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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,

vs.

JOHN DOE, et al.,

Respondents.

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

PETITIONERS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The issue before this Court is a simple one: did the trial court abuse its discretion in refusing to close public records containing the names and addresses of co-participants in and witnesses to the Willetses' sex-for-hire scheme, none of whom ever disproved before the trial court that they were clients of Kathy Willets? The Fourth District correctly found that it did not. Notwithstanding the attempt of these individuals (known throughout these proceedings only as the "John Does") to mislead this Court, the disclosure at issue on the certified questions is only of the Does' names and addresses, not of notations about their genital size, their sexual performance or other such matters. The trial court expressly ruled release of the latter information would be considered only after an in camera inspection which, to date, has never taken place.

Despite the John Does' protestations to the contrary, the documents containing their names and addresses are public records as defined by Florida's Public Records Act and it is that statute which governs their disclosure. The documents were received in connection with the transaction of official agency business, specifically, the business of the Broward County state attorney in prosecuting the Willetses and in complying with discovery, and thus they are presumptively open for public inspection unless a statutory exemption applies. Contrary to the Does' assertions in their brief, the Does cannot prevent these materials from being classified as public records in the first instance; the only means

open to the Does is to prove one of the exemptions to disclosure identified by the Legislature requires these public records be kept from public view.

That the Legislature amended the Public Records Act in 1988 to add the specific (C)5A[1] exemption upon which the Does rely does not alter the status of the materials at issue as public records as the Does contend. Before the 1988 revision, all documents provided to a criminal defendant in discovery were no longer exempt from disclosure as "active criminal investigative information" or "active criminal intelligence information" and thus were open for public inspection. The 1988 amendment merely narrowed this "exception" to the criminal investigative and criminal intelligence exemption: although furnished to the defense in discovery, public records whose release the court finds would be "defamatory" to the "good name of a victim or witness" would still be exempt from disclosure.

Nor does the 1988 amendment relieve the Does of the burden of proving a basis for nondisclosure. Then as now the person seeking to bar release of public records bears the burden of proving a reason to seal them. Here, the Does failed to adduce competent evidence demonstrating they enjoyed "good name[s]", and that release of their names and addresses would be "defamatory". They never affirmatively disprovedthey are anything but clients of Kathy Willets, although the trial court gave the Does every

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[1] Subsection b of Section 119.011(3)(c)5 ("(C)5") is not at issue here,

opportunity to do so. The trial court was free to ascribe whatever persuasive value it deemed appropriate to the material the Does submitted to it, including the Does' anonymous and conclusory affidavits, and did not abuse its discretion in finding the Does' evidentiary showing deficient. Contrary to the Does' erroneous assertions and the Fourth District's mischaracterization, at no time did the trial court ever find the Does had proved release of the public records containing their names and addresses would cause the Does real harm. And, at no time was the trial court misled into believing the Does had to prove both prongs of the (C)5 exemption.

That in denying the Does' Closure Motions the trial court also referred to the test in Miami Herald Publishing Co, v. Lewis (relating to closure sought by criminal defendants) does not require reversal of the trial court's ruling. It is well-established that the reason or theory articulated by a trial court is not controlling upon review and this Court may affirm the judgment below if the record as a whole reveals any basis to support it. The record in this case -- devoid as it is of competent evidence to support nondisclosure -- requires that this Court affirm the ruling of the trial court and answer the second certified question in the negative.

None of the cases the Does cite in their brief control the issues on the certified questions. For example, this Court's decision in Barron v. Florida Freedom Newspapers, Inc. has no application here, for at issue there was a common law right of

access to judicial records, not a right guaranteed by the Public Records Act to a public record. And, the federal privacy decisions upon which the Does rely do not support secrecy because the Does here never had any expectation of privacy, as the claimants in those decisions arguably did. Moreover, the Constitution of this State expressly forbids any privacy-based limitation on the release of public records. This Court repeatedly has rejected attempts such as the Does' to carve out a privacy exception to the Public Records Act; it is those decisions which remain good law and which require affirmance here.

