene in the criminal action.[12] Likewise, nothing required Post-Newsweek to seek them from one agency as opposed to another.

Second, such a practice of "deferring" disputes over requests for criminal discovery material to the criminal court would abrogate the Act's remedial purposes. Persons seeking access to criminal discovery material from agencies not a party to the criminal prosecution would have no means of enforcing compliance from that agency. The result is a narrowing of access in the face of the legislative and state constitutional

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[12] This Court has held that the press, as a surrogate for the public, has standing to intervene in any civil or criminal action for the purpose of obtaining access to records and proceedings, and for the purpose of opposing efforts to restrict the press's ability to gather and report the news. Florida ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 908 (Fla. 1976); Lewis, 426 So.2d at 4; Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113, 118 (Fla. 1988). Not surprisingly, then, Post-Newsweek, as other members of the press and public, for years have moved to intervene in existing criminal proceedings to compel the state to comply with the Act with respect to public records in its possession.

mandate to the contrary. For example, the county court hearing the criminal matter here could not order the City, an entity not before it and over whom it had no jurisdiction, to produce the Records in the City's custody. Nor could it **prohibit** the City from producing those Records. Had the criminal court judge timely held a hearing and denied Post-Newsweek's motion to compel the State to produce the Records, such an order would have had no effect on the City's obligation to comply with its statutory duty under the Act. There was nothing improper or unlawful about seeking the records from two different custodians. Respondents' proposed rule of deference would have prevented Post-Newsweek from enforcing its rights against the only custodian (the City) admitting to having custody of the Injury Photo and Statement.

Finally, such a rule of deference is wholly unnecessary. If the concern is alleged trial prejudice or inclusion of the defendant in the process, then the remedy is a motion for protective order with the appropriate evidentiary showing under McCrary. As noted above, a defendant concerned about such issues should move for a protective order prophylactically before he serves and files his discovery

notice.

CONCLUSION

For the reasons described above and in Post-Newsweek's Initial Brief, Post-Newsweek asks the Court to (i) answer the certified question by holding 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, (ii) quash the 2-1 panel decision of the Third

District, and (iii) affirm the trial court's order.

MITRANI, RYNOR, ADAMSKY
& MACAULAY, P.A.
Karen Williams Kammer, P.A.
Fla. Bar No. 771200
2200 SunTrust Int'l Center
Miami, Florida 33131
305/358-0050;305/358-0550 (fax)
By: _____
Attorneys for Petitioner Post-Newsweek Stations Florida, Inc.

CERTIFICATE OF SERVICE

I certify a true copy of the foregoing was served by mail this ____ day of July, 2003, on:

Nicole Kanfer, Assistant City Attorney
444 S.W. 2nd Avenue, Suite 945
Miami, Florida 33130
Counsel for Respondent City of Miami

Angelica D. Zayas, State Attorney's Office
1350 N.W. 12th Avenue
Miami, Florida 33136-2111
Counsel for Respondent/Intervenor State of Florida

Benedict P. Kuehne
Sale & Kuehne, P.A.
Bank of America Tower, #3550
100 S.E. 2nd Street
Miami, Florida 33131-2154
Counsel for Respondent/Intervener Mayor Joe Carollo

_____

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.