IN THE

SUPREME COURT OF FLORIDA

CASE NO.: 69,660

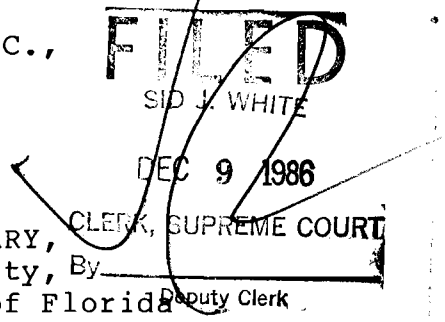
FLORIDA FREEDOM NEWSPAPERS, INC.,

Petitioner,

vs.

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

Respondents.



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

PETITIONER'S BRIEF ON JURISDICTION

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CITATIONS OF AUTHORITY

CITATIONS OF APPEAL CASES PENDING

OTHER

CONSTITUTION

JURISDICTIONAL BASIS

1. The decision in Florida Freedom Newspapers, Inc. v. McCrary expressly construes a provision of the state or federal constitution.

2. The decision in Florida Freedom Newspapers, Inc., v. McCrary conflicts with Wait v. Florida Power & Light Co. 372 So.2d 420 (Fla.. 1979) and others cited herein by creating a judicial exception to the Public Records Act.

3. The decision in Florida Freedom Newspapers, Inc., v. McCrary conflicts with Bundy v. State, 455 So.2d 330 (Fla. 1984) by establishing a burden for denial of access which is contrary to that standard announced in Bundy.

FACTS

On December 10, 1985, Petitioner's paper, the Panama City News-Herald began a series of articles detailing allegations of prisoner abuse in the Jackson County jail. The investigations by state officials which followed resulted in the arrest and the filing of formal charges against seven correctional officers.

Several of the Defendants moved to seal the discovery documents to be exchanged pursuant to the Rules of Criminal Procedure. Notice was given to the Petitioner and on March 13, 1986 a hearing on the Defendants' motion was held.

At the hearing the movants introduced no evidence other than approximately twelve articles from newspapers circulated in Jackson County. Movants introduced no evidence as to demonstrate the scope of circulation or the impact, if any, the stories had on readers, the use of a less restrictive means to accomplish the same purpose, or that the closure would, in fact, accomplish the desired goals.

The trial judge then entered an order directing that no material exchanged in discovery was to be made public until the court reviewed it in camera, to determine to the potential prejudice to the Defendants. The order itself was qualified in that it used terms such as "may have been" prejudicial publicity and there "may be more such publicity."

The Petitioner sought relief from the order in the First District Court of Appeal on the grounds that: 1) The material sought was a public record and 2) The movants had failed to

meet the burden for denial of access under the three-pronged test.

The district court upheld the trial judge stating that while the documents were public records, nondisclosure could be justified when made in an effort to insure a fair trial for the Defendants. The court, acknowledging that at least some First Amendment Rights were at issue, then held that a showing of "cause" was all that was required to merit denial of access.

SUMMARY OF ARGUMENT

The original opinion [(11 FLW 1464, July 4, 1986) (hereafter, Opinion)] and the Order of Clarification [(11 FLW 2291, Nov. 7, 1986), (hereinafter, Order, collectively "decision")] of Florida Freedom Newspapers, Inc. v. McCrary construe the First and Sixth Amendments of the federal constitution, outlining the rights of the parties to this litigation.

The district court has failed to adhere to the principle that there can be no judicially created exceptions to the Public Records Act and has denied access to documents that it admits are public records. This holding creates a conflict with Wait v. Florida Power and Light Co., 372 So.2d 420 (Fla. 1979), Satz v. Blankenship 407 So.2d 396 (Fla. 4th DCA 1981) and the subsequent cases on this issue.

An additional conflict exists as to that burden the moving party must meet to deny access to certain records. The court

has allowed closure on a showing of "cause" which creates a conflict with that burden announced in Bundy v. State, 455 So.2d 330 (Fla. 1984). The court also made this lesser standard applicable to gag orders. As a gag order constitutes prior restraint, the establishment of any lesser burden is in conflict with cases on that point.

ARGUMENT

I

CONSTITUTIONAL CONSTRUCTION

The opinion and order in this case present two grounds for discretionary jurisdiction. The decision construes the U. S. Constitution and also creates several conflicts with the existing law of this state.

