IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, FLORIDA

RUSSELL LLOYD POST,

Appellant,

Case No.: 5D17-2085
L.T. No.: 2011-DR-001859

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF ON THE MERITS

On Appeal from the Circuit Court, Seventh Judicial Circuit, in and for Marion County, Florida

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PUBLIC DEFENDER

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PRELIMINARY STATEMENT

Appellant, RUSSELL LLOYD POST, the appellant before this court, the Respondent in the injunction hearing, the defendant in the parallel postconviction proceeding, and the contemnor in the trial court, will be referenced in this brief as "Mr. Post" or "Appellant." Appellee, State of Florida, the prosecution authority in the trial court, will be referenced herein as "the State" or "Appellee." The Petitioner, the individual who sought and received a permanent injunction against Mr. Post, will be referenced herein as "Petitioner." References to the record on appeal will be designated by "R." in parentheses followed by the relevant page number. The record consists of one volume of 150 pages.

STATEMENT OF THE CASE

This appeal arises from a trial court's order finding Mr. Post in indirect criminal contempt for violating the terms of an Injunction for Protection Against Sexual Violence. This injunction was sought by the Petitioner against Mr. Post. (R. 1-4). The Petitioner was the victim in a parallel criminal proceeding that eventually led to Mr. Post's incarceration. *State v. Post*, No. 2011-CF-1443 (Fla. Marion Cir. Ct. 2011)

Following his conviction and sentence in the criminal matter, Mr. Post filed a motion before the trial court seeking postconviction relief. (R. 80). In furtherance of that postconviction motion, Mr. Post made a public records request to the

Petitioner's employer, the Marion County Clerk of Court. (R. 80). Following the request, the Clerk of Court denied Mr. Post's request on the sole ground that a permanent injunction was entered against him by the Petitioner that prohibited him from making requests to third-parties associated with the Petitioner, in this case, her employer. (R. 22). Thereafter, the trial court issued an Order to Show Cause to Mr. Post to explain why he should not be held in contempt of court. (R. 34-5). Per this order, counsel was appointed to Mr. Post, and the Office of the State Attorney was appointed to prosecute this matter. (R. 34-5).

A hearing was held and the State presented evidence to support a finding that Mr. Post had violated the terms of the trial court's order by sending this public records request. (R. 62-117). Following a hearing, the trial court issued an order finding Mr. Post guilty of indirect criminal contempt and sentenced him to six months to run concurrent with his current sentence. (R. 45-50). The terms of the injunction, the reason for the public records request, and the evidence presented by the State to support the indirect criminal contempt conviction, are discussed more fully below.

STATEMENT OF THE FACTS

A. Petition for Injunction for Protection against Sexual Violence.

On April 13, 2011, the Petitioner filed a Petition for Injunction for Protection Against Sexual Violence. (R. 1-9). Thereafter, a Temporary Injunction for Protection

Against Sexual Violence was thereafter entered by the trial court. (R. 10-17). On April 26, 2011, a Final Judgment of Injunction for Protection Against Sexual Violence (After Notice) was entered by the trial court (hereinafter "injunction"). (R. 18-21). In the injunction, the trial court ordered the following pertinent limitations regarding the contact between Mr. Post and the Petitioner:

> 2. No Contact. Respondent shall have no contact with the Petitioner unless otherwise provided in this section.
>
> **A.** Unless otherwise provided herein. Respondent shall have no contact with Petitioner. Respondent shall not directly or indirectly contact Petitioner in person, by mail, e-mail, fax, telephone, through another person, or in any other manner. Further, Respondent shall not contact or have any third party contact anyone connected with Petitioner's employment or school to inquire about Petitioner or to send any messages to Petitioner.

(R. 19).

Following the entry of this injunction, Mr. Post had a concurrent criminal proceeding taking place regarding the Petitioner.

On April 19, 2011, Mr. Post was charged with multiple counts of sexual battery, lewd or lascivious battery, and unlawful sexual activity with a minor. *State v. Post*, No. 2011-CF-1443 (Fla. Marion Cir. Ct. 2011). Following a jury trial, on November 19, 2012, Mr. Post was adjudicated guilty of multiple counts of sexual battery. *Id.* Mr. Post received a sixty-year sentence. *Id.*

Following the entry of his conviction and sentence, Mr. Post filed a direct appeal that was *per curiam* affirmed. *Post v. State*, 130 So. 3d 234 (Fla. 5th DCA

2013). On May 5, 2015, Mr. Post filed a motion for postconviction relief before the trial court, and on February 19, 2016 he filed his amended motion for postconviction relief raising several issues. *State v. Post*, No. 2011-CF-1443 (Fla. Marion Cir. Ct. 2011).

B. Public Records Request pursuant to section 119, Florida Statutes and the Clerk of Court's Response.

On February 1, 2017, Mr. Post made a public records request to the Marion County Clerk of Court regarding the Petitioner. (R. 23). The document identified the request was made pursuant to section 119.07, Florida Statutes for "records not exempt from disclosure requirements." (R. 23). The specific records requested were "[t]he employment records of [the Petitioner] including but not limited to: Application hire date, position hired for, any and all positions held since hired, supervisors names in held positions, and any and all references used for hire and since hire. Also any complaints filed." (R. 23). At the bottom of the form, it requested that, "If your agency denies this, please specify the statutory exemptions in your response. § 119.07(1)(d), (e), (f), Fla. Stat." (R. 23).

On February 9, 2017, in response to this public records request, David R. Ellspermann, Clerk of the Circuit Court & Comptroller for Marion County, Florida prepared an affidavit as a basis for denying this public records request. (R. 22). In pertinent part, Mr. Ellspermann averred to the following:

> 2. On February 6, 2017, I received a Public Records Request, pursuant to Chapter 119 of the Florida Statutes, from Russell Post for employment records on a Marion County Clerk employee.
>
> 3. In accordance with Marion County Case Number 2011-1859-DR-FV, however, per the Final Judgment of Injunction, dated April 21, 2011, executed by The Honorable David Eddy, Mr. Post is not only prohibited from having any contact with the employee, but also is prohibited from contacting anyone connected with her employment to inquire about her. I believe that Mr. Post has violated the Final Judgment of Injunction by sending me his Public Records Request about her; and, after consulting with my legal counsel, I am of the opinion that, unless and until the Final Judgment of Injunction is amended in this regard, I am not able to provide Mr. Post with any documentation regarding her in response to this or any other Public Records Requests he might make pertaining to her.

(R. 22).

