IN THE SUPREME COURT OF FLORIDA

CASE NO.: 69,660

FLORIDA FREEDOM NEWSPAPERS, INC.,

Petitioner/Appellant

vs.

THE HONORABLE ROBERT L. McCRARY,
Circuit Judge of Jackson County,
Fourteenth Judicial Circuit, State of Florida,

Respondent/Appellee

ON PETITION FOR REVIEW OF A DECISION OF
THE FIRST DISTRICT COURT OF APPEAL

AMICUS CURIAE TALLAHASSEE DEMOCRAT'S INITIAL BRIEF

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STATEMENT OF FACTS AND OF THE CASE

Tallahassee Democrat, Inc., has reviewed the Statement of Facts and of the Case contained in the Brief filed by Florida Freedom Newspapers, Inc., and hereby incorporates by reference that description of the facts with the additions set forth below.

Tallahassee Democrat, Inc., is the owner and publisher of the Tallahassee Democrat, a newspaper of daily circulation in the North Florida Panhandle, including Jackson County. Several articles from the Tallahassee Democrat were introduced into evidence by the criminal defendants as part of the basis for seeking the March 13, 1986, Order. However, the Tallahassee Democrat was not provided with notice of the Motion to Control Prejudicial Publicity and did not learn of the motion in time to intervene and participate in the March 13, 1986, hearing. Tallahassee Democrat did appear and participate in the April 11, 1986, hearing. Additionally, Tallahassee Democrat appeared as Amicus Curiae in the appellate proceedings below. Tallahassee Democrat covered the news story involving the allegations of jailer misconduct and, in a larger sense, is interested in the issues raised by the trial court's order placing certain restrictions on the First Amendment and Florida's Public Records Law.

References to the Appendix filed with Florida Freedom Newspaper's Initial Brief will be referred to as [App. ____]. Tallahassee Democrat adopts and incorporates that Appendix by

reference. Tallahassee Democrat has also attached an Appendix which contains copies of the newspaper stories submitted in evidence below. Tallahassee Democrat apologizes for how difficult some of the stories are to fully read, but this is how they appear in the record.

SUMMARY OF ARGUMENT

The decision under review affirmed orders of the Circuit Court in Jackson County sealing documents that everyone involved concedes are public records pursuant to §119.011(3)(c)(5), Fla. Stat. (1986 Supp.). The sealed documents were witness statements taken by the State Attorney's Office and given to the criminal defendants during the course of discovery. These records were sealed by the trial court based on its "inherent power" in order to attempt to protect the defendants from pretrial publicity.

This Court and other courts in the State of Florida have consistently held there can be no judicial exceptions to the Public Records Law. The imposition of the closure orders, and their affirmance by the First District Court of Appeal, constitute reversible error.

The trial court authorized closure simply based on a "good cause" standard and held that sealing of public records may be authorized even if "not strictly and inescapably necessary." The trial court then proceeded to make findings based on the three-part test identified in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1983).

The First District Court of Appeal affirmed, holding that it was not necessary for the party seeking closure to satisfy the Lewis test, thereby authorizing the sealing of public records based simply on a showing of "good cause." If this Court is to

authorize the sealing of §119.011(3)(c)(5) documents, then a strong burden must be imposed on those seeking closure in order to preserve and protect the sanctity of Florida's Public Records Law. The party seeking closure must be required to present evidence sufficient to satisfy the strict standards set forth in Lewis.

While the trial court made findings using the "magic words" from Lewis the record in this case is woefully inadequate to demonstrate that the Lewis standard (or any other standard) has been met. The closure orders were simply based on a few newspaper stories, an in camera review of the documents and lawyer argument. As a matter of fact and law, this evidence cannot be sufficient to justify this serious infringement on the Public Records Law.

The trial court also imposed a gag order on all members of the Fourteenth Judicial Circuit State Attorney's Office and all personnel of the Jackson County Sheriff's Office during the pendency of the proceedings below. Gag orders are the most serious infringement on the First Amendment rights of those burdened by the order, and also inhibit the ability of the news media to gather and report the news. The evidence presented below totally fails to meet the standards necessary to impose a gag order and the orders were also procedurally defective in that the trial court failed to make factual findings adequate to support such orders. The First District Court of Appeal erred by affirming the issuance of the gag orders.

For the foregoing reasons, the decisions rendered by the

trial court and the First District Court of Appeal should be REVERSED.

I. THE COURTS BELOW ERRED BY SEALING PUBLIC RECORDS AND FURTHER ERRED IN THE STANDARD APPLIED TO JUSTIFY THE CLOSURE ORDER

A. INTRODUCTION

As this Court is well aware, the courts (including this Court) have consistently held that there can be no judicial exceptions to the Public Records Law. Douglas v. Michel, 410 So.2d 936, 939 (Fla. 5th DCA 1982), certified questions answered, 464 So.2d 545 (Fla. 1985). See also, State ex rel. Veale v. City of Boca Raton, 353 So.2d 1194, cert. denied, 360 So.2d 1247 (Fla. 1978). See generally, City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985); Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985).

