IN THE
SUPREME COURT OF THE STATE
OF FLORIDA

Case No. 69,660

FLORIDA FREEDOM NEWSPAPERS, INC.,

Petitioner,

vs.

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

Respondent.

Initial Brief of Amici Curiae The Miami Herald Publishing Company, The Florida Press Association, The Florida Society of Newspaper Editors, and The Florida First Amendment Foundation

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INTEREST OF AMICI CURIAE

Amici curiae The Miami Herald Publishing Company, The Florida Press Association, The Florida Society of Newspaper Editors, and The Florida First Amendment Foundation (the "press amici") file this Initial Brief in support of petitioner Florida Freedom Newspapers, Inc.

The press amici are journalists, publishers, and press organizations throughout the State of Florida.[1/] The press amici routinely report on criminal cases, and characteristically rely upon public records such as those at issue here to do so. Such reliance is essential to the accuracy of press coverage of the criminal courts.

Access to documents given by the prosecution to the defense is of fundamental importance to amici and the public at large. The decisions of the First District would permit courts to restrict this access despite the clear mandate of

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1/ The Florida Press Association is an association of 55 daily and 160 weekly newspapers published in Florida. The Florida Society of Newspaper Editors is a professional association of Florida journalists who exercise editorial control or editorial functions at Florida daily newspapers. The Florida First Amendment Foundation is a not-for-profit foundation created to foster and protect First Amendment values. The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder Inc. which publishes The Miami Herald, a daily newspaper of general circulation throughout the State of Florida. Knight-Ridder Inc. is a nationwide communications company engaged in the publication of magazines, books, and 28 daily newspapers.

the Public Records Law to the contrary and would thus have a substantial adverse impact on the ability of the press to gather and report news.

STATEMENT OF THE CASE AND FACTS

The Incidents In The Jackson County Jail And The Arrests Of Gordon Hartley, Jr. And Dale Sims

In December 1985, the Panama City News Herald, one of Petitioner's newspapers, uncovered a pattern of jailer mistreatment and prisoner abuse in the Jackson County Jail. A. 45-53, 111[2/]. The newspaper reported that young black inmates were being tortured by jailers who would handcuff them and leave them to hang suspended by their hands for long periods of time. Id. The inmates, who confirmed that this activity was a common occurrence in the jail, claimed that the torture was racially motivated. Because of the importance of the story to the community, other area newspapers soon joined the Panama City News Herald in reporting the story. The stories led to official investigations of the inmates' allegations of abuse. These investigations soon culminated in the arrests of several

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2/ All documents referred to are included in the Appendix to this brief. Citations to the Appendix are indicated by "A. _____."

correctional officers on charges ranging from aggravated child abuse to jailer malpractice. Gordon Hartley, Jr. and Dale Sims, were two of the jailers arrested and so charged. A. 111.

The Defendants' Requests To Seal The Documents Provided To Them By The State Attorney And The First Order Of The Trial Court

On February 18, 1986, Hartley made a demand for discovery pursuant to Rule 3.220, Fla.R.Crim.P. In anticipation of the documents which he expected the State to provide, Hartley filed a Motion to Control Prejudicial Publicity. A. 1-7. Sims, who had not yet made his demand for discovery but anticipated doing so, did likewise. A. 8-10. In their motions, Sims and Hartley admitted that the documents to be provided them would be open to inspection under the Public Records Law unless the court sealed them. A. 2, 8. They urged the court to seal the documents and prohibit participants in the case from making any public comment on the case, claiming that without this blanket closure, they would be unable to obtain a fair trial in Jackson County. A. 3, 9.

On March 13, 1986, the court held a hearing on the Motion. The court heard no testimony. The only pieces of "evidence" placed before the court were the newspaper articles which had already been published relating to the

Jackson County Jail incidents. A. 45-53. Solely on the basis of these articles, the court entered an order barring the State from disclosing any of the documents to the public without first submitting them to the court for in camera review. A. 54, 55. The court also prohibited the State Attorney's Office, the Jackson County Sheriff's Office and the Clerk of the Court from making any out of court statements relating to the case.[3/] A. 54, 55.

The Newspaper's Public Records
Request And The State's Compliance
With The Defendants' Discovery Demands

Counsel for Florida Freedom Newspapers immediately served a formal public records demand on the state attorney, who was the custodian of the documents, requesting that he produce the documents for inspection pursuant to the Public Records Law. A. 56. The state attorney promptly responded, explaining that the order of the trial court prohibited him from producing the documents for inspection. A. 57-58.

