IN THE SUPREME COURT OF FLORIDA

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

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

Petitioners/Cross-Respondents,

vs.

JOHN DOE, et al.,

Cross- Petitioner/Respondent.

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

AMENDED REPLY BRIEF CROSS-PETITIONER/RESPONDENT, JOHN DOE

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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

SUMMARY OR' ARGUMENT

The Media has misstated that an in camera review of the client list was not conducted and that the court below only ruled on the release of names and addresses. It is clear from the Record, as well as from the decision rendered by the Fourth District Court in Doe v. State, 587 So.2d 526 (Fla. 4th DCA 1991) that not only was an in camera review of the client list conducted, the list was ordered to be released.

Additionally, John Doe contends that the court below erred in denying his request for the judicial retention of the client list submitted for in camera review. Without the client list to review, the Florida Supreme Court is unable to assess the trial court's factual determination that the John Does "lacked an expectation of privacy" in the list.

The trial court relied upon an improper, inapplicable standard for assessing the rights of John Doe litigants rather than the correct standard set forth in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988). In Barron, the Florida Supreme Court determined that closure of court proceedings or records should be ordered in cases to avoid infringement on protected privacy rights, and to avoid substantial injury to innocent third parties. John Doe met the burden contemplated in Barron, thereby entitling him to closure of the documents in question.

Finally, the Media errs in rejecting John Doe's federal constitutional right to privacy and in limiting that right by the State privacy statute.

In Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed2d 64 (1977), the Supreme Court clearly concluded that there are at least two different kinds of privacy interests each citizen possesses. One is the individual interest in avoiding disclosure of personal matters. The second privacy right is the interest in independence and making certain kinds of important decisions. At bar, the individual interest in avoiding disclosure of personal matters is in question. A long line of cases in Florida deals with personal decision making, and the Florida Supreme Court has previously indicated that the Florida right to privacy with regards to personal decision making is much broader in scope than that of the federal Constitution. Based upon the Privileges and Immunities Clauses of the United States Constitution John Doe contends that he is entitled to the same fundamental right of privacy with regards to avoiding disclosure of personal matters as set forth in Whalen v. Roe and cases which have developed therefrom. Accordingly, the Media incorrectly asserts that the State Constitution and State decisional authority forbid John Doe from asserting his federal right to privacy. On the contrary, the Privileges and Immunity Clauses of the United States Constitution entitled John Doe to the same federal privacy protection afforded all citizens. Disclosure of the information seized from the Willets in this case will clearly violate John Doe's right to privacy.

ARGUMENT I

THE MEDIA MISSTATE8 THAT AN IN CAMERA REVIEW OF THE "CLIENT LIST" WAS NOT CONDUCTED *AND* THAT THE COURT BELOW ONLY RULED UPON THE RELEASE OF NAMES *AND* ADDRESSES; NOT ONLY WAS AN IN CAMERA REVIEW OF THE CLIENT LIST CONDUCTED, THE LIST WAS ORDERED TO BE RELEASED.

Since the arrest of Jeffrey and Kathy Willets and the first John Doe's filing of a Motion for Order Denying Access to Pretrial Proceedings, several John Does have sought a court order exempting the seized materials from public view pretrial. At no time did the Does seek to limit either the State's or defense's ability to produce evidence at trial. John Doe acknowledges from the outset that the case law distinguishes closure of pretrial versus trial proceedings.

At bar, several materials were sought to be closed from public view. Included in those materials were the names and addresses of individuals connected with the "Willets' Sex Scandal", commonly referred to as John Does, as well as various items seized from the Willets. In the Media's Reply Brief they have misstated that the trial court's order denying closure allowed for the release of names and addresses only, rather than acknowledging that an in camera review of the client list was conducted and that the list was ordered to be closed.

In Seattle Times v. Rhinehart, 467 U.S. 20, 81 L.Ed.2d 17, 104 S.Ct. 2199 (1984), a protective order entered upon a showing of good cause was held to offend neither the public's right to access nor the First Amendment in a civil pretrial discovery setting. In Seattle Times, the court specifically discussed the privacy rights

of third parties and witnesses, anticipating the recognizable privacy interest of individuals situated in positions similar to John Doe. The United States' Supreme Court recognized that discovery may seriously implicate the privacy interest of litigants and third parties. Seattle Times, 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 at common law, pretrial proceedings were not open to the public. See, Gannett Co. v. DePasquale, 443 U.S. 369, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The courts have held that restraints placed upon discovered, but not yet admitted information are not restrictions on traditionally public sources of information. Seattle Times, 2208. The United States Supreme Court specifically stated:

> 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.

