IN THE

SUPREME COURT 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.

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

RESPONDENT'S BRIEF

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Department of Legal Affairs
The Capitol - Suite 1502
Tallahassee, Fla. 32399-1050
(904) 488-9935

Attorney for Respondent,
THE HONORABLE ROBERT L. McCRARY

TABLE TO CONTENTS

TABLE OF CITATIONS

OTHERS

STATEMENT OF THE CASE AND FACTS

The respondent accepts the statement of the case and facts of petitioner, Florida Freedom Newspapers, except for the conclusions on page 2 of its brief concerning the impact and prejudicial effect that the evidence, especially the 31 witness statements, could have had with respect to the defendants. The respondent also believes petitioner's statement should be supplemented with the following facts.

The proceedings below involved the prosecution of defendants Gordon Hartley and Dale Sims for the alleged abuse of juvenile offenders in the Jackson County jail. Several other defendants were charged with similar offenses in related cases. (All prosecutions have been concluded.) The charges of abuse generated a significant amount of publicity in Jackson County and nationally. Copies of several published news articles are included in the appendix to the amicus brief of the Tallahassee Democrat.

In the trial court, defendants Hartley and Sims filed motions seeking to prevent the public disclosure of witness statements the State Attorney is required to furnish defendants pursuant to Rule 3.220, Fla.R.Crim.P. The statements of some 31 witnesses were provided pursuant to this rule. (Miami Herald App. at 59) The motions also sought an order prohibiting

extrajudicial statements concerning the case by members of the State Attorney's Office, the Jackson County Sheriff's Office, the Clerk of Court's Office and others.

Finding that the pre-trial publicity may have been "prejudicial" and that "there may be more such publicity," the trial court first entered an order in each case on March 13, 1986, prohibiting disclosure of the witness statements until it could hold an in camera inspection. (Pet. App. Docs. 6 and 7.) It also ordered the State Attorney's Office, the Sheriff's Office and personnel of the Clerk of Court's Office not to make any out-of-court statement "relating to the trial of these causes or the parties or issues in said trials."

Petitioner Florida Freedom Newspapers sought review of the orders in the District Court of Appeal, First District, contending that it was entitled to the witness statements as public records and that withholding their release, even for purposes of in camera inspection, was an unconstitutional "prior restraint." The newspaper also contended that the portion of the orders prohibiting out-of-court statements was overbroad.

The trial court subsequently conducted an in camera inspection of over 1,000 pages of witness statements and, in its orders of April 16, 1986, prohibiting their public disclosure, found, inter alia, that the statements "graphically described" the events giving rise to the crimes charged and contain matters which tend to incriminate and exculpate the defendant; the

documents are voluminous; numerous articles had been published by the press using the word "torture;" the newspapers publishing these articles circulated in Jackson County; the prosecutor, sheriff and others had made statements intended for publication; the accusations are widely discussed in the community; the trial court was not denying the press access to any judicial proceeding; there had been widespread publicity prejudicial to each defendant's right to receive a fair trial in Jackson County before an impartial jury; public dissemination of the witness statements would pose a serious and imminent threat to the administration of justice requiring temporary nondisclosure of the discovery documents; publication of the documents could make it difficult if not impossible to select an impartial jury in Jackson County; various considered alternatives to nondisclosure would not be adequate to overcome the effects of dissemination of the statements; temporary nondisclosure would be effective in protecting the rights of the defendants without being broader than necessary; the press was not prohibited from interviewing prospective witnesses except those in the State Attorney's Office or the Sheriff's Office. (Pet. App. Docs. 7 and 8)

The trial court concluded that the constitutional rights of the defendants are controlling over Chapter 119, Florida Statutes, pertaining to public records, and that the trial court

had authority pursuant to Rule 3.220(h), Fla.R.Crim.P., to restrict or defer disclosure of discovery material upon a showing of good cause. The court found:

> Good cause has been shown. Publicity of the discovery documents poses special risks of unfairness because it may influence public opinion against this defendant and inform potential jurors of inculpatory information inadmissible at the actual trial. It is difficult at the discovery stage of these proceedings to measure the effects of prejudicial publicity on the fairness of the trial. To safeguard the defendant's right to receive a fair trial, this Court has a constitutional duty to minimize the effects of prejudicial pretrial publicity. Because of the constitution's pervasive concern for these rights, this Court may take protective measures even when they are not strictly and inescapably necessary. Gannett Co. Inc. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

(Pet. App. Docs. 7 and 8, ¶3) The trial court further found that the "three-pronged test" did not apply because the court was not closing any judicial proceeding or any judicial record to the press and public. Nonetheless, on consideration of the facts, the court concluded that the three-pronged test was met.

The trial court also modified the prohibition on out-of-court statements, limiting its scope to "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 restriction on the Clerk of Court was removed.

Following trial of the defendants, the lower court entered an order making the witness statements available to the public. (See Appendix to Respondent's Brief on Jurisdiction.)

SUMMARY OF ARGUMENT

Any statutory right the press and public may have to review witness statements produced in response to a discovery demand is subordinate to a criminal defendant's constitutional right to a fair trial under the Sixth Amendment to the United States Constitution. Pursuant to Rule 3.220(h), Florida Rules of Criminal Procedure, a trial court may temporarily deny public access to such material upon a showing of good cause - in this case that publication of the statements would prejudice a defendant's right to a fair trial.

The three-pronged test has been adopted to balance the constitutional right to a fair trial with the public's right of access to judicial proceedings or judicial records. It is an inappropriate test to apply to prejudicial material produced pursuant to a discovery demand because of the chilling effects it will have on the discovery process. No matter which test is applied however, the trial court properly denied, on a temporary basis, access to the witness statements in question.

The orders restraining extrajudicial comment by attorneys and law enforcement personnel were properly entered in the sound discretion of the trial court. No more than a "reasonable likelihood" test should be adopted for determining whether attorney comment may prevent a fair trial.

ARGUMENT

I. A COURT MAY TEMPORARILY DENY THE PRESS AND PUBLIC ACCESS TO WITNESS STATEMENTS EVEN IF SUCH STATEMENTS ARE PUBLIC RECORDS IN ORDER TO PRESERVE A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A. Chapter 119, Florida Statutes, Does Not Deprive The Courts Of Their Inherent Authority To Control Proceedings Before Them, Nor Can It Be Interpreted To Deprive A Criminal Defendant Of The Constitutional Right To A Fair Trial.

Petitioner, Florida Freedom Newspapers, Inc., ("FFN"), and its amici contend categorically and without exception that a court cannot, even temporarily, deny the press and public access to a Chapter 119 public record. Although we have been concerned with constitutional issues in this case from the beginning, the briefs of FFN and the Miami Herald fail to mention or acknowledge in any way the Sixth Amendment to the United States Constitution and the right of a criminal defendant to a fair trial. The brief of the Tallahassee Democrat fleetingly adverts to a defendant's right to a fair trial but states that the "Democrat does not want to suggest for an instant that . . . an exception [to Chapter 119] should be allowed." (TD Brief 8, 9)[1]

Although the press posits both a constitutional basis (the First Amendment) and a statutory basis (Chapter 119, the Public Records law) to support its claim of absolute entitlement to view

---

[1] Petitioner FFN even goes so far as to argue that the defendants in the trial court were without standing to challenge the release of the documents. (FFN Brief 10)

and publish the witness statements in question, it is clear that both must yield to the more fundamental constitutional right to a fair trial. The United States Supreme Court has called the constitutional right to a fair trial "the most fundamental of all freedoms." Estes v. Texas, 381 U.S. 532, 540, 14 L.Ed.2d 543, 549, 85 S.Ct. 1628 (1965). The Supreme Court has further imposed an affirmative constitutional duty upon trial judges to minimize the effects of prejudicial pre-trial publicity to ensure a fair trial. Gannett Co. v. DePasquale, 443 U.S. 368, 378, 61 L.Ed.2d 608, 620, 99 S.Ct. 2898 (1979). Consistent with Estes and Gannett, this Court has itself stated:

> In Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), we concluded that the nonconstitutional interests of the public and press in access to pretrial proceedings should not be elevated to a level of equal importance with the fundamental constitutional right of an accused to a fair trial by an impartial jury in the county where the crime was committed. Thus any balancing test must be applied with recognition of the fact that in such a clash of interests, the weightier considerations are with the accused defendant.

Bundy v. State, 455 So.2d 330, 338 (Fla. 1984). See also, Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378, 380 (Fla. 1987) (". . . where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield."); State ex rel. Tallahassee Democrat v. Cooksey, 371 So.2d 207, 209 (Fla. 1st DCA 1979)("The right of the news media

and the public to know all that transpires in a criminal case (beyond their unchallenged right to observe all proceedings in open court) must be weighed carefully against the defendant's right to a fair trial, but the defendant's right to a fair trial should be given paramount consideration.")(E.S.)

It is clear that the press and public have no constitutional or common law right of access to Rule 3.220 discovery material that has not been made part of the court file and is therefore not a judicial record. Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987). What rights, if any, the press and public have to the 31 witness statements in question are those created by Chapter 119, Florida Statutes. That law, however, is subject to the "inherent power of the courts to preserve a defendant's right to a fair trial under the Sixth Amendment." State ex rel. Times Pub. Co. v. Patterson, 451 So.2d 888, 891 (Fla. 2d DCA 1986).

In view of the fact that the operation of Chapter 119 is subject to constitutional constraints, as are all statutes, petitioner's assertion that that there can be no judicially-created exceptions to that law does not merit consideration. Even the cases petitioner cites for this point do not support

it. For example, Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), involved press access to tape recordings provided the defendant pursuant to his discovery demand. On appeal, the defendant argued that release of the tapes would create prejudicial pre-trial publicity. The district court of appeal noted that this point should have been presented to the trial court and could not be raised for the first time on appeal. It did not hold that the defendant was powerless to protect his constitutional right to a fair trial.

B. The Three-Pronged Test Does Not Apply to Denial of Access to Rule 3.220 Discovery Material.

The "three-pronged test" of Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), applies to the closure of court proceedings or to the denial of access to court records. This Court, citing recent decisions of the Supreme Court, recognized in Burk, supra, that the right of access to court proceedings and records in criminal cases was based on the First and Fourteenth Amendments. However, as Burk held, there is no constitutional (or other) right of access to unfiled discovery materials and hence no requirement to apply the three-pronged test.

Petitioner bases its right of access to the witness statements on the Public Records Law, specifically section 119.011(3)(c)(5), Florida Statutes, which excepts from otherwise unavailable "criminal intelligence information" and "criminal investigative information"

> [d]ocuments given or required by law or agency rule to be given to the person arrested . . . .

The witness statements sought by the press were not required by law or by any agency rule to be given to defendants Hartley and Sims. The defendants were entitled to demand copies of such statements under Rule 3.220, Florida Rules of Criminal Procedure. Once given to defendants, it appears the witness

statements become public records under section 119.011(3)(c)(5); except for what is provided in this section, however, the press and public would have no right at all to view witness statements. Burk, supra.

The mere fact that access may exist under Chapter 119 does not, ipso facto, command application of the three-pronged test. That test was devised for the specific purpose of providing access to judicial proceedings (and, subsequently, judicial records):

> As previously discussed we found in Lewis that there was no constitutional right of press access to pretrial suppression hearings. Our commitment to opening the judicial process to such hearing was predicated on the fact that suppression hearings were judicial proceedings and we, therefore, provided a method for press participation because the public has "a right to know what occurs in the courts." 426 So.2d at 6-7. Discovery depositions are judicially compelled for the purpose of allowing parties to investigate and prepare their case, but, unlike a suppression hearing, they are not judicial proceedings "for the simple reason that there is no judge present, and no rulings nor adjudications of any sort are made by any judicial authority." Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867, 872 n.4 (Fla. 1st DCA 1979). We agree with the holding in Willis that once a transcribed deposition is filed with the court pursuant to Rule 1.400 Fla.R.Civ.P., it is open to public inspection. Id. at 870-871. See also Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980). (Emphasis the Court's.)

* * * *

> We find that neither chapter 119 nor our commitment to an open judicial process can be applied to unfiled depositions. (E.S.)

Burk, supra, 504 So.2d at 384.

Although presumably the legislature may create a right for the press and public to view "documents given . . . to the person arrested," the particular documents in question were given pursuant to a discovery rule adopted by the Florida Supreme Court. Matters of practice and procedure are assigned by the Florida Constitution exclusively to the Florida Supreme Court. Market v. Johnson, 367 So.2d 1003 (Fla. 1978); Johnson v. State, 336 So.2d 93 (Fla. 1976); In re Florida Bar, 398 So.2d 446 (Fla. 1981); Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378, 384 n. 2 (Fla. 1987). If the legislature may create a right for the public to view discovery material, it still remains the constitutional prerogative of this Court to say how and when that access may occur.[2]

Rule 3.220(h) provides, as the opinion of the First District Court of Appeal recognized, that upon a showing of cause, the trial court "may at any time order that specified

---

[2]Although no challenge was made to the constitutionality of Section 119.011(3)(c)(5) in the proceedings below, we point out that in State ex rel. Times Publishing Co. v. Patterson, 451 So.2d 888 (Fla. 2d DCA 1984), the press challenged the constitutionality of section 119.07(3)(m) as violating the rule-making powers of the judiciary.

disclosures be restricted or deferred, or make such other order as is appropriate . . . ." Rule 3.220(i) provides for in camera proceedings for the denial or regulation of disclosures. The trial court followed these rules and found that good cause existed for the temporary denial of public access to the witness statements. The trial court's order emphasized that the denial of access was temporary; that the court was not prohibiting the press from publishing any information in its possession; that the press could interview any witnesses who were not part of the Sheriff's Office or the State Attorney's Office; and that all court proceedings were open to the press.

The extent to which the trial court's order interferes with news-gathering is minimal. As outlined in Burk, supra, the witness statements are discovery or investigative material to which the press and public have traditionally had no access. The Court should keep this fact in mind in deciding whether a defendant should be required to show more than the "cause" or "good cause" required by Rule 3.220(h) for temporarily restricting public access to that material.

In Burk, this Court observed that liberal discovery, a recent and welcome development in the law, is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigation. It further stated:

> Open access would not serve this purpose. The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and

> of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog.

504 So.2d at 384. This is especially true in criminal proceedings. The defendant, who it may be presumed has enough problems once charged or indicted, may be unable for a number of reasons to meet the stringent and demanding three pronged test, which was devised we should remember to balance competing constitutional claims. The defendant simply may be unable to finance a second legal battle against the individual or combined forces of the press. He thus may be forced to choose between foregoing discovery or risking substantial prejudicial publicity. Such a dilemma is precisely what this Court rejected in Burk:

> Aside from the impracticability of seeking protective orders beforehand, seeking such orders "would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals." Seattle Times, 467 U.S. at 36, n. 23, 104 S.Ct. at 2209 n. 23. The effect such a procedure would have on the speedy trial rights of the accused and public is obvious. Moreover, it would not serve the purpose of criminal discovery-assisting in the trial or resolution of criminal charges-and would carry us even farther from the central aim of a criminal trial-trying

> the accused fairly. We hold there is no first amendment right of public access to criminal deposition proceedings or to unfiled depositions in criminal prosecutions.
>
> * * * *
>
> In addition to the compelling reasons which militated against a constitutional right of access, providing such access would severely undermine our adversarial system . . . . Because counsel should be unfettered to explore all matters and depose all witnesses which may be of use in his case, the process by which such information is gathered must be as free from chilling influences as possible. Providing access to unfiled depositions under the guise of chapter 119 or our commitment to opening the judicial process would not only present serious constitutional concerns for both the accused and innocent third parties, it would also undermine effective advocacy, as counsel may be inhibited from asking certain questions fearing that damaging or prejudicial information may be published before trial.

504 So.2d at 383, 384. (E.S.)

Despite the First Amendment rhetoric with which this Court has been deluged, there is no constitutional right drawn into question by the temporary denial of access to witness statements. If discovery is to be truly unfettered and as free as possible from chilling influences, then the cause or good cause standard of Rule 3.220 should be the criterion for denying, temporarily, public access to discovery materials.

C. The Evidence Supporting The Trial Court's Order Meets Both The Cause Standard of Rule 3.220 And The Three Pronged Test.

The petitioner and its amici contend that the only evidence the trial court considered consisted of a few newspaper articles and argument of counsel. This representation is patently misleading. The trial court also reviewed in detail some 1,172 pages of witness statements and so stated in its orders.

Paragraph 2 of the trial court's orders of April 16, 1986, reflects that far more than "4 or 5" articles were introduced. The articles the trial court considered appeared in the Tallahassee Democrat, the Panama City News-Herald and the Jackson County Floridian. Virtually every article used the word "torture;" one resurrected the specter of a past lynching. The prosecutor and other law enforcement people had made statements intended for publication that were prejudicial to the defendants. As to the witness statements, the court found that they "graphically described" the events giving rise to the crimes charged; that they contained matters tending to incriminate and exculpate the defendants; and that they included matters that might not be admissible as evidence.

In paragraphs 3, 6 and 7 the trial court found that publication of the documents posed a special risk of unfairness because of their inculpatory and inadmissible information; that public dissemination posed a serious and imminent threat to the administration of justice; and that publication could make it

difficult if not impossible to select an impartial jury in Jackson County. The court also found that alternatives such as an increased number of peremptory challenges, special instructions to the jury, individual voir dire of prospective jurors and sequestration would not be sufficient "to overcome the volumes of information that would be subject to dissemination by the press and the probable effect of public dissemination upon the minds of prospective jurors." A change of venue was not considered because defendants had asserted their constitutional right to be tried in Jackson County. A change of venue is not an alternative to closure. Miami Herald v. Lewis, 426 So.2d 1, 6 (Fla. 1983).

In view of the trial court's careful consideration and analysis of 1, 172 pages of statements, it is certainly no service to this Court for petitioner to assert that "it is uncontradicted that no evidence other than newspaper articles was introduced at either hearing" and to suggest that the trial court's findings were "conclusory" and not based on evidence. (FFN Brief 16, 17).

Apparently, petitioner and its amici are demanding that a party adduce empirical proof of the effects of releasing the witness statements. They do not explain how such empirical proof could be developed and presented without releasing the

statements. They do not even attempt to demonstrate that the trial court misstated the content and misperceived the probable effect of the witness statements.

In Miami Herald v. Lewis, supra, the three-pronged test for closure of judicial proceedings is stated to be:

> 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 6. The first factor is determined by an evaluation of the extent of prior hostile publicity and the possibility of further aggravating adverse publicity. Id. at 7. The trial court considered the nature of the crimes charged, the numerous published articles, their content and the content of the witness statements. We may presume it took into account the relatively small population of Jackson County. That is sufficient evidence on which to gauge the threat to a fair trial. In assessing the second factor, the court is directed by Lewis to consider continuance, severance, change of venire, voir dire, peremptory challenges, sequestration, and admonition of the jury. Id. at 8. The court considered and rejected each of these, reasoning that continuance would undermine the right to a speedy trial and

remaining measures would not offset the volumes of information that would be published. Although perhaps a different conclusion might have been reached, especially in a county of larger population, it cannot be said that the trial court abused its discretion in reaching these conclusions. See, Tallahassee Democrat v. Cooksey, 371 So.2d 207, 210 (Fla 1st DCA 1979); Bundy v. State 455 So.2d 330, 338 (Fla. 1984). The trial court's approach and analysis is in accord with that approved in Cooksey and in Levine v. United States District Court etc., 764 F.2d 590, 596-601 (9th Cir. 1985). The Levine analysis shows the inadequacy of the less restrictive alternatives where publication of extrajudicial statements of counsel is the issue. Here, of course, we are concerned with "graphic" witness accounts sought to be published in a small county.

Obviously the third prong of the test was met because the trial court only temporarily denied access to the witness statements and in no way restricted press attendance at court proceedings or the press' ability to interview witnesses, except those who were part of the Sheriff's Office or State Attorney's Office. The order was narrowly drawn to protect only against the perceived harm. Lewis, supra, 426 So.2d at 8. The order meets the cause standard of Rule 3.220 and the three-pronged test.

II. THE ORDERS RESTRAINING EXTRAJUDICIAL COMMENTS WERE PROPERLY ENTERED IN THE SOUND DISCRETION OF THE TRIAL COURT.

The trial court's orders of April 16, 1986, prohibited personnel of the State Attorney's Office and personnel of the Jackson County Sheriff's Office from making out-of-court statements concerning the crimes with which defendants were charged "until the threat of prejudice . . . no longer exists." This Court has specifically approved the entry of such orders in the sound discretion of the trial court:

> Limitations placed upon lawyers, litigants and officials directly affected by court proceedings may be made at the court's discretion for good cause to assure fair trials. Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court's inherent power to control professional conduct. The constant spotlight of public attention focused upon public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons. With the exception of lawyers, litigants, witnesses, jurors and court personnel, the court should limit restrictions against comments to those areas in which clear and present danger of miscarriage of justice might arise from statements affecting or relating to the trial.

State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So.2d at 910, 911 (Fla. 1977) (emphasis supplied). The U.S. Supreme Court has encouraged the appropriate use of gag orders without the slightest suggestion that anything like the three-prong test must

first be met. Sheppard v. Maxwell, 384 U.S. 333, 361-63, 86 S.Ct. 1507, 1522 (1966); Nebraska Press Assoc. v. Stuart, 467 U.S. 539, 96 S.Ct. 234, 49 L.Ed.2d 683 (1976), Brennan, J., concurring at 601, n. 27.

Petitioner contends that the gag order is a "prior restraint" (FNN Brief 25) and the Tallahassee Democrat argues with great hyperbole that the gag order "is the most onerous and impermissible type of infringement on the First Amendment." (TD Brief 25) Both protest too much. The restraint here is not on publication but on the making of prejudicial comments by attorneys and law enforcement personnel. The trial court did precisely what Justice Brennan suggested be done in his concurring opinion in Nebraska Press Association, supra, 467 U.S. at 601, n. 27, i.e., "stem . . . the flow of prejudicial publicity at its source, before it is obtained by representatives of the press." Justice Brennan suggested that a trial court may proscribe extrajudicial statements by lawyers, parties, witnesses, court personnel and law enforcement personnel. Justice Brennan's views have neither been adopted nor rejected by

the Supreme Court; however, no later decision of the Court casts doubt on the use of such orders to control publicity that may threaten a fair trial.[3]

In the wake of Sheppard and Nebraska Press Association the courts have not suceeded in adopting a single standard for regulating extrajudicial comment by attorneys in criminal cases. A report of the Judicial Conference of the United States, whose membership consists of federal judges, reviewed pertinent case law and recommended regulating attorney comment if there is a "reasonable likelihood" that such comment would prevent a fair trial. See, Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial Issue, 87 F.R.D. 519 (1980). A few courts have required the seemingly more stringent showing of a "clear and present danger" or a "serious and imminent threat to the administration of justice." See, e.g., Levine v. United States District Court, 764 F.2d 590 (9th Cir. 1985). The Levine decision cites numerous cases and notes that the "overwhelming majority" of such restraining orders have been upheld no matter which standard is employed.[4] Id. at 596.

---

[3]As noted in the trial court's orders, however, three years later in Gannett Co. Inc. v. DePasquale, 443 U.S. 368, 378, 61 L.Ed.2d 608 (1979), the Supreme Court said that "a trial judge may surely take protective measures even when they are not strictly and inescapably necessary."

[4]Chapter 4-3.6 of the Rules Regulating the Florida Bar also imposes restraints on extrajudicial statements by attorneys.

This Court, in McIntosh, supra, pointedly rejected the clear and present danger test for "lawyers, litigants, witnesses, jurors and court personnel," leaving the decision in the sound discretion of the trial court. 340 So.2d at 910, 911. This obviously tends more toward recognition of a reasonable likelihood test. The trial court in this case found that "the prosecutor, DOC inspector, sheriff and potential witnesses have made statements prejudicial to the Defendant intended for publication." In view of the nature of the crimes charged, the intense publicity they received and the fact that the state attorney had over 1,000 pages of "graphic" witness statements in his possession, there was certainly a reasonable likelihood that further statements from officials could prejudice a fair trial, and it was certainly within the sound discretion of the trial court to restrain comment of attorneys and law enforcement personnel.[5]

---

[5]Decisions recognizing the reasonable likelihood standard include In re Russell, 726 F.2d 1007 (4th Cir. 1984); Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Central South Carolina Chapter, etc. v. Martin, 431 F.Supp. 1182 (D.S. Carolina 1977), aff'd 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022, 98 S.Ct. 749; Younger v. Smith, 30 Cal.App.3d 138, 106 Cal.Rptr. 225 (2d Dist.Cal.1973). Other cases strongly supporting the use of gag orders on counsel and parties include Hamilton v. Municipal Court, 270 Cal.App.2d 797, 76 Cal.Rptr. 168 (Cal.App.1969), cert. denied, 396 U.S. 985, 87 S.Ct. 39; State v. Schmid, 109 Ariz. 349, 509 P.2d 619; State v. Thomas, 273 Minn. 1, 139 N.W.2d 490, 514 (Minn. 1966), cert. denied, 385 U.S. 817, 87 S.Ct. 39; State v. Duyne, 43 N.J. 369, 204 A.2d 841 (N.J. 1964), cert. denied, 380 U.S. 987, 85 S.Ct. 1359. None of these adopts a "clear and present danger" test.

Adoption of the "clear and present danger" or "serious and imminent threat to the administration of justice" standard does not appear appropriate barring a more definitive ruling from the Supreme Court. For one thing, it invites the very contention made in this appeal - that empirical evidence must be adduced of the effect of events that have yet to occur, that it must be proved that remarks will be made and they will have prejudicial effect. Such things cannot be proved empirically, if they can be proved at all. The Supreme Court has recognized that publicity and its impact on prospective jurors is "of necessity speculative" and in gauging its impact the trial judge deals with "factors unknown and unknowable." Nebraska Press Association, supra, 427 U.S. at 563; see also, In re Russell, 726 F.2d 1007, 1010-1011 (4th Cir. 1984), recognizing these difficulties and adopting the reasonable likelihood test. This being so, the clear and present danger test seems not only unrealistic but also perhaps a bit untruthful. Recognition of the reasonable likelihood test or its equivalent will tell attorneys and law enforcement personnel to attend to trying the case where it ought to be tried -- in court.

Finally, we address the contention of the Tallahassee Democrat that the orders, if read literally, prohibit the members of the State Attorney's Office and the Sheriff's Office from communicating among themselves in preparing these cases for trial. This argument is facetious at best. The orders were

clearly intended to apply to public statements and were so understood. They are virtually indistinguishable from the order approved in Levine, supra. There is nothing of record indicating that either office found its preparation impeded by the orders. We may presume that a State Attorney would seek appropriate relief were that the case.

The Democrat's reliance on CBS v. Young, 522 F.2d 234 (6th Cir. 1975), is also misplaced. First, that was a civil case. Second, the gag order applied to people who were not identified with sufficient certainty. And third, the restrictions were not limited to matters which might prejudice the trial.

CONCLUSION

On the basis of the foregoing reasons and authority, the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1502
Tallahassee, Fla. 32399-1050
(904) 488-9935

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **LAURA BESVINICK**, Greer, Homer, Cope and Bonner, Southeast Financial Center, Suite 4360, 200 South Biscayne Blvd., Miami, Florida 33131; **WILLIAM A. LEWIS**, of Sale, Brown, Smoak and Chartered, Attorney for Petitioner, Post Office Box 1579, Panama City, Florida 32402; **JOHN D. SIMPSON**, Esquire, Attorney for Dale Sims, 120 South Jefferson Street, Marianna, Florida 32446; **FLOYD GRIFFITH**, Esquire, Attorney for Gordon Hartley, Jr., Post Office Box 207, 302 E. Jackson Street, Marianna, Florida 32446; **RICHARD J. OVELMAN**, ESQUIRE, General Counsel, The Miami Herald Publishing Company, 1 Herald Plaze, Miami, Florida 33101; **SUSAN H. SPRILL**, Thomson, Zeder, Bohrer, Werth and Razook, Southeast Financial Center, Suite 4900, 200 South Biscayne Blvd., Miami, Florida 33131; **JAMES DUNNING**, Assistant State Attorney, Jackson County Courthouse, Marianna, Florida 32446 and **HONORABLE ROBERT L. McCRARY**, Circuit Judge, Jackson County Courthouse, Marianna, Florida 32446, this 9th day of June, 1987.

LOUIS F. HUBENER