One of the issues in this case is whether this Court will now deviate from this long line of cases and allow trial courts to seal public records. It is unquestioned that the documents that Florida Freedom Newspapers and the Tallahassee Democrat sought access to were public records at the time access was sought. They were documents required by law to be given to the defendants and, as such, were not "criminal intelligence information" or "criminal investigative information" that is exempt from disclosure. §119.011(3)(c)(5), Fla. Stat. (1986 Supp.) Once these transcripts were provided to the defense in March 1986, they clearly became public records. (App. 8 and 9)

In addition to the cases cited above, two cases have clearly held that records disclosed to the defense pursuant to Rule 3.220, Florida Rules of Criminal Procedure, were public records subject to disclosure. Bludworth v. Palm Beach Newspapers, Inc.,

476 So.2d 775 (Fla. 4th DCA 1985) review denied, 488 So.2d 67 (Fla. 1986); Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), cert. denied, 413 So.2d 877 (Fla. 1982).

Despite the dictates of the Public Records Law and the holdings of these various cases, the trial court invoked its "inherent power" to deny access to these records. The use of this "inherent power" was ratified by the First District. (App. 1 and 2; 497 So.2d 652)

Palm Beach Newspapers, Inc. v. Burk, ___ So.2d ___, 12 FLW 103 (Fla. 1987) (motion for rehearing denied, April 21, 1987), holds that there is no First Amendment or common law right of access to unfiled depositions. While the instant case also involves discovery materials, two significant elements distinquish this case from Burk.

The obvious distinction is that provided by the Public Records Law. In Burk, this Court held that nothing in the Public Records Law provides a right of access to unfiled depositions. Here, the records would indisputably be subject to disclosure absent judicial intervention.

The second distinction is a bit more subtle. In Burk, this Court held that discovery depositions are not judicial proceedings and there is no First Amendment or common law right of access. Under this holding, no judicial action is necessary to bar the press or the public from the taking of a deposition or the review of an unfiled deposition transcript. The instant case is the opposite in that, absent affirmative judicial intervention and

action, these records would have been made public.

If this Court is to stand by the principle that there are no judicial exceptions to the Public Records Law, then the decisions below must be reversed. If, on the other hand, this Court holds there may be some limited situations in which access to public records can be denied by the courts where the rights of a criminal defendant are seriously prejudiced, then this Court must impose strict limitations on the exercise of that authority by trial judges. The courts cannot allow a few newspaper stories and lawyer argument to satisfy the evidentiary standard necessary to justify an order limiting public access. Otherwise, serious damage will be done to the Public Records Law and the long history of open government that is so important in this state and nation. In either case, the decisions below must fall. Tallahassee Democrat finds it very disturbing to think that, on the one hand, the courts can use the sword of their "inherent power" to override the Public Records Law and at the same time, put up a shield claiming these are not judicial records and denying access based on the flimsy and tenuous evidence presented below. It shouldn't be both ways.

Tallahassee Democrat is not going to use this Amicus Brief to extensively argue that there are no circumstances which a court can deny public access to §119.011(3)(c)(5) documents to protect a criminal defendant's right to a fair trial. The Petitioner and other Amici have fully argued this point. Instead, Tallahassee Democrat will use this opportunity to urge this Court

that if it is going to allow such an exception, then strict and explicit evidentiary burdens must be imposed on those who seek to limit access to these public records. However, in making this argument, Tallahassee Democrat does not want to suggest for an instant that such an exception should be allowed.

B. THERE IS A STRONG TRADITION OF ACCESS IN THIS STATE AND COUNTRY TO THE PROCESSES OF GOVERNMENT

In looking at the standards to be utilized in determining whether public records may be sealed, we start with the basic proposition that this country takes great pride in the ability of an informed citizenry to govern itself:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

Red Lion Broadcasting, Co. v. F.C.C., 395 U.S. 367, 390 (1969).

The United States Supreme Court has repeatedly recognized the public's right to know and the right of the press to gather news under the First Amendment. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court held:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives

> would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

420 U.S. at 491-492. In First National Bank of Boston v. Belotti, 435 U.S. 765 (1978), the United States Supreme Court held that a statute prohibiting corporations from making expenditures for the purpose of expressing corporate opinions on referanda issues violated the First Amendment right of the public to access to government-controlled information:

> Similarly, the court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. . . . Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification.
> . . .
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> Nor do our recent commercial speech cases lend support to appellee's business interest theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information."

435 U.S. at 783 (citations omitted). See also, Pacific Gas and Electric Co. v. Public Utilities Comm'n of California, ___ U.S.

__, 89 L.Ed2d 1, 7 (1986).

Further, in Board of Education, Island Trees Union Free School District No. 26 et al. v. Pico, 457 U.S. 853 (1982), the Court held that the discretion of a governmental body to restrict public access to materials in its control is strictly limited by the public's right of access to government-held information as protected by the First Amendment.

> Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965). In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969); see Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972) (citing cases). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First the right to receive ideas follows ineluctably from the sender's First Amendment right to send them: "The right of freedom of speech and press. . .embraces the right to distribute literature. . .and necessarily protects the right to receive it." Martin v. Struthers, 318 U.S. 141, 143 (1943) (citation omitted). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." Lamont v. Postmaster General, 381 U.S. 301 (1965) (Brennan, J., concurring).
>
> More importantly, the right to receive ideas is a necessary predicate to the

> recipient's meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us that:
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> > "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

Id. at 866-867.

The right of the press and the public to access to judicial proceedings in all but the most highly unusual circumstances is now a well-entrenched precept of our legal system. See, e.g., Press-Enterprise Co. v. Superior Court of California for the County of Riverside, 478 U.S. _____, 92 L.Ed.2d 1 (1986)(Press Enterprise II); Press Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984)(Press Enterprise I); Globe Newspapers Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1983).

The importance of this presumption of access was described in Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), as follows:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records . . . American decisions generally do not condition enforcement of this right on a proprietary

> interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies. . . and in a newspaper publisher's intention to publish information concerning the operation of government. . . .

435 U.S. at 597-598.

As is evident from Nixon and these other cases, there is a recognition of a need for access to the entire criminal justice system and not just what takes place in open court.

> People in open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Richmond Newspapers, 448 U.S. at 572. See also, State ex rel Tallahassee Democrat v. Cooksey, 371 So.2d 207, 209 (Fla. 1st DCA 1979).

It is against the framework of these cases establishing strong principles of open government that this Court must establish a standard which trial judges will have to apply when asked to seal documents that are public records under §119.011(3)(c)(5).

The trial court sealed these public records based simply on a showing of "good cause" and held that, ". . . this Court may take protective measures even when they are not strictly and inescapably necessary." (App. 8 and 9 at para. 3) The appellate court affirmed and, in so doing, specifically rejected the

three-part test enunciated in Lewis.[1] 497 So.2d at 655. This use of a "good cause" standard and rejection of the Lewis test constitutes reversible error.

C. IF CLOSURE OF §119.011(3)(c)(5) DOCUMENTS IS TO BE ALLOWED, THEN CLOSURE SHOULD ONLY BE JUSTIFIED AFTER THE PARTY SEEKING CLOSURE HAS SATISFIED THE THREE-PRONG LEWIS TEST.

If the decision by the appellate court below is allowed to stand, then trial judges will be allowed to seal public records based only on a showing of "good cause" and would allow closure even if "not strictly and inescapably necessary."

While it is not clear from either the trial court or appellate decisions, the use of the 'good cause' standard appears to come from Fla. R. Civ. P. 3.220(h), authorizing the issuance of protective orders "upon a showing of cause. . . ." This standard gives the trial judge broad discretion in the handling of discovery issues. See, Author's Comment to Fla. R. Crim. P. 3.220(h). Cf, Belger v. State, 171 So.2d 574 (Fla. 1st DCA 1965), cert. denied, 176 So.2d 510 (Fla. 1965) (based on prior statute). This type of broad, unfettered discretion would be highly inconsistent with the Public Records Law and the tradition of access inherent in our justice system.

The Florida Legislature has provided a simple and direct

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[1]In the trial court's Order of April 16, 1986, findings were made using the 'magic words' from Lewis. As will be dealt with in more detail later in this Amicus Brief, the evidence in this record does not, as a matter of fact or law, satisfy this test.

statement of the purpose of Florida's Public Records Law:

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

Section 119.01(1), Fla. Stat. (1986 Supp.)

This Court has consistently rejected the assertions of those that would seek to carve out non-statutory exceptions to the law. Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984) appeal dismissed, 471 U.S. 1096 (1985); Forsberg v. Housing Authority of the City of Miami Beach, 455 So.2d 373 (Fla. 1984); Rose v. D'Allesandro, 380 So.2d 419 (Fla. 1980); Wait v. Florida Power and Light Co., 372 So.2d 420 (Fla. 1979). In News-Press Publishing Co., Inc., v. Gadd, 388 So.2d 276 (Fla. 2d DCA 1980), the court held:

> The Public Records Act and cases interpreting the Act make it clear that all documents falling within the scope of the Act are subject to public disclosure unless specifically exempted by an act of our legislature. . . . Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution resulting from such disclosure.

388 So.2d at 278 (citations omitted).

Then again, in Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982), certified questions answered, 464 So.2d 545 (Fla. 1985), the court held:

> The statute was amended with such specificity when it became clear that the courts were going to give Chapter 119 its literal meaning, by refraining from carving out any judicial exceptions, no matter how

> harmful and damaging the disclosure might be. *See Rose v. D'Allessandro*, 380 So.2d 419 (Fla. 1980); *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979); *Gannett Co. v. Goldtrap*, 302 So.2d 174 (Fla. 2d DCA 1974).

410 So.2d at 939. See also, State ex rel. Veale v. City of Boca Raton, 353 So.2d 1194, cert. denied, 360 So.2d 1247 (Fla. 1978). See generally, City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985); Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985).

To now authorize trial judges to bar access to public records based on a highly discretionary 'good cause' standard even if such relief is "not strictly and inescapably necessary" is totally inconsistent with the intent of the law and the long line of cases cited above.