This first basis exists through the court's determination of the rights of the respective parties under the First and Sixth Amendment of the federal Constitution.

While the Petitioner concedes that the court accurately states the present state of the law, i.e., the Defendant's right to a fair trial may outweigh Petitioner's First Amendmendment rights, it is the scope of these rights which is at issue.

The district court attempts to distinguish this case from State ex rel Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), Miami Herald Pub. Co. v. Lewis, 426 So.2d 1 (Fla. 1982) and Bundy v. State, 455 So.2d 330 (Fla. 1984) by noting access is sought here to pretrial discovery material. (Opinion

at pp. 2,3,4,7,8 and 9 and Order at pp. 2,3 and 5). Petitioner contends limiting the protection of First Amendment is contrary to the holdings of Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Both cases held the First Amendment affords protection to those rights and activities which are naturally attendant to the enjoyment of those rights specifically ennumerated. [Globe Newspaper at 604, Richmond Newspapers, Inc., at 575, 576 and at 583, 584 (Stevens, J. concurring)]. These pronouncements by the U.S. Supreme Court are binding up this Court. Department of Education v. Lewis, 416 So.2d 455, 461 (Fla. 1982).

The court, through the use of "labels" ("pretrial discovery material") creates an artificial limit on the scope of protection due Petitioner. The use of certain catch words to substantiate the decision only highlights such strained construction. One must fairly weigh the First and Sixth Amendments, affording to each the total protection they offer. It is only by consideration of the amendments on an equal footing that a just result will occur.

This strained construction of these amendments alone is sufficient to merit review by this court but the decision also has created several conflicts which require consideration.

II

PUBLIC RECORDS ISSUE

The district court does concede that under Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), pet. rev. den., 413 So.2d 877 (Fla.1982) and Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985) the documents are public records under Chapter 119, but justifies nondisclosure as being within the trial court's inherent power. (Opinion p.5).

In Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979), and subsequent cases, the courts have held unequivocally that there can be no judicially created exception to Chapter 119. Veale v. City of Boca Raton, 353 So.2d 1194 (Fla. 4th DCA 1977), Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), Rose v. D'Alessandro, 380 So.2d 419 (Fla.1980), and Orange County v. Florida Land Co., 450 So.2d 341 (Fla. 5th DCA 1984).

As this Court has declined to create such exceptions, the district court must do likewise. Some argue a failure to carve out an exemption will cause the law to be unconstitutional. Petitioner then urges this Court declare it so and have the legislature address the problem. Since the documents are admittedly public records, the decision in Florida Freedom is clearly in conflict with those cases cited above on this issue and calls for reversal.

III

BURDEN ISSUE

Even if one ignores the fact the documents sought are public records, those cases on access to court proceedings and files dictate disclosure.

Petitioner contends that a party moving to seal the records, and thereby deny access to the press and public, must meet that test as originally announced in McIntosh, supra, as modified in Lewis, supra, and last stated in Bundy, supra. The decision in Florida Freedom does not require a party to meet the test of Bundy and, in fact, establishes a lesser burden for closure and gag orders. Such holding creates conflict with the above cited and other decisions.

The most recent statement of the law by this Court on this issue is found at page 337 of Bundy, supra, where the Court noted:

> ...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 prevent a serious and imminent threat 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 added).

As noted earlier the court attempts to distinguish the cases pointing out that access in the instant case is sought to pretrial discovery material.

Even if the court ignores the fact these documents are public records, there is no question that they are court records. The in camera inspection surely brought the documents within the bosom of the court and one must infer that the trial court felt Section 119.07(4) Florida Statutes, gave them authority to seal the court file.

Regardless of the label used on the documents sought, the district court imposed a lesser burden ("cause", Opinion, p.8) on those seeking closure. This is in direct conflict with that test announced in Bundy. Petitioner contends there is no law to support a holding that a lesser burden is applicable. Access cases have consistently imposed a much higher burden.

The applicability of the three-pronged test in access cases has recently been affirmed by the Fourth District Court in Goldberg v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986.) It is noteworthy that the press was not the party objecting to closure in that case and the court still held the same standard for closure was applicable. Goldberg creates an additional basis for conflict jurisdiction.