Mr. Ellspermann also sent a letter to Mr. Post informing him that his office was in receipt of the public records request but he was "unable to fulfill your Request per the Injunction Order dated April 21, 2011 executed by Judge Eddy." (R. 22). Thereafter, the trial court issued an order to show cause regarding Mr. Post's alleged violation of the injunction. (R. 34).

C. Order to Show Cause.

On February 17, 2017, the trial court issued an Order to Show Cause, Order Scheduling Arraignment, Order Appointing State Attorney, and Order Appointing Public Defender (hereinafter "Order"). (R. 34). In the Order, the trial court compelled Mr. Post's attendance to show cause "why you should not be adjudged in indirect criminal contempt of court for violating the Final Judgment of Injunction or

Protection Against Sexual Violence entered by the Court on April 21, 2011[.]" *Id.* As grounds for this violation, the Order stated that Mr. Post "notified Petitioner's employer and made a request for employment records of the Petition in violation of the Injunction by making third-party contact." (R. 35).

D. State's correspondence to trial court following the Order to Show Cause.

Following the trial Court's Order, the State Attorney's Office sent two different letters from two different assistant state attorneys regarding this matter. (R. 44-5). In the first letter, the assistant state attorney stated that Mr. Post's "request is titled a Public Records Request … [and] [t]he request does not seek personal information of the Petitioner[.] … The State would recommend no further action be taken at this time." (R. 45). However, on the same day, another assistant state attorney wrote a letter to the trial court stating, "After further review of the file and the evidence, the State would recommend that the Court issue an Order to show Cause" and to disregard the previously filed letter. (R. 44).

E. Hearing regarding Mr. Post's alleged indirect criminal contempt.

On April 25, 2017, a hearing was held before the trial court to determine whether Mr. Post was in indirect criminal contempt for allegedly violating the Injunction. (R. 62-117). At the hearing, the State called two witnesses in its case-in-chief: Mr. Ellspermann, (R. 66-76), and the Petitioner. (R. 77-8). The Petitioner did

not testify to any substantive issues. For the defense, Mr. Post testified. (R. 78- 96). In rebuttal, the State called Mr. Michael Passche, (R. 97-9), as well as Mr. Michael Ufferman, Esq., Mr. Post's postconviction counsel. (R. 100-4).

(1) Mr. Ellspermann's Testimony

Mr. Ellspermann is currently the Clerk of the Court and Comptroller for Marion County. (R. 66). He receives the public records requests for the Clerk's Office. (R. 66). He received the public records request from Mr. Post. (R. 67). After reviewing Mr. Post's public records request, he denied this request because

> [e]very public records request, particularly from an inmate who asks for information from an employee, raises a flag of caution for myself because we have often defendants fall in love with individuals they come across during the courtroom proceedings and often asked for these records. So I asked staff what relationship does Mr. Post's case have in the court system. And that's when it was determined and pulled the injunction specifically specified the limitations of him on upon contacting the employer.
>
> I wrote an affidavit to the court advising the court what I had received to cover my bases. Then I wrote him a letter saying based on that injunction, I was not going to violate the injunction as an employer.

(71-72).

Mr. Ellspermann admitted there was no indicia within Mr. Post's request suggesting that any messages be conveyed to the Petitioner. (R. 73). Following his testimony, the State called the Petitioner; however, her testimony of identifying Mr. Post was stipulated to by the parties and not substantive to the public records request. (R.77). The defense then called Mr. Post.

(2) Mr. Post's Testimony

Mr. Post admitted to writing and submitting the public record request. (R. 79). He explained the purpose of submitting the request to the trial court as follows:

> [A]the time, we were in the middle of a 3.850 investigation and we had filed a motion prior to trial, for my criminal trial, to recuse the SAO's office based on relationships that have formed between the petitioner and the SAO's office. We had backed it up with Facebook photos, Facebook messages. Further testimony later at trial would come out that this was beforehand.
>
> And after I went to prison, [the Petitioner] was hired inside the clerk's office and we were wondering if there was a certain conflict of interest. So I discussed it with my attorney and I was wondering, by looking at the application, based on references or who hired her, if any of that would have coincided with the prior motion that we had filed before trial and it was simply an investigation; it wasn't in contact – trying to contact. It was just we were trying to dig up – and if it became an issue, then we were going to amend the 3.850 motion and then submit it to the Court.

(R. 80).

He testified that nothing in the request was intended to convey a message, threaten, or intimidate the Petitioner, nor did he have any reason to believe the Petitioner would ever learn about it. (R. 81). He just thought it was a "public records request" and "didn't think anything about it." (R. 81).

Prior to sending the request, Mr. Post conferred with his attorney, Michael Ufferman. (R. 81-2). His legal counsel did not dissuade him or tell him not to submit the *pro se* public records request. (R. 82). He did not inform his postconviction

counsel about the injunction because he was unaware of the full scope of it himself. (R. 88).

In terms of his knowledge of the scope of the injunction, Mr. Post stated that at the injunction hearing he was only told not to have contact with the Petitioner. (R. 83). He did not receive a copy of the complete permanent judgment identifying that he was prohibited him from contacting third parties associated with the Petitioner as well. (R. 84). From the moment he was arrested he was on suicide precaution and never received a copy of either the temporary or permanent injunction. (R. 86). He had no knowledge regarding the terms of the temporary injunction because he was brought directly to a cell after signing that he had received it and was not allowed to have any copies of paperwork because of the fact he was on suicide precaution. (R. 86-7). No one read him the terms of the injunction when it was entered. (R. 87). He said he did not willfully intend to violate the terms of the injunction because the sole purpose for the public records request was "[s]trictly to investigate [the] conflict of interest." (R. 85).

Following Mr. Post's testimony, his defense counsel published video of the injunction hearing. Mr. Post's counsel stated that at 10:19 AM and 50 seconds the clerk provided Mr. Post a sheet of paper to sign, takes it back from him, and then Mr. Post is removed from the courtroom. (R. 96). At 10:24 AM and 15 seconds the

clerk returned with copies of the final injunction but did not provide a copy to Mr. Post because he had already been taken out of the room. (R. 96).

(3) Michael Passche's Testimony

Mr. Paasche testified for the State in rebuttal. (R. 97). He was employed at the Marion County Sherriff's Office and in that capacity had received training in serving injunctions to respondents in and out of custody. (R. 97-8). The process for serving respondents with an injunction is to read to the respondent all the important information. (R. 98). However, he stated that he never read any portion of the injunction in this case to Mr. Post, nor did he witness any other officers serving or reading the contents of the injunction to Mr. Post. (R. 98-9).