A closely related case is the decision in State ex rel. Times Publishing Co. v. Patterson, 451 So.2d 888 (Fla. 2d DCA 1984). At issue in Patterson was the legality of an administrative order entered by the chief judge in the Sixth Judicial Circuit. This administrative order was promulgated after an amendment to the Public Records Law that specifically exempted confessions and witness lists from disclosure until disposition of the charge.[2] §119.07(3)(m), Fla. Stat. The order automatically sealed certain documents. In holding that the administrative order was overbroad and invalid, the Court noted that closure could only be had where

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[2]The exemption for witness lists was later removed. Ch. 84-298, Laws of Florida.

"necessary to prevent a serious and imminent threat to the administration of justice" and there "must be compelling reasons" for closure. 451 So.2d at 891. This case is important because it is a case in which the court recognized that strict standards would have to be met before a Sixth Amendment argument could be successfully used to deny access to public records.[3]

Another important case to consider that has some similarity to the instant case is Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980). Ocala Star Banner involved a motion to control pretrial publicity in a murder and aggravated battery case in Marion County. The motion included copies of eighteen news stories published in the local paper. After a hearing in which no other evidence was presented, the trial court entered an order closing the case and sealing the court file. The trial court also sealed the testimony of certain witnesses the State had videotaped.[4]

In reviewing the trial court order, the appellate court began by holding the order was overbroad and had no evidentiary

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[3]To the extent Patterson may be construed to suggest that a judicial exception can be created to the Public Records Law, it should be rejected. However, if this Court does hold that there may be circumstances in which a court could withhold disclosure to protect a criminal defendant's fair trial right, then Patterson supports the argument that strict standards must be met prior to any closure order.

[4]While the opinion is not clear on this point, it appears the videotapes were not a part of the court file, but instead may have been statements taken and held by the state attorney. If so, they would be virtually identical to the statements sealed in this case.

basis despite the presence of the eighteen news stories attached to the motion.[5]

The Court then went on to hold that closure could not be authorized until the party seeking closure had satisfied the three-prong test of State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), to wit:

> (1) Closure is necessary to prevent a serious and imminent threat to the administraiton of justice;
>
> (2) That no less restrictive alternative is available; and
>
> (3) That closure will in fact achieve the court's purpose.

Ocala Star Banner, 388 So.2d at 1370. The fact that McIntosh was a prior restraint case was of no consequence to the Court:

> Prior restraint orders are acknowledged censorship orders. The press is permitted to gather the information, but is not allowed to print it. Limitation of access is likewise a form of censorship because the press is denied the right to gather the news, thus unable to print it. Although there is a distinction between the two types of orders, it appears to us to be a distinction without a difference. Under either order, the information is kept from the public and censorship results. Under these circumstances, we see no reason to adopt a different type of test in access cases. Here, the trial court made the findings, but we see nothing *in the record* to support these findings.

388 So.2d at 1371.

It is the position of Tallahassee Democrat that if this

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[5]In the instant case, the trial court had even fewer newspaper stories before it.

Court determines it is appropriate in some cases to temporarily seal §119.011(3)(c)(5) documents to protect a criminal defendant's right to a fair trial, the burden must be placed on the person seeking closure to satisfy the three-part Lewis test. In Lewis, this Court held there was no First Amendment right of access to a pretrial suppression hearing.[6] Yet, despite this finding, it imposed the following test that must be satisfied prior to closure:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice.
>
> 2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial.
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> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Lewis, 426 So.2d at 3.

This test can be applied to §119.011(3)(c)(5) documents without any modification. The use of this test would be entirely consistent with the U.S. Supreme Court access cases, the decision by this Court in Lewis and the long line of access cases decided by the Florida courts. See, e.g., Sentinel Star Company v. Booth, 372 So.2d 100 (Fla. 2d DCA 1980). More importantly, the use of this test would be consistent with the heretofore impermeable mandate of the Public Records Law. If this law is to continue to have the strength it is obviously intended to have, then even in

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[6]Lewis was decided prior to Press-Enterprise II which recognized a First Amendment right of access to a preliminary hearing.

the face of a Sixth Amendment claim by a criminal defendant, exceptions should be allowed in only the most unusual circumstances.

The reason the Lewis test is appropriate here can be seen by analogy to pretrial suppression cases in which the test is used. In a case in which a criminal defendant seeks to close a pretrial suppression hearing, it is because he or she is concerned that certain evidence (often a confession) will be made public even though it may be found this evidence is not admissible at trial. The criminal defendant goes on to argue the publicity generated from an open preliminary hearing will so taint the jury venire that he or she will be unable to get a fair trial thereby violating that defendant's Sixth Amendment rights. Despite this assertion, the Florida Supreme Court has held the criminal defendant must satisfy the three-prong test before closure of the hearing will be allowed.