Shortly thereafter, the State complied with the defendants' discovery demands. A. 59-60. The state attorney provided Hartley and Sims with the transcribed statements of

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3/ This Statement of the Case and Facts is limited to those facts relevant to the issue addressed by the amici herein. Those portions of the courts' orders limiting extrajudicial comment are not discussed.

thirty-one individuals. Among the individuals who had given statements were inmates of the Jackson County Jail and sheriff's office personnel familiar with the incidents. Id.

The Second Order Of The Trial Court

After conducting an in camera review of the documents, the court entered a second order prohibiting the public disclosure of any of the documents until after the trial.[4/] A. 112-13. In support of its decision to seal the documents, the court conclusorily stated:

> [T]here has been widespread publicity which is prejudicial to the [defendants'] right to receive a fair trial free from outside influences . . . and right to be tried before an impartial jury in Jackson County, Florida. The disclosure of the discovery documents . . . would open to the press additional volumes of information not previously made public. The public dissemination of this additional information poses a serious and imminent threat to the administration of justice requiring temporary nondisclosure of the discovery documents.

A. 113.

4/ Prior to issuing the second order, the court held a second hearing on the documents. A. 61-109. No additional evidence was adduced at that time to support sealing the documents. Id.

The Decisions Of the First District Court Of Appeal

On appeal, the First District Court of Appeal affirmed. The court held that the documents were public records but nonetheless held that the trial court had properly sealed them. A. 114. The court reasoned that the documents, although public records, were only pretrial discovery materials. A. 116-17. As such, the documents were comparable to the unfiled deposition transcripts sealed in Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985). Id. The First District therefore explicitly refused to apply the test announced in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), to determine whether it was constitutionally necessary to seal the documents. Id.

On motion for rehearing, the court maintained its position. Distinguishing this case from Lewis for the second time, the court stated:

> In this case, the press has not sought access to a judicial proceeding, but rather the disclosure of pretrial discovery material.

A. 121 (emphasis in original).

This Court granted review.

SUMMARY OF ARGUMENT

In 1975, the Florida Legislature amended the Public Records Law to preclude judicial exemptions from the inspection requirements of the Public Records Law. Since that amendment, this Court has steadfastly refused to permit Florida courts to exempt legislatively decreed public records from the inspection requirements of the Law. In an abrupt departure from this history of deference to the legislative will, the First District Court of Appeal has held that the public's right to inspect documents declared public records by the Legislature, which are in the custody of the executive branch, is less protected than the analogous right to inspect public judicial records. Mistakenly relying on the rationale of the Fourth District Court of Appeal in Palm Beach Newspapers, Inc. v. Burk, supra, the First District explicitly sealed documents of the state attorney which it knew to be public records, treating them as nonpublic discovery materials.

This Court should reverse the decisions of the First District for two reasons: First, the documents are clearly public records which are open to inspection under the Public Records Law. They are "public records" as defined by Chapter 119, Fla.Stat.; as "public records," they may only be exempted from inspection by the Legislature; and the Legislature has not exempted them from inspection. In fact,

it explicitly excluded these documents from an exemption. Second, having failed to treat the documents as public records subject to public inspection requirements, the First District sealed the documents as "pretrial discovery material" to which no right of public inspection attaches. The court explicitly declined to require the defendants to meet the closure standard for public judicial records announced by this Court in Miami Herald Publishing Co. v. Lewis, supra.

The decisions of the First District are not only a disturbing intrusion of the courts into the Legislature's domain, they seriously threaten to curtail public access to a critical source of information regarding the prosecutorial process. This Court should reverse the decisions and reaffirm its commitment to a policy of sunshine in government.

ARGUMENT

I. The Documents Are "Public Records" Which The Legislature Has Opened To Public Inspection Pursuant To Chapter 119

As the First District recognized, A. 114, the documents which were prepared by and in the custody of the state attorney's office and released to the defendants are public records open to inspection under Chapter 119, Fla.Stat.

A. The Legislature Has Determined That Documents Provided To The Defense By The State Attorney Are "Public Records" Within The Meaning Of Chapter 119

The first subsection of Chapter 119, Florida's Public Records Law, makes the intent of the law abundantly clear:

> 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.

§119.01(1), Fla.Stat. (emphasis added). "Public records" are, in turn, broadly defined to include

> all . . . material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

§119.011(1), Fla.Stat. (emphasis added). "Agency" means "any state . . . officer, department . . . or other separate unit of government created or established by law." §119.011(2), Fla.Stat.

