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 REPLY BRIEF

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ARGUMENT

In its initial Amicus Curiae brief, Tallahassee Democrat argued 1) that if there is to be an exception to Chapter 119, Florida Statutes, strict and explicit evidentiary burdens must be imposed on those who seek to limit access to those records and 2) the gag order imposed by the trial court was facially overbroad. Respondents urged that no such test is necessary and the gag order was not overbroad.

Respondent's brief does not adequately address or refute the points raised by Tallahassee Democrat for several reasons. First, Respondent claims the right to a fair trial takes precedence over the right of access and courts have the inherent power to preserve this right. This argument, however, misses the thrust of Tallahassee Democrat's position. Tallahassee Democrat does not seek to jeopardize the right to a fair trial. What is sought is a recognition and a utilization of the mechanism established by this Court which balance the right of access with the right of a fair trial; a mechanism the courts below (particularly the First District Court of Appeal) incorrectly failed to recognize or apply.

Respondent's brief virtually ignores Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), State ex rel Times Publishing Co. v. Patterson, 451 So.2d 888 (Fla. 2d DCA 1984) and Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980). All three cases involved facts similar to the instant

case. The key question in these cases was whether pretrial publicity would adversely affect a defendant's right to a fair trial. In all three cases the courts balanced the right of access with the right to a fair trial. All three ruled the lower court overstepped its bounds in protecting the right to a fair trial. All three involved the press advancing a common law as opposed to a constitutional or statutory right of access.[1] In reaching its decision in Nebraska Press the United States Supreme Court used a balancing test similar to the one later used by this Court in Lewis.

The above cases illustrate that courts have historically attempted to balance the competing interests of the press and the accused, regardless of which right is paramount. This Court must do the same in the instant case.

Second, Respondent claims the Lewis test is not applicable in the instant case. This argument fails to recognize the Lewis test is the best test for balancing the rights of the press and the accused, whether the basis for claiming a right of access is constitutional, by common law or by statute.

In Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), this Court established a three-part test to determine whether the right of access will infringe on the right to a fair trial. 426 So.2d at 6. This test applies whether the right of

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[1]However, reliance on these cases should not be read to suggest that First Amendment rights are not involved or affected by this case.

access claimed is constitutionally based or non-constitutionally based. See, Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378, 381 (Fla. 1987). The Lewis test provides the best balance between the need for open government and public access to the judicial process and the right of a defendant to a fair trial before an impartial jury. Lewis, supra, at 7. The Lewis test gives maximum importance to both interests. 426 So.2d at 3. Because of its flexibility, this test can and should be applied anytime the potential exists for a confrontation between the right of access and the right to a fair trial. The instant case is no exception.

In addition, the use of the Lewis test will result in a more uniform standard being applied throughout the lower courts. Respondent would have this Court apply the "showing of cause" standard of Rule 3.220(h), Florida Rules of Criminal Procedure. This rule allows a court much more discretion than the Lewis test. It does not require a court to either consider the criteria this Court carefully crafted in Lewis, or establish a record for the reviewing court of why the press should or should not be granted access. Trial judges must be given greater guidance and appropriate limitations should be placed on judicial discretion when balancing interests as compelling as those of the press and the accused. In such a situation, courts need to have uniform standards against which judicial discretion may be measured, so that to the extent possible, similar situations will produce similar results. Ocala Star Banner v. Sturgis, 388 So.2d 1367, 1370-71 (Fla. 5th DCA 1980). Without the Lewis standard, similar

situations could lead to dissimilar results and prejudice both the press and the accused.

Whether or not the right to a fair trial is paramount, courts have tried to accomodate the interests of the press and the accused. The Lewis test is the best method for doing this and should be used in the instant case if this Court determines an exception to the Public Records Act is necessary. The Lewis test is flexible and easily adapted to a variety of situations, including that presented in the instant case. While Respondent argues this test should not apply, he does not argue the test will not work as a means to balance the competing interests at stake here.

Third, Respondent claims that holding an evidentiary hearing prior to closure could prejudice a defendant unable to afford a second legal battle. The logical conclusion to Respondent's argument in that criminal defendants should be allowed to unilaterally seal these public records without any hearing whatsoever. This clearly cannot be the law. This Court in Lewis, and other courts dealing with similar issues, have always specifically put the burden on the party seeking closure to show that press access would be prejudicial. 426 So.2d at 7, 8. Applying the Lewis test to cases such as the instant one may result in increased costs to the defendant. However, these costs would be no greater than those situations in which the Lewis test is already used such as in cases dealing with closure of pretrial hearings. This argument by Respondent is not persuasive and does

not justify reallocation of the burden of proof or the underlying suggestion that the press and public be denied access to records without any right to a hearing.

The instant case is very similar to cases involving access to depositions in criminal matters. Under the current state of the law, unfiled depositions remain out of reach of the press. Once filed, pursuant to Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979), they become available to the public unless those seeking closure can meet the Lewis test. See, Burk, supra. Likewise, the witness list and statements in the instant case are not public records under Chapter 119, Florida Statutes, until demanded by the defendant. At that point, they become public. Satz v. Blankenship, 407 So.2d 396, 398 (Fla. 4th DCA 1981). A party seeking closure of such records should likewise have to meet the Lewis test for the reasons set forth in the briefs filed by Petitioner and Amici.

Fourth, Respondent argues the evidence presented to the trial court in support of closure is sufficient to meet the Lewis test. Lewis, however, requires an evidentiary hearing to be held and requires the party seeking closure to prove several elements. 426 So.2d at 7, 8. The evidence presented to the trial court consisted of several newspaper articles and the witness statements. The trial court then attempted to document its findings using the criteria set forth in Lewis. No evidence, however, was presented which established any link between the articles and statements and prejudice to the defendant. This

link was made by the trial court absent any evidentiary basis. Lewis, clearly requires such a link:

> The trial judge must determine if there is a serious and imminent threat that publication will preclude the fair administration of justice. In determining this question, an evidentiary hearing should be held and findings of fact should be recorded by the judge in his order granting or refusing closure.

426 So.2d at 7, 8. (emphasis added).

The trial court must have evidence showing prejudice to the defendant before denying access. It had none in the instant case.

Fifth, Respondent argues the gag order issued by the trial court was proper. Respondent relies heavily on State ex rel Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977) and urges the "clear and present danger" test should not be applied to the order issued in the instant case. While McIntosh may not condone the clear and present danger test for "lawyers, litigants, witnesses, jurors and court personnel", it expressly requires it for all other persons who may make prejudicial comments. 340 So.2d at 911. This is consistent with Tallahassee Democrat's position in its amicus brief that gag orders should be issued in only the most compelling circumstances.

The trial court made no finding of clear and present danger prior to issuing its gag order. The order not only covered those persons directly connected with the case, but also all persons in the State Attorney's office and the Jackson County Sheriff's office. The order restrained these persons "until the threat of prejudice to this Defendant no longer exists." By including too

many persons without finding a clear and present danger, the order was overbroad. By not providing guidelines as to when the threat of prejudice would end, the order was unduly vague.

In addition, the trial court's issuance of the gag order was not based on evidence which linked the pretrial publicity with prejudice to the defendant. As discussed above, Lewis requires that evidence of prejudice to the defendant prior to any restraint on the flow of information. If no evidence is presented, no restraint should be issued. This is particularly important in a case involving a gag order; the most serious form of intrusion on the First Amendment.

In short, Tallahassee Democrat believes that once the witness list and statements were made available to the defendant, they become public records, available without restriction pursuant to Chapter 119, Florida Statutes. If, however, this Court determines that an exception to the Public Records Act is to be made, the Lewis test should govern. Courts have historically sought to balance the right of the accused to a fair trial with the right of the public to an open judiciary. Lewis provides the best mechanism to balance these interests. The trial court in the instant case found Lewis to be unnecessary to its decision although it did go through the Lewis criteria. The First District rejected the Lewis test entirely. Lewis requires evidence of prejudice before any restraint may be imposed. No such evidence was presented to trial court prior to either its decision on the documents or the gag order. The gag order issued is overbroad

and vague. The decisions of the trial court and its affirmance by the First District 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 20th day of July, 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 20th day of July, 1987, and copies of the foregoing have been provided by prepaid U. S. Mail to the following:

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