Although the press has a common law right of access to court records, the right is not absolute and is not given the same level of protection accorded constitutional rights. See, e.g. United States V. Schlette, 842 F.2d 1574 (9th Cir. 1988). As stated in

Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nevada, 798 F.2d 1289 (9th Cir. 1986) the common law right to copy and inspect public records is not of constitutional dimension, is not absolute, and is not entitled to the same level of protection afforded constitutional rights. Id. at 1291.

In an analogous situation in United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986) rehearing denied 805 F.2d 1043, cert. denied, Tribune Co. v. United States, 107 S.Ct. 1567, 480 U.S. 931, 94 L.Ed.2d 760, the Eleventh Circuit Court of Appeal ruled that a newspaper was not entitled to view discovered documents describing similar fact evidence, nor was the public or press entitled to demand a hearing on whether a "discovery bill" should be sealed. However, when a trial court refuses to unseal court documents in a criminal case the trial court must render written arguable reasons for denying the press or public's request to unseal documents. United States v. Kooistra, 796 F.2d 1390 (11th Cir. 1986). The findings must be adequate for a reviewing court to determine, in conjunction with a review of the sealed documents, what important interests compelled non-disclosure. Id. at 1391. As stated in State ex.rel. Tallahassee v. Cooksey, 371 So.2d 207 (Fla. 1979)

> ... the trial judge walks a tight wire in resolving the constitutional conflict. The right of the news media and the public to know all that transpires in a criminal case (beyond their unchallenged right to observe all proceedings in open court) must be carefully weighed against the defendant's right to a fair trial, but the defendant's right to a fair trial should be given paramount consideration. This should be with the realization, of course, that denial of access by the press to all or part of the criminal

> case file is not forever and should be terminated when the necessity for such denial has ceased to exist.
>
> Id. at 209

Further, as eloquently stated by Arthur R. Miller in his article entitled Private Lives or Public Access?, August ABA Journal 65:

> The rights to privacy and property ownership are among the most fundamental rights that we have as citizens of this country. Any type of governmental intrusion into these rights is costly to society as a whole, and should not be permitted except for the lost compelling reasons. A presumptive right of public access to information, the physical embodiment of these rights, would work a wholesale invasion of them-not for some demonstrated compelling reason, but in most instances for no legitimate reason at all. Id. at 68

At the trial level, John Doe sought closure of the release of any and all business cards, notes, journals, lists, and/or tape recordings seized from the Willets.' John Doe has argued throughout these proceedings that disclosure of the evidence in question would cause him to be held up to public scorn, hatred, and ridicule, and would adversely affect his honesty, integrity, virtue, religious philosophy, and reputation a person and in his profession. Doe v. State, 587 So.2d 526, 527 (Fla. 4th DCA 1991). John Doe sought, inter alia a protective order pursuant to Rule 3.220, Florida Rules of Criminal Procedure, protecting the identity of John Doe and all references to said individual. An important

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'The term "client list" has been used below and throughout these proceedings as a shorthand way of referring to all of the papers, documents, tape recordings, video recordings, et cetera, seized from the Willets.

set of documents referred to as the closet list, referred to numerous "John Does" and contains intimate personal details regarding each individual. After the Willets' arrest, the arresting law enforcement officers released the probable cause affidavit which contained a sample of the information contained in the client list seized.[2]

In John Doe's Petition for Writ of Certiorari, John Doe sought an immediate stay of the trial court order denying John Doe's Motion for an Order Denying Access to Pretrial Proceedings, as well as seeking reversal of the trial court's denying John Doe's Motion for Order Denying Access to Pretrial Proceedings. John Doe argued below that in the event the Fourth District affirmed the trial court's order allowing access to pretrial proceedings, a more narrowly limited order allowing the release of John Doe's name only should be imposed, restricting disclosure of intimate personal details such as those contained in the "client list" and reprinted in the probable cause affidavit.

