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IN THE SUPREME COURT OF FLORIDA

POST-NEWSWEEK STATIONS, FLORIDA INC., THE MIAMI HERALD PUBLISHING COMPANY, NEWS AND SUN-SENTINEL COMPANY, NBC SUBSIDIARY (WTVJ-TV), INC.,

CASE NO: 78,915
4TH DCA CASE NO: 91-2550

Petitioners/Cross-respondents,

v.

JOHN DOE, et al,

Respondent/Cross-petitioner.

****

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
CERTIFYING QUESTIONS TO BE OF GREAT PUBLIC IMPORTANCE

****

INITIAL BRIEF OF CROSS-PETITIONER/RESPONDENT JOHN DOE

****

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POINTS ON APPEAL

ARGUMENT I:

THE CROSS-PETITIONERS HAVE STANDING TO SEEK A PRETRIAL ORDER EXEMPTING DEFAMATORY MATERIALS FROM BEING DEEMED PUBLIC RECORDS PURSUANT TO SECTION 119.07(1)(2), FLORIDA STATUTES, AND TO SEEK A PROTECTIVE ORDER PURSUANT TO RULE 3.220, FLORIDA RULES OF CRIMINAL PROCEDURE

A. THE LEGISLATIVE CHANGE IN SECTION 119.011(3)(C)(5) ALLOWS JOHN DOE TO SEEK EXEMPT MATERIAL FROM BEING CLASSIFIED AS "PUBLIC RECORD" IF SAID INFORMATION IS DEFAMATORY

B. JOHN DOE HAS STANDING TO PROHIBIT DISCLOSURE UNDER RULE 3.220, FLORIDA RULES OF CRIMINAL PROCEDURE

ARGUMENT 11:

THE TRIAL COURT APPLIED AN INCORRECT TEST TO ASSESS THE RIGHTS OF JOHN DOE LITIGANTS THEREBY ABUSING ITS DISCRETION AND DEPARTING FROM THE ESSENTIAL REQUIREMENTS OF LAW

A. THE LEWIS TEST IS INAPPLICABLE AT BAR

B. BARRON SHOULD BE APPLIED TO ASSESS THE RIGHTS OF JOHN DOE LITIGANTS

ARGUMENT 111:

JOHN DOE PROPERLY ASSERTED HIS RIGHT TO PRIVACY WHICH IS A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT

PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout this Initial Brief of Cross-Petitioner/ Respondent, JOHN DOE:

The term "JOHN **DOE"** shall refer to the Cross-Petitioner/ Respondent at the Supreme Court level, referred to in the District court as Petitioner, and at the Circuit Court level as interested party/witness.

The term "JOHN **DOE"** shall include all five JOHN DOES represented by undersigned counsel.

The Petitioners/Cross-Respondents at the Supreme Court level, Post-Newsweek Stations, Florida Inc., The Miami Herald Publishing Company, News **and** Sun-Sentinel Company, and NBC Subsidiary (WTVJ-TV), Inc., shall be referred to as the **"Media".**

Citations to the **"DOES** Appendix" filed at the District Court level and submitted to this Court by the Media as **"DOES** Appendix" shall be referred to as the "trial court appendix" and shall be indicated by the abbreviation **"TCA"** followed by the appropriate page number (TCA).

Citations to the Media's appendix to Petitioner's Initial Brief filed herein shall be indicated by a **"MA"** followed by the appropriate page number (MA).

Citations to the appendix to Cross-Petitioner/Respondent, JOHN DOE's Initial Brief shall be referred to as the **DOE's** Appendix, and will be indicated by a **"DA"** followed by the appropriate page number **(DA).**

Citations to Petitioner's Initial Brief filed at the Supreme Court level shall be indicated by an "IB" followed by the appropriate page number (IB).

All emphasis is that of the writer unless otherwise specified.

STATEMENT OF THE CASE AND OF THE FACTS

In July, 1991, law enforcement authorities received information from an anonymous source that a Tamarac, Florida woman named Kathy Willets was engaging in prostitution and that her husband, Jeffrey Willets, a Broward County Sheriff's Officer, was living off the proceeds of Kathy Willets' sexual activities. On July 23, 1991 a search was conducted of Jeffrey and Kathy Willets' home and Jeffrey Willets' patrol car (TCA 4-21). Several items of physical evidence were seized during the searches. The items included a multitude of business cards, a rolodex containing several names and notations, cassette tapes, and "list[1]". The Media speculated that the list contained the names and intimate personal details of several South Florida men and sought the release of all names connected with the "Willets sex scandal" by filing Public Records Act requests with the Broward sheriff's office and the office of the State attorney, 17th Judicial Circuit in and for Broward County, Florida (TCA 24). On August 6, 1991 the arresting officers filed Probable Cause Affidavits which were immediately accessible to the public pursuant to the Public Records Act (TCA 4-21). In addition to detailing the facts surrounding Jeffrey and Kathy Willets' alleged criminal activity, the Probable Cause Affidavit reprinted a "sample" of the graphic information

[1]All parties, including the trial court and the District Court used the wording "client list" as a shorthand way of referring to all of papers, documents, tape recordings, video recordings, etc. seized.

contained in some of the evidence seized (TCA 11-12).[2] Shortly thereafter JOHN DOE closure motions were filed by several JOHN DOE seeking that the entry of an Order closing the pretrial discovery proceedings in this case from public view (TCA 22-42; 57-60; 61-72; 73; 81-82; 231-233). In particular, JOHN DOE sought closure of the release of any and all business cards, notes, journals, lists and/or tape recordings seized so that the identity of individuals referred to in the pretrial discovery would not be disclosed. Additionally, JOHN DOE sought a protective order pursuant to Rule 3.220 (1), Florida Rules of Criminal Procedure protecting the identity of victims and/or witnesses in the "Willets sex scandal" and all references to said individuals. In light of the Public Records Act and Rule 3.220(m), Florida Rules of Criminal Procedure, JOHN DOE further sought an Order requiring all pretrial documents submitted to the court to be submitted in-camera.

Five JOHN DOES initially submitted sworn Affidavits in support of their requests (TCA 33-42). The Affidavits set forth their well grounded fear that their names and/or intimate personal details of their personal lives would become public during the investigation

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[2]The sample contained in the Probable Cause Affidavit is reprinted as follows:

"MON 5/27 GARY $150.00 2TIMES Good 8^30 - 12^30 Watched BIG"
" Tue 5/28 Ralph $50 Suck tits PLAY Pussy 1030-1130
"Wed 5/29 [illegible] $150. 1 TIME 11^AM - 12^30 Watched Good"
" FRI 5/31 STeve 8^20 - 9^00 Talked Too much"
" FRI 5/31 Mark $150, 5 times 1 cum, 1BJ 9:30-11^10 Weird watch
" Wed 6/5 Paul West $150. 2 times 10^A 12^00 Big OK Watched Touch ass

(TCA 11-12)

and prosecution of the Willets, stating under oath that the information would be **defamatory.**[3] The Affidavits further averred that each JOHN DOE was a private individual rather than a "public **official."** The Affidavits were numbered from one to five in the upper right hand corner to discern which JOHN DOE affidavits corresponding with the specific individual using the **JOHN** DOE pseudonym.