The argument made by the criminal defendant seeking to seal §119.011(3)(c)(5) documents is identical. The assertion is that public disclosure of information given by the prosecution to the defense will prejudice the defendant's right to a fair trial in the county where charged. (App. 5, pp. 12-14; App. 8 and 9 at para. 6)

The only distinction between Lewis and the instant case is that in Lewis, the right of access was provided by the common law (and not the First Amendment) and in this case, the right of access is provided by a strong Public Records Law. This is the

proverbial distinction without a difference. Even if the §119.011(3)(c)(5) documents are not judicial records and even if there is no First Amendment right of access,[7] they are clearly intended by law to be public. The Public Records Law should not be denigrated by allowing closure simply upon a showing of "good cause" even if closure is "not strictly and inescapably necessary." Instead, the Lewis test, which is directly adaptable, should be imposed and the decisions below should be REVERSED.

D. THE DEFENDANT BELOW FAILED TO PROVIDE ANY EVIDENTIARY BASIS FOR CLOSURE OF THESE DISCOVERY DOCUMENTS.

In its second order sealing the discovery documents, the trial court made findings using some of the 'magic words' from the Lewis test.[8] (App. 8 and 9, pp. 6-8) However, the evidence

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[7]Which is a conclusion suggested by Burk, but one the Tallahassee Democrat respectfully does not agree with.

[8]In this respect, the appellate court created greater error than the trial court since the First District Court of Appeal rejected the three-prong test entirely. 497 So.2d at 655.

in this record simply does not support these findings.[9]

The evidence presented below consisted of five or six newspaper articles from three different newspapers, the Tallahassee Democrat, the Panama City News-Herald (owned by Petitioner) and the Jackson County Floridan. (Tall. Dem. App.) The trial judge, after his first order and prior to his second order, indicated he had made an in camera review of the witness statements. (App. 6, 7, 8 and 9) Otherwise, the only basis for these closure orders was argument of counsel. Absolutely no other evidence whatsoever was presented.

Viewing the evidence in the light most favorable to Respondent, all that can be said is there was a moderate[10] amount of pretrial publicity. This Court judicially knows that

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[9]In reaching its decision, this Court should make an independent examination of the record. In Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the U.S. Supreme Court held that when an appellate court reviewed a libel case, the court should make an independent review of the record. The reason for independent review is the importance of the First Amendment issues and to be sure, "the judgment does not constitute a forbidden intrusion on the field of free expression." 466 U.S. 499 quoting New York Times v. Sullivan, 376 U.S. 254, 285 (additional citations omitted).

In this case, the Court is reviewing the record in a case involving a restriction on the news gathering process. This case therefore involves First Amendment considerations and mandates a more detailed level of scrutiny of the record.

Additionally, the next section of this Amicus Brief addresses the gag order entered below; the most significant form of intrusion on the First Amendment. Clearly under Bose and the authority cited therein, it is important for this Court to independently review the record on the gag order issue.

[10]With only five or six newspaper stories in the record, the use of the word "moderate" is generous.

many more cases generate much more publicity but do not result in the type of closure orders entered here. In Ocala Star Banner, three times the number of newspaper stories was held to be legally insufficient to justify closure. 388 So.2d at 1371. While the trial court found there had, "been widespread publicity which is prejudicial..." (App. 8 and 9 at para. 6), this record simply cannot support such a finding. If this Court ratifies a closure order based on such flimsy evidence, then the burden placed on those seeking closure becomes no burden at all and the strong tradition of access to government that exists will be seriously compromised.

Additionally, while there was some evidence of publicity, there was absolutely no evidence of any prejudice. There is nothing in the record to suggest the Defendants' would be unable to receive a fair trial in Jackson County. As discussed in more detail below, the mere fact that some jurors may know something about a case does not mean that jurors cannot reach a fair and impartial decision based on evidence presented in court. It would be a sad state of affairs if all we wanted on our juries are people that are totally ignorant of the world around them.

In its April 16, 1986, orders, the trial court also indicated that alternatives to closure had been considered. (App. 8 and 9 at para. 7) Again, the trial court used the 'magic words' from Lewis, but failed to explain why additional challenges, jury instructions or other alternatives would be any less effective in this case than in any other that had generated some pretrial

publicity. This finding by the trial court should also be rejected as a matter of law.

Finally, the trial court concluded, based on this limited record, that temporary nondisclosure would be effective without being broader than necessary. The trial court went on to state that the press could interview those witnesses that were not under the gag order. (App. 8 and 9 at para. 8) These two findings are internally inconsistent. The press does not have access to witnesses if those witnesses are under a gag order. Further, as to those witnesses that are free to speak, the sealing of their statements would not be effective in preventing the dissemination of the information. Either way, this finding is legally deficient.

The conclusion that must be reached from a review of this record and the decision below is that allowing closure based solely on a "good cause" standard is legally insufficient and repugnant to our strong principles of open government. Additionally, under the Lewis test (or even a lesser standard), the few newspaper stories presented by the Defendants below are legally insufficient to justify a serious intrusion on the Public Records Law.

II. THE COURTS BELOW ERRED BY AUTHORIZING THE GAG ORDER ON ALL THE PERSONNEL IN THE STATE ATTORNEY AND SHERIFF'S OFFICES.