The Fourth District acknowledged that "after a hearing at which the trial judge entertained argument and personally examined

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[2]The sample contained in *the* probable cause affidavit *is* reprinted as follows:

"MON 5/27 Gary B $150.00 2 TIMES Good 8:30-12:30 Watched BIG
"Tue 5/28 Ralph $50 Suck tits Play Pussy 10:30-11:30
"Wed 5/29 Paul $150. 1 TIME 11:17-12:30 Watched Good"
"Fri 5/31 Steve 9:00-9:00 Talked Too much"
"Fri 5/31 Mark $150. 5 times 1 cum, 1 BT 9:30-11:10 Weird kinky
"Wed. 6/5 Paul West $150. 2 times 10:12:00 Big OK Watched Truck a55
(TCA 11-12).

a 'client list', the trial court denied the motions filed by the various movants. . ." Doe at 527. Despite the Fourth District's acknowledgment that the trial court "personally examined a 'client list'," and the records of the proceedings conducted on September 4, 1991, the media nonetheless argues that no in camera review of the client list occurred and that the information contained in the list "was not at issue before the Fourth District and is not at issue before this Court." (MR 6) The media's misstatements are clear from the Record.

A. Contrary to the Media's Assertions, an In Camera Hearing Was Conducted after which the Trial Court Ordered the Release of The Client List.

The media's lead argument in the Petitioner's Reply Brief, centers around the media's allegations that the trial court below allowed access only to the names and address of "possible co-participants in, and, at minimum, witnesses to criminal activity." (MR 4) The media misstates that the materials at issue herein are limited to the Does' names and addresses. (MR 5) The media's contention that "to date no such in camera review has occurred and the trial court has not ruled as to disclosure of those records" is likewise false. (MR 6)

The media's assertions are patently incorrect and directly contravene the trial court's oral ruling of September 4, 1991, as well as the Fourth District's characterization of the materials sought to be closed. The media's denial that an in camera hearing was conducted by the Honorable John Frusciante with regards to the "client list" misrepresents what occurred and is a blatant attempt

to mischaracterize the materials subject to review pursuant to these proceedings. Following a lengthy hearing during which the trial court ordered release of all witnesses' names and addresses, the court went further and conducted an in camera review of the client list. The prosecutor explained that the "client list!! was, in actuality two documents. The prosecutor stated that "one is a 'client list', and one is my rol-a-disk list.!! (MA 286) The trial judge agreed to take the "client list!! and review it as "one of the first documents before the court," promising a swift decision or whether it should be released. (MA 286) The court suggested an immediate in camera review of the ''client list!! asking the State "counsel, why don't you give it [the client list] to me right now perhaps?!! (MA 287) The trial court agreed to conduct the in camera hearing "right now" and the prosecutor handed the documents to the court for the in camera review. The record is crystal clear stating:

> Thereupon, the court reviewed the "client list."
>
> (MA 288)

After reviewing the documents, the court refused to reach the merits of the Does! request for closure of the client list based upon the defamatory nature of the documents. Nor would the court assess the alleged violations of John Doe's privacy rights which would occur from the release of the list. On the contrary, the court refused to proceed after determining that John Doe had failed to meet the "standing" threshold finding that "no expectation of privacy should be expected on the part of the individuals involved

here." (MA 288)

Contrary to the media's representations, it is clear that not only was an in camera review of the client list conducted, the documents were ordered to be released. In fact, the court ordered that the client list should be given to the press, but expressed his opinion that just because it was ordered released did not mean all the information in it should be printed by the media.

The list the trial court ordered "passed on to the press" is the same "client list" the media asserts was never reviewed by the court or ruled upon.[3] The court ordered that upon release of the "list" to the defense as part of discovery, the documents should be "disbursed to the press as well." (MA 292)

At that juncture, based upon the trial court's oral pronouncements, the media was granted access to not only the names and addresses of the John Does, but also the client list reviewed by the trial court. John Doe alleges that the "list" contains defamatory information, and that its release will violate John Doe's federal constitutional rights to privacy. The trial court apparently did not address the merits of John Doe's argument,

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[3]The media is correct that no written order reflects the trial court's oral ruling of September 4, 1991, releasing the client list. At the time of the filing of John Doe's Petition for Writ of Certiorari, the only written order was the Order denying John Doe's Motion for Stay. Originally, the District Court refused to act on John Doe's Petition until receipt of a written order by the trial judge. Unfortunately, the written order does not conform to the oral pronouncement concerning the client list. No mention whatsoever is made in the order concerning the in camera review or the court's oral pronouncement that the list should be released.

instead ruling that John Doe lacked standing to seek closure. Unfortunately, the list examined and ruled upon factually has not been retained by the court under seal, despite John Doe's request that the list be retained for appellate review. Nevertheless, it is clear that an in camera review of the list occurred and that the court orally pronounced the list should be disseminated to the press.