(4) Mr. Ufferman's Testimony

Mr. Ufferman testified that he is Mr. Post's postconviction attorney. (R. 100-101). He was not aware there was an injunction in place in this case. (R. 101). However, he had discussions with Mr. Post regarding public records in his case and he personally submitted a public record request to the State Attorney's Office. (R. 101-2).

Mr. Post asked him whether he thought it may be fruitful to conduct public record requests regarding the petitioner's employment because of a motion to disqualify the State Attorney's office. (R. 102). Mr. Ufferman informed Mr. Post that he had submitted his own public record request, and although he was not going

to do it himself, to the extent that it could be relevant and lead somewhere, he was free to make the request himself. (R. 102-3). He stated that Mr. Post's request was "clearly an effort to uncover information that might be relevant to our pending post-conviction motion." (R. 103).

Mr. Ufferman is board certified in criminal appellate law by the Florida Bar, (R. 103). He stated that submitting public records requests is a common tool in preparation for a postconviction hearing, and, in fact, it may be ineffective assistance of counsel if one fails to submit some type of public records request when pursuing a postconviction case. (R. 103-4). Mr. Ufferman also stated that Mr. Post never conveyed to him any motivations to harass the alleged victim in the case when making this request. (R. 104).

F. The parties' arguments and trial court's findings.

Mr. Post's counsel made three arguments for why Mr. Post should not have been held in indirect criminal contempt. (R. 105-6). First, he argued there was an issue of service of the injunction. (R. 106). He argued it was pure speculation to suggest that the injunction was actually served on Mr. Post, and as a result, there was no evidence he was aware of the contents of the injunction. (R. 106). Second, there was a "fundamental due process issue" because Mr. Post "has every legal right to pursue preparing" a postconviction relief motion. (R. 106). Specifically, defense counsel argued

> [t]he absurdity that he would be prevented from [making a public records request] or restrained from doing so is just as absurd as to suggest that Mr. Post is somehow currently in violation of an injunction because of the alleged victim being present in the court this afternoon.
>
> I don't foresee Mr. Post getting charged or arrested for violating the injunction for today's purposes; equally as absurd is to suggest that he cannot file a public records request in preparation for a postconviction relief hearing.

(R. 106-7).

Third, Mr. Post's defense counsel argued the *prima facie* elements of the offense of had not been established. (R. 107) He argued that Mr. Post "had no purpose in submitting this single document to the clerk's office, other than to get public records information in which to prepare for his postconviction relief hearing." (R. 107). Therefore, the elements of "willfulness, knowingly, intentionally, purposefully" were not established beyond a reasonable doubt. (R. 107).

In response, the State argued that Mr. Post had notice of the injunction and its terms because he signed for the final injunction and he received a copy of the temporary injunction. (R. 108). Additionally, the State argued that because he had an appellate attorney, if that attorney thought the request was relevant, he would have requested the records. (R. 109). Finally, the State argued that petitioner's employment in a position after Mr. Post's conviction and sentence became final is relevant to any appellate motion. (R. 109-10).

The trial court found the issue of service was without merit. (R. 110). However, the court was "concerned" that "because of the unique circumstances of his having this criminal court case, his making a public records request is somehow an exception to the no contact provision[.]" (R. 110-11). In requesting further argument from the parties, the trial court stated, "I do understand what you're saying, that you consider it to be unrelated and that he had a lawyer who could have done it if he needed to have done it. But if the lawyer could have done it, could not this gentleman have done it?" (R. 111).

In response, the State said it was "just a bad piece of luck" that she was employed with "somebody that has that responsibility. I don't think that the fact that it's a public records demand, that that mitigates the violation." (R. 111). Alternatively, the defense stated this concern goes "directly toward the due process portion of the respondent's argument in this case. On one hand, the State suggest that this information would have been readily available through counsel. On the other hand, suggests that the respondent was not entitled, on a *pro se* level, to pursue that same information." (R. 112). Defense counsel continued that it was "absurd" to prevent him from seeking this information after receiving such a lengthy prison sentence, (R. 112), and a defendant "has every due process right to participate in their own defense which includes preparation for any postconviction matter[ ]." (R. 113).

Following the parties' arguments, the trial court stated: "Well, I think at a minimum, he would have been required to file a motion for leave to make that request and that he did not do that." (R. 113). The trial court found that he violated the injunction, and therefore, "he's guilty of the criminal offense of violation of the injunction as a contempt of the court's order." (R. 113). The trial court adjudicated Mr. Post guilty of criminal contempt of court and sentenced him to six months concurrent with his present prison sentence, (R. 114), and imposed the costs of prosecution and cost of defense. (R. 114-15). A judgment and sentence for indirect criminal contempt of court was entered on April 25, 2017. (R. 49-50). The trial court continued the injunction and it is currently in place. (R. 114).

SUMMARY OF ARGUMENT

The trial court erred in finding Mr. Post guilty of indirect criminal contempt. This case requires this Court to: (i) review the evidence offered by the State to determine whether the trial court erred by holding Mr. Post in indirect criminal contempt; (ii) analyze the constitutional restrictions of the contempt power on a contemnor when the contemnor is exercising a fundamental right of seeking postconviction relief in a parallel proceeding; and (iii) determine whether the trial court's action violated the separation of power doctrine. Accordingly, Mr. Post's arguments can be summarized as follows:

1. The State failed to offer competent substantial evidence that Mr. Post was served with the injunctions, and thus he did not have notice of the entirety of the court's order. *Infra* Argument, § I at 18. Specifically, the State failed to offer sufficient evidence that Mr. Post was fully aware of the scope of the court's order when he stated that he never received copies of the two orders (temporary or permanent). Mr. Post testified that he knew he could not contact the Petitioner, but he was never informed he was limited from contacting third parties associated with her. He only knew of the terms of the injunction because he attended the permanent injunction hearing and the trial court clearly communicated this no contact provision to him; however, because he was on suicide precaution watch, he never received, nor was read, the terms of the injunction as written. The State failed to offer any evidence to dispute Mr. Post's testimony.

2. The State failed to offer competent substantial evidence that Mr. Post unequivocally and intentionally disobeyed the order or acted in gross dereliction of the order. *Infra* Argument § II at 23. As stated above, he never received notice of the full terms of the injunction; therefore, he could not violate those terms. However, even if the trial court's findings are upheld that he received the injunction, Mr. Post did not have the calculated intent to disobey the court order; therefore, the trial court erred in making this finding.