Thereafter, an Information was filed charging Kathy Willets with one count of committing an act of prostitution with Forest McAllister contrary to §796.07(3)(a), Fla. Stat., (Count 111), charging Jeffrey Willets with one count of living off the proceeds of prostitution in violation of 5796.05, Fla. Stat., (Count I) and charging both Jeffrey and Kathy Willets with unlawfully intercepting communications contrary to §934.03(1)(a), Fla. Stat. and 5777.011, Fla. Stat. (Count 11). Prior to arraignment the Willets' filed their Motion to Control Prejudicial Pretrial Publicity to Prevent Public Disclosure, seeking to keep from public view any discovery materials provided by the State (TCA **85-92).**[4] The Willets submitted several newspaper articles which they alleged supported their claim that the Media's coverage of the Willets' investigation **was** irrevocably tainting the potential jury panel and

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[3]**The** JOHN **DOES** specified that release of the information would "hold them **up** to public scorn, hatred and ridicule, and the same would be used to impeach his honesty, integrity, virtue, religious philosophy, and reputation as a person and in his **profession."** (**A** 33-41)

[4]**Although** the Willets have been named as parties throughout the trial and District Court of Appeal proceedings, no appearance has been entered on their behalf at the district level or herein.

violating the Willets' rights to **due** process of law (TCA 103-128).

At a hearing conducted on August 26, 1991, the Honorable John A. Frusciante heard argument by several Media attorneys, the attorneys for the Willets, Assistant State Attorneys, and from several JOHN DOE attorneys regarding the release of names associated with the Willets' case and dissemination of materials seized. The **JOHN DOES** argued that the items were exempt from public records and that they were entitled to a protective order under several theories. The trial **court** refused to **release** the information **before** the Willets' requested discovery pursuant to Rule 3.220, Florida Rules of Criminal Procedure **(MA 110).** The court **was** concerned about dissemination of the material on the list stating:

> What interest would the public have or the press have in disseminating information of individuals that have nothing to do with this case but are on that list?
>
> For instance, suppose the Willets have a plumber that they use in their home or some businessman, an insurance man, and it is on this Rolodex card, and I determine that they are not witnesses in this case and that it could be disseminated to the press. If I would do that, wouldn't that be exactly what the JOHN DOES **are afraid of?**
>
> **(MA 108-109).**

Thereafter, on August 30, **1991,** the Willets' filed their discovery request (MA 117-121). Pursuant to the Rules of Criminal Procedure the State had until on or before September 16, 1991 to comply with the request. Prior to the State's compliance **a hearing** was conducted on September **4**, 1991 regarding the Willets' Motion,

JOHN DOE's Motion for closure and the Press/Intervenors' Motions for **Access.** At **the** inception of the hearing the Willets offered a joint Affidavit attesting to the extraordinary publicity surrounding their case to support their motion. The Willets' swore **via** affidavit that vandals had attacked their home and hecklers had harassed them (TCA 103-105). The trial court denied the Willets' and **DOES'** motions orally at the conclusion of the September **4**, 1991 hearing (**MA** 149-150)

JOHN DOE submitted evidence at the hearing establishing five categories of JOHN DOE individuals: those (1) individuals who forwarded business cards and/or letters and engaged in sexual activity for hire with Kathy Willets; (2) individuals who forwarded business cards and/or letters and engaged in sexual activity **not** for hire; (3) individuals who forwarded business cards and/or letters and did not engage in sexual activity; **(4)** individuals who sent a **"fake"** business cards and/or letters under an unsuspecting third party's name: and ***(5)*** individuals who sent a "fake" business cards and/or letters under an unsuspecting third party's name who engaged in sexual activity under an assumed name (**TCA** 93-102; MA **195).**

JOHN DOE submitted evidence in support of his Motion for Closure and for a Protective Order. Along with proffers by counsel and JOHN **DOE's sworn** affidavit, testimony was presented from a licensed psychologist, Dr. Kronscol, and an audio tape from an unnamed JOHN **DOE.** Dr. Kronscol testified that he was presently treating the JOHN **DOE** who presented the audio tape to the court.

The patient was being treated for Dystinement Disorder according to the Diagnostic and Statistical Manual of the American Psychiatric Association. (MA 218-219) The expert witness opined that this disorder would be greatly exacerbated by the revelation of his patient's name or disclosure to the Media of intimate personal details of his patient's **life.**[5]

The trial court orally denied the DOES' closure motions and denied **the** DOES' request for a stay. The court orally stated:

> Now I feel that that's what we have here and that alone -- I can anticipate that there are perhaps a number of individuals that certainly can be embarrassed and they may be in fact these proceedings may be harmful to their business even.
>
> But I am looking beyond that and it is very difficult for this court to do, let me assure you counsel. That I do not do this without a though that things will be other than Mr. Ferraro mentioned. That perhaps there will be harm being brousht to these individuals. 1 consider that to be potentially a real harm. But I have overriding interest here that I have to be concerned with. One of which and perhaps foremost in front of my mind at this time is the integrity of the whole system as it relates to criminal justice."
>
> (MA **309).**

The court conducted an initial in-camera review of a portion of the **"list",** finding no expectation of privacy and ruling it be made public (MA 288).[6]

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[5] **The** trial judge, utilizing the aforementioned categories of John Doe, classified this particular John Doe as **"at** least into category two". (MA 222)

[6] Despite JOHN DOES' request that the **"list"** be submitted under seal for appellate purposes, the district court denied the DOES' request.

On September 11, the trial court issued its written Order granting the press public access to pretrial proceedings (MA **123-** 130). Meanwhile, on September **9**, 1991, JOHN DOE filed his Petition for Writ of Certiorari to review denial of JOHN **DOE's** Motion for Order Denying Access to Pretrial Proceedings and Motion to Stay Disclosure in the District Court of Appeal, Fourth District (MA 304-321). The District Court granted JOHN DOE's September 9, 1991 Request for a Stay pending full briefing on the issues. The stay was continued by the District Court and remains in effect. (DA 36 **- 41).**

During the pendency of the proceedings at the district court level an Amended Information was filed against Jeffrey and Kathy Willets, alleging that Kathy Willets had committed acts of prostitution with many of the JOHN DOES. Initially, an Amended Information was filed with the court and a duplicate **"redacted"** Information disseminated to the public referring to each JOHN DOE by initials only. Jeffrey and Kathy Willets were additionally charged with unlawfully intercepting several telephone conversations, some with JOHN DOES involved in the prostitution counts, some with lay people (not JOHN DOES) and several with individuals named only in the wiretap counts. The names of all of the individuals in the Amended Information have since been released to the public. JOHN DOE requested the District Court hold the **"list"** under seal to conduct its own in-camera review or alternatively to enable the appellate court to assess the correctness of the trial court's decision to release the

information.[7] The request was denied. (DA **42-46**; **74-75)**

Although the district court denied JOHN DOES' Petition for Writ of Certiorari, the court continued the stay concluding the case to "be a case of great public importance and that the public and parties are entitled to a resolution of this dispute by the State's highest court **...**" DOE **v.** State, **587 So.2d 526, 528** (Fla. 4th DCA **1991).** The Fourth District certified the following two questions as being of great public importance:

> 1. IN A CRIMINAL PROCEEDING CHARGING **A** DEFENDANT WITH PROSTITUTION, **DOES A** NON-PARTY WHO CLAIMS A RIGHT OF PRIVACY IN DOCUMENTS HELD BY THE STATE ATTORNEY AS CRIMINAL INVESTIGATIVE INFORMATION HAVE STANDING TO SEEK AN ORDER OF THE TRIAL COURT WHICH WOULD DENY THE PUBLIC AND THE PRESS ACCESS TO EVIDENCE REVEALING NAMES OF THE DEFENDANT'S CLIENTS WHEN PURSUANT TO THE DEFENDANT'S DISCOVERY MOTION THE STATE IS PREPARED TO DELIVER SAID EVIDENCE TO THE DEFENDANTS **AS** REQUIRED BY FLORIDA RULE OF CRIMINAL PROCEDURE **3.220** AND WHICH UPON DELIVERY WOULD OTHERWISE RENDER THEM 'PUBLIC RECORDS' PURSUANT TO Bludworth v, Palm Beach Newspapers, Inc., **476 So.2d** *775* (Fla. 4th DCA **1985),** review denied at **488** So.2d ***67* (Fla. 1986).**
>
> **2.** IN A CRIMINAL PROCEEDING CHARGING A DEFENDANT WITH PROSTITUTION, DOES THE TRIAL COURT ABUSE ITS DISCRETION UNDER SECTION **119.011(3)**(c)*5* OF THE PUBLIC RECORDS ACT IN DENYING CLOSURE OF DISCOVERY DOCUMENTS WHERE AN UNNAMED THIRD PARTY CLAIMS THAT RELEASE OF SUCH INFORMATION WOULD BE DEFAMATORY TO HIM AND WOULD INVADE HIS RIGHT OF PRIVACY **BOTH** UNDER THE ACT, ARTICLE 1, SECTION **23** OF THE **FLORIDA** CONSTITUTION AND THE FEDERAL CONSTITUTION, AND THE TRIAL **COURT** FINDS THAT THE RELEASE OF THE INFORMATION WILL HARM THE THIRD PARTY?

In a lengthy concurring opinion, Judge Warner discussed the

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[7]**This** Court is without the **"list"** to review to assess whether an abuse of discretion occurred or whether the trial court departed from the essential requirements of law in releasing information following the trial court's decision that there was no expectation of privacy in the names on the list concerning those John Does whose identities have been revealed (MA 288-290).

necessity that the stay entered by the Fourth District be continued so as not to moot out the issue, stating:

> The Media has argued that neither the trial court nor this court has any authority whatsoever to stay the release of the client list. Thus, the trial court's order would become essentially unreviewable since it ordered immediate release. This is a complete misreading of Cannella[8]. In that case the supreme court addressed the question of whether the custodian of a record (in that case the City of Tampa) may delay the release of a public record in order to give affected parties a chance to challenge its release. Nowhere in that opinion did the supreme court ever address the authority of a court to order a stay when a question concerning the proper interpretation of the Public Records Act or of constitutional issues presents itself to the judicial branch for resolution. When so presented, the courts have the inherent authority to issue such orders as are necessary for the complete exercise of their jurisdiction, including a stay of release of the records where necessary for the court to consider the issue before it is rendered moot by their release. We have so exercised our jurisdiction to stay the release of the documents sought by the press below to consider the substantial issues raised.
>
> DOE at 529.

Judge Warner discussed the applicability of the Lewis[9] test, as applied by the trial court. Also discussed was the Barron[10] test, argued by JOHN DOE to be the correct standard. (DA 47-65). Without determining which test was more appropriately applied at

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[8]Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984).

[9]Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982).

[10]Barron v. Florida Freedom Newssasers, Inc., 531 So.2d 113 (Fla. 1988).

bar, Judge Warner concurred in the result that the trial court did not abuse its discretion or depart from the essential requirements of law. **DOE** at 534. Judge Warner acknowledged the dilemma facing JOHN DOE regarding how with regards to how his identity could be protected and the manner in which he could attempt to establish good cause for a protective order or demonstrate that the material would be defamatory, noting that:

> Clearly the JOHN DOES face a dilemma. Under Miami Herald v. Lewis, the news Media is to be given notice of closure motions, and the hearing on the motion is open to the Media. Yet to make the particularized showing necessary to sustain closure under Section **119.011(3)**(c)5 in **a** public hearing would defeat the very purpose for which the motion was brought. How the judicial system factors the rights of uncharged individuals into access to criminal proceedings by the public is a significant issue of constitutional and statutory interpretation."
>
> **DOE** at 534.

The District Court denied JOHN DOE's Motion for Rehearing and/or Clarification and Request for Rehearing En Banc, as well as the Respondent, WFTL'S Motion for Clarification. (MA 21). On November **13,** 1991, at **the** request of JOHN DOE, the Fourth District delayed issuance of the Mandate pending resolution of this matter by the Florida Supreme Court. (DA 91).

The Media filed a Notice to Invoke Discretionary Jurisdiction on November 1, 1991, and on November 6, **1991** a Cross Notice to Invoke Discretionary Jurisdiction was timely filed on behalf of the JOHN **DOE**. On November 15, **1991** this Court entered **its** Order Postponing Decision on Jurisdiction and Briefing Schedule. This Initial Brief of Respondent/Cross-Petitioner, JOHN DOE ensued.

SUMMARY OF THE ARGVMENT

JOHN DOE requests that this Court answer both of the **questions** certified by the Fourth District Court of Appeal as being of great public importance **in the** affirmative. JOHN **DOE** has standing to raise issues with respect to his right to privacy, and is entitled to lodge privacy claims under the Public Records Act, the Florida Rules of Criminal Procedure, and because the privacy rights asserted are clearly established constitutional rights.

Newly adopted Section 119.011(**3**) (c)5, Florida Statutes allows an individual to request the trial court close certain information and excluded from becoming public where it is defamatory. This legislative change negates case law such as Bludworth **v.** Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985) and Satz v. Blankenshis, **407** So.2d 396 (Fla. 4th DCA 1981). Those cases, decided prior to the legislative change, did not permit closure. Section **119.011(3)(c)5** allows JOHN DOE to seek closure if the material would be defamatory. JOHN DOE asserts that the requisite showing was made at the trial court level. **The** statute on **its** face **requires** that JOHN DOE establish **that** the material was defamatory **and** would impair the ability of a state **attorney** to locate or prosecute a co-defendant.

Below, Justice Warner determined that the **"and"** should be an **"or".** The legislative notes support this interpretation. Even the Media concedes in **its Initial Brief that the word "and"** should mean

"or", stating it was a "scrivener's **error"**. Thus, the trial court departed from the essential requirements of law in failing to properly apply Section 119.011(3)(c)5 and in requiring JOHN DOE to establish both prongs of the test. JOHN DOE established below that the information is defamatory.

The court below applied the standard enunciated in Miami Herald Publishing Co. v. Lewis, **426** So.2d 1 (Fla. 1982) to analysis whether or not to release the seized materials. The Lewis test balances the defendant's rights to a fair trial against the public's right to disclosure in **pretrial** proceedings. Clearly Lewis does not address the question of a third party's right to privacy impacted by the public disclosure of pretrial discovery information. JOHN DOE asserts that the test enunciated in Barron v. Florida Freedom Newspapers, Inc., **531** SO.2d **113** (Fla. 1988) should have been followed. In Barron the Florida Supreme Court formulated a separate test to be applied where a non-criminal litigant seeks closure of courtproceedings. Based upon the proper application of Barron, JOHN DOE'S Motion for Closure below should have been granted.