B. The Court Below Erred in Denying John Doe's Request For the Judicial Retention of the Client List Submitted for In Camera Review.

On September 27, 1991, the Fourth District Court of Appeal entered an Order denying John Doe's request that the "client list" reviewed by the trial court in camera be submitted and held by the court under seal. (DA 74-75) John Doe argued, inter alia, that such a procedure was required to enable proper appellate review of the trial court's factual determination that the John Doe's lacked an expectation of privacy in the documents. (DA 42-46)

John Doe relied in part upon Rule 3.220(m) in support of his contention that the client list should be sealed and preserved in the records of the court to be made available to the appellate court in the event of this appeal. 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 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.

Likewise, Rule 3.220(l) allows for the sealing of pretrial discovery matters to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy. Said rule states:

> Upon a showing of good cause, the court shall at any time order that specific disclosures be restricted or deferred, that certain matters not be inquired into, or that the scope of the deposition be limited to certain matters, 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 material and information to which a party is entitled must be disclosed in time to permit such party to make beneficial thereof.
>
> Rule 3.220(l), Florida Rules of Criminal Procedure.

The Fourth District acknowledged that "after a hearing at which the trial judge entertained argument and personally examined a 'client list', the trial court denied the motions filed by the various movants..." Doe at 527. At bar, when the court reviewed the client list, the same should have been retained as part of the court record. Failure to do so herein has thwarted John Doe's right to review. It has invited the media's argument that no in camera review occurred. As established in Argument I(A), supra, it is clear that the review occurred, and it is likewise clear that the court ordered release of the client list. John Doe contends this matter should be temporarily remanded to the trial court with instructions to direct the Office of the State Attorney to submit the client list under seal to enable appellate review of the material. Thereafter, the material should be reviewed by this

court to determine if the trial court abused its discretion or departed from the essential requirements of law in ordering the list released. Alternatively, this court should remand this matter to the trial court for an evidentiary hearing to assess John Doe's standing to seek closure,[4] and to assess John Doe's privacy rights and determine if the material was defamatory pursuant to Section 119.011(3)(c)5.

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[4]John Doe's argument establishing standing is contained within Argument I of John Doe's Initial Brief. The argument was not replied to in the Media's Reply Brief.

ARGUMENT II

TEE TRIAL COURT RELIED UPON *AN* IMPROPER, INAPPLICABLE STANDARD FOR ASSESSING THE RIGHTS OF JOHN DOE LITIGANTS RATHER THAN THE CORRECT STANDARD BET FORTE IN BARRON V. FLORIDA FREEDOM NEWSPAPERS, INC.

Throughout these proceedings the media has asserted that the trial courts reliance upon Miami Herald Publishing Company v. Lewis, 426 So.2d 1 (Fla. 1982)(herein after referred to as Lewis), rather than Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988) (hereinafter referred to as Barron) was correct. John Doe contends that Lewis is inapplicable sub judice. 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 posed herein of a third party's right of privacy as 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."
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> 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 a witness or third party 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., supra. In the media's Reply Brief, Barron was ignored in assessing the rights of John Doe litigants except for the argument that "this court may affirm the trial court's denial of the Does - closure motions for reasons other than those articulated by the trial court ..." (MR 24)

The media argues factually that John Doe failed to produce competent evidence to justify closure. In boldly alleging that the Does failed to "meet their burden of proving a basis for non-disclosure of public records" the media seemingly acknowledges that Lewis is inapplicable at bar, yet also argues that Barron is inapplicable. (MR 15) Nowhere does the media suggest an

appropriate standard to be applied to assess the privacy rights of witnesses in a criminal case. Without an appropriate standard to be applied, and without acknowledging that the issue involved herein is broader than just the names and addresses on a witness list, the media's assertion that "no error occurred below" is not surprising.