ARGUMENT

I. THE ISSUE BEFORE THIS COURT IS WHETHER THE JOHN DOES, AS THE PARTIES SEEKING NONDISCLOSURE, HAVE PROVEN WITH COMPETENT EVIDENCE THAT DOCUMENTS WHICH CONTAIN THE NAMES AND ADDRESSES OF WITNESSES AND WHICH BY STATUTE ARE PUBLIC RECORDS ARE EXEMPT FROM DISCLOSURE.

The core issue presented by the certified questions is whether the public should be denied access to public records solely because those records contain the names and addresses of persons identified by the State as possible co-participants in, and, at minimum, witnesses to, criminal activity. Throughout their brief[2/]

[2/] References to pages in the Initial Brief of Cross-Petitioner/Respondent John Doe will be shown by "Does' Brief" followed by the page number, as in "Does' Brief at 1". References to pages in Petitioners' Amended Initial Brief and to Petitioners' Amended Appendix to Initial Brief will be to "Petitioners' Brief" followed by the page number, as in "Petitioners' Brief at 1", and "Amended App. at A. 1". References to pages in the appendix to this Reply Brief will be shown by "A." followed by the page number, as in "A.1".

the John Does erroneously assert: (i) that the materials at issue contain more than the Does' names and addresses; and (ii) that they are not public records. Neither contention is correct.

A. Contrary To The Does' Unsupported Assertions, The Materials At Issue Here Are Public Records As Defined By Chapter 119, Florida Statutes, And Are Exempt From Disclosure Only If The Does Prove A Statutory Exemption Applies.

1. The records at issue here contain the names and addresses of the John Does and other potential witnesses, not the sexual details to which the Does allude in their brief.

The Does mischaracterize the materials at issue as containing information regarding genital size or sexual performance,[3] when in fact all that is at issue is the disclosure of their names and addresses. Contrary to the Does' assertions, the issue raised by the second certified question[4] is not the disclosure of all materials seized at the Willetses' home before the state filed charges -- including the notations about sexual performance and genital size. Rather, this case deals solely with the disclosure of the names and addresses of persons such as the Does with knowledge of a crime. To state otherwise is to distort

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[3] See Does' Brief at 4, n. 2.

[4] With respect to the first certified question regarding the Does' standing to prevent release of public records, Petitioners believe that if the Does have any such standing at all it is under Rule 3.220 of the Florida Rules of Criminal Procedure, and not, as the Does contend, under the Public Records Act. Does' Brief at 16; Petitioners' Brief at 15 - 17. Strangely, in their brief the Does appear to suggest that they have standing under both the Public Records Act and the criminal discovery rules. Does' Brief at 13, 16-25.

the trial court's September 11 Order denying the Does' Closure Motions. There, the trial court ordered release of the Does' names and addresses only; it expressly ruled it would review the other information -- including the type of information to which the Does refer in their brief in footnote 2 on page 4 -- in camera. See September 11 Order at 7; Amended App. at A. 129; A. 7 (holding "[o]ther discoverable material and any other information regarding the named individuals will be reviewed in-camera by this Court as to whether or not this information shall be released at a later time."). To date no such in camera review has occurred and the trial court has not ruled as to disclosure of those records. Consequently, that information was not at issue before the Fourth District and is not at issue before this Court.

2. The documents containing the Does' names and addresses are "public records" under the Public Records Act.

The Does argue repeatedly in their brief that the records at issue here -- documents provided to the defense under the criminal discovery rules -- are not "public records" under the Public Records Act. Curiously, it is only now before this Court that the Does challenge the materials' status as public records; in fact, the Does have conceded all along that this matter "involves public records". See John Doe's Emergency Motion to Stay Proceedings at Lower Tribunal at 5; Petitioners' Amended App. at A. 481.

Documents containing the names and addresses of witnesses given to the defense in discovery fall squarely within the definition of "public records" under Chapter 119, Florida Statutes. They are:

> [ ] documents . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Section 119.011(1), Florida Statutes (1991). The documents at issue here are documents received in connection with the transaction of official agency business, specifically, the business of the Broward County state attorney[5] in prosecuting the Willetses and in complying with the criminal discovery rules. Therefore, this case is about the names and addresses of persons with knowledge of an alleged sex-for-hire scheme[6] of a law enforcement officer and his wife, specifically, whether those persons -- the Does -- have proven the release of such information would be "defamatory" to their "good name".