3. The trial court violated Mr. Post's substantive due process right to prepare for his postconviction proceeding. *Infra* Argument § III at 26. Mr. Post has a liberty interest in preparing his postconviction case to challenge his conviction. This right is a fundamental liberty interest. In furtherance of that right, Mr. Post prepared a public records request. The trial court deprived him of that request when it held him in indirect criminal contempt. The trial court did not have an adequate justification in its actions, and even though it has a compelling interest in upholding court orders, its actions were not narrowly tailored and thus violated Mr. Post's substantive due process rights.

4. The trial court violated the constitutional prohibition of separation of powers by creating a de facto public records exemption to prohibit Mr. Post's public records request. *Infra* Argument § IV at 37. Only the Florida Legislature is empowered to limit the types of records that may be released pursuant to a public record request, and because the agency cited no statutory basis for denying this information, the trial court's finding of indirect criminal contempt and enforcement of the terms of the injunction acted as a de facto exemption in violation of Mr. Post's constitutional public right to receive public records as enshrined in the Florida Constitution.

As discussed more fully below, the trial court erred in holding Mr. Post in indirect criminal contempt. This Court should reverse the trial court's order and

vacate Mr. Post's conviction and sentence. Further, Mr. Post should be granted leave to seek these records from the postconviction trial court, unless a valid legislatively enacted exemption applies.

ARGUMENT

Issues presented.

I. **Whether the trial court erred in finding Mr. Post received service of the permanent injunction and had notice of the full scope of the injunction?**

II. **Whether the trial court erred in finding that Mr. Post intentionally and willfully violated the terms of the injunction?**

III. **Whether the trial court's finding Mr. Post guilty of indirect criminal contempt violates his substantive due process rights?**

IV. **Whether the trial court violated the separation of powers doctrine by denying Mr. Post's public records request based on the injunction?**

Preliminary Matters.

i. Jurisdiction. This is a direct appeal arising from a circuit court's order imposing final judgment adjudicating Appellant guilty. Fla. R. App. P. 9.030(b)(1)(A); 9.140(b)(1)(A).

ii. Standard of Review. A judgment of contempt must be supported by competent, substantial evidence in the record. *See Pearson v. Pearson*, 932 So. 2d 601, 602 (Fla. 2d DCA 2006). A judgment of contempt will be overturned if the trial

court either abused its discretion or departed so substantially from the law that fundamental error occurred. *DeMello v. Buckman*, 914 So. 2d 1090, 1093 (Fla. 4th DCA 2005). A trial court's discretion is limited by rules, statutes, and case law, and a trial court abuses its discretion when its ruling is based on an erroneous view of the law. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007).

Merits.

I. The trial court erred in finding Mr. Post received service of the injunction and had notice of the full scope of the injunction.

To understand why the trial court erred in finding Mr. Post was properly served, one must first understand the trial court's contempt powers, the procedure for indirect criminal contempt, and the burden of proof in finding indirect criminal contempt.

A. Trial court contempt powers, indirect criminal contempt procedure, and burden of proof.

A trial court's power to punish for contempt is fundamental to the judicial system. In Florida, this power arises from a court's inherent power to punish and by statute. *See In re Hayes*, 72 Fla. 558, 568, 73 So. 362, 365 (1916) ("The Supreme Court has, independent of statutory authority, inherent power to punish for contempt."); § 38.22, Fla. Stat. (2017) ("Every court may punish contempts against it whether such contempts be direct, indirect, or constructive, and in any such

proceeding the court shall proceed to hear and determine all questions of law and fact.").

The Legislature has defined contempt as "[a] refusal to obey any legal order, mandate or decree, made or given by any judge relative to any of the business of the court, after due notice thereof, is a contempt, punishable accordingly." § 38.23, Fla. Stat. (2017). A court may criminally punish both direct criminal contempt (*i.e.*, contempt observed by the court) and indirect criminal contempt (*i.e.*, contempt not observed in the presence of the court) by adhering to procedures outlined in the Florida Rules of Criminal Procedure. Fla. R. Crim. P. 3.830 and 3.840.

An indirect criminal contempt "shall be prosecuted" in the manner proscribed by Rule 3.840. *See, e.g.*, Fla. R. Crim. P. 3.840(a)-(g). Indirect contempt occurs "not in the presence of a court or of a judge acting judicially, but at a distance under circumstances that reasonably tend to degrade the court or the judge as a judicial officer, or to obstruct, interrupt, prevent, or embarrass the administration of justice by the court or judge." *Forbes v. State*, 933 So. 2d 706, 711 (Fla. 4th DCA 2006). These proceedings must fully comply with Rule 3.840, Florida Rules of Criminal Procedure, and defendants are entitled to both procedural and substantive due process protections. *See Pompey v. Cochran*, 685 So. 2d 1007, 1013 (Fla. 4th DCA 1997).

If indirect criminal contempt arises from a violation of a court order, then that "order must be one which clearly and definitely makes the person aware of its command." *Smith v. State*, 954 So. 2d 1191, 1194 (Fla. 3d DCA 2007) (citing *Barnes v. State*, 588 So. 2d 1076, 1077 (Fla. 4th DCA 1991)). There must be evidence that the contemnor was aware of the terms of that order before the violation. *See generally Robinson v. State*, 840 So. 2d 1138, 1139 (Fla. 1st DCA 2003). Thus, to establish criminal contempt, "[t]here must be proof beyond a reasonable doubt that (1) the contemnor had notice of the order, (2) the order was directed at the contemnor, and (3) the contemnor unequivocally and intentionally disobeyed the order or acted in gross dereliction of the order to such an extent that intent can be presumed." *M.J. v. State*, 202 So. 3d 112, 113 (Fla. 5th DCA 2016).

Each element must be supported by competent, substantial evidence in the record. *See Pearson*, 932 So. 2d at 602. Competent, substantial evidence has been defined as follows:

> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged.

Dunn v. State, 454 So. 2d 641, 649 n. 11 (Fla. 5th DCA 1984). Failure to offer competent substantial evidence of any of the three elements on review requires an appellate court to reverse a conviction for indirect criminal contempt. *See, e.g.*, *Robinson*, 840 So. 2d at 1139 (revering conviction for violation of injunction on the ground that appellant's motion for judgment of acquittal should have been granted because "the State failed to establish that appellant knew the permanent injunction had been entered against him, either through proof that appellant had been served with the permanent injunction, or through proof that appellant had some other notice.").

B. The State did not offer competent substantial evidence that Mr. Post received service of the temporary or permanent injunction nor was aware of all of the terms of the injunction.