Rule 3.220, Florida Rules of Criminal Procedure likewise provides an avenue of **relief** for **JOHN DOE.** Said rule allows JOHN DOE to show good cause to restrict disclosure. Such restriction will protect a witness from harassment, unnecessary inconvenience or an invasion of privacy. At bar, release of the materials shall violate JOHN DOE'S right to privacy.

The right to privacy is a clearly established constitutional

right. See Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). The constitutional right involved herein is the right to avoid disclosure of personal matters. The material seized from the Willets contained highly sensitive matters which refer to intimate personal details. Such matters should not be disclosed to the general public.

Based upon incorrect applications of Section 119.011(3)(c)5 and the utilization of the Lewis standard rather than Barron, the trial court departed from the essential requirements of law and abused its discretion.

ARGUMENT I

JOHN DOE HAS STANDING TO SEEK A PRETRIAL ORDER EXEMPTING DEFAMATORY MATERIALS FROM BEING DEEMED PUBLIC RECORDS PURSUANT TO SECTION 119.001(3)(c)5, FLORIDA STATUTES, AND TO SEEK A PROTECTIVE ORDER PURSUANT TO RULE 3.220, FLORIDA RULES OF CRIMINAL PROCEDURE.

Cross-Petitioner/Respondent, JOHN DOE, contended below as he does herein, that he has standing to seek an Order which would deny the press and public pretrial access to defamatory pretrial information contained within the State Attorney's and law enforcement officials files and investigative materials. The first certified question posed by the Fourth District addressed JOHN DOE's standing. The Respondent/Cross-Petitioner, JOHN DOE, urges this Honorable Court to answer the certified question in the affirmative, holding that a non-party who claims a right to privacy has standing to seek a closure order. The Media requests this Court modify the question and answer it in the affirmative. (IB 12). Pursuant to the recent enactment of Section 119.011(3)(c)5, Fla. Stat. (1988 Supp.), it is clear that the legislature intended to allow non custodians of records to seek closure from inspection and examination of records. How else could a "victim or witness" seek closure or restriction of the dissemination of defamatory material? Additionally, it is well settled that Rule 3.220, Fla. R. Crim. Pro. allows "any person" to seek a protective order to protect a witness from harassment, unnecessary inconvenience or invasion of privacy. ***See***, e.g. Rule 3.220(1), Fla. R. Crim. Pro.

Contrary to the question posed by the Fourth District Court, the evidence adduced below established that not all JOHN DOES were

"clients" of the Willets. On the contrary, only one of **the** five categories of **DOES** could properly be classified as **"clients".**[11] Petitioners do not contest the DOES' standing under Rule 3.220. (IB 16). Petitioners contend that under the Public Records Act only a custodian of public records may obtain an examination or inspection of the public records. 119.07(1)(a). The Petitioners' argument ignores JOHN DOE's argument that the materials under scrutiny herein are not public records as they are exempt pursuant to Section 119.011(3)(c)5. Accordingly, JOHN DOE objects to the classification of the records as "public records" under the Public Records Act, and **may** seek protection from material being disseminated via both the Public Records Act and the Rules of Criminal Procedure.

A. THE LEGISLATIVE CHANGE IN SECTION 119.011(3)(c)5 ALLOWS JOHN DOE TO SEEK TO EXEMPT MATERIAL FROM BEING CLASSIFIED AS "PUBLIC RECORDS" IF SAID INFORMATION IS DEFAMATORY.

Prior to the legislative changes of 1988, all "documents given or requested by law or agency rule to be given to the person arrested" were public record except specified documents set forth in §119.07(3)(h). The statute did not allow an exemption of public records if the materials were defamatory to a witness.

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[11]Obviously if a DOE is a **"client"** who paid for sex thereby committing a crime, it would be more difficult to establish that revelation of his identity would be defamatory pursuant to Section 119.011(c)(3)5 or to establish **"good** cause" to limit disclosure pursuant to Rule 3.220, Florida Rules of Criminal Procedure. However, whether a **"client"** or not, John Doe has asserted a right to privacy in documents which contain intimate personal details about him which would be defamatory.

Effective October 1, 1988 the legislature adopted Section 119.011(c)(5) which exempts information from being classified as a public record, and allows the court in a criminal case to keep the information in a confidential manner until released at trial if the release of the information would defame a victim or witness. Specifically, 119.011(3)(c)5 section states:

> Documents given or required by law or agency rule to be given to the person arrested except the court in a criminal case may order that certain information ... be maintained in a confidential manner and exempt [from disclosure) if it is found that the release of such information would: a) be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and b) impair the ability of a **state** attorney to locate or prosecute a co-defendant.

Prior to the legislative enactment of Section 119.011(3) (c)5, documents given or required by law to be given to a person arrested became "public records" open to public inspection. **See**, Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985); Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981); Downs v. Austin, 522 So.2d 931 (Fla. 1st DCA 1988).[12]

Newly adopted Section 119.011(3)(c)5:

> ...allows the trial court to close certain information and exclude it from becoming public in nature where it is defamatory to a victim or witness or would jeopardize the safety of a victim or witness or would impair the state attorney in locating and prosecuting

[12]**Prior** to the legislative changes of 1988, all "documents given or requested by law or agency rule to be given to the person arrested" were public record except specified documents set forth in section 119.07(3) (h). The statute did not allow an exception of public records if the materials were defamatory to a witness.

a co-defendant.

DOE at 432.

Likewise, in Section 119.07(4), the Florida Legislature specifically recognizes the power of the court to close portions of a court file as an exception to the requirement of general access to public records. See, Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988).

Bludworth was expressly based upon the prior Section 119.011(3)(c)5, rather than the version adopted in 1988. As a result the holding in Bludworth is no longer consistent with the state's statutory scheme. Bludworth was specifically considered by the legislature prior to enactment of the new statutory subsection. The state of Florida Senate and House Staff Analysis and Economic Impact Statements regarding CS/HB 650 and SB 654 discussed that Bludworth was the controlling case on the subject, and anticipated the effect of the proposed changes to provide that active criminal intelligence information and criminal investigative information are exempt from the public records law even after discovery is provided to the Defendant if the information would be defamatory to a witness. (MA 446-469).

Section 119.011(3)(c)5 allows documents and information which would be defamatory to the good name of a witness to be kept closed even though information is required by law or agency rule to be given to the person arrested. The court may order the material be maintained in a confidential manner and exempt from the provisions of Section 119.07(1), Fla. Stat., until released at trial.

The Media concedes that the legislative history surrounding Section **119.011(3)(c)5** "suggests that the 'and' should be an 'or'". Petitioner's term the discrepancy between the intent of the legislative **change** and amended statute as a "scrivener's error". (IB **24**, n. 17). Judge Warner noted below that:

> While the statute uses the connective **'and'**, I conclude that it should be construed as an 'or'. **See**, Winemiller v. **Feddish**, 568 So.2d **483** (Fla. 4th DCA 1990)
>
> Doe **at** 532.