A. The Florida Supreme Court has previously Determined That Closure of Court Proceedings or Records Should Be Ordered in Cases Where the Matters Are Protected By Privacy Rights or to Avoid Substantial Injury To Innocent Third Parties.

In Barron, the Florida Supreme Court analyzed the "content of the information" sought to be closed in a proceeding, and 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.

Barron recognized that "all trials, civil and criminal, are public events, and there is strong presumption of public access to these proceedings and their records." Barron at 114. Further, the Florida Supreme Court recognized that "the law has established numerous exceptions to protect competing interests." Barron at 117.

In Justice Barkett's concurring opinion in Barron, it was observed:

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

> involve government or questions effecting the general public ... [t]here may be grave danger that [rights] of third parties will be harmed by scandalmongering, the sole effect of which is to undermine reputation, privacy or justice.
>
> Barron at 1120.

It is precisely the "scandalmongering" which has occurred throughout the "Willets "Sex Scandal" that John Doe sought to avoid in his initial Motion for Order Denying Access to Pretrial Proceedings, and his subsequent Petition for Writ of Certiorari.

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. Housing Authority of City of Miami Beach, 445 So.2d 373 (Fla. 1984) and Mitchel V. Douglas, 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." (MI 34). That Forsberg 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. Clearly Barron is the most appropriate standard to assess the rights of John Doe litigants.

B. John Doe Met The Burden Contemplated In Barron.

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."
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> Barron at 118.

In Barron, the Florida Supreme Court formulated a 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.

Applying Barron to the facts adduced below and at bar, John Doe established that there "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.

Interestingly, the media has failed to apply Barron to the facts sub judice. However, the application of Barron to the facts at bar was discussed at length by Judge Warner in her concurring

opinion in Doe v. State, supra.

Doe acknowledges that consistent with first factor in Barron, there is a presumption of openness in trial court proceedings. As noted by Judge Warner,

> in both civil and criminal discovery proceedings, most discovery documents are not filed unless they are witness lists, depositions actually to be used as a pretrial hearing or trial, or other discovery actually being used in a trial proceeding. It is only through the application of the Public Record Acts, that unfiled criminal pretrial discovery information becomes available to the press.
>
> Doe at 12.

However, in Palm Beach Newspapers v. Burke, 504 So.2d 378 (Fla. 1987), the Florida Supreme Court ruled that information obtained during discovery may be closed to prevent the danger to the reputation and privacy interests of an individual. Id. at 384

Although ordinarily once a document is released to the defendant pursuant to Rule 3.220, Florida Rules of Criminal Procedure, it becomes a "public record," the 1988 legislative amendment to the Public Records Act provides an exception to prevent public disclosure of certain documents regardless of whether the same are released to the defendant. One such exemption, contained within Section 119.011(3)(c)5, Florida Statutes (1989)[5] prevents the release of information which would be defamatory to the good name of a victim or witness.

The second factor in Barron, places the burden of proof on the party seeking closure. Although John Doe contends that an

[5]Discussed at length in John Doe's Initial Brief, Argument I.

incorrect standard was applied at the trial court level, the burden was properly placed upon John Doe from the outset. John Doe asserts that he met his burden of proof.

The third factor in Barron, requires a complex analysis of the records sought to be closed. As argued herein in argument I, supra, John Doe contends that the items sought to be closed include intimate personal details and wholly private matters and more than just the "names and addresses of witnesses."

Aspects of the third prong in Barron take into consideration "public policy set forth in the Constitution, statutes, rules, or case law." Barnes v. Glen Theater, Inc., ___ U.S. ___ (January 8, 1991) [5FLW Fed. S633] was first considered only a "nude dancing" decision, but has First Amendment implications which shed light upon society's goals and public policy. Last term in Barnes the United States Supreme Court relayed the clear intent of the Court that the states may regulate conduct to protect society and morality. The Indiana Statute upheld in Barnes was deemed to have the purpose of "protecting societal order and morality." Barnes at 635.

At bar, the closure sought by John Doe would promote established national public policy. The release of intimate personal details of John Doe would run afoul of the stated objective. Additionally, Florida law allows for such closure upon a showing that the information would be defamatory to the good name of the witness.