The State bears the burden to proof, by offering competent substantial evidence, that contemnor was fully aware of the scope of court order beyond a reasonable doubt. *Smith v. State*, 954 So. 2d at 1194; *M.J.*, 202 So. 3d at 113 ("[t]here must be proof beyond a reasonable doubt that … the contemnor had notice of the order"). When an allegation of indirect criminal contempt arises for an alleged violation of an injunction, the lack of service of an injunction is a defense. *See Robinson*, 840 So. 2d at 1139. This is so because "[p]roof of service of the permanent injunction [is] required in order for [for a defendant] to be convicted of violating [a]

permanent injunction … because [n]otice is an essential element to a charge of violation of the provisions of an injunction, and proof of service is critical." *Suggs v. State*, 795 So. 2d 1028, 1030 (Fla. 2d DCA 2001) (internal citations omitted).

Here, the State did not offer competent substantial evidence to establish Mr. Post was properly served with the permanent injunction, and thus failed to offer sufficient evidence that he had notice of the full scope of the injunction beyond a reasonable doubt. Mr. Post testified that he was on suicide watch during the time he was served with both the temporary and permanent injunctions. (R. 86-7). During both occasions, he was not allowed to have any documents in his possession. (R. 86-7). He also testified that at the injunction hearing he was not informed that he could not contact a third party associated with the Petitioner. (R. 83-7). This testimony was supported by the video that showed during the initial injunction hearing Mr. Post was taken out of the courtroom prior to the parties receiving the full injunction. (R. 96).

The State attempted to rebut Mr. Post's testimony by outlining the policy of the sheriff's office of reading the terms of the injunction to respondents. (R. 97-99). However, the individual that testified also stated that he did not read the terms of the injunction to Mr. Post, nor has any knowledge whether that was done at all. (R. 98-9). There is no evidence that Mr. Post was actually informed and received service of the complete temporary, or permanent, injunctions.

The State failed to meet its burden of offering competent substantial evidence to support the fact Mr. Post was properly served with the injunction. The State failed to offer any quantity of evidence rising even to a "mere iota or scintilla," beyond mere pure speculation that he received the full injunction beyond a reasonable doubt. *Dunn*, 454 So. 2d at 649. Thus, because the first element is not supported by competent substantial evidence, the indirect criminal contempt conviction should be reversed, and the conviction and sentence should be vacated.

II. The trial court erred in finding that Mr. Post intentionally and willfully violated the terms of the injunction.

When a finding of contempt is based upon a violation of a court order, there must be evidence of the accused's intent to disobey the court's order, or "that he or she was guilty of such gross dereliction that the intent will be presumed." *Barnes v. State*, 588 So. 2d 1076, 1077 (Fla. 4th DCA 1991)). Thus, "[f]or a person to be held in contempt of a court order, the language of the order must be clear and precise, *and* the behavior of the person must clearly violate the order." *Reder v. Miller*, 102 So. 3d 742, 743 (Fla. 2d DCA 2012) (quoting *Paul v. Johnson*, 604 So. 2d 883, 884 (Fla. 5th DCA 1992)). In this context, contempt is "[a]n act which is *calculated* to embarrass, hinder, or obstruct a court in the administration of justice, or which is *calculated* to lessen its authority or dignity." *Garcia v. Pinellas Cty.*, 483 So. 2d 443, 444 (Fla. 2d DCA 1986) (quoting *Thomson v. State*, 398 So. 2d 514, 517 (Fla. 2d

DCA 1981) (emphasis maintained). The purpose of a trial court in possessing this power is "to vindicate the authority of the court or to punish for an intentional violation of an order of the court." *Parisi v. Broward Cty.*, 769 So. 2d 359, 364 (Fla. 2000) (quoting *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985)).

This legal standard has been discussed by multiple district courts of appeal. *See, e.g., Ray v. State,* 352 So. 2d 110 (Fla. 1st DCA 1977); *Litus v. McGregor,* 381 So. 2d 757 (Fla. 5th DCA 1980). In discussing this standard, these courts rely on the Florida Supreme Court's decision *Ex parte Biggers*,85 Fla. 322, 95 So. 763 (Fla. 1923) which, in pertinent part, states:

> [I]f the matter complained of constituting contempt, when fairly interpreted, does not have a reasonable tendency to degrade or to embarrass or hinder… a judge in performing his own duty, or to affect a mind of reasonable fortitude, it is not a criminal contempt for which imprisonment may be lawfully adjudicated, particularly when an intent to offend is denied on oath.
>
> Generally it is the nature and reasonable tendencies of the matter complained of that controls; and, if the matter is of doubtful tendency or might or might not be considered ambiguous as to its general or specific purpose, the circumstances under which the thing was done or in which its consequences are to appear, may be considered in determining the reasonable tendency of the matter to affect judicial authority or dignity….

85 Fla. 322, 95 So. 763 (Fla. 1923).

As noted by the First District in relying on *Ex parte Biggers*, "[t]he power to punish for criminal contempt should be exercised cautiously and sparingly." *Ray*, 352 So. 2d at 110; *see also Thompson v. State*, 427 So. 2d 341, 342 (Fla. 1st DCA 1983).

Accordingly, when an alleged criminal contempt is based upon the violation of a court order, the contemnor's intent is critical to establish the offense. *See Roberts v. Bonati*, 133 So. 3d 1212, 1216 (Fla. 2d DCA 2014). Here, Mr. Post did not have the calculated intent to violate this court order.

Mr. Post testified that he did not know about the full terms of the injunction because he was not served with a copy of the injunction. (R. 86-7). He solely made this request in furtherance of preparing for his postconviction motion, and not for a purpose of contacting the Petitioner. (R. 80-1). This statement was verified by Mr. Ufferman who stated that he had a conversation with Mr. Post about this request and the only purpose was to further discovery for his postconviction motion. (R. 81-2; 96). Mr. Post's intent was not "*calculated* to embarrass, hinder, or obstruct a court in the administration of justice, or "*calculated* to lessen its authority or dignity." *Garcia*, 483 So. 2d at 444 (quoting *Thomson*, 398 So. 2d at 517) (emphasis maintained). While Mr. Post does not contest the trial court has the power "to vindicate the authority of the court or to punish for an intentional violation of an order of the court," *Parisi*, 769 So. 2d at 364 (quoting *Bowen*, 471 So. 2d at 1277), he contends that his intent did not rise to the level where this vindication was required.