Justice Warner further stated:

> Not only does the legislature recognize that certain defamatory information may be excluded but it also sets as an "identifiable public purpose" for maintaining an exemption under the Act that the exemption **"protects** information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of **such** individuals." §119.14(4)(b)(2), Fla. Stat. **(1989).** By allowing **the** court to exempt from public records treatment, information which may be defamatory in a criminal proceeding, the legislature has acted consistently with this **identified** public purpose and balanced legislatively the individual's privacy interest with the right of the public to be informed.
>
> **DOE at 532.**

JOHN DOE asserts below that the trial court failed to apply the correct standard with regards to Section 119.011(3)(c)5. In discussing the issue during the August **26**, 1991 hearing, the Media/Intervenors argued that JOHN DOE was required to prove both of the prongs set forth in subsections (a) and (b). The Media now concedes that the application of subsection **"b"** is not an issue

herein. (IB 24, n. 18). The DOES assert that the Media's argument that both prongs be proven convinced the trial court to apply a strict statutory construction to the subsection. Though not dispositive of all issues herein, applying a strict statutory construction, JOHN DOE could not exempt the pretrial discovery documents from becoming "public records" , thereby becoming accessible to the Media and public upon the dissemination of the materials to the Defendant or Defendants. JOHN DOE asserts that as a witness will seldom, if ever, be able to establish that granting of access to the Media would impair the ability of the State Attorney to locate and prosecute a co-defendant, therefore he can never satisfy subsection (b). The trial court therefore did not analyze the JOHN DOE's closure motion under the appropriate statutory standard. The court did not first address whether the materials were exempt from public record as being defamatory. Likewise, the trial court only analyzed JOHN DOE's position under the Lewis standard. Cross-Petitioner suggests a public records analysis to determine whether the material is defamatory must be conducted to determine if the exemption is met. Next, if and only if it is determined the matters are public record, (not defamatory) the trial court must determine whether Rule 3.220 permits a closure of the records upon a showing of good cause. Rule 3.220(e), Fla. R. Crim. Pro. Interwoven in the statutory and Rule of Criminal Procedure analysis is JOHN DOE's fundamental constitutional right to privacy. See, Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). As the uncontroverted affidavits submitted

established that pretrial release of the information seized would be defamatory to JOHN **DOE,** the trial court abused its discretion and departed from the essential requirements of law in failing to enter an Order that materials **and** information be exempt **from** public records pursuant to Section 119.07(1), based upon a proper application of Section 119.(3)(c)5.

The Media contends that the DOES failed to meet the requisite showing **and** failed to meet their burden for pretrial closure. No where does Petitioner suggest the appropriate standard which should have been applied.

Consider the JOHN **DOE's** dilemma. **JOHN DOE** seeks a protective order and exemption of documents revealing his identity and/or revelation of intimate personal details alleged to relate to him. JOHN DOE presented their claims below in the only manner available. Although the Petitioners suggest in the Statement of Facts that the **DOES** could have "made themselves available for cross examination by Petitioners, even by remote audio hook up," (IB 7) at the trial level the Media did not **object** *to* the submission of the affidavits nor did they offer the audio hook up suggestion to the ***court.*** Without a proper objection below, JOHN DOE had no need to offer the evidence through different means. Even if offered via different means, as the trial court applied an incorrect standard regarding Section 119.011(3)(c)5. The trial court Order must be reversed or reconsidered applying the correct statutory test. Prior to the 1988 legislative change in 119.011(3)(c)5, the statute **and** case law emanating therefrom would have barred JOHN **DOE's request** for

closure under the Public Records Act. The trial court's failure to consider the statutory change, and the Court's application of Lewis rather than Barron, constitute a departure from the essential requirements of law requiring reversal.

B. JOHN DOE HAS STANDING TO PROHIBIT DISCLOSURE UNDER RULE 3.220, FLORIDA RULES OF CRIMINAL PROCEDURE.

JOHN DOE requested that pursuant to Rule 3.220, Florida Rules of Criminal Procedure, the trial court regulate disclosure of specified pretrial proceedings which would reveal the name, identity, business address, home address, and information of JOHN DOE from disclosure. Pursuant to Rule 3.220(m):

> 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 release 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.

> Upon the request of **any** person, the court may permit a showing of cause. Surely, **JOHN** DOE, who regardless of which category he falls into, has sufficient standing to "stand in the shoes" of **"any** person", so as to proceed to reach the merits as to his showing of cause to restrict disclosure and seal the court file.

JOHN DOE's Motion for Order Denying Access to Pretrial Proceedings **seeks** what is **more** commonly referred to as a "protective order". Pursuant to Rule 3.220(1):

> **Upon** a showing of good cause, the court shall at any time order that specified disclosures be restricted or deferred, that certain matters not be inquired into, or that the

> scope of the deposition be limited to certain matters, <u>that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience or invasion of privacy, provided that all materials and information to which a party is entitled must be disclosed in time, to permit such party to make beneficial use thereof.</u>

Below, JOHN DOE argued that he must be allowed or permitted to ***see*** protection from harassment, unnecessary inconvenience, and <u>invasion of privacy</u>. The invasion of privacy prong of the Rule contemplates the constitutional right to privacy which is sought to be protected by allowing "any person" to seek an order restricting the scope of discovery, allowing discovery to be sealed. After the discovery is sealed it may only be opened by order of the court.

In addition to the court's inherent authority to regulate its proceedings, the court, under Rule 3.220(e), Florida Rules of criminal Procedure, on its own motion, is entitled to restrict disclosure. Said rule states:

> The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to **<u>any</u>** <u>persona of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to either party.</u>

JOHN DOE did not seek to hamper either the State of Florida nor the defense in their respective preparation of this matter. Rather, the DOES contended that they had more than a substantial risk of annoyance or embarrassment which would result from

disclosure. In light of the Affidavits presented and the trial courts finding that harm would be brought to the JOHN DOE individuals, the DOES contend that the court abused its discretion and departed from essential requirements of law in failing to following the Public Records Act and Florida Rules of Criminal Procedure by restricting discovery and sealing the materials specified.

ARGUMENT II

THE TRIAL COURT APPLIED *AN* INCORRECT TEST TO ASSESS THE RIGHTS OF JOHN DOE LITIGANTS THEREBY ABUSING ITS DISCRETION AND DEPARTING FROM THE ESSENTIAL REQUIREMENTS OF LAW.

The Fourth District upheld the trial court's order allowing access, deeming that the trial court order did not constitute an abuse of discretion nor a departure from the essential requirement of law, citing State v. Pettis, *520* **So.2d** 250, 254, (Fla. **1988);** DOE at **528.** JOHN **DOE** contends that an incorrect test was applied to assess the rights of JOHN DOE litigants, and that application of the incorrect test **warrants a** reversal. Alternatively, at a minimum, remand to the trial court is required for a determination based upon the appropriate standard. Rather than the Lewis test, which balances a Defendant's rights to a fair criminal trial, the trial court and district court should have applied the Barron test. Barron recognizes the strong presumption of public access to criminal and civil proceedings, and set forth a test to be applied where a non-criminal defendant litigant seeks closure. Further, as set forth more fully in Argument I, supra, the trial and District court incorrectly interpreted **§119.011(3)(c)5** which, as conceded by the Petitioner, contains a scriveners error.