John Doe contends that the closure sought would avoid

substantial injury to John Doe by disclosure of matters protected by privacy rights not generally inherent in the specific type of proceeding sought to be closed. In Barron the court stated

> "We find that, under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of Article I, Section 23, could form a constitutional basis for closure under (e) or (f) in this regard, we disagree with the district court in the instant case. Further, we note that it is generally the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted. However, a privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure.
>
> At bar, it is impossible to review the specific subject matter of the client list as the same was not retained following the in camera review. However, in each of the sworn affidavits submitted by John Doe below, it is uncontested that each John Doe is a private individual rather than a "public figure".

The media concedes that the Petitioners "did not formerly object to the production of the affidavits and audio tape" introduced into evidence by the John Does. (MR 21) However, the media asserts that their failure to object to the Doe's evidence "is of no moment and does not require reversal of the trial court order." (MR 21) John Doe asserts that the third factor from Barron was met by John Doe below.

As noted by Judge Warner in Shaktman v. State, 553 So.2d 148 (Fla. 1989), the Florida Supreme Court stated:

> The right of privacy, assured to Florida's citizens demands that individuals be free from uninvited observation of or interference in

> those aspects of their lives which fall within the ambit of this zone of privacy, unless the intrusion is warranted by the necessity of the compelling State interest.... because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its pre-eminence over "majoritarian sentiment" and thus cannot be universally defined by consensus.
>
> Id. at 150-151.

In her concurring opinion, Justice Warner recognized that John Doe's right of privacy was implicated in this case, stating:

> The right of privacy has traditionally been applied to sexual intimacies conducted in a private setting. However, where those acts are violations of a criminal statute, the accused's rights of privacy in his non-public sexual acts would be inferior to the State's compelling interest in prosecuting crime. To that extent the information received from Kathy Willets cannot be considered shielded from the State and its ability to prosecute any and all John Does whom the State finds probable cause to have committed a crime. The State has not yet accused any of the John Does of participating in acts of prostitution. Therefore, we are not dealing here with the State's compelling interest in prosecuting crimes, but in the publics access to information regarding individuals who have not as yet been charged with any offense. Because the issues here deal with the most private of human interaction, I find that the right of privacy is implicated in this case, contrary to the finding of the trial court.
>
> Doe at 531-532.

Finally, John Doe has overcome the presumption of openness throughout the appellate proceedings at bar, thereby fulfilling the fifth and final prong of Barron.

Based upon a proper application of the standard set forth in Barron, the trial court and District Court erred in failing to grant closure. Alternatively, this matter must be remanded to the trial court with instructions to conduct an evidentiary hearing applying the standards set forth in Barron.

ARGUMENT III

THE MEDIA ERRS IN REJECTING JOHN DOE'S FEDERAL CONBTITUTIONAL RIGHT TO PRIVACY *AND* IN LIMITING TEAT RIGHT BASED UPON THE STATE PRIVACY STATUTE

The media errs in ignoring John Doe's federal constitutional rights to privacy. The media alleges that John Doe failed to establish that disclosure would invade his privacy. (MR 33) The media states that even if such a showing had been made, the State constitution and case law developing therefrom "forbid that as a basis for keeping public records from public view." (MR 33)

The Media failed to discuss the landmark case of Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) in any of its briefs. In Whalen, the Supreme Court concluded that:

> [T]he cases sometimes characterize as protecting privacy have in fact involved at least two different kinds of interest, 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, 598-600; 97 S.Ct. at 876-877.

Clearly John Doe's federally protected fundamental rights to avoid disclosure of personal matters are implicated at bar.

A. The Media Incorrectly Asserts that the State Constitution and State Decisional Authority Forbid John Doe from Asserting his Federal Right to Privacy.

The media asserts that factually, John Doe failed to establish that disclosure of the seized materials "will invade their privacy." The media incorrectly states that:

Even had the Does proved an invasion of privacy (as opposed to some other harm, which they did not prove either), the State

constitution and the established decisional authority of this court forbid that as a basis for keeping public records from public view. (MR 33)

The media's assertion that no constitutional right to privacy exists is similarly misplaced. Although the constitutional right to privacy has vague contours and "has been in a state of flux in recent years, an individuals 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 Douglas, Georgia, 941 F.2d 1539 (11th Cir. 1991).