When "fairly interpreted," Mr. Post's conduct "does not have a reasonable tendency to degrade or to embarrass or hinder… a judge in performing his own

duty," thus "it is not a criminal contempt for which imprisonment may be lawfully adjudicated." *Ex parte Biggers,* 85 Fla. 322, 95 So. at 763. This is especially true because Mr. Post's "intent to offend" was "denied on oath." *Id.* The State has failed to meet its burden of offering competent substantial evidence to support the element that Mr. Post had the intent to violate the injunction beyond a reasonable doubt. Because "[t]he power to punish for criminal contempt should be exercised cautiously and sparingly," *Ray,* 352 So. 2d at 110, the indirect criminal contempt conviction should be reversed, and the conviction and sentence should be vacated.

III. The trial court's decision to find Mr. Post in indirect criminal contempt violates his substantive due process rights.

Both the United States and Florida Constitutions protect individuals from arbitrary and unreasonable governmental interference with a person's right to life, liberty, and property. *See* U.S. Const. Amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."); XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); Art. I, § 9, Fla. Const. ("No person shall be deprived of life, liberty or property without due process of law . . . ."). The United States Supreme Court has identified two distinct areas of due process protections: procedural and substantive. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 348, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

Substantive due process bars "certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991) ("Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. . ."). In essence, substantive due process "asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose." Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1501 (1999). While procedural due process deals with whether the government has provided "notice and a hearing" before it takes away an individual's recognized fundamental rights, substantive due process "means the government must show a compelling reason that would demonstrate an adequate justification" for taking away that right, regardless of procedural due process considerations. *Id.* at 1501-02; *see also In re Forefeiture of 1969 Piper Navajo*, 592 So. 2d 233, 235 (Fla. 1992) ("[T]he basic test [of substantive due process] is whether the state can justify the infringement of its legislative activity upon personal rights and liberties."). Thus, the question of whether a substantive due process violation occurs turns on whether "there is a sufficient justification, a good enough reason for such a deprivation." Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. at 1501

To establish a substantive due process violation, the movant must establish three elements: "First, there must be a deprivation, second, it must be of life, liberty or property, and third, it must be shown that the government did not have an adequate justification for its action." Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. at 1527 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976) (explanatory footnote omitted). The Florida Supreme Court has recognized that substantive due process claims may be raised by an individual alleging the government's action is either facially unconstitutional (*i.e.*, unconstitutional for everyone) or unconstitutional as applied to that specific individual. *See State v. Robinson*, 873 So. 2d 1205, 1214 (Fla, 2004). When a movant alleges an "as applied" constitutional challenge, the movant argues that the government action is constitutional for some persons, but not as to the individual movant. *Id.* at 1214 (holding that the designation of a defendant as a sexual predator based solely on his conviction for kidnapping a minor who was not his child violated his substantive right to due process of law and the statute was unconstitutional as applied to him).

Here, the trial court holding Mr. Post in indirect criminal contempt through its statutory right, § 38.22, Fla. Stat., and application of Florida Rule of Criminal Procedure 3.840, is unconstitutional as applied to him and violates his substantive due process rights. The trial court deprived Mr. Post of his individual liberty interest to postconviction discovery. The trial court did not have an adequate justification for

this action because it was not narrowly tailored and the least restrictive means of protecting its compelling state interest in having the right to enforce its indirect criminal contempt powers, or injunction protections, against individuals who fail to adhere to court orders. As discussed more fully below, this Court should reverse and vacate the trial court's order finding Mr. Post guilty of indirect criminal contempt.

(1) The trial court caused a deprivation to Mr. Post.

The trial court deprived Mr. Post of his liberty interest in seeking discovery to support his postconviction relief motion through the denial of his public records request. This violates his personal liberty interest to postconviction relief. This deprivation was imposed by the trial court pursuant to its indirect criminal contempt powers granted by statute and the procedural requirements as codified in the Florida Rules of Criminal Procedure. § 32.88, Fla. Stat. (2017); Fla. R. Crim. P. 3.840. As discussed more fully below, this deprivation amounts to a violation of Mr. Post's liberty interest, and thus violates his substantive due process right to liberty.

(2) The trial court deprived Mr. Post of his liberty interest in seeking postconviction relief.

An inmate has a liberty interest in pursuing postconviction relief following a conviction. *DA's Office v. Osborne*, 557 U.S. 52, 53 (2009). This is so because the "most elemental" of the liberties protected by the due process clause is "the interest in being free from physical detention by one's own government." *Hamdi* v. *Rumsfeld*,

542 U.S. 507, 529 (2004) (plurality opinion); *see also Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"). Although an inmated's has less protections than an accused, "incarceration does not divest prisoners of all constitutional protections". *Shaw* v. *Murphy*, 532 U.S. 223, 228-229 (2001).

The United States Supreme Court has consistently "recognized protected interests in a variety of postconviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause of the Fourteenth Amendment requires States to respect certain fundamental liberties in the postconviction context." *Osborne*, 557 U.S. at 93-94 (dissenting opinion J. Stevens, with whom J., Ginsburg, J., Breyer join, and with whom J., Souter joins as to Part I, dissenting). The exact confines of this right are generally left to the each specific state's postconviction framework, and an alleged violation from a denial within that framework turns on whether the government action, when viewed within the framework of a specific state's postconviction relief procedures, "offends some [fundamental] principle of justice" or "transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 557 U.S. at 53 (citing *Medina* v. *California*, 505 U.S. 437, 446, 448 (1992)).

The Florida Supreme Court has promulgated and adopted rules of procedure whereby inmates may challenge their convictions in a postconviction proceeding.

See, e.g., Fla. R. Crim. P. 3.800, 3.850, 3.851, 3.853. An inmate, not convicted of a capital crime, may bring "claims for relief from judgment or release from custody" when that inmate "has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida[.]" Fla. R. Crim. P. 3.850(a). These claims may arises on several different grounds, Fla. R. Crim. P. 3.850(a)(1)-(6), including that "[t]he judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida[.]" Fla. R. Crim. P. 3.850(a)(1).

The importance of public records requests in postconviction matters is well understood. This truth is evident in the Florida Supreme Court independently promulgating Rule 3.852, which governs the procedure to obtain public records for use in capital postconviction litigation. *In re Amendment to Fla. Rules of Crim. Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d 475, 475 (Fla. 1996) ("The rule was promulgated on this Court's own motion in response to the Court's study of problems with procedures pertaining to the production of public records in capital postconviction proceedings."). As noted by the Court, there is an important societal interest in public record requests in capital postconviction matters. *Id.* at 477 (Anstead, J., specially concurring) (Kogan, C.J. and Grimes, J., concurs) ("Trial courts must be mindful of our intention that a capital defendant's right of access to public records be recognized under this rule. If there is any category of

cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed.").