A. THE LEWIS TEST IS INAPPLICABLE AT BAR.

Below, the trial **judge** applied the standard enunciated in Miami Herald Publishing Co. v. Lewis, **426 So.2d** 1 (Fla. **1982)** to analyze whether or not **to release the** "client list". (DA **19-26).** The Lewis test balances the defendant's rights to a fair trial

against the public's right to disclosure in pretrial proceedings. Clearly, Lewis does not address the question of a third party's right of privacy impacted by the public disclosure of pretrial discovery information. In Lewis, the court dealt with the closure of a pretrial hearing, not merely the exchange of unsubstantiated discovery documents. As noted in Judge Warner's concurring opinion below:

> A pretrial hearing is more of a "public event" to which First Amendment considerations might apply. However, noting that there is no First Amendment protection of the press' rights to attend pretrial hearings (and even less in non-judicial portions of the discovery process), the court stated that, **"[W]e** should not elevate this non-constitutional privilege of the press [to be present at pretrial hearings] above the constitutional right of the defendant to a fair trial."
>
> Lewis, at *6;* Doe at 530.

In fact, the court described the defendant's constitutional rights as 'paramount' to the press and public's right of access. Lewis at 7; **DOE** at 530. Lewis is clearly applicable in purely criminal cases, as is obvious by its concern with protecting the rights of the accused **...** " Lewis at *6*. In Lewis, the concern with prejudicial pretrial publicity arose out of the accused's right to a fair trial before an impartial jury. It is submitted that the Lewis test should not apply in assessing the privacy interests of **JOHN** DOE. JOHN DOE quite unlike a criminal defendant, is not **charged** with any crime, nor is he a 'party' in the strict sense of that word. He is **more** akin to witnesses or third parties and should be treated as such. He was permitted to **assert his** claims

below as an interested party/witness. Accordingly, the test to be applied in assessing the validity of JOHN DOE's claims of privacy and protection from undue ignominy and harassment are better judged by the standards set forth by the Florida Supreme Court in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988).

B. BARRON SHOULD BE APPLIED TO ASSESB THE RIGHTS OF JOHN DOE LITIGANTS

In Barron, while recognizing that "**all** trials, civil and criminal, are public events and there is a strong presumption of **public access to these proceedings and their records,"** **Barron at** 114 [original emphasis], the Florida Supreme Court nonetheless recognized that **"the** law has established numerous exceptions to protect competing interest." Barron at 117. The Supreme Court of Florida found that one of the exemptions dealt "with the content of the **information."** Barron at 117. In Barron the court distinguished the rights of criminal litigants from others, such as the civil (divorce) litigants stating

> "This [Lewis test], derived primarily because of First Amendment contentions **was** designed to address the problems of prejudicial pretrial publicity and the competing constitutional rights to a fair trial and an impartial jury for criminal defendants. The test was not conceived or drawn to address closure in civil proceedings."
>
> Barron at 118.

In Barron, the Florida Supreme Court formulated a wholly different and separate test to be applied where a non-criminal litigant sought closure of court proceedings, and expressly **"recogniz[ed]** that the trial courts may exercise their power to **close** all or part of a proceeding in limited **circumstances."** Lewis

at 6. The Supreme Court commenced its analysis by recognizing "a strong presumption of openness [that] exist for all court proceedings." Lewis, at 6-7. Next, the Supreme Court assigned to the parties seeking closure the burden of proof. Finally, the Supreme Court held that "closure of court proceedings or records should occur 'where the parties seeking disclosure establishes, inter alia, that closure is necessary 'to avoid substantial injury to innocent third parties ... or ... to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceedings sought to be closed." Barron at 118. It is significant to note that the Barron court found that under certain circumstances, "the constitutional right of privacy established in Florida by the adoption of Article I, Section 23, could form a constitutional basis for closure ...". Barron at 118. The Cross-Petitioner submits that the Barron test for closure is the most appropriate test to apply in this case, and that the Lewis test is, by its own terms, inapplicable. Moreover, Barron's placement of Florida's unique privacy amendment in the closure equation totally forecloses and demonstrates the fallacy of the Media's reliance upon Forsbers v. Housinq Authority of City of Miami Beach, 445 So.2d 373 (Fla. 1984) and Mitchel v. Douslas, 464 So.2d 545 (Fla. 1985), both cases cited by the Media for the proposition that the Supreme Court "has previously ruled that there is no constitutional right to privacy with respect to public records." (IB 34) That Forsberq can no longer be cited for the blanket rule upon which the

Media relies is made clear by Justice Ehrlich's concurring opinion in Barron, concurring in the result only, wherein Justice Ehrlich disagrees with the majorities' inclusion of Article I, Section 23 and the test for determining closure at the behest of non-criminal parties. Justice Ehrlich expressly cited Forsberg for his conclusion that the privacy amendment should **not** be utilized in determining closure of public files. The majority thought otherwise.

Below, the Media relied on Cape Publications, Inc. v. Hitchner, **549 So.2d 1374** (Fla. **1989).** Such reliance was similarly misplaced. In Hitchner, the Supreme Court dealt with the release of confidential information lawfully obtained by a newspaper after a child abuse trial was concluded. The Supreme Court expressly noted that the Media in that case **"was** not attempting to sensationalize a private non-government matter". Hitchner at **1378.** Neither of those observations can be made in the case at bar where the information at issue has not (yet) been lawfully obtained by the Media from government records, and the Media is indeed seeking to "sensationalize a private government matter". The Hitchner court was careful to "hold narrowly that the information disclosed by Cape was of legitimate public concern". Hitchner at 1379.[13]

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[13]**The** Media's contention that coverage of the "Willets sex scandal" is a legitimate public event is tenuous. While the DOES recognize the public's right to hold public officials accountable for their actions and inactions, at bar no determination **was** made that the JOHN **DOES** are acting public officials or that their actions or inactions concern the public. Even assuming arguendo that public officials were contained on the list, and assuming their names should be disclosed, disclosure of intimate personal details is neither warranted nor serves any legitimate governmental

Concurring in the majorities' decision that there was no invasion of privacy by the public disclosure of facts lawfully **obtained by** the Media, **Justice** McDonald observed:

> [T]hat the Hitchners had been charged with and tried for child abuse and, therefore, had lost any claim of privacy for these acts."
>
> Hitchner at 1379.

At bar, JOHN DOE has not been charged with any crime. He has not lost his claims of privacy. While one of the five categories of JOHN DOE Petitioners engaged in sex for money, the remaining four categories of individuals did not commit any crime. Those JOHN DOE Petitioners that the State has firm evidence engaged in sex for **money** have **been** disclosed **to** the public via the Amended Information. Another individual who is neither a **"client"** nor **"customer"** did not know that **his** business **card** had been sent to an individual later charged with committing acts of prostitution, Kathy Willets. Such an individual must be entitled to assert his constitutional right to privacy and have that right as interpreted through the 14th Amendment to the U.S. Constitution, asserted under a standard that bears a rational basis. Barron is an appropriate standard.