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[5] The state attorney's office is an "agency" whose records are public under the Act and are exempt from disclosure only if one of the enumerated statutory exemptions applies. See State v. Kokal, 562 So.2d 324 (Fla. 1990); Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985).

[6] That the underlying criminal prosecution has concluded does not render the issue moot.

3. The Public Records Act provides the public with a statutory right of access to the public records containing the Does' names and addresses unless a statutory exemption to disclosure applies.

Because the documents containing the Does' names and addresses are public records, they are available for any person to inspect and copy at any time:

> Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so . . . .

Section 119.07(1)(a), Florida Statutes (1991) (emphasis added). However, the Legislature has determined that for policy reasons certain categories[7/] of "public records" are not available for inspection and copying. One such category is for "active criminal intelligence information" and "active criminal investigative information". Section 119.07(3)(d), Florida Statutes (1991). The Act defines "criminal intelligence information", "criminal investigative information", and "active", Section 119.011(3)(a), (b), and (d), Florida Statutes (1991), and, as part of such definitions, describes what those categories do not include, namely, documents given to the defendant under the state's criminal discovery rules. Section 119.011(3)(c)5, Florida Statutes (1991). That "exception" for criminal discovery material itself has an exception: criminal investigative or intelligence information

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7/ See Petitioners' Brief at 39-40.

(otherwise publicly available because it was turned over to the defense in discovery) may not be disclosed

> 5. [I]f it is found that the release of such information would:
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> > a. Be defamatory to the good name of a victim or witness or wauld jeopardize the safety of such victim or witness . . . .

Section 119.011(3)(c)5.a., Florida Statutes (1991) (emphasis added).[8/]

Thus, assuming they satisfy the initial test for being "public records", documents maintain that status regardless of whether under the circumstances they may also be exempt from disclosure. Accordingly, the documents containing the Does' names and addresses are public records, and the only question is whether they are public records which Petitioners and any other member of the public may view. That a document may not be available for public inspection does not mean it is not a "public record"; rather, it is a policy decision of the Legislature that certain records made or received pursuant to law or ordinance or in connection with the transaction of official agency business (in this instance, criminal discovery material the state attorney has provided to the defense) not be disclosed. The Does have not provided and cannot provide support for their tortured reading of the Act.

[8/] Subsection b of Section 119.011(3)(c)5 is not at issue here. See Petitioners' Brief at 23.

4. The 1988 amendment to (C)5 does not affect the public's right of access to public records containing the Does' names and addresses.

In 1988 the Legislature amended (C)5 to exempt certain materials from disclosure even though they might have been provided to a criminal defendant under the criminal discovery rules. See Petitioners' Brief at 28 - 29. Prior to that time, the section read in relevant part:

> (3)(c) "Criminal intelligence information" and "criminal investigative information" shall not include:
>
> * * *
>
> 5. Documents given or required by law or agency rule to be given to the person arrested
> . . . .

Section 119.011 (3)(c)5, Florida Statutes (1987). While then as now "public records" are documents made or received pursuant to law or ordinance or in connection with the transaction of official agency business, those documents which contain active criminal intelligence or investigative information are exempt from disclosure. Section 119.07(3)(d), Florida Statutes (1991). Before the 1988 amendment, the "exception" to that exemption was for documents the state provided to a criminal defendant under the criminal discovery rules, Section 119.011(3)(c)5, Florida Statutes (1991); Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985), rev. denied, 488 So.2d 67 (Fla. 1986) (construing virtually identical 1983 version of Section 119.011(3)(c)5). Documents produced to a criminal defendant in discovery were therefore no

longer "active criminal intelligence information" or "active criminal investigative information" (categories of information which the Legislature determined required secrecy) and thus automatically lost their status as exempt material. Proponents of the 1988 change sought to narrow this "exception" to the exemption. The Legislature passed the revised section to exclude from public disclosure material whose release the court finds would "be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness . . . ." Section 119.011(3)(c)5.a., Florida Statutes (1991). See Petitioners' Brief at 28 - 29.