Rule 3.852 is only a discovery tool in capital postconviction matters. *See Abdool v. Bondi*, 141 So. 3d 529, 550 (Fla. 2014) ("[F]lorida Rule of Criminal Procedure 3.852 . . . governs capital postconviction public records production . . . ."); *Sims v. State*, 753 So. 2d 66, 69 (Fla. 2000) ("This rule is a discovery rule for public records production ancillary to proceedings pursuant to rules 3.850 and 3.851.") (quoting *Amends. to Fla. R. of Crim. Pro.*, 754 So. 2d 640, 643 (Fla. 1999))). However, the policies and procedures that the Florida Supreme Court promulgated are instructive in the case at bar.

In this context, if a public record request for a postconviction matter is denied, a hearing to determine whether that denial was appropriate must be held. *See, e.g.*, *Peede v. State*, 748 So. 2d 253 (Fla. 1999) (where defendant was convicted of first degree murder and sentenced to death, defendant was entitled to an evidentiary hearing on, *inter alia*, the availability of public records). These hearings should be held before the postconviction trial court, and it is the denying agency's burden to assert what exemption applies. *See, e.g., Braddy v. State*, 219 So. 3d 803, 821 (Fla. 2017) (reviewing the State Attorney's reliance on the "work product" exemption, § 119.071(1)(d)1., Fla. Stat. (2014)). Following a hearing, the postconviction court's

decision to grant or deny the public records request is reviewed for an abuse of discretion and is appealable. *Id.* (concluding "that the postconviction court did not abuse its discretion in denying Braddy access to the vast majority of the materials in sealed box 6202 pertaining to attorney work product and notes.").

Although Rule 3.852 is not applicable to non-capital inmate, the Florida Supreme Court has also recognized the importance of public records requests for postconviction claims for non-capital inmates. *Hoffman v. State*, 613 So. 2d 405 (Fla. 1992) (holding that all public records in the hands of prosecuting state attorney were subject to disclosure by way of motion under Florida Rule of Criminal Procedure 3.850, even if they included the records of outside agencies). Similarly, in this context, when a public records request is made directly to an agency, if that agency denies the request, the agency is the one "to raise any defenses to the disclosure which they may deem applicable." *Hoffman*, 613 So. 2d at 406.

Based on the foregoing, Florida inmates, like Mr. Post, have a liberty interest in pursuing public records requests as a form of discovery in support of postconviction relief. As Mr. Post's attorney testified, it is well settled that public records requests are essential to preparing and presenting a postconviction claim, and failing to make such requests may rise to the level of ineffective representation. (R. 103-4). At the hearing, it was not in dispute that Mr. Post was making this public records request for the purpose of his postconviction motion. (R. 80). Both Mr. Post

and Mr. Ufferman testified to this fact. (R. 80-1; 96). The State offered no ulterior motive, nor could it. Therefore, based on the foregoing, Mr. Post has a liberty interest in public records requests in furtherance of preparing for a postconviction claim, regardless of the injunction.

(3) The trial court did not have an adequate justification for its actions.

The question of adequate justification turns on whether the government action "offends some [fundamental] principle of justice" or "transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 557 U.S. at 53 (citing *Medina* v. *California*, 505 U.S. 437, 446, 448 (1992)). The government's action must not be unreasonable, arbitrary, or capricious, and must have a "reasonable and substantial relation" to a compelling governmental objective. *State v. Saiez*, 489 So. 2d 1125, 1128 (Fla. 1986). When a government action infringes on fundamental constitutional rights, the act must be narrowly tailored to achieve the state's purpose. *See In re Forfeiture*, 592 So. 2d at 235.

Here, Mr. Post concedes the government, and particularly trial courts in the State of Florida, have a compelling interest in ensuring it has and may maintain a contempt power to enforce court orders and injunctions. However, in the context of this matter, the trial court erred because its decision to hold Mr. Post in contempt was "unreasonable" and not narrowly tailored to achieve the government's purpose.

See Saiez, 489 So. 2d at1128; *In re Forfeiture*, 592 So. 2d at 235. The trial court's decision was unreasonable in three ways.

First, the trial court's decision was unreasonable based upon the generally accepted practice that public records should be utilized when preparing a postconviction matter. As noted by Mr. Ufferman, public records requests are critical to adequately prepare a postconviction claim. (R. 103-4). Even beyond Mr. Ufferman's representations, the Florida Supreme Court has recognized how critical these records are for capital inmates when it independently promulgated a rule of procedure to ensure capital defendants receive these records. Fla. R. Crim. P. 3.852. The Court has held that for non-capital inmates public record requests are equally important. *See Hoffman*, 613 So. 2d at 405.

Second, the scope of the injunction made it impossible for even Mr. Post's postconviction counsel to make a public records request. Although the State argued that Mr. Ufferman as his postconviction counsel could have made this public records request without issue, that is not true. Based on the plain language of the injunction, had Mr. Ufferman made the request, then Mr. Post would have been in violation of the injunction. (R. 19) ("Respondent shall not contact *or have any third party contact anyone connected with Petitioner's employment* or school to inquire about Petitioner or to send any messages to Petitioner.") (emphasis added). Because Mr. Ufferman is Mr. Post's third party representative, had he sent this public records request he too

would have caused Mr. Post to violate the injunction. Thus, the terms of the injunction, and the State's reasoning for finding Mr. Post in indirect criminal contempt, is unreasonable.

Third, the initial reactions of the parties, including the trial court, demonstrate that finding Mr. Post in indirect criminal contempt for this action was unreasonable. Both Mr. Post, and his postconviction counsel, testified the only reason the public records request was made was in furtherance of discovery for a postconviction relief motion. (R. 80-1; 103-4). Further, the State's initial reaction to the request was to "recommend" to the trial court that "no further action be taken at this time." (R. 45). At the hearing, Mr. Post's defense counsel argued that it was "absurd" to punish him for making this public record request and was in fact a violation of his due process rights. (R. 106-7; 112). The trial court even acknowledged this concern and asked for further argument because it was not sure there was some type exception that came into play in this case. (R. 110-11). The reactions of the parties to Mr. Post's conduct demonstrate that holding him in contempt, under this circumstance, was unreasonable.