The documents at issue here are clearly within this definition of public records. They were assembled by the state attorney for use in prosecuting certain criminal defendants, and they were required by court rule to be provided to the defendants by the state attorney.

Specifically, the documents included thirty-one transcribed statements of jail inmates and sheriff's office personnel collected in the course of an official investigation into the Jackson County Jail incidents. The documents were thus (i) in the custody of a "state officer" whose position and duties are "established by law," i.e., the state attorney, see ch. 27, Fla.Stat., and (ii) "made or received pursuant to law" and "in connection with the transaction of official [law enforcement] business."

B. Only the Legislature May Exempt Public Records From The Inspection Requirements Of Chapter 119

All "public records" are open to inspection, unless explicitly exempted by statute. Thus, Section 119.07(1)(a), Fla.Stat., provides that "[e]very person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so." (Emphasis added). Only "public records presently provided by law to be confidential or which are prohibited from being inspected . . . by general or special law . . . are exempt" from such inspection. §119.07(3)(a), Fla.Stat. As this Court has recently explained this statutory framework: "Thus, in the Public Records Law, the coverage is expressed generally; exemptions are identified explicitly." Wood v. Marston, 442 So.2d 934, 938 (Fla. 1983).

This Court has consistently recognized and repeatedly reaffirmed the Legislature's exclusive authority to create exemptions. In Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979), this Court explicitly held:

> [I]n enacting section 119.07(2), Florida Statutes (1975), the legislature intended to exempt those public records made confidential by statutory law.

(emphasis added). The Court rejected the plea that "public policy considerations" compelled the judicial recognition of non-statutory exemptions, and explicitly adopted the rationale of the Fourth District in State ex. rel. Veale v. Boca Raton, 353 So.2d 1194 (Fla. 4th DCA 1978):

> [W]e do not believe that a court is free to balance the public's interest in disclosure against the harm resulting to an individual by reason of such disclosure. This policy determination was made by the Legislature when it enacted the statute.

353 So.2d at 1197 (emphasis and citation omitted); Tribune Co. v. Cannella, 458 So.2d 1075, 1077 (Fla. 1984) (exemptions limited solely to those provided by statute); Forsberg v. Housing Authority, 455 So.2d 373, 374 (Fla. 1984) (same); Rose v. D'Allesandro, 380 So.2d 419, 419 (Fla. 1980) (same); accord, Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 779 n.1 (Fla. 4th DCA 1985) (same); Orange County v. Florida Land Co., 450 So.2d 341, 343 (Fla. 5th DCA 1984)

(same); Satz v. Blankenship, 407 So.2d 396, 398 n.4 (Fla. 4th DCA 1981), review denied, 413 So. 2d 877 (Fla. 1982) (same); Morgan v. State, 383 So.2d 744, 746 (Fla. 4th DCA 1980) (same).

C. The Legislature Has Not Exempted The Documents From The Inspection Requirements Of Chapter 119

The status of the documents at issue here is specifically addressed in Chapter 119. The Legislature explicitly excluded documents such as those requested here from exempt status. Section 119.07(3)(d), Fla.Stat., exempts "[a]ctive criminal intelligence information and active criminal investigative information from inspection." The documents -- transcribed statements taken as part of an official investigation -- are clearly within the scope of this exemption. Another section, however, specifically excludes the documents from this exemption once they are provided to the criminal defendant involved:

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

§119.03(c)(5), Fla.Stat.

The Fourth District Court of Appeal has twice upheld the release of documents of this type pursuant to this clear statutory mandate. In Satz v. Blankenship, supra, and more recently in Bludworth v. Palm Beach Newspapers, Inc., supra, the Fourth District in unambiguous terms held that documents provided to the defense by the State pursuant to court rule are public records open to inspection under Chapter 119. In Satz, the court considered the possible applicability of the statutory exemptions for active criminal intelligence and investigative information and concluded:

> '[D]ocuments given or required by law or agency rule to be given to the person arrested' are open for public inspection. [Section 119.011(3)(c)(5).] This provision reveals that once documents are released [to a criminal defendant], the Legislature believed there is no longer a need for secrecy.

