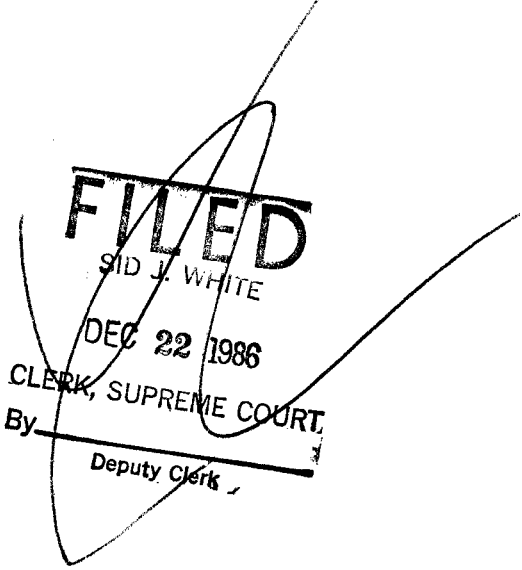

IN THE

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 ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent believes petitioner's statement of facts would be more clearly understood if supplemented with the following facts.

Rule 3.220(a), Florida Rules of Criminal Procedure, requires a prosecutor to furnish a defendant with, inter alia, written or transcribed witness statements in his possession. Pursuant to this rule, two criminal defendants in the proceedings below sought and obtained such witness statements from the state attorney.

Because of intense pretrial publicity, the defendants filed motions to prevent public disclosure of the transcribed witness statements and also to prohibit the prosecuting attorneys, sheriff's office personnel and other individuals from publicly commenting on the case. Rule 3.220(h) and (i) provide:

> (h) **Protective Orders.** Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit such party to make beneficial use thereof.
>
> (i) **In Camera Proceedings.** Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made **in camera**. A record shall be made of such proceedings. If the court enters an order granting the relief following a

> showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. (Emphasis supplied).

The trial court entered an initial order prohibiting the state attorney from disclosing the statements without first submitting them to the court for in camera inspection. It also granted the motion to prohibit out-of-court statements about the case. Following in camera review, the court found that because of existing widespread prejudicial publicity and the nature of the witness statements, their public dissemination posed a serious and imminent threat to the administration of justice requiring their temporary non-disclosure. Accordingly, it entered an order temporarily prohibiting disclosure of the witness statements. It also clarified the gag order and modified it so that it did not apply to the clerk of the court.

It should be noted that the witness statements in question were not filed in the court file at the time they were first disclosed to the defendants. In fact, although they were provided directly to the judge for in camera review, they were never filed with the clerk and never became a court record. Rule 3.220 does not require that a copy of discovery material provided to the defendant also be filed in the court file. Most prosecuting attorneys do not routinely file Rule 3.220 discovery material in the court file.

Following trial of defendants, the trial court vacated its order and made the discovery material subject to public disclosure. (A 1,2).

SUMMARY OF THE ARGUMENT

Petitioner's brief concedes that the right of an accused to a fair trial outweighs petitioner's limited rights, if any it has, to publish Rule 3.220 discovery material that will prejudice a fair trial. This is well established law and petitioner suggests no reason why the decision below should be changed. (Point I)

Courts have the inherent authority to control their proceedings and the responsibility to protect a defendant's right to a fair trial. Doing so does not create "judicial exceptions" to the public records law. There is no conflict with any other appellate decision. (Point II)

The three-pronged test applies only to closure of court proceedings and court records. The ruling below temporarily prohibited disclosure of discovery material and does not create decisional conflict with any other case. (Point III)

I. THE COURT SHOULD NOT ACCEPT JURISDICTION OF THIS APPEAL BECAUSE IT IS CLEARLY ESTABLISHED LAW THAT THE CONSTITUTIONAL RIGHT OF AN ACCUSED TO A FAIR TRIAL IS SUPERIOR TO THAT OF THE PRESS IN NEWSGATHERING.

This case presented the question of whether the press has a First Amendment right to have access to and publish discovery material in the hands of the prosecution and defense counsel, material which was not part of the court file and which, according to the finding of the trial court, would prejudice the rights of defendants to a fair trial if made public.

Petitioner's argument under its Point I is less than clear, and the amicus brief of the Miami Herald does little to clarify the issue. Both say nothing more than that this Court should grant review because the lower court "construed the First Amendment" in denying the press access to unfiled investigative material.

The trial court and the First District Court of Appeal found that petitioner had no First Amendment right of access to this material, especially in view of its prejudicial effect on the defendants' right to a fair trial. While it seems debatable that a ruling finding no constitutional right expressly construes a constitutional provision as required by Art. V, Section 3(b)(2), Florida Constitution, petitioner's brief states that "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 Amendment rights. . . ." Even if we assume discretionary jurisdiction lies when a lower court simply finds there is no constitutional right at stake (as least as far as the petitioner is concerned), neither petitioners

nor the amici offer one cogent reason why this Court should review the ruling below when the constitutional issue is conceded.

Respondent contends that even if there is some slight interplay of constitutional rights here, the balance has been struck so clearly in favor of the right of a criminal defendant to a fair trial that any further exposition by this Court would be superfluous. This Court has made it clear that the right to a fair trial is superior to the interest of the press in newsgathering. Bundy v. State, 455 So.2d 330 (Fla. 1984). The United States Supreme Court has itself stated that the right to a fair trial is "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 interests of the press are not of equal importance with the right of an accused to a fair trial. Bundy v. State, supra, at 338, citing Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982); Seattle Times Co. v. Rhinehart, 67 U.S. 20, 33-34, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984): limitations on a party's ability to disseminate information in advance of trial implicates First Amendment rights to a far lesser extent than restraints in a different context.