Petitioner additionally contends that the lesser burden required to justify closure as indicated by the District Court in Florida Freedom is in conflict with that decision rendered in Ocala Star Banner Corporation v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA). There, the court held that the three-pronged test should be applicable in access as well as in prior restraint

cases. The court made a thoughtful analysis of this at page 1371 where they reasoned:

> ...the other district courts which have considered the issue have applied the three-prong test to denial of access cases, and although as pointed out in Edwards, this test was spawned in prior restraint cases, it appears to be a reasonable test to apply to access cases as well.
>
> Prior restraint orders are acknowledged censorship orders. The press is permitted to gather the information, but is not allowed to print it. Limitation of access is likewise a form of censorship because the press is denied the right to gather the news, thus unable to print. 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. Under these circumstances, we see no reason to adopt a different type of test in access cases.

This concept is consistent with principles of First Amendment protection announced in Globe Newspaper, and Richmond Newspapers, supra. The application of this logical extension of this protection then requires anyone attempting to deny these rights to meet the strict scrutiny burden.

McIntosh, supra, and Miami Herald Pub. Co. v. Morphonios, 467 So.2d 1026 (Fla. 3rd DCA 1985) both held that any form of prior restraint is presumptively unconstitutional and must be judged by a strict scrutiny standard. When one applies those principles announced in Globe Newspaper and Richmond Newspapers, supra, (and impliedly adopted by Sturgis) and the admission by the district court that the First Amendment Rights of Petitioner were at issue (Opinion at p. 5, Order at p. 3, but see Opinion at p.8), it is obvious that the standard here should be one of strict scrutiny.

The court has emasculated this standard by allowing denial of access upon a showing of "cause" (Opinion p.8). Petitioner contends that application of a lesser standard constitutes a conflict with those cases cited above and merits consideration by this court.

The First District has also established a burden applicable to "gag orders" which is in direct conflict with existing case law. While the restraint here is not directly on the Petitioner, McIntosh and Morphonios, supra, have both held that any form of prior restraint is presumptively unconsitutional and must be judged by strict scrutiny standards. When this restraint, albeit on others, is considered in light of the reasoning in Sturgis, it is easy to see the same onerous censorship occurs.

These conflicts and inconsistencies rise to the level required by this court for invoking its jurisdiction pursuant to Rule 9.030 (a)(2)(A)(iv), Florida Rules of Appellate Procedure.

In Williams v. Duggan, 153 So.2d 726 (Fla. 1963), at 727, the Court noted the issue of "conflict" was to be a conflict on a point of law rather than a conflict on all fours. The issue in conflict there is that burden which is to be imposed on a party seeking to seal the records in a case or impose a "gag order." One test to be applied in determining the existence of a conflict is whether the opinion "create(s) an inconsistency or conflict among the precedents." Kincaid v. World Insurance Company, 157 So.2d 517, 518 (Fla. 1963). This Court has also

held that obiter dictum within a case may create that conflict sufficient to merit granting discretionary jurisdiction. Sweet v. Josephson, 173 So.2d 444 (Fla. 1965). See also, Garcia v. Cedars of Lebanon Hospital Corp., 444 So.2d 538 (Fla. 3rd DCA 1984).

These standards for invoking discretionary jurisdiction are surely met upon comparison of the First District's decision in Florida Freedom with those prior decisions of other district courts and this Court on the issues detailed above.

There are a series of cases presently on appeal pending which deal with the closure of court files and/or proceedings. [Florida Freedom Newspapers v. Sirmons, 1st DCA, Docket #BQ-113, Sentinel Communications Co. v. Smith, 11 FLW 1484 (July 11, 1986), (Petition for discretionary Jurisdiction pending in Supreme Court Case 69,491), Sentinel Communications Co. v. Gridley, (Fla. 5th DCA), per curiam opinion issued October 29, 1986, question certified)]. The confusion which now exists as to this issue merits a final, clear, and definitive holding from this Court. Petitioner urges this Court to accept jurisdiction and resolve this issue.

CERTIFICATE OF SERVICE

The undersigned certifies that he has served copies of the foregoing with appendix as provided to the following:

Jim Smith, Attorney General, Attention Louis F. Hubener, Assistant Attorney General, Tallahassee, Florida for Respondent; Michael J. Glazer of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Tallahassee Democrat, Inc.; John D. Simpson, Mariannna, Attorney for Dale Sims, Floyd A. Griffith, Marianna, Attorney for Gordon Hartley, Jr., James Dunning, Marianna, Assistant State Attorney and Hon. Robert L. McCrary, Respondent. Service was accomplished by mailing the below to each of the foreoing this 8th day of December, 1986.

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