Notwithstanding the Does' unsupported assertions to the contrary, this amendment did not 'overrule' or otherwise render ineffective the Fourth District's opinion in Bludworth V. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985), rev. denied, 488 So.2d 67 (Fla. 1986). Does' Brief at 18 - 19. The Does contend that because Bludworth was "based upon the prior Section 119.011(3)(c)5, rather than the version adopted in 1988[,] the holding in Bludworth is no longer consistent with the state's statutory scheme." Does' Brief at 19. This is patently false. Bludworth, interpreting the 1983 version of (C)5, merely stands for the proposition that once material which qualifies as criminal intelligence or investigative information is turned over to a criminal defendant in discovery, there no longer is a need for secrecy. Bludworth, 476 So.2d at 779, reaffirming Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981); Downs v. Austin,

522 So.2d 931, 935 (Fla. 1st DCA 1988). The 1988 amendment did not affect the pre-existing portion of (C)5 excluding discovery material produced to the defense from the definitions of active criminal intelligence and investigative information. The Does' argument suggests the change deleted the (C)5 language when it clearly did not. The revision merely narrowed the "exception" to the exemption from disclosure for active criminal intelligence and investigative information. Now, otherwise publicly available criminal intelligence or investigative information provided to the defense in discovery will still be exempt from disclosure if it is proved and the court finds that disclosure would be "defamatory" to the "good name" of a witness or victim. Furthermore, the court in Bludworth also recognized that any exemptions to disclosure must be made by the Legislature, not by the courts. Bludworth, 476 So.2d at 779 - 80, n. 1. This, too, was and remains the law even after the 1988 amendment to (C)5. Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979); Neu v. Miami Herald Pub. Co., 462 So.2d 821 (Fla. 1985); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980).

B. Because The Materials At Issue Here Containing The Does' Names And Addresses Are Public Records, The Does Had The Burden Of Proving A Basis For Nondisclosure.

As described more fully in Petitioners' Brief,[9/] because the materials at issue are public records, it was the Does' burden,

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9/ See Petitioners' Brief at 17-29.

as the parties seeking to prevent their release, to prove a basis[10/] for nondisclosure. In fact, the Does never disputed this. During the September 4 hearing the trial court instructed the Does' counsel that the public records at issue are "presumed to be open. They [Petitioners] have nothing to prove in this case." September 4 Transcript at 52; Amended App. at A. 194. The Does' counsel agreed: "It's our burden, and that's why we're here today, is to prove this." Id. See also Amended App. at A. 211-212.[11/] Exceptions to disclosure of public records are "in the nature of an affirmative defense" and thus must be proven by the party asserting them with competent evidence. Donner v. Edelstein, 415 So.2d 830, 831 (Fla. 3d DCA 1982); State ex rel. Davidson v. Couch, 158 So 103, 104 (Fla. 1934). See also Goodyear Tire & Rubber Co. v. Cooey, 359 So.2d 1200, 1202 (Fla. 1st DCA 1978) (finding, under analogous civil rule[12/] for protective orders, that "party seeking

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[10/] As more fully described in Petitioners' Brief at 19-22, documents which are public records may be closed to public inspection only in the circumstances identified by the Legislature.

[11/] And, at several points in their brief, the Does appear to concede -- correctly -- that the burden of proof is theirs. See Does' Brief at 17, n. 11 (acknowledging that a Doe would have to "establish that revelation of his identity would be defamatory pursuant to Section 119.011(c)(3)5 [sic] [119.011(3)(c)5] or to establish 'good cause' to limit disclosure pursuant to Rule 3.220, Florida Rules of Criminal Procedure."); Does' Brief at 29 (emphasis added) (citing Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988) for proposition that "parties seeking closure [bear] the burden of proof"). However, as discussed more fully below at Part II.C., the Does err in suggesting that Barron controls the result in this case.