Here, of course, the trial court made the finding that the defendants' Sixth Amendment right to a fair trial would be jeopardized by release of the witness statements. This court's jurisdiction is discretionary in this appeal. To be blunt, the

petitioner's apparent contention that it has a constitutional right to obtain and publish the statements regardless of their prejudicial effect does not merit the court's consideration.

II. THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH OTHER CASES PRECLUDING THE CREATION OF JUDICIAL EXCEPTIONS TO CHAPTER 119, FLORIDA STATUTES, THE PUBLIC RECORDS LAW.

Petitioner urges that conflict jurisdiction exists and cites four cases standing for the general proposition that courts cannot judicially create "exceptions" to the public records law, Chapter 119, Florida Statutes. It further urges that the court declare Chapter 119 unconstitutional if the Sixth Amendment must control its application.

This argument is without merit and unworthy of the court's consideration. None of the cases cited in point II of petitioner's argument involved consideration of a claim of prejudicial publicity and impairment of an accused's right to a fair trial, a fact given explicit recognition in the First District's opinion. (Pet. App. p.5). Here there is no conflict between the decision of the First District Court of Appeal below and the cases petitioner relies upon. In fact, in one of the cases on which petitioner relies for conflict, Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA, 1981), it was urged on

appeal that disclosure of investigative material (tape recordings) pursuant to Section 119.011(3)(b), Florida Statutes (1979), would prejudice the defendant's right to a fair trial. In response to this, the Court of Appeal did not say it was powerless to carve out judicial exceptions to Chapter 119. Rather, observing that the question had not been first presented to the trial court, the Fourth District stated:

> We also recognize that the trial judge . . . is the one who should first consider and deal with the competing considerations involved in limiting pretrial publicity. [Citations omitted.]

Satz, supra, at 398.

Furthermore, it is axiomatic that courts will give a constitutional construction and application to statutes whenever possible. 49 Fla. Jur. 2d Statutes §113. There is no need to declare any part of Chapter 119 unconstitutional because in nearly all circumstances it will operate constitutionally. In the few and narrow circumstances in which it may not, the opinion below relied on this court's ruling in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 909 (Fla. 1976):

> . . . a trial court has the inherent power to control the conduct of the proceedings before it, and it is the trial court's responsibility to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten fairness of his trial and the abrogation of his constitutional rights.

See also, Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 3, 4 (Fla. 1982).

The First District Court of Appeal gave a constitutional rather than unconstitutional application to the public records law. There is no need to disturb that ruling and no conflict of case law to resolve.

III. THE THREE-PRONGED TEST APPLIES ONLY TO CLOSURE OF COURT PROCEEDINGS OR COURT FILES; NO CASE HOLDS THAT IT APPLIES TO GAG ORDERS OR A STATE ATTORNEY'S INVESTIGATIVE FILE.

Petitioner's third point, stated as "burden issue," is so cryptic that one can only guess at the nature of the issue posed. Seemingly, petitioner complains both of the "gag" order the trial court imposed on counsel and the district court's failure to require that the so-called "three-pronged" test be applied to material controlled by Rule 3.220, Florida Rules of Criminal Procedure.

As the district court's opinion noted, the Florida Supreme Court has clearly approved restrictions on extrajudicial comment by orders " muzzling lawyers" in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1977). (See Pet. App. p.15). The court did not rule that a "three-pronged test" had to be applied to lawyers. Lawyers' statements that may

have prejudicial effect are already restrained by Rule of Conduct 4-3.6. No three-pronged test is necessary to judicially enforce that rule.

Heretofore, the three-pronged test has been applied only to closure of a judicial proceeding or of a court file. Access to court proceedings and court records undoubtedly involves constitutional considerations. See, Miami Herald v. Lewis, 426 So.2d 1 (Fla. 1982). Here, petitioner suggests that that test be extended to include discovery material to which it has no comparable constitutional right of access. The district court declined to view the state attorney's investigative files as part of the court's record and hence held that the three-pronged test did not apply. (Pet. App. pps. 7-8). This ruling does not conflict with any other case applying the test. It does not interpret a provision of the constitution except to the extent of recognizing that the press has no constitutional right to demand a state attorney's investigative files. This being so, point III presents no basis for jurisdiction.

CONCLUSION

The Court should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **WILLIAM A. LEWIS**, Sale, Brown, Smoak, Chartered, Attorney for Petitioner, 304 Magnolia Avenue, Post Office Box 1579, Panama City, Florida 32401; **MICHAEL J. GLAZER**, Ausley, McMullen, McGehee, Carothers & Proctor, Attorney for Tallahassee, Democrat, Inc., Post Office Box 391, Tallahassee, Florida 32302; **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, Marianna, Florida 32446; **JAMES DUNNING**, Assistant State Attorney, Jackson County Courthouse, Marianna, Florida 32446; **HONORABLE ROBERT L. McCRARY**, Circuit Judge, Jackson County Courthouse, Marianna, Florida 32446; **RICHARD J. OVELMEN**, One Herald Plaza, Miami, Florida 33101; **LAURA BESVINICK**, Sharpstein & Sharpstein, P.A., 3043 Grand Avenue, PH 1, Coconut Grove, Florida 33133; **PARKER D. THOMSON** and **SANFORD L. BOHRER**, Thomson, Zeder, Bohrer, Werth & Razook, 4900 Southeast Financial Center, Miami, Florida 33131; and **GERALD B. COPE**, Greer, Homer, Cope & Bonner, P.A., 4360 Southeast Financial Center, Miami, Florida 33131, this 22nd day of December, 1986.

LOUIS F. HUBENER