Additionally, the trial court's decision was not narrowly tailored. The trial court did not need to find Mr. Post in indirect criminal contempt to ensure the court order was followed. To vindicate the order, at this hearing, Mr. Post could have been clearly informed by the trial court of the terms of the injunction, unquestionably

provided him a copy of the permanent injunction, and ensured there was no question of the terms of the injunction. Additionally, rather than holding Mr. Post in indirect criminal contempt, the trial court could have transferred the public records proceeding to the postconviction court for further proceedings to determine if it was an appropriate request related to the merits of the postconviction case. Finally, to ensure the denial of this public records request was in accordance with the Florida Public Records Act, the trial court could have ordered the Clerk of Court to identify an exemption that limited the documents from being released. In this case, the decision to find Mr. Post in indirect criminal contempt was not only unnecessary, it was not narrowly tailored in furtherance of the trial court's interest in ensuring court orders are complied with in the future.

Therefore, based on the foregoing, as applied to Mr. Post, the trial court violated his substantive due process rights through its application of its indirect criminal contempt powers. This Court should reverse the trial court's order and vacate the judgment and sentence.

IV. The trial court violated the separation of powers doctrine when it relied on the injunction as the sole basis to deny Mr. Post's public records request.

The United States and Florida Constitution's separation of powers doctrine prohibits the exercise of one branch's power over another branch of government. *See* Art. II, § 3, Fla. Const. ("The powers of the state government shall be divided

into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). When interpreting this doctrine, the Florida Supreme Court has "traditionally applied a strict separation of powers doctrine." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

Article I, section 24 of the Florida Constitution, and chapter 119, Florida Statutes, guarantee a substantive public right to access of public records. *Allen v. Butterworth*, 756 So. 2d 52, 65 (Fla. 2000) ("This Court has recognized that 'chapter 119 grants a substantive right to Florida citizens,' on which the Legislature 'has the prerogative to place reasonable restrictions.'") (quoting *Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999)); *Campus Communs., Inc. v. Earnhardt*, 821 So. 2d 388, 399 (Fla. 5th DCA 2002) ("[T]he Florida courts have consistently recognized that the right to inspect and copy public records under the Public Records Act is a public right."). The limitations on what public records are protected from release is limited solely by the Florida Legislature.

Section 119.011(8), Florida Statutes defines the term "exemption" as "a provision of general law which provides that a specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), s. 286.011, or s. 24, Art. I of the state Constitution." Both the Florida Constitution and the Public Records Act specifically allow for the creation of exemptions from public records

requests by the legislature. *See* Art. I, § 24(c), Fla. Const. ("*the legislature*, however, may provide by general law for the exemption of records from the requirements of subsection (a).") (emphasis added); § 119.15(4)(b), Fla. Stat. ("an exemption may be created or maintained" by the legislature). Thus, the right to inspect and copy public records is a right subject only to divestment by legislative enactment. *Id*. Only the Florida Legislature possess "the prerogative to place reasonable restrictions on that right." *Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999) (citation omitted). As the Fifth District has unequivocally stated, "all public records are subject to public inspection and copying *unless* the records fall within a specific statutory exemption *enacted by the Legislature*." *Campus Communs., Inc.*, 821 So. 2d at 398-99 (emphasis maintained and added).

Article I, section 24(c), Florida Constitution, authorizes the legislature to enact general laws creating exemptions provided that such laws "shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." *See Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 so. 2d 373, 380 (Fla. 1999) (refusing to "imply" an exemption from open records requirements stating "we believe that an exemption from public records access is available only after the legislature has followed the express procedure provided in Article I, section 24(c) of the Florida Constitution."). These exemptions must be "clear and specific" to prohibit release of

records. *Housing Auth. of City of Daytona Beach v. Gomillion*, 639 So. 2d 117, 121 (Fla. 5th DCA 1994) ("It is the policy of . . . the Florida Public Records Act . . . that the records of public bodies should be accessible to the public absent a clear and specific exemption from disclosure.").

The general purpose of the public records law it to "open public records to allow Florida's citizens to discover the actions of their government.*" Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1977). The Public records act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. *See National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), *review denied*, 37 so. 3d 848 (Fla. 2010). The burden rests with an agency claiming an exemption of proving the right to an exemption. *See Woolling v. Lamar*, 764 so. 2d 765, 768 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1186 (Fla. 2001).

Critically, "[c]ourts cannot judicially create any exceptions, or exclusions to Florida's Public records act." *Board of County Commissioners of Palm Beach County v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th DCA 2001); *accord Wait v. Florida Power and Light Company*, 372 So. 2d 420, 425 (Fla. 1979) (Public records act "excludes any judicially created privilege of confidentiality"); *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 492 (Fla. 1995) (noting that the

judiciary cannot create a privilege of confidentiality to accommodate the desires of government and that the "right to access public documents is virtually unfettered, save only the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest.").

Here, holding Mr. Post in indirect criminal contempt and enforcing the injunction in the manner it did, the trial court, in essence, created a judicial exception and exclusion from Florida's Public records act in violation of the Florida Constitution's separation of powers doctrine. This cannot stand. In this case, the Clerk of the Court never asserted an exemption under the public records act. Rather, it solely relied on the injunction as a basis for denying the request. (R. 22). The trial court also never relied on an exemption under the public records act in finding Mr. Post in indirect criminal contempt. Rather, it informed him he should have sought to amend the injunction prior to making the request. (R. 113). However, even if he had sought to amend the injunction, there was no guarantee it would have been amended, nor is this an exemption under the Florida law. The trial court erred in the use of its contempt power to enforce a restriction on a public records request without reliance on an exemption.

The fact this proceeding even occurred in the manner it did is a fundamental error that did not need to be preserved for review for this court's consideration. This is so because the trial court's error goes to the core of the proceeding. *See, e.g.*,

Rutherford v. Moore, 774 So. 2d 637, 646 (Fla. 2000) (holding that fundamental error is an "error that reaches down into the validity of the [proceedings] itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error," or "error so prejudicial as to vitiate the entire [proceeding]."); *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). Therefore, this court should reverse the trial court's order holding Mr. Post in indirect criminal contempt and vacate his conviction and sentence.

CONCLUSION

Appellant, RUSSELL LLOYD POST, based on the foregoing grounds, request this Court vacate the trial court's order finding him in indirect criminal contempt, and remand with direction for the Clerk of Court of Marion County to provide an exemption for not releasing the public records pursuant to Mr. Post's request, and if no exemption exists, release the records pursuant to Mr. Post's unfulfilled public records request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the Office of the Attorney General at crimapptlh@myfloridalegal.com on this the 18th day of September 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

s/ Rocco J. Carbone, III
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