In Barron, Justice Barkett's concurring opinion is significant with regard to the instant case. She observed:

> It seems to me that the public interest in access is diminished when the issue does not

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purpose. Each of the affidavits filed by the DOES specified that the individuals were "private individuals" rather than "public figures". See New York Times v. Sullivan, 376 U.S. 254, **84 S.Ct. 710, 11 L.Ed 2d 686 (1964).**

> involve government or **questions** affecting the general public. **...** [t]here may be **grave** danger that the [rights] of third parties will be harmed by scandalmongering, the sole effect of which is to undermine reputation, privacy or justice.
>
> Barron at 120.

It is precisely the **"scandalmongering"** which JOHN **DOE** seeks to avoid in his request for closure of the materials and documents at issue. Moreover, the Cross-petitioner herein is not a government official, but rather a private citizen whose acts have not been demonstrated, nor even alleged to be criminal, let alone involving a position of public trust. As the Barron majority observed, **"a** privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individuals seeking disclosure". Barron at 118. The Cross-Petitioner did not fall into this category.

This brings us to the second fallacy appearing in the trial judge's Order, the Media's Response, and the Fourth District's decision. The Cross-Petitioner's involvement in the Willets' criminal acts is presupposed, simply because the Cross-Petitioner's name appears, in one **form** or another, in documents, audio tapes, **and video** tapes seized from the Willets' home. The trial court expressly found that the **DOES** "have no reasonable expectation of privacy", and that "the public [had] an interest in knowing the identity of those involved in this controversy. Once involved in a matter of public interest, the JOHN **DOES** can **no** longer substantiate infallible rights to privacy." (DA **24).**

Similarly, the Media argued below:

> "The public has an interest in knowing, at minimum, whether any public officials, Media practioners or persons holding themselves out as setting a moral role were involved with the controversy. The JOHN **DOES** very likely themselves could be defendants (irrespective of grants of immunity) or material witnesses and their involvement, if any, in the alleged crimes is within the public's right to know. They are involved in matters of public interest and no longer can assert a right to privacy regarding these matters.
>
> See Post Newsweek's Response, pg. 5 - 6.

It is submitted that both the courts and the Media have engaged in a classic begging of the question. That some of the JOHN DOES "could be defendants", or "that their involvement, if any" in the Willets' crimes might at some future point in time disentitle them to any privacy claim, cannot remove them now from the Barron test for determining the interests of "innocent third parties," and place them into the Lewis test involving criminal defendants.

Barron'*s* finding that disclosure was inappropriate to the divorce proceedings there involved, does not bar application and recognition of the criminal rules of procedure to the closure issues before this court. Clearly, the criminal rules of procedure **place** a **gloss** on the Public Records Acts, Chapter 119, not addressed by the trial judge or by the majority decision rendered by the Fourth District. Clearly these protective rules, when read in pari materia with Article I, Section 23 of the Florida Constitution provide the framework for analysis of the Petitioner's claim in this case. Certainly, the Barron privacy test can co-

exist well with the Rules of Criminal Procedure and the privacy amendment.

This much **was** made clear in Pevton v. Browning, 541 So.2d 1341, 1343-1344 (Fla. 1st DCA), review denied, **548 So.2d 662 (Fla.** 1989). In Pevton, certain financial affidavits generated in a dissolution of marriage proceeding **were** sealed pursuant to Rule 1.611(a), Florida Rules of **Civil** Procedure, which, like Rule **3.220,** Florida Rules of Criminal Procedure, provided that **"[o]n** the request of either party the affidavits and any other financial information may be **sealed."** The First District observed that "[c]onsistent with the privacy interest inherent in individual financial affairs, rule 1.611(a) makes provision for sealing the financial information which the parties are required to **file."** Pevton at 1343 [emphasis added]. In Peyton, the plaintiff, a joint venturer against the former **husband** in the dissolution proceedings, sought to unseal the financial records, and relied upon Barron for the rule that **the** presumption of openness attaches to civil dissolution proceedings. Rejecting any such blanket rule, the **First** District in Pevton held:

> We consider that the rule's **[1.611(a)]** provision for sealing financial affidavits and other financial information reflects established public policy contemplated by the Florida Supreme Court in the Barron opinion as an exception to the presumption of openness of all judicial proceedings.***[J]ust as rule 1.611(a) was duly promulgated by the Supreme Court to insure the provision of accurate financial information for an appropriate determination of alimony and child support in dissolution proceedings, so was it designed to advance public policy to protect sersonal financial matters from unnecessary Public

disclosure.

> Significantly, the closure order in Barron was not predicated on rule 1.611(a), nor do we find anything in the opinion which could be read as the intent to amend or to abrogate the rule.
>
> Peyton at 1343-1344.

Similarly, while JOHN DOE does indeed rely upon the Barron test for assessing his claim for closure here, **his** simultaneous reliance upon the Rules of Criminal Procedure seeking protection from unlimited and humiliating disclosure in this case is perfectly consistent with Barron. As in Peyton, nothing in Barron can be read to abrogate Rule 3.220's protection of noncriminal participants from "unnecessary ... invasion of privacy ...". The Media's failure or refusal to acknowledge the field of operation of the rules of criminal procedure as invoked by the Petitioners is fatal to its assertion of full and unlimited disclosure. At bar, the application of incorrect tests to assess the rights of JOHN DOE litigants constituted reversible error, an abuse of discretion and departure from the essential requirements of law.

ARGUMENT III

JOHN DOE PROPERLY ASSERTED HIS RIGHT TO PRIVACY WHICH IS A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT.

Below, JOHN DOE sought closure of documents and items seized from the Willets containing JOHN DOE's name as well as intimate personal details including the alleged size of their genitals and other personal information which would be defamatory to their good name. The Media/Intervenors claimed below and at bar that the privacy interest claimed by JOHN DOE was not constitutionally protected. On the contrary, the right to privacy is a clearly established constitutional right. See, e.g., Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

Although the constitutional right of privacy has vague contours and "has been in a state of flux in recent years, an individual's right to privacy is nonetheless a constitutionally protected fundamental right. See, Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); James v. City of Doualas, Georgia, 941 F.2d 1539 (11th Cir. 1991).

In Whalen v. Roe, supra, the Supreme Court concluded that:

> [T]he cases sometimes characterized as protecting privacy have in fact involved at least two kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. Whalen at 598 - 600; 97 Sup.Ct. at 876 - 877. The Supreme Court again recognized an individual's privacy interests in avoiding disclosure of personal matter in Nixon v. Administrator of General Services, 488 U.S. 425, 457 - 459, 97 Sup.Ct. 277, 2795 - 2796, 58 L.Ed2d 867 (1977).
>
> James at 1543.

In James, a former police informant brought a civil rights action against the City and police officers alleging that the officers violated her constitutional right to privacy by allowing others to view a tape showing a suspect in an insurance fraud case and the informant engaging in sexual activity. The Eleventh Circuit Court of Appeals affirmed the District Court's denial of motions to dismiss based upon qualified immunity, holding that the "informant alleged facts sufficient to amount to a violation of a clearly established constitutional right to privacy," and that thus the officers were not entitled to qualified immunity. James at 1543. In James, the court stated:

> The inquiry is whether there is a legitimate state interest in disclosure that outweighs the threat to the plaintiff's privacy interests. The answer to that inquiry does not depend on whether the person to whom disclosure was made is a state official or a member of the general public.
>
> James at 1544.

In a key case in this area, Fadjo v. Coon, 633 F.2d 1172 (5th Cir. Unit B 1981), the court described the right to privacy as a "right to confidentiality." In Fadjo the court stated:

> "[E]ven if the information was properly obtained, the state may have invaded Fadjo's privacy in revealing it to Joelson and the insurance companies because 'implicated in ... the complaint is the allegation that no legitimate state purpose existed sufficient to outweigh this invasion into Fadjo's privacy.'"
>
> Fadjo at 1173.

Therefore, the opinion in Fadjo is consistent with the rule that a state official may not disclose intimate personal

information obtained under a pledge of confidentiality unless the government demonstrates a legitimate state interest in disclosure which outweighs the threat to the individual's privacy interest. At bar, JOHN DOE's right to privacy will clearly be invaded by disclosure. The State's interest in disclosure is far outweighed by the infringement on **the** defendant's privacy interest. See Miller, Private Lives or Public Access, August ABA Journal **65** **(1991)**

The privacy interests asserted by JOHN DOE herein are similar to the privacy interests contemplated by the United States Supreme Court in Seattle Times Company v. Rhinehart, **467** U.S. 20, **81** L.Ed.2d **17, 104 S.Ct. 2199 (1984),** and **by** the Florida Supreme Court in Florida Freedom Newspapers v. McCrary, ***520*** So.2d 32 (Fla. **1988),** and Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 370 (Fla. **1987).** Most cases in this area pit the defendants right to a fair trial against the Media's right to access. Other cases have dealt with a "victims" rights to closure pertaining to the **"rape-shield"** statute. Sub judice, JOHN DOE asserted that he was entitled to raise his privacy claims and be **heard** on the merits, based upon the Florida Rules of Criminal Procedure, the case law which has developed surrounding the area involving Media access, based upon the Public Records Act, and upon the trial court's inherent equitable powers. The court ordered the release of the "client list" based upon a lack of expectation of privacy. Precedence indicates that the trial court **erred** in its failure to enter a protective order and its failure to deny access to the materials

which were protected by the privacy rights of JOHN DOE.

In Seattle Times v. Rhinehart, supra, a protective order entered upon a showing of good cause was held not to offend the First Amendment in a civil pretrial discovery setting. In Seattle Times, the court specifically discussed the privacy rights of third parties and witnesses, thereby anticipating the standing or recognizable privacy interest of individuals situated in positions similar to JOHN DOE. The United States Supreme Court recognized the court's ability to restrict the free expression of participants, witnesses and jurors. Seattle Times at 2207, n.18. The court also contemplated that discovery may seriously implicate the privacy interest of litigants and third parties. Seattle Times at 2208.

The United States Supreme Court discussed that much of the information that surfaces during pretrial discovery may be unrelated to the underlying cause of action. Therefore, the court held that restraints placed on undiscovered, but not yet admitted information are not a restriction on a traditionally public source of information. Seattle Times at 2208.

The United States Supreme Court specifically stated that:

> The rules do not distinguish between public and private information. Nor do they apply openly to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain-incidentally or purposefully-information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest

> in preventing this sort of abuse of its processes.
>
> Seattle Times at 2208-2209.

At bar, the information sought to be closed is not trial information; on the contrary, it is pretrial discovery material which may or may not lead to discoverable evidence, and most likely will not lead to evidence which would be admissible at trial.

In Burk, supra, the Florida Supreme Court held that the Media had no qualified right under the First Amendment, under the criminal and civil rules or under the Public Records Law to attend pretrial discovery depositions in a criminal case or to obtain copies of unfiled depositions.

In deciding the issue presented in Burk, the Florida Supreme Court considered the various constitutional rights which must be balanced in determining whether closure is appropriate. The court specifically contemplated the "privacy rights of ... trial participants." The court stated:

> The question of public access to pretrial criminal proceedings directly implicates a variety of constitutional rights: the due process right to a fair trial under the Fifth and Fourteenth Amendments; the rights to a speedy and public trial by an impartial jury in the venue where the crime was allegedly committed under the Sixth Amendment; the rights of the public and press under the First Amendment; and the privacy rights of the accused and other trial participants under the First Amendment and Article I, Section 23 of the Florida Constitution. It also implicates the State's interest in inhibiting disclosure of sensitive information and the right of the public to a judicial system with effectively and speedily prosecutes criminal activities.

Burk at 379-380.

In **Burk,** the court contemplated a witness seeking a protective order such as **was** sought by JOHN DOE below, stating:

> Thus, it is not feasible for a **potential** witness, for example, to **seek** a protective order in **advance** of the deposition and it is too late to do so if the information becomes public knowledge. The often irrelevant and inadmissible evidence discovered during a deposition has the substantial potential of hazarding the right to a fair trial, **the** privacy rights of both **parties** and non-parties, and the right to a trial in the **venue** of the alleged crime.

Burk at 383.

The Supreme Court of Florida, in explaining its sensitivity to the privacy rights of witnesses and/or interested parties who are brought into proceedings because of their knowledge to the **subject** matter, stated:

> 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.

Burk at **384.**

In Florida Freedom Newspapers v. McCrary, supra, the Florida Supreme Court held that a publisher was not entitled to pretrial transcribed statements taken by the State and furnished to the defendants pursuant to a demand **for discovery.** The Supreme Court stated:

> There is no First Amendment right of access to pretrial discovery material. There is in Florida a statutory right of access to statutory material when it become a public record, but that statutory right must be balanced against the constitutional rights of a fair trial and due process. There is no constitutional impediment to a court prohibiting prosecutors, defense counsel, witnesses, and other interested parties involved in the case before the court from making prejudicial pretrial comments which are intended for publication.

McCrary at 36.

Based upon the case law which has developed in the United States and throughout the State of Florida, it is clear that JOHN DOE has a recognizable privacy interest and standing to request an order denying access to specified pretrial proceedings. Based upon JOHN DOE'S showing of good cause for a protective order and his showing that his good name will be defamed pursuant to §119.011(3)(c)5, the courts below erred in failing to grant JOHN DOE the relief sought.

CONCLUSION

Based upon the argument set forth herein JOHN DOE requests that this Court answer both certified questions posed by the Fourth District in the affirmative, reversing the trial court's Order and entering an Order staying disclosure.

Further, JOHN DOE requests that a Protective Order be entered and that the material sought to be disclosed be sealed from public view. Further, in the event that this Court affirms the trial court's order below, JOHN DOE requests that the matter sought be narrowly limited to avoid embarrassment, harassment, invasion of privacy, loss of business, and infringement on JOHN DOE'S personal affairs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of the foregoing was furnished this 6th day of JANUARY, 1992 to the Clerk of Court - Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1925 and copies mailed to the attached list of counsel and the Honorable John A. Frusciante, Broward County Circuit Court Judge, 201 SE 6th Street, Room 822, Ft. Lauderdale, FL 33301.

Respectfully submitted,

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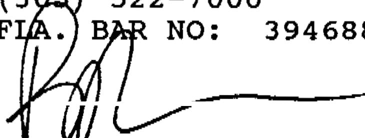

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