407 So.2d at 398 (footnote omitted). When the issue arose again, the Fourth District squarely reaffirmed its holding in Satz:

> Thus, we reaffirm what we held in [Satz v. Blankenship]; namely that once documents are released, the legislature intended an end to secrecy about those documents. The legislature has been aware of our earlier decision since 1981, and of the denial of the petition for review thereof by this state's highest court in 1982; and it will be similarly aware of our reaffirmation.

Bludworth, 476 So.2d at 779 (citation and footnote omitted).

More recently, in Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987), this Court was careful to reaffirm the holding of the Fourth District in Satz and the right of the public to inspect documents provided by the State to the defense in a criminal case:

> Satz v. Blankenship, 407 So.3d 396 (Fla. 4th DCA 1981), review denied, 413 So.2d 877 (Fla. 1982), recognized that, under section 119.011(3)(c)(5), once documents are required to be given to an arrested person, the disclosed documents become 'public in a sense.' 407 So.2d at 398. We find this to be a narrow and specific situation which is in accord with the analysis employed by Willis.

504 So.2d at 384 n.2.

This is precisely the "narrow and specific situation" described in the foregoing footnote of the Court. The documents, although discovery documents, are public records which the Legislature has not exempted from inspection. As such, Chapter 119 mandates that they be open to public inspection.

II. The Decisions Of the First District Should Be Reversed Because The Court Sealed The Documents As If They Were Merely Discovery Materials Instead Of Public Records The Legislature Has Opened To Public Inspection

Despite the fact that the documents were public records, the First District held that the trial court had properly sealed them. This was error. In the absence of a

statutory exemption, agency documents which the Legislature has statutorily declared public records are due the same respect as judicial records which are public as a matter of law. Individuals seeking to seal public records must satisfy the requirements of the Lewis test.

A. The First District Improperly Treated The Documents As "Pretrial Discovery Materials" Rather Than "Public Records" Which The Legislature Has Opened To The Public

The First District upheld the order sealing the documents because it made one pivotal mistake: it characterized the documents purely as pretrial discovery materials to which the public enjoys no right of access and ignored their status as public records which the public has a right to inspect. As a result, the court analogized the documents to the unfiled deposition transcripts recently addressed in Palm Beach Newspapers, Inc. v. Burk, supra. A. 116-17. Thus, the court stated:

> Accordingly, we adopt the reasoning in [Burk] and hold that the Lewis test does not apply to pretrial transcribed statements furnished to the defendants pursuant to their demand for discovery under Rule 3.220, Florida Rules of Criminal Procedure.

A. 117.

In fact, the court should have treated the documents as public records, so designated by the Legislature. As public records, the documents are comparable to public judicial records and proceedings. Thus, public records may only be sealed when the constitution requires it. See, e.g., Forsberg v. Housing Authority, 455 So.2d 373, 374 (Fla. 1984) ("There is no exemption, nor is there a constitutional right of privacy, which prevents [the records'] inspection.").

B. The First District Should Have Required The Application Of The Lewis Test

In Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), this Court adopted a three-part test to be applied when a party seeks to close a public judicial record or proceeding. In order to obtain closure, the party must demonstrate that:

> 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; and
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

426 So.2d at 3. In addition, the court must make evidentiary findings to support the order of closure. Mere conclusory

holdings that access will cause incurable prejudice are legally insufficient. Id. at 7-8.

The Court adopted this test and evidentiary standard in Lewis because it struck "the best balance between the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury." Id. at 7. The Court should adopt the same test in this case for the same reason. The origins of the access right do not alter its character. Legislatively-defined public records and public judicial records are both open to public inspection. Courts should not permit either to be sealed unless the party seeking confidentiality can satisfy the Lewis test. The failure of the First District to apply the test thus mandates reversal.[5/]

5/ Had the First District conducted a public records analysis and applied the Lewis test, it would have been compelled to reverse the orders of the trial court for failure to comply with Lewis. As is clear from the face of the orders, the trial court made no attempt to comply with Lewis. The conclusory "findings" of the trial court are not factual findings at all. They could not be; no facts were ever presented to the court. No testimony was taken regarding the putative need to seal the documents, and no affidavits were filed. Neither were any alternatives less restrictive than complete closure considered. Newspaper articles about the Jackson County Jail incidents constituted the only "evidence" before the court. The only finding the court could have made which the record would have supported was that the jailhouse incidents had received publicity. As a matter of law, this single fact alone is insufficient to support the closure of public records.

CONCLUSION

Amici curiae respectfully request that the decisions of the First District Court of Appeal be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 18th day of May, 1987 to the following addressees:

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