A. GAG ORDERS ARE THE MOST SERIOUS INFRINGEMENT ON THE FIRST AMENDMENT AND SHOULD BE ENTERED ONLY IN THE MOST COMPELLING CASES.

This case involves more than just a denial of access to public records. Tallahassee Democrat also believes reversible error was committed below by the imposition of an overbroad gag order that was entered without any foundation in law or fact. This gag order was not imposed simply on the lawyers, litigants or officials directly affected by the case,[11] State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), but instead:

> . . . [P]rohibit[s] personnel of the State Attorney's Office, Fourteenth Judicial Circuit of the State of Florida, and personnel of the Jackson County Sheriff's Office from making any out-of-court statements regarding the events giving rise to the crimes charged herein or the parties or issues involved in the trial of said charges until the threat of prejudice to this Defendant no longer exists.

(App. 8 and 9)

In other words, the issue before this Court is the most onerous and impermissible type of infringement on the First Amendment. Prior restraints have never fared well before the courts and are presumptively unconstitutional. See, e.g., Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971) (the Pentagon Papers case);

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[11] In fact, it was not imposed on any of the lawyers other than the State Attorneys.

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Gardner v. Bradenton Herald, 413 So.2d 10 (Fla. 1982), cert. denied, 459 U.S. 865 (1983).

Because of the importance of the First Amendment values at stake here, this Court must make it clear that prior restraint orders on anyone (not just the press) are the remedy of last resort to be used in only the most extreme and unusual circumstances.

The First Amendment is not a narrow, restricted right, but is a broad mandate from the framers of the Constitution to be applied throughout many aspects of society. In Globe Newspaper Company v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982), the Supreme Court of the United States held:

> But we have long eschewed, any "narrow, literal conception" of the Amendment's terms. NAACP v. Button, 371 U.S. 415, 430 (1953), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. Richmond Newspapers, Inc., v. Virginia, 448 U.S. at 579-580, and n. 16 (plurality opinion) (citing cases); id., at 587-588, and n. 4 (BRENNAN, J., concurring in the judgment.)...By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

457 U.S. at 604.

Before analyzing the order at issue in this case, it is

instructive to look at several important prior restraint cases in more detail.

In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), six members of one family were murdered in a small Nebraska town of about 850 people and a suspect was quickly arrested. An order was entered by the trial court that restricted everyone in attendance, including the press, from reporting testimony at a preliminary hearing. This order was later modified by the Nebraska Supreme Court, but still imposed restrictions. The U.S. Supreme Court invalidated the order.

The basis for the original gag order was to prevent excessive pretrial publicity. The Supreme Court considered the First Amendment right of freedom of the press and the Sixth Amendment right of a defendant to a fair trial. The Court examined some of its earlier decisions and held:

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights...
>
> A prior restraint,...has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

427 U.S. at 559.

In determining whether the facts of the case demonstrated such a clear and present danger as to justify such a serious and significant intrusion on the First Amendment, the Court looked at "(a) the nature and extent of pretrial news coverage; (b) whether

other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." 427 U.S. at 562. While there was a substantial amount of publicity in the small community, the Court noted this fact does not automatically deprive a defendant of a fair trial. 427 U.S. at 565. Reasonable alternatives were not explored and, in the small community where the murder occurred, the Court did not believe a gag order would prevent rumors; rumors which might be more dangerous to a fair trial than accurate news reports.

Shortly after the Nebraska Press Association case, this Court had the opportunity to review a similar prior restraint case. The case of State ex rel. Miami Herald Publishing Company v. McIntosh, 340 So.2d 904 (Fla. 1977), involved charges of criminal securities fraud. In order to control pretrial publicity, the trial court entered an order prohibiting the Attorney General's Office, defense counsel, court personnel and witnesses from discussing the case outside of court except to quote from public records or testimony. The order went further and restrained members of the news media from reporting anything about the case, except that which was presented in open court or in a public record.

In its opinion quashing the gag order, the Florida Supreme Court began its discussion by stating:

> Any form of prior restraint of expression comes to a reviewing court bearing a heavy presumption against its constitutional validity; therefore, the party who seeks to

> have such a restraint upheld carries a heavy burden of showing justification for the imposition of such restraint.

340 So.2d at 908.

Admittedly, this Court made a distinction in McIntosh between the press and lawyers, litigants and officials directly affected by court proceedings. 340 So.2d at 910-911. However, the orders under review in the instant case affect a much broader group of people. The First Amendment rights of these individuals should not be restricted any more so than that of other citizens. Wood v. Georgia, 370 U.S. 375 (1962). The imposition of this gag order not only limits the First Amendment rights of the individuals affected, it also limits the ability of the press to gather the news; an activity protected by the First Amendment. United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978). See also, Capital Cities Media, Inc. v. Toole, 463 U.S. 1303 (Brennan, Circuit Justice, 1983); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973); United States c. Columbia Broadcasting System, 497 F.2d 102 (5th Cir. 1974); In re Halkin, 598 F.2d 176 (Ct. App. D.C. Cir. 1979); Barnes v. Schwartz, 6 Med. L. Rptr. 1649 (S.D. Fla. 1980); State ex rel. Miami Herald Publishing Co. v. Rose, 271 So.2d 483 (Fla. 2d DCA 1972); Miami Herald Publishing Co. v. Morphonios, 467 So.2d 1026 (Fla. 3d DCA 1985).