The media not only ignores John Doe's federal constitutional privacy rights, they refused to recognize John Doe's right to privacy based solely upon their limited reading of Article I, Section 23 of the Florida Constitution. It is true that under the Florida Constitution, an individual's state constitutional right to privacy shall not be construed to limit the public's right of access to public records and meetings as provided by law. However, the law, specifically Section 119.011 provides for closure of the release of defamatory material which would otherwise be deemed public records. Further, the federal constitution provides for a constitutional right to privacy which must take precedence over a Floridian's right of access to public records. John Doe has contended throughout that Barron is the appropriate standard to be applied at bar. Such contention meshes well with Article I, Section 23. 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 Forsberg v. Housing Authority of City of Miami Beach, 445 So.2d 373 (Fla. 1984), and Mitchell v. Douglas, 464 So.2d 595 (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." (MI 34) That Forsberg 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 majority's conclusion 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.

B. The Privileges and Immunity Clauses of the United States Constitution Entitles John Doe to the Same Federal Privacy Protection Afforded All Citizens.

Article IV, Section 2 of the United States Constitution provides that the citizens of each State are entitled to all privileges and immunities of citizens in the several States. Pursuant to Section 1 of the Fourteenth Amendment to the United States Constitution, no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

John Doe asserts that his right to privacy, specifically his right to avoid disclosure of personal matters is among the

privileges and immunities of citizens of the United States which may not be restrained or abridged by any State. See, e.g., Stephens V. Stickel, 146 Fla. 104, 200 So. 396 (1941)(liberty of speech and of the press secured against congressional action by the First Amendment to the United States Constitution is secured against State action by the Fourteenth Amendment). The purpose of the provisions of Article IV, Section 2, is to place citizens of each State upon the same footing with citizens of other States. It insures to the citizens of one State the same freedom possessed by citizens in other States.

John Doe is a citizen of Florida, and as such is entitled to the same federal constitutional privacy protections as any individual in any State. The media's allegations that the "Doe's err in claiming a constitutionally protected privacy interest" are incorrect. (MR 32)

Article I, Section 23 of the Florida Constitution must be read in conjunction with the First Amendment to the United States Constitution which guarantees John Doe privacy in the disclosure of personal materials and intimate personal details.

Several cases in Florida suggest that Article I, Section 23 extends more protection to an individual with regards to an individual's personal decision making than does the federal constitution. See Winfield v. Division of Parimutuel Wagering, 477 So.2d 544 (Fla. 1985); In Re: T.W., 551 So.2d 1186 (Fla. 1989)

It has been stated that

> "The citizens of Florida opted for more protection from Governmental intrusion when

> they approved Article I, Section 23, of the Florida Constitution. This Amendment is an independent, free standing constitutional provision which declares the fundamental right to privacy. Article I, Section 23, was intentionally phrased in strong terms. The drafters of the Amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'Governmental intrusion' in order to make the privacy right as strong as possible. Since the people of this State exercised their prerogative and enacted an Amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, and can only be concluded that the right is much broader in scope than that of the federal constitution."
>
> Id. at 548

The media's analysis is flawed from the outset. The media refuses to acknowledge the in camera review of the "client list" and the subsequent oral pronouncement that the reviewed list was to be released to the press. As argued more fully in argument I, supra, it is clear that an in camera review was in fact conducted, and that the court ruled that John Doe lacked a legitimate privacy interest in the list, thereby ordering its release.

CONCLUSION

Based upon the arguments set forth herein as well as in John Doe's Initial Brief on Appeal, 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.

Additionally, John Doe requests that a protective order be entered and that the materials sought to be disclosed be sealed from public view. In the event that this Court affirms the trial court's order below, John Doe requests that the matters sought, be narrowly limited to avoid embarrassment, harassment, invasion of privacy, loss of business, and infringement of John Doe's personal affairs.

Additionally, John Doe requests that an order be entered requiring the Office of the State Attorney to submit the client list previously reviewed by the trial court under seal for this Court's in camera inspection.

Respectfully submitted,

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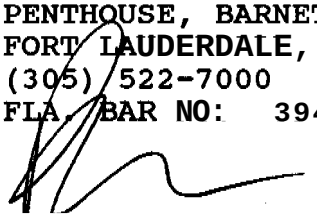

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CERTIBICATR OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Amended Reply Brief was furnished by U.S. mail this 25th day of MARCH, 1992 to the attached mailing list.

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