[12/] The relevant portion of Rule 1.280(c) of the Florida Rules of Civil Procedure contains language similar to that found in (continued...)

a protective order has the burden of showing 'good cause'"); Florida Freedom Newspapers, Inc. v. Dempsey, 478 So.2d 1128, 1130 (Fla. 1st DCA 1985). Indeed, the language of the criminal discovery rules upon which the Does rely demands that there be an affirmative demonstration of a basis for a protective order: "[u]pon a showing of good cause, the court shall . . ." (Rule 3.220(l)) (emphasis added); "the court may permit any showing of cause . . ." (Rule 3.220(m)) (emphasis added); and "the court . . . shall deny or partially restrict disclosures authorized by this Rule if it finds . . ." (Rule 3.220(e)) (emphasis added). Yet, as more fully described below and in Petitioners' Brief, the Does wholly failed to satisfy their burden. In essence, the Does' argument before the trial court, the Fourth District and this Court is empty rhetoric: an unsubstantiated declaration that release of discovery documents containing their names and addresses would be "defamatory" to their "good name" and would invade their privacy and therefore should not be released. Simply saying records are exempt does not make it so.

12/ (...continued)
its counterpart in the criminal rules:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order to protect a party or person . . . .

Rule 1.280(c), Fla. R. Civ. P. (emphasis added).

II. THE TRIAL COURT PROPERLY REFUSED TO GRANT THE DOES' CLOSURE MOTIONS BASED ON THE DOES' FAILURE TO MEET THEIR BURDEN OF PROVING A BASIS FOR NONDISCLOSURE OF PUBLIC RECORDS.

This matter can be distilled to one simple proposition: a failure of proof. Although given every opportunity to provide competent evidence demonstrating that an exemption to disclosure of public records applies,[13] the Does failed to adduce any.[14] Accordingly, the trial court correctly refused to grant the Does the relief they sought, and this Court must answer the second certified question in the negative.

A. The Does Adduced No Competent Evidence Sufficient To Support Nondisclosure Of Public Records Containing Their Names And Addresses And Thus The Trial Court Did Not Abuse Its Discretion In So Finding.

At the heart of this controversy lies the inescapable conclusion that the Does failed to produce competent evidence to support their contention that public records containing their names and addresses be hidden from public view, although the trial court gave the Does every opportunity *to do* so (a point the Does do not

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[13] In fact, the trial court repeatedly emphasized to the Does their obligation in this regard. See, for example, Amended App. at A. 59, 94-95, 101, 193-94, 221 and 250.

[14] The Does cite to the criminal discovery rules regarding protective orders, but ignore the plain fact that the language of the rules requires a "showing", Rules 3.220(l) and 3.220(m), or a "find[ing]", Rule 3.220(e). It is more accurate for the Does to state, as they do for example at page 24 of their brief, that "JOHN DOE argued" and the "DOES contended" disclosure of public records containing their names and addresses would result in harm, rather than proved such to be the case. Does' Brief at 24 (emphasis added).

dispute). Nevertheless, in their brief the Does contend the trial court erred by denying them the relief they sought. While this Court should not substitute its judgment for that of the trial court, Shaw v. Shay, 334 So.2d 13, 16 (Fla. 1976), even a cursory review of the record below shows conclusively the trial court ruled correctly.[15/]

As an initial matter, it is patently false to assert, as the Does do in their brief, that "no where [sic] does Petitioner [sic) suggest the appropriate standard which should have been applied." Does' Brief at 22. On the contrary, Petitioners extensively briefed this issue, explaining that because the Does sought relief under Rule 3.220(1)[16/] of the Florida Rules of Criminal Procedure,[17/] they had to demonstrate "good cause", the standard identified in the Rule, a point even the Does concede later in their brief. Does' Brief at 42. Because the Does seek to deny the public access to records which the Legislature has

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15/ The Does rely extensively on Judge Warner's special concurrence, yet even Judge Warner emphasized the complete lack of anything in the record to support the Does' contentions. Opinion at 19 (special concurrence of Warner, J.); Amended App. at A. 19.