In Morphonios, the court imposed the following test on those seeking a prior restraint order:

> Those who seek closure of a pretrial proceeding (or a restraint operating as a

> closure), must first provide an adequate basis to support a finding that closure is necessary to prevent a serious and imminent threat to the administration of justice. Second, those seeking closure are required to show that no less restrictive alternative measures than closure are available for this purpose. Third, those seeking closure must demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm. *Nebraska Press Ass'n v. Stuart*, 96 S.Ct. at 2804; *Miami Herald v. Lewis*, 426 So.2d at 6. The trial court upon ruling that a closure is warranted, must make findings of fact and must extend its order no further than the circumstances require. *Miami Herald v. Lewis*, 426 So.2d at 8.
>
> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and the closure or restraint order must be narrowly tailored to serve that interest. A trial court can determine, on a case by case basis, whether these legitimate concerns necessitate closure. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed 629 (1984); *Capital Cities Media, Inc., v. Toole*, 463 U.S. 1303, 103 S.Ct. 3524, 77 L.Ed.2d 1284 (1983); *Globe Newspaper v. Superior Court*, 102 S.Ct. at 2621.

467 So.2d at 1029-1030.

CBS, Inc., v. Young, 522 F.2d 234 (6th Cir. 1975), began when a federal district judge issued the following order in a civil suit filed after the tragic incidents at Kent State University on May 4, 1970:

> For good cause appearing, it is
>
> ORDERED that in addition to all counsel and Court personnel, all parties concerned with this litigation, whether plaintiffs or

> defendants, their relatives, close friends and associates are hereby ORDERED to refrain from discussing in any manner whatsoever these cases with members of the news media or public.

The case came to the Sixth Circuit Court of Appeals on a Petition for Writ of Mandamus against the judge. The Court began its analysis of the order by reviewing U.S. Supreme Court decisions regarding prior restraints on First Amendment freedoms. The Court noted that these cases have held that prior restraints are subject to the "closest scrutiny"; that the restrained activity "must pose a clear and present danger, or a serious or imminent threat to a protected competing interest"; that there is a "heavy presumption" against the constitutionality of the restraint; the government has a "heavy burden" of justification; and the "restraint must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." 522 F.2d at 238 (citations omitted).

In issuing the writ of mandamus overturning the gag order, the court noted it effectively blocked all sources of information. The order was also unduly vague in that it did not define "relatives, close friends and associates." In addition, the Court held:

> We find the order to be an extreme example of a prior restraint upon freedom of speech and expression and one that cannot escape the proscriptions of the First Amendment, unless it is shown to have been required to obviate serious and imminent threats to the fairness and integrity of the trial.

522 F.2d at 240. Young is particularly important because, as in the instant case, the prior restraint was imposed on people

directly related to the case as opposed to members of the news media.

The litigation process is a form of expression protected by the First Amendment. Halkin, 598 F.2d at 187. This Court should specifically recognize that the First Amendment protects everyone, not just the news media. As this Court looks specifically at the facts of this case, it should remember that the First Amendment right of freedom of speech is too important to be compromised or restricted for anything except the most compelling reasons.[12] Tallahassee Democrat would urge this Court to re-examine that portion of McIntosh authorizing gag orders on certain individuals and impose a much higher burden than the 'good cause' standard that exists. In any event, the gag orders at issue here should be overturned as overbroad and because they were entered without adequate foundation under any standard.

B. THE GAG ORDER ENTERED BELOW IS SUBSTANTIVELY AND PROCEDURALLY DEFECTIVE.

The gag order portion of the trial court's April 16, 1986, order provides as follows:

> ORDERED AND ADJUDGED that the final paragraph of this Court's Order dated March 13, 1986, be, and the same is hereby modified to prohibit personnel of the State Attorney's Office, Fourteenth Judicial Circuit of the State of Florida, and personnel of the Jackson County Sheriff's Office from making

[12]Lawyers are already restricted by ethical rules governing trial publicity. Fla. Bar Rules of Professional Conduct, Rule 4-3.6. Additional restrictions should be allowed only in the most highly unusual circumstances.

> any out-of-court statements regarding the events giving rise to the crimes charged herein or the parties or issues involved in the trial of said charges until the threat of prejudice to this Defendant no longer exists. The prohibition in the order directed to the Clerk of the Court is removed because there is no evidence indicating that the Clerk or his employees have made any statement to the press concerning this case or indicating that the Clerk or his employees have knowledge of the events giving rise to the crimes charged.

(App. 8 and 9)[13]

The prior restraint is unconstitutional for a variety of different reasons.

First, as noted in the cases cited above, it is the burden of the party seeking the gag order to <u>prove</u> that this most onerous abridgment of constitutional rights is required. This burden should be on the party seeking the order irrespective of whether it is to be directed at the news media, the parties, the lawyers or other individuals directly or indirectly involved with the case. Necessarily, this must be a heavy burden and one which the defendants below failed to even attempt to meet.

The only evidence presented in support of the gag order was an unverified motion, a few newspaper stories and argument of counsel. No evidence was presented to demonstrate the scope of pretrial publicity, the extent to which it may have permeated the jury venire, whether a gag order would effectively limit pretrial publicity, etc. The Defendants merely made some blanket

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[13]The original order of March 13, 1986 also included a gag order on the personnel in the Office of the Clerk of the Circuit Court. (App. 6 and 7)

and generalized assertions about the potential for adverse pretrial publicity and totally failed to carry the heavy burden that must be met before the imposition of this type of prior restraint. This alone justifies reversal of the gag order.

Related to the issue of the Defendants' failure of proof below is the fact that this gag order fails the three prong test outlined in Morphonios.[14] As noted above, the Defendant failed to present any competent evidence that closure is necessary to prevent a serious and imminent threat to the administration of justice. Other than the few articles submitted to the trial court, there was no proof that any Sixth Amendment right to a fair trial would be jeopardized in the absence of this gag order.

> We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he might be charged alone presumptively deprives the defendant of due process." Murphy v Florida, 421 US, at 799, 44 L Ed 2d 589, 95 S Ct 2031.

Nebraska Press Association, 427 US at 565.

Particularly in rural areas such as Jackson County, the courts often deal with defendants, lawyers and jurors that may know each other. There was no showing this particular case is so extraordinary as to justify this most serious of

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[14]In fact, it is Tallahassee Democrat's position this record would not support the issuance of this gag order even if the less restrictive "good cause" standard is used.

constitutional limitations on freedom of speech. As noted above, the Nebraska Press Association case involved a vicious murder in a small town and yet the court refused to allow the imposition of this same type of prior restraint.

The Defendants also failed to prove that other available alternatives would not be adequate to protect their right to a fair trial. The Defendants merely asserted that the only available alternative that would adequately protect their rights is that of a change of venue. (App. 3) However, there are numerous other alternatives that are available that were not shown to be equally as effective without resorting to a prior restraint. Such alternatives generally include a consideration of remedies such as continuance, severance, change of venire, voir dire, peremptory challenges, sequestration, or admonitions to the jury. Lewis, 426 So.2d at 8. The failure of the court to consider alternatives such as these to the imposition of this gag order also renders this Order fatally defective.

The Defendants also failed to carry their burden to prove that this gag order would be effective in protecting the danger they perceived to their right to a fair trial. This case, and the incidents leading thereto, had already generated pretrial publicity prior to the gag order, as well they should. This Court judicially knows that abuses within our prison system constitute one of the pressing issues in this state. There was absolutely no showing that the gag order would be effective in protecting the Defendants from the perceived danger. If

anything, the imposition of the gag order resulted in a greater danger of lopsided or less informed reporting of these events. This is so because limiting the First Amendment rights of these various state officials leads to a greater danger of publicity on only one side of this story since the gag order was only imposed on state officials.

This gag order is also unconstitutionally overbroad. It was imposed on all members of the State Attorney's Office and the Sheriff's Office without any consideration as to whether all such persons have any involvement whatsoever with these proceedings. The Order also fails to provide any true guidance as to when it will expire and potentially subjected those persons to sanctions from the court from the date of the Order to a point in time that may have been months or years in the future. The Order is also so broad that it arguably prohibited all those persons from engaging in any communication that may have been necessary to prepare for the criminal trials. As it reads, the Order prevented those people from talking to each other, to witnesses or to other persons with knowledge of the cases in addition to the prohibition against talking to members of the press. While this was probably not the intent of the Order, it is, by its own terms, so overbroad as to be facially invalid.

Finally, these gag orders are also procedurally deficient in that they do not contain any findings upon which the prior restraint could be based. Upon close review, it is clear that the factual findings in these orders relate only to the discovery

documents. There are simply no stated facts related to any danger justifying a gag order. Undoubtedly, the dearth of evidence presented did not allow the trial court to make factual findings. It is well established that the trial court is required to specifically articulate those findings which justify the imposition of any restraints on the First Amendment so that the reviewing court can adequately and properly review the basis for the decision. Press Enterprise Company v. Superior Court of California, Riverside County, 464 U.S. 501 (1984); Lewis, supra. The failure to do so also invalidates this gag order.

For any or all of these reasons, the decisions below issuing the gag orders and affirming them on appeal should be REVERSED.

CONCLUSION

For the foregoing reasons, the decision entered by the First District Court of Appeal in Florida Freedom Newspapers, Inc., v. McCrary, 497 So.2d 652 (Fla. 1st DCA 1986), should be REVERSED.

DATED this 14th day of May, 1987.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing have been furnished by hand delivery to the Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, FL 32301, this 18th day of May, 1986, and copies of the foregoing have been provided by prepaid U. S. Mail to the following:

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