O/a 9-2-87

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IN THE

SUPREME COURT OF FLORIDA

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CASE NO.: 69,660

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**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

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# APPELLANT'S INITIAL BRIEF

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## STATEMENT OF THE CASE AND THE FACTS

In December, 1985, the Panama City News-Herald, one of Appellant's newspapers, began a series of articles detailing certain allegations of abuse and torture in the Jackson County Jail. The reporter's source, a former jail trustee, told of correctional officers hanging inmates, mostly young blacks, by their arms which were handcuffed behind their backs. A chain would be attached to the handcuffs and run over the top rung of the cell's bars and the inmate would be hoisted into the air and left in this position for varying periods of time.

These articles prompted investigations by both the State Attorney of the Fourteenth Judicial Circuit and the Department of Corrections. These investigations resulted in the arrest of seven correctional officers on charges ranging from aggravated child abuse to malpractice by a jailer. None of the pre-arrest articles named any of the Defendants, nor were they accused of any wrongdoing until the arrests were made. At that point, the "accusations" were merely recitals of those contained within the informations filed by the State Attorney.

Attorneys for Defendants Hartley and Sims filed Motions to Control Prejudicial Publicity (Appendix,

Exhibits 3 and 4). The Petitioner appeared and was allowed to intervene and be heard on these motions on March 13, 1986. The attorney for Defendant Hartley, Mr. Floyd Griffith, sought the entry of an order denying access to the discovery which was to be furnished to the Defendants by the State, **and** a gag order prohibiting certain persons from discussing the case. Griffith presented his legal argument as to the issues and introduced, without objection, several newspaper articles which had appeared both in the News-Herald and the Jackson County papers. (Petitioner's Appendix to 1st DCA, Exhibit 6). There was no evidence introduced to show circulation/penetration; the impact, if any, of these articles on readers; or any prejudice either for or against the Defendants. Defendants did not introduce evidence as to the effectiveness of closure or the use/availability of less restrictive methods. (Appendix, Exhibit 5.)

The trial court entered identical orders on March 13, 1986, denying access to, or dissemination of, the material disclosed in discovery pending an in camera inspection. The court also granted the gag orders (Appendix, Exhibits 6 and 7). A second hearing was held on April 11, 1986, after the trial judge had made an in

camera inspection of the discovery material. No new evidence was presented by either Defendant. On April 16, 1987, the court entered a second pair of orders making certain findings of fact and conclusions of law. These orders recognized the documents were public records but held that non-disclosure would continue and all future discovery documents were to be submitted to the court for an in camera inspection. The court did modify somewhat the gag orders by excluding certain persons from their coverage. (Appendix, Exhibits 8 and 9).

Florida Freedom sought review of the trial court's orders in the First District Court of Appeals pursuant to Rule 9.100(d) Florida Rules of Appellate Procedure. The court's first opinion was issued on July 1, 1986. (Florida Freedom I, Appendix, Exhibit 1) Appellant then filed for Rehearing or Clarification and the court issued a second opinion on October 29, 1986. (Florida Freedom II, Appendix, Exhibit 2.) Both affirmed the orders of the Court below. It is the holdings of these two opinions (collectively Florida Freedom) which create the issues raised in the Appellant's brief on jurisdiction and which will be more fully discussed herein.

## SUMMARY OF ARGUMENT

The Appellant, the trial and district courts all concur that the documents sought are within the scope of Chapter 119. (Appendix, Exhibit 8 and 9 at paragraph 3, Exhibit 1 at page 5). Both courts have however elected to disregard the disclosure required by this fact. The holdings of Florida Freedom ignore the procedural provisions of the statute and act to create judicial exceptions to the Public Records Act. Initially the trial court allowed a "non-custodian" to assert a challenge to disclosure and then, based on this challenge, went on to **create** an exception to the Act. Appellant contends both "procedures" constitute reversible error by the trial court. This error has been compounded by the affirmance from the First District Court of Appeals in Florida Freedom.

The district court upheld the trial court's action by the application of an incorrect burden of proof. The court said the standard was a showing of "cause." This standard was established even after the district court admitted that constitutional issues were at stake. (Exhibit 1 at page 5). The Appellant contends that the application of such a "weak" standard is contrary to all

law dealing with the abridgement of First Amendment rights. The satisfaction of a showing of cause is not sufficient to merit an infringement on the newspaper's First Amendment rights. Regardless of the burden required, the Defendants failed to establish, by competent evidence, that non-disclosure was justified.

The final point is that the trial court imposed, and the district court sustained, a "gag order" upon that same showing of cause. The gag order was a classic prior restraint on speech. The district court, through a misplaced reliance on earlier cases, attempted to distinguish the Florida Freedom based on a "speech" versus "publication" argument. In doing so, no consideration was given to the clear prohibitions of the First Amendment. The use of any standard short of strict scrutiny in such cases constitutes error. As the Defendants failed to meet the burden of a showing of cause, they surely failed to meet the strict scrutiny standard.

## ARGUMENT

ISSUE ONE

> Can a court deny access to those documents provided to a criminal defendant and which are public records pursuant to Section 119.011(3)(c)(5), Florida Statutes (1985) and thereby create a judicial exception to Chapter 119?

There is no doubt that the documents in question constitute public records under Section 119.011(3)(c)(5) Florida Statutes (1985). That section provides that "(d)ocuments given or required by law or agency rule to be given to the person arrested..." are not within the "criminal intelligence" or "criminal investigative information" exceptions to Chapter 119. Both the trial and district court have admitted the documents are public records.[1] The non-exempt status of such items has been confirmed in Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), pet. rev. den., 413 So.2d 877 (Fla. 1982). There the court noted that the legislature has determined the delivery of such documents to the person arrested obviated the need for secrecy. This analysis of the legislative intent when considered together with the intent expressed in Section 119.01, clearly dictates that such records are to be open for inspection following this

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[1] Trial court's orders of April 16, 1986, at paragraph 3; (Appendix, Exhibit 8 and 9) Florida Freedom I at page 5. (Appendix, Exhibit 1)

disclosure. Again in Bludworth v. Palm Beach Newspapers, 476 So.2d 775 (Fla. 4th DCA 1985) the court reached the same conclusion and noted, in the footnote at page 779, the all-inclusive nature of Chapter 119.

The character of the documents having been established, one must then determine whether there is an exception to the disclosure requirement. An examination of Section 119.07(3) and the sections cited in [2] Note following Section 119.07 reveals that no exemption exists.

As there is no statutory exception, the question then becomes: Can the court deny Appellant access to these items? This Court and other lesser courts have consistently held there can be no denial of access in such cases.

In 1977, the Fourth District Court of Appeals in State ex rel Veale v. City of Boca Raton, 353 So.2d 1194 (Fla. 4th DCA 1977), held that in the absence of a statutory exception to the Public Records Act, disclosure was required. There, as here, it was conceded that the documents were public records. Id. at 1196. That court adopted the language of the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Acc. Board, 540 S.W. 2d 668 (Tex. 1976):

> "All information collected, assembled or maintained by governmental bodies is subject to disclosure unless specifically excepted. We decline to adopt an interpretation which would allow the court in its discretion to deny disclosure even though there is no specific exception provided."
> Veale at 1197.

This Court adopted the rational of Veale in Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979). There this Court noted it was up to the legislature, **not the Court**, to amend the statute as to the scope of the exemptions provided. Id. at 424. See also, Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980) City of North Miami v. Miami Herald Publishing Company, 468 So.2d 218 (Fla. 1985), and Tribune Company v. Public Records, 493 So.2d 480, (Fla. 2d DCA 1986).

In News-Press Publishing Company, Inc. v. Gadd, 388 So.2d 276, 278, (Fla. 2d DCA 1980), the court citing two of the cases referenced above, summed up the issues in public records cases:

1) Are the documents public records? and 2) Is there a statutory exception? These are the only viable issues and absent an exception, the Court may not consider public policy issues or the damage to an individual or institution resulting from such disclosure.

Again in 1984, this Court, in Tribune Company v. Cannella, 458 So.2d 1075 (Fla. 1984), declined to judicially create exemptions to Chapter 119. The decision in Florida Freedom Newspapers, Inc. v. McCrary, 497 So.2d 652 (Fla. 1st DCA 1986) (hereafter cited as Florida Freedom I, original opinion of July 1, 1986; Florida Freedom II -- opinion as modified October 29, 1986, and Florida Freedom, collectively.) is also at odds with other holdings of Cannella and these conflicts merit the attention of this Court.

The first is the timing of disclosure. The Court, at page 1077, held that disclosure occurred at the moment they become public records. Defendant Hartley, in paragraph 4 of his Motion to Control Prejudicial Publicity, admitted that he and the State had delayed the exchange of discovery pending resolution of the motion. (Appendix, Exhibit 3) Such agreement evidences the fact both the State and the Defendants were aware that disclosure was required immediately following the exchange. The Defendants were sent their discovery on March 17, 1986 as evidenced by Assistant State Attorney Dunning's letter to Griffith. (Appendix, Exhibit 10).

A second, and more important issue is that of who can assert the claimed exemption. This Court throughout

the Tribune Company opinion states that the custodian is the one to assert the exception. At 1079, the Court held "(the) **only** person with the power to raise such a challenge is the custodian." (Emphasis supplied). See also, Public Records, supra, 493 So.2d at 484.

A review of the transcripts of the hearings on March 13, 1986 and April 11, 1986, fails to reveal any such claim being asserted by either the State Attorney or the Clerk of the Circuit Court. (Appendix, Exhibits 5 and 11.)

The failure of the custodian (either the State Attorney or the Clerk, depending upon the stage of the proceedings) to challenge the release of the documents would, pursuant to the holding in Tribune Company, defeat any non-disclosure. Appellant contends the Defendants were without standing to challenge the release of the documents.

The legislative intent of this act is clearly spelled out in Section 119.01(1) which reads: "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." (Emphasis supplied). This legislative intent is the polestar by which the Court must be guided. Satz at 397,398, supra. There is

no equivocation in that statement of intent. It mandates disclosure.

The district court has allowed the trial court to write into Chapter 119 a new exception. This is clearly beyond the court's authority. The Defendants justify this saying it is within the courts' inherent power to control the proceedings before them. This power of the courts is however circumscribed by valid existing laws. Miami Herald Publishing Company v. Collazo, 329 So.2d 333, 336 (Fla. 3rd DCA 1976). Appellant urges this Court to strike this judicially created exception to the Public Records Act. Failure to do so not only flies in the face of precedent, but will open the floodgates to the creation of such exceptions. These exceptions will eviscerate the Public Records Act.

Appellant has continually maintained that Chapter 119 is dispositive of the issue, however, Florida Freedom has raised other serious issues which merit this Court's attention. Failure of this Court to address these issues will only require appellate review of other cases.

ISSUE TWO

If access to discovery materials provided to criminal defendants can be denied, then what burden of proof must be met by those seeking to deny such access?

While the facts of this case do not present an example of "classical prior restraint", appellant contends the results are the same. It is the resulting encroachment on the newspaper's rights which dictates the standards by which the validity of such restrictions are to be determined. Access to public records is guaranteed by both the common law and the First Amendment. United States v. Beckham, 789 F.2d. 401 (6th Cir. 1986) Conti, J., dissenting at 419. As the trial court's orders infringe on Florida Freedom's First Amendment rights they must be judged by the strict scrutiny standard.

The orders of the trial court severely curtailed the appellant's newsgathering efforts. It naturally follows that the ability to **report** the news was impaired.

The U. S. Supreme Court said in Globe Newspaper Company v. Superior Court for the County of Norfolk, 457 U. S. 596, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982);

> "...we had long eschewed any narrow, literal conception' of the Amendment's terms, (citations omitted) 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." 457 U.S., at 604, 102 S.Ct., at 2618-19.

Citations thereafter reflect this principle had also been discussed in Richmond Newspapers, Inc. v. Virginia, 448 U. S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). The Richmond Court, in a similar vein, noted:

> "[T]he 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." Id. at 448 U.S., at 575-76, 100 S.Ct., at 2826-27.

The restrictions on the appellant's ability to gather and hence report the news, clearly falls within the protection of the First Amendment as contemplated in Beckham, Richmond, and Globe, supra. These rights can only be limited in the most exceptional circumstances which must be judged by the strict scrutiny standard.

As noted this is not the classical prior restraint, however the end result is the same. The Fifth District Court of Appeals agreed with this conclusion in Ocala Star Banner Corporation v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980) where they reasoned:

> Prior restraint orders are acknowledged censorship orders. The press is permitted to gather the information, but is not allowed to print it. **Limitation on 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. (Emphasis supplied.)

The burden required of those who seek the imposition of such restraints has been addressed in several Florida several cases.

In State ex rel Miami Herald Publishing Company v. McIntosh, 340 So.2d 904,908 (Fla. 1977), this Court acknowledged that **any** form of prior restraint suffers a heavy presumption against constitutional validity and to have such restraints upheld, those seeking limitations bear the burden of showing adequate justification for such restraints. Application of the Veale "difference without distinction" rationale to the instant facts, dictates this burden must have been met by the Defendants here.

The showing required by McIntosh, supra, was further defined in Miami Herald Publishing Company v. Lewis, 426 So.2d 1 (Fla. 1982), with the announcement of the three-pronged test. While Lewis dealt with the closure of a hearing, this Court has broadened the application of the test to include closure of court files. In Bundy v. State, 455 So.2d 330 (Fla. 1984), at page 337, the Court held:

> "...Florida courts have held that **denial of access to** court proceedings or **records** for the purpose of protecting the interests of parties to litigation **may only be ordered after finding that the following three-pronged test has been met.** It must be shown that (1) the measure limiting or denying access (closure **or sealing of records** or both) is necessary to the administration of justice; (2) no less restrictive alternative measures are available which would mitigate the danger; and (3) the measure being considered will in fact achieve the Court's protective purpose." (Emphasis supplied.)

The language above clearly holds that the three-pronged test is applicable and is the standard for those seeking closure of proceedings **or sealing of records.**

As the trial judge conducted an in camera inspection of the documents, they became part of the court file and, in a sense, the record of that judicial proceeding (the inspection). As such, they may only be closed upon a showing the three-pronged test has been met. In Bundy, supra, this Court held the party seeking closure bears the burden of showing the three-pronged test had been met.

Both the trial court and the First District Court of Appeals held this test was not the applicable standard by

which closure in this case was to be judged.[2] The State agreed, at least impliedly, with the appellant that the three-pronged test was applicable in the instant case. (Appendix, Exhibit 11 at page 3-4.) The trial court does **claim** that the three-pronged test has been met; however, an examination of the hearing transcripts (Appendix Exhibits 5 and 11) shows this to be a hollow assertion. If one were to draw an analogy between the proof offered in the instant case in and a criminal trial, all the proof required in the latter would be an information followed by the State Attorney's closing argument. Trial courts daily caution jurors that what the lawyers say **is not evidence.** The examination of the record reveals, and it is uncontradicted that **no** "evidence" other than the newspaper articles was introduced at either hearing. The U. S. Supreme Court noted in Press Enterprise Co. v. Superior Court of California for the County of Riverside, __U.S.__, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), that First Amendment rights "cannot be overcome by the conclusory assertion that publicity might deprive the Defendant of (a fair trial)." See also Beckham, supra, at 413 and Conti, J., dissenting at 420-421.

The facts of the instant case are very similar to

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[2] Trial Court's orders of April 16, 1986, at page 5 (Appendix, Exhibits 8 and 9) Florida Freedom I, at page 8. (Appendix Exhibit 1).

those in Sentinel Star Co., v. Booth, 372 So.2d 100 (Fla.2d DCA 1979). There nine (9) newspaper articles were submitted to the Court in support of the Defendant's motion to seal discovery depositions. The district court held that the trial court's superficial inquiry was insufficient to substantiate an order which abridged First Amendment freedoms. In Miami Herald Publishing Co. v. Morphonios, 467 So.2d 1026, 1029 (Fla. 3d DCA 1985) the party seeking closure "must first provide an adequate **basis** to support" the closure. Appellant contends this "basis" must be competent evidence.

If one examines the evidence introduced in light of each element of the three-pronged test, it is clear that the Defendants failed to prove any one of those elements. The transcripts reveal that little, if any, attention was devoted to the second two elements.

It is disconcerting that the First District used a series of "labels" to "distinguish" the cases and thereby avoid this standard. At page 5 of the Florida Freedom I (Appendix, Exhibit 1) the district court quoted from McIntosh, supra, language relating to a court's power to control those "proceedings before it...", yet noted at page 7 that this is **not** a judicial proceeding because it is not before a judge. The use of this "yes it is, no it isn't" argument to support the holding shows the gossamer nature of the reasoning of the opinion.

The district court at page 8 of the opinion (Florida Freedom I) noted: "If, however, the discoverable statements had been filed with the trial court, the three-pronged test would have applied." (Emphasis, the court's own). Appellant contends that the submission of the documents to the trial judge for examination constitutes a "filing." This concept of "filing" is supported by the language of Certified Question # 2 of the Fourth District Court of Appeal in Palm Beach Newspapers, Inc., v. Burk, 12 FLW 103 (February 20, 1987) which specifically dealt with records **filed** with the judge.[3] The court's apparent finding that the delivery of the documents to the judge did not constitute a "filing" is analogous to those transfers in Tober v. Sanchez, 417 So.2d 1053 (Fla. 3rd DCA 1982). To call the delivery of documents to the judge something other than a "filing" and thereby circumvent disclosure, violates the intent of Chapter 119. In the instant case semantics rather than physical transfer was used to play that "shell game" condemned in Tribune Co. v. Cannella, 438 So.3d 516, 523 (Fla. 2DCA 1983). Appellant also reasserts their claim that these documents constitute the record of the in camera inspection.

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[3] Is the press entitled to access to pretrial discovery depositions in a criminal case which may or may not have been transcribed but which have not been filed with the clerk of court or the judge?

This "filing" of the documents with the court (albeit not the clerk) and the fact that such documents constitute the record of this judicial, in camera, inspection require these items be open to inspection absent **proof** of the three-pronged test.

The district court in Florida Freedom II (Appendix Exhibit 2) continued to characterize the documents as statements, pretrial discovery material, and pretrial materials while ignoring that such "classes" of material could be part of the court file or records. Such reasoning amounts to a "form over substance" argument and merely furthers the "shell game". The use of these myopic characterizations acts to frustrate the application of the broader principles involved.

Assuming, arguendo, that the materials in the instant case do not merit the application of the three-pronged test, the issue then becomes by what standard can access be denied. The district court in Florida Freedom has said it is a showing of **cause.**[4]

The establishment of this standard is shocking in light of the acknowledgement by the district court that the appellant's First Amendment rights are at issue.[5]

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[4] Florida Freedom I at Page 8 (Appendix, Exhibit 1)

[5] Florida Freedom 11 at page 2.

No other court has ever held that there may be an abridgement of one's First Amendment Rights on a showing of "cause." This holding surely flies in the face of existing constitutional law on this point and puts at risk the freedoms protected by this amendment. By merely saying this is not a "traditional" First Amendment right the court attempts to justify this lesser standard. Again it appears semantics are used to defeat the protection offered by this amendment. Appellant contends this is error.

This Court in McIntosh, supra, held that any abridgment of First Amendment freedoms must be supported by a showing of "an immediate, not merely likely, threat to the administration of justice." Id. at 908. This was acknowledged in Sentinel Star Co., supra, also.

## ISSUE THREE

The trial court and First District Court of Appeals did not judge the validity of the "gag" order by the proper standard and require the Defendants to meet that burden required to issue such order.

The district court continues this cavalier treatment of constitutional rights in Florida Freedom II in addressing the gag orders.

The final gag orders entered by the trial court do, by the district court's own admission, involve First and Sixth Amendment values, but the court again attempts to distinguish the instant case through the use of "labels." They note Florida Freedom deals with "comment" and Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), deals with "publication."[6] Appellant contends that the court failed to acknowledge the **principles** set forth in Stuart and the First Amendment itself. The fundamental protection of the First Amendment is expressed so clearly it is difficult to see any merit in the First District Court of Appeal's "distinction." This wording is without a doubt applicable to both the written **and** spoken word and any holding to the contrary cannot stand."[7]

The Court in Stuart, supra, while dealing primarily with the issue of publication, noted that it is a well-settled principle that the First Amendment affords "special protection against orders that prohibit...commentary -- orders that impose a 'previous' or 'prior' restraint on **speech.**" (Emphasis supplied.) Id. 427 U.S., at 556, 96 S.Ct., at 2801.

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6 Florida Freedom II at page 3. (Appendix, Exhibit 2).

7 "Congress shall make **no law**...abridging the freedom of speech, **or** of the press. (Emphasis supplied.) U. S. Constitution, Amendment I.

It is clear that "comment" is due the same protection that "publication" is afforded, and the question again then becomes what burden must the Defendants meet to merit imposition of such orders.

Appellant does not suggest nor believe the law supports an absolute prohibition of such orders. There must, however, be a showing that such restrictions are merited. This showing must be supported by competent evidence and cannot be sustained on mere assertions contained in the movant's argument. As previously noted, this Court in McIntosh, supra, held that any form of prior restraint of **expression** can only be justified if it is shown that the expression constitutes "an immediate, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Id. at 908. The use of the term "expression" indicates this Court's recognition that the First Amendment affords protection to more than "publications."

Again examination of the hearing transcripts (Appendix, Exhibit 5 and 11), shows them to be devoid of evidence sufficient to support entry of the gag orders.

In Stuart, supra, the Court noted the factors to be examined:

> "(a) the nature and intent 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. The precise terms of the restraining order are also important. We must then consider **whether the record supports** the entry of a prior restraint or publication, one of the most extraordinary remedies known to our jurisprudence." Id., 427 U.S. at 562, 96 S.Ct., at 2804.

The holdings of Sentinel Star Company and Morphonios supra, are equally applicable here as it relates to the inquiry and proof required. The record before this Court shows these issues were not even addressed, much less proved sufficiently to sustain the gag order.

## CONCLUSION

The decision in Florida Freedom goes far beyond merely creating conflict with cases dealing with Chapter 119 and the First Amendment. This decision, if allowed to stand, will justify the creation of exceptions to the Public Records Act and establish a standard for the abridgement of constitutional rights heretofore unheard of.

This Court must require strict adherence to existing precedent regarding the interpretation of the Public Records Act. Without this, the ensuing chaos will be used to circumvent the stated legislative intent.

Those seeking to infringe on the Constitutional Rights of others must also be put to task and be required to prove that this sacrifice is absolutely necessary. This proof must be by competent evidence, not mere assertions in argument.

Appellant therefore urges this Court to reverse the decision below; continue to prohibit **any** judicially created exception to Chapter 119, and require the movant to establish, by competent evidence, the three-pronged test as stated in Bundy, supra.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief with appendix has been furnished to the following this 15th day of May, 1987:

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