16/ Some Does also sought protection under Rules 3.220(m) (providing for a showing of "cause" in camera), and 3.220(e) (permitting court, prosecutor or defense counsel to seek orders restricting disclosure). See Petitioners' Brief at 4, n.4.

17/ In fact, as discussed in Petitioners' Brief, the only vehicle with which the Does may properly assert any interest they may have is through the criminal discovery rules, not the Public Records Act. See Petitioners' Brief at 14 - 17. Thus, the Does' assertion that Petitioners "fail[ed] or refus[ed] to acknowledge the field of operation of the rules of criminal procedure as invoked by the [Does]", Does' Brief at 35, is without merit and disingenuous. The Does failed to meet their burden of proving "good cause" existed under the Rules.

mandated be open for inspection under the Public Records Act, "good cause" must be one of the enumerated statutory categories, in this case, Section 119.011(3)(c)5. Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979); Neu v. Miami Herald Pub. Co., 462 So.2d 821 (Fla. 1985); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980). Petitioners' Brief at 17 - 25. The "good cause" the Does thus had to establish is that disclosure of their names and addresses would be "defamatory" to their "good name" as provided by (C)5. This they failed to do. See Petitioners' Brief at 22 - 29.

As more fully discussed in Petitioners' Brief, the Does submitted the following at the September 4 hearing: (1) the testimony of a psychologist regarding the purported strain this case has had on one of the Does and acknowledging that Doe had sexual relations with Kathy Willets; (2) six identically worded John Doe affidavits asserting privacy interests, making conclusory recitations, and not containing the signature of the affiant (either offered under seal or in camera); and (3) an audiotaped plea by one John Doe asking the judge not to release his name. Petitioners' Brief at 6-8.[18/] The affidavits make identical conclusory recitations related to the six Does' asserted privacy interests, their status as "private" individuals, and their opinions that release of the "lists" seized from the Willetses' home would embarrass them. A. 9-20; Does' Appendix at 33 - 42 and

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[18/] In their brief the Does contend the affidavits were numbered to distinguish among the various John Does. Does' Brief at 5. However, the copies of the affidavits provided to Petitioners contain no such numbering or other distinguishing feature.

234 - 235; Amended App. at A. 131 - 142; Petitioners' Brief at 6-8. None of the affiants denies he was a customer of Kathy Willets in her prostitution business, and none denies he committed the criminal act of paying Kathy Willets for her services, except for one who admits sending a letter and his business card to Kathy Willets and speaking with her on the telephone while asserting he did not meet "Kathy Willets, travel to her house, or engage or attempt to engage in any illegal activity with her". A. 17-18; Does' Appendix at 42; Amended App. at A. 139-140. Curiously, only one of the six affidavits the Does' counsel submitted to the trial court contains this alleged disclaimer, suggesting that were the other five affiants able to make a similar claim, they would have done so. Even that one John Doe (whose status does not affect the status of the others) admits speaking with Kathy Willets on the telephone and sending her his business card and a letter, not disproving that he may have solicited her for prostitution or otherwise engaged in "telephone sex". Significantly, this John Doe never explains the nature of his contact with Kathy Willets; were it truly innocent (sending her his card and speaking with her, for example, to sell her an insurance policy), one would expect him to have done so. Instead, he merely offers a vague denial. The other John Does did not even do that.

Nevertheless, before this Court, as before the Fourth District, the Does continue to declare they established the "good cause" necessary for exempting the public records from disclosure. The trial court gave the Does notice and an opportunity to present

whatever evidence they had -- evidence, not arguments in lieu of evidence. This is because the law requires a party seeking to deny the public access to a public record to set forth evidence sufficient to establish an exception to the public's right of access. Donner V. Edelstein, 415 So.2d 830 (Fla. 3d DCA 1982); State ex rel. Davidson v. Couch, 158 So. 103 (Fla. 1934). See also Goodyear Tire & Rubber Co. v. Cooey, 359 So. 2d 1200, 1202 (Fla. 1st DCA 1978) (construing analogous civil rule for protective orders); F o · a ed c v s , 478 So.2d 1128, 1130 (Fla. 1st DCA 1985). The submission of anonymous affidavits, and the making of other, similarly self-serving and untested contentions in lawyers' argument, are not evidence. As the Fourth District has previously held:

> [T]he practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts. it is essential that attorneys conduct themselves as officers of the court: but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making faotual determinations; and the court cannot so consider them on review *of* the record.

Leon Shaffer Golnick Advertising v. Cedar, 423 So.2d 1015, 1016-1017 (Fla. 4th DCA 1982) (emphasis added). Thus, this Court (as did the Fourth District) has no choice but to unanimously decline to find any abuse of discretion by the trial court which had ruled on the evidence before it. Moreover, the trial *court* did not exclude any evidence or deny any Doe the opportunity to introduce

any evidence, and thus the Does made no legitimate "proffer" of evidence.

Throughout the course of these proceedings, the Does have referred to "five categories"[19] of Does, as if evidence were offered or admitted before the trial court from which one could find such categories to exist. In truth, no facts were admitted into evidence below, or even proffered, to establish these hypothetical classifications. Contrary to the Does' suggestions, counsel for Petitioners did object to the introduction of the "categories".[20] September 4 Transcript at 65; Amended App. at A. 207. Regardless, the discussion of the categories was merely argument of the Does' counsel and thus, as noted above, need not have been objected to or otherwise opposed by counsel for Petitioners.

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[19] Surprisingly, despite being given the opportunity, counsel for the "John Doe" on the audiotape refused to "disclose what category he falls under" in answer to the court's inquiry, and suggested that question be "subject to an in-camera proceeding", but never took any action to produce any evidence or proffer that information to the court. September 4 Transcript at 73; Amended App. at A. 125.

[20] The following transpired at the September 4 hearing:

> THE COURT: Counsel, do you recognize the five categories that Mr. Rosenbaum referred to?
>
> MR. FERRERO: I don't think that's been proven, and I can not recognize them. Can I recognize them as possibilities? Of course I can recognize them as possibilities.

September 4 Transcript at 65; Amended App. at A. 207.

Even assuming the John Doe affidavits and audiotape were competent evidence (they were not), it was well within the trial court's discretion to ascribe to them whatever persuasive value the judge deemed appropriate. Not surprisingly, the trial court found them lacking, advising the Does' counsel: "I have not been impressed by the evidentiary value of the affidavits that I have received." September 4 Transcript at 92; Amended App. at A. 234. The trial court also reminded the Does' counsel that "they're all the same affidavit." September 4 Transcript at 53; Amended App. at A. 195.

That Petitioners did not formally object to the production of the affidavits and audiotape is of no moment and does not require reversal of the trial court's order. In their brief the Does suggest that Petitioners waived any right to advise this Court of the defects in the Does' evidentiary showing before the trial court because Petitioners did not raise the issue there. Does' Brief at 22. However, Petitioners' failure to object (even assuming the affidavits and audiotape to have been admissible) did not prevent the trial court from finding the material not credible. As noted above, the trial court warned the Does' counsel he found their presentation lacking, yet the Does never cured the defects. The trial court, as the finder of fact, was free to evaluate the material submitted to it, and did not abuse its discretion in reaching the conclusions it did.

Furthermore, contrary to the Does' repeated unsupported assertions and the Fourth District's erroneous characterization of

the trial court's order, the trial court never found that release of the public records containing the Does' names and addresses would indeed harm the Does. Does' Brief at 25. See also Petitioners' Brief at 10. Nowhere in the court's eight-page September 11 Order does the court make such a "finding". In fact, the court expressly stated that the Does failed to meet their burden of overcoming the presumption that such public records should be disclosed and ordered them released, and further rejected the Does' claim that disclosure would violate a privacy interest. September 11 Order at 4-6; A. 4-6; Amended App. at A. 126 - 128. Similarly, during the September 4 hearing when the court first announced its ruling, the court never made any findings -- either express or implied -- to that effect. The court instead noted only that:

> perhaps a number of individuals that certainly can be embarrassed, and they may be . . . . These proceeding [sic] may be harmful to their businesses even.
>
> * * *
>
> [P]erhaps there will be harm being brought to these individuals . . . potentially a real harm.

September 4 Transcript at 134; Amended App. at A. 276 (emphasis added). While the Does in their brief quote this portion of the transcript, Does' Brief at 8, it is not surprising that they ignore the plain meaning of the words the trial court used: Although the potential for harm existed, the Does' lack of evidence resulted in their failure to prove that release of their names and addresses would result in harm.

While conceding the burden of proof is theirs and contending they indeed had made the required showing, the Does nevertheless contend they face a "dilemma". Does' Brief at 22. The Does suggest the "dilemma" lies in being unable to prove a basis for nondisclosure of their identities without disclosing their identities, and assert that they "presented their claims below in the only manner available." Id. On the contrary, such "dilemma" is only illusory; the Does had a myriad of ways to make their case. For example, their affidavits could have -- and should have -- recited facts, not conclusions: they could have contained such recitations as, "I am a _____ in _____ County. I have never run for elected public office nor have I ever been appointed to public office. I have never been accused of being dishonest or violating any law," and so on. Even assuming such "dilemma" to exist, the test they suggest the trial court should have used (the one in Florida Freedom Newspapers, Inc, v. Barron) does not alleviate the problem: even Barron requires that an evidentiary showing be made.[21/]

Petitioners had no burden whatsoever; rather, it was up to the Does to affirmatively disprove the implication that they were clients of Kathy Willets (and thus prove a basis for nondisclosure). The Does concede in their brief that clients of a prostitute would not enjoy a "good name" which could be "defam[ed]". Does' Brief at 17, n. 11. Both the trial court and

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[21/] See page 32, n.31 below.

the Fourth District[W] correctly presumed the Does were "clients",[23/] and the Does did not adduce competent evidence to refute that presumption. Therefore, it is nonsensical to assert -- as the Does do -- that any of these Does enjoyed a "good name" which release of the information at issue here would "defame" under (C)5. Certainly, no court found such to be the case, as (C)5 requires.

B. Contrary To The Does' Unsupported Assertions, This Court May Affirm The Trial Court's Denial Of The Does' Closure Motions For Reasons other Than Those Articulated By The Trial Court, And Thus The Trial Court's Reference To Miami Herald Pub. Co. v. Lewis Is Not Reversible Error.

The Does contend the trial court's denial of their Closure Motions constitutes an abuse of discretion, ostensibly for two reasons. First, according to the Does, the trial court was

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22/ In fact, in the first certified question the Fourth District describes the Does as "clients". Amended App. at A. 6.

23/ Ironically, the Does unabashedly refer in their brief to the Superseding Information (what the Does call in their brief the "Amended Information") which added a couple of dozen counts against the Willetses and named several John Does as participants in acts of prostitution and subjects of wiretapping. Does' Brief at 31. Of course, this document is not in the record because this is the very same Superseding Information/"Amended Information" addressed during the October 31 hearing, and which, when Petitioners referred to it in their brief, the Does successfully moved to strike it. *See* John Doe's Motion to Strike Petitioner's [sic] Appendix and Part of Initial Brief Which Contains Material That is Not in the Record on Appeal (served December 20), and January 10, 1992 Order of this Court granting that motion to strike; A. 21-28. Some of the John Does named in the Superseding Information/"Amended Information" may be the same Does who are the Respondents before this Court on the certified questions, and some may not be: the Respondent Does have never established who is and who is not.

mistakenly "convinced" the Does had to prove both prongs of (C)5 rather than just the one prong as suggested by the section's legislative history. Does' Brief at 20 - 21. The second reason, according to the Does, is their assertion that the trial court applied the incorrect test -- the test this Court enunciated in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) -- in determining the Does' rights with respect to disclosure of the public records containing their names and addresses. Does' Brief at 21 and 26 - 28. The Does further argue that such alleged 'errors' require reversal. Does' Brief at 23.

As for the first asserted error, nowhere in the trial court's eight-page September 11 Order or in its oral ruling at the September 4 hearing did the court refer to the Does' failure to prove both prongs of Section 119.011(3)(c)5. September 11 Order; A. 1-8; Amended App. