IN THE

SUPREME COURT OF FLORIDA

CASE NO. _____

FLORIDA FREEDOM NEWSPAPERS, INC.,

Petitioner,

vs.

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

Respondent.

Jurisdictional 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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INTRODUCTION

Amici Curiae The Miami Herald Publishing Company, The Florida Press Association, The Florida Society of Newspaper Editors, and The Florida First Amendment Foundation (the "amici") respectfully request that this Court accept jurisdiction of this case pursuant to Rule 9.030(a)(2)(A)(ii) and (iv), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

The amici adopt the Statement of Petitioner Florida Freedom Newspapers.

SUMMARY OF ARGUMENT

This Court has jurisdiction because the First District decisions[1] expressly construe the United States Constitution, and because the decisions are in express and direct conflict with the decisions of this Court and the other courts of appeal.

The First District affirmed the trial court's denial of public access to public records and upheld the gag order on trial participants imposed by the trial court. In both instances, the First District expressly construed the First Amendment to the United States Constitution; consequently this Court has jurisdiction. See Section I infra.

Since the decisions expressly create a "judicial" exemption from the Public Records Law, this Court has conflict

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[1] The "decisions" include the initial panel opinion ("McCrary I") and the subsequent rehearing opinion ("McCrary II"), both attached as Appendices hereto.

jurisdiction for at least two distinct reasons.[2] First, this ruling conflicts with decisions of the Fourth District which specifically hold that records given by the State to the defendant are public records which the public may inspect. Second, it conflicts with the many decisions of this Court and the courts of appeal which hold that courts may not create exemptions from the Public Records Law.

The decisions of the First District seriously limit public access to a critical source of information regarding the criminal justice system in Florida. This Court should therefore grant review and reverse the decisions of the court below.

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE DECISIONS OF THE FIRST DISTRICT EXPRESSLY CONSTRUE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court has jurisdiction to grant review when a decision "expressly construes a provision of the state or federal constitution." Fla.R.App.P. 9.030(a)(2)(A)(ii). In this case, both McCrary I and McCrary II "expressly construe" the First Amendment to the United States Constitution in deciding two distinct issues: (1) the denial of public access to public records and (2) the gag order placed on the trial participants.

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[2] The decisions of the First District are also in conflict with this Court's decision in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), on the gag order issue. Amici adopt Petitioner's Brief on Jurisdiction with respect to this issue.

In McCrary I, the First District expressly held that "no First Amendment right is implicated" and therefore limited its inquiry solely to whether "cause" existed to justify the sealing of the records and entry of the gag order. App. 8. Finding that such cause existed, the court affirmed both orders.

In McCrary II, the First District abandoned its First Amendment holdings. The court admitted that "these two issues involve distinct First Amendment considerations," App. 12 (emphasis in original), and examined each question separately. The court again affirmed the trial court's denial of access to the public records, holding:

> Since no traditional First Amendment right is implicated by that portion of the order which prohibits the petitioner's access to pretrial discovery documents, the defendant's paramount right to a fair trial before impartial jurors prevails.

App. 13 (emphasis in original).

The court likewise reaffirmed the gag order on trial participants entered by the trial court. Although the court recognized that the gag order did implicate a "traditional First . . . Amendment value[]," App. 13, it held the order, limited to trial participants, to be "an alternative measure short of prior restraint," App. 14, "within the power of the trial judge" to impose. App. 15.

Because the decisions of the First District expressly construe the First Amendment and severely restrict its scope, this Court should exercise its jurisdiction.

II. THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE DECISIONS OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEAL WHICH HOLD THAT DOCUMENTS PROVIDED TO A CRIMINAL DEFENDANT BY THE STATE ARE PUBLIC RECORDS AND THAT ONLY THE LEGISLATURE MAY EXEMPT SUCH RECORDS FROM DISCLOSURE

In McCrary I and McCrary II, the First District denied public access to documents which the State released to certain criminal defendants pursuant to court rule. See Fla.R.Crim.P. 3.220. These decisions of the First District are in express and direct conflict with (1) two decisions of the Fourth District Court of Appeal holding that records such as these are subject to inspection under Chapter 119, Fla. Stat., and (2) numerous decisions of this Court and the courts of appeal holding that the Legislature alone -- and not the judiciary -- has the power to exempt otherwise public records from disclosure.

A. Documents Released By The State To Criminal Defendants Are Records Subject to Public Inspection Under Chapter 119.

In 1979, in direct response to this Court's decision in Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979), and after substantial public debate, the Florida Legislature exempted "criminal intelligence information" and "criminal investigative information" from the inspection requirements of the Public Records Law. This careful compromise of interests explicitly provided that "documents given or required by law or agency rule to be given to the person arrested" would not

be so exempt from public inspection. Section 119.011(3)(c)(5) Florida Statutes (1979).

The Legislature spoke in 1979, and the law has been settled until these decisions by the First District. In fact, the Fourth District Court of Appeal has twice followed this clear statutory mandate. In Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), and more recently in Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985), 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).

In stark contrast to the deference paid to the policy of the Public Records Law by the Fourth District in Satz and Bludworth, the First District, although professing "no quarrel with the Satz rule," App. 5, treats the legislative judgment that such documents are public records open to inspection as if it were of no significance whatsoever. Thus, in McCrary I, the court summarily holds that "[u]nder the circumstances presented . . . the Public Records Law . . . [is] properly subject to the inherent power of the court to preserve a defendant's right to a fair trial." App. 5 (emphasis in original). And, having so held, the court never again refers to the public record character of the documents in issue. The court undertakes "a balancing of the rights of the respective parties," App. 4, but it fails to accord the statutory access right any weight.

There is an express and direct conflict between this case and the Fourth District cases of Satz and Bludworth, and this Court should exercise its jurisdiction and resolve it.[3]

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[3] The First District's attempt to distinguish Satz and Bludworth on the ground that those cases did not involve an asserted fair trial right is a non sequitur. The assertion of a Sixth Amendment right cannot change the fact that the Legislature has determined that prosecution documents provided to the defense are public records. Inspection was not denied on the ground that the Public Records Law would be unconstitutional as applied to these records.

B. Only The Legislature May Exempt Otherwise Public Records From Disclosure Under Chapter 119 Absent A Clear Constitutional Right Requiring Confidentiality.

The First District wholly disregarded the statutory inspection right afforded the public by the Legislature and exercised its "inherent power" to exempt the documents sought from disclosure. This judicial creation of an exemption for documents which are clearly non-exempt public records under Chapter 119 is in express and direct conflict with the many decisions of this Court and the courts of appeal which hold that only the Legislature may create exemptions from the inspection right granted by the Public Records Law.

In Wait v. Florida Power & Light Co., 372 So.2d at 424, 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). Accord 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); Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d at 779 n.1 (same); Orange County v. Florida Land Co., 450 So.2d 341, 343 (Fla. 5th DCA 1984) (same); Satz v. Blankenship, 407 So.2d at 398 n.4 (same); Morgan v. State, 383 So.2d 744, 746 (Fla. 4th DCA 1980) (same).

In McCrary I, the First District acknowledged that the discovery documents in issue are public records, yet, in the clear absence of any statutory exemption from disclosure, exempted them from public inspection. This decision of the First District is in express and direct conflict with the virtually unanimous conclusion of Florida courts that no court has the authority to create exemptions where the Legislature has determined not to. The First District explicitly did not find the Public Records law to be unconstitutional as applied to the records requested. Yet only if the statutory access right were found unconstitutional would the court have any authority to deny public access.

In fact, the court explicitly declined to apply the three-part test adopted by this Court in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), to determine when closure is constitutionally required to protect Sixth Amendment rights:

> [T]he 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.

App. 8. The most obvious flaw in this is that the Florida Legislature has determined that records given by the State to

the defendant are public records available for public inspection, irrespective of whether they are "discovery" documents. Section 119.03(c)(5), Fla. Stat. The Court simply ignored the fact that--whatever the status of discovery documents in a civil case, see, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984)--in Florida, all records given by the prosecution to the defense in a criminal case are public records pursuant to statutory mandate and are open to inspection by the general public. For this reason alone, this Court should exercise its jurisdiction and grant review of the decisions below.[4]

REASONS FOR GRANTING REVIEW

The decisions of the First District create an exemption from the Public Records Law for records upon which the

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[4] In Lewis, this Court held that a party seeking to close a public judicial proceeding must present evidence 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. A fortiori, a party must meet this test before a public record may be withheld from the public.

In this case, no factual showing was made to justify the closure; the trial court simply concluded summarily that release of the discovery documents would cause prejudice that no measure short of closure could cure. Mere conclusory holdings of this kind cannot support closure. Lewis, 426 So.2d at 7-8 (requirement of evidentiary findings).

press has routinely relied to report proceedings and which the Legislature has judged should be open to the public. The judicial creation of an exemption, against the Legislature's will, is wholly contrary to the law of Florida. Decisions of this Court and the courts of appeal uniformly stress the strong public policy served by the Public Records Law and the need to defer to the Legislature in matters relating to public access. The decisions of the First District are not only a disturbing intrusion of the courts into the Legislature's domain, they seriously curtail public access to a critical source of information regarding the prosecutorial process. It is therefore essential this Court grant review and reverse the decisions below.

CONCLUSION

For the foregoing reasons, this Court should exercise its discretionary jurisdiction and grant review in this case.

Respectfully submitted,

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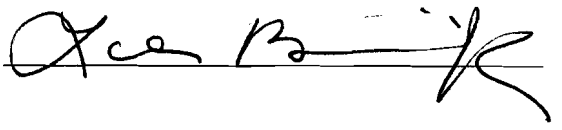
By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Amici Curiae was mailed on this 10th day of December, 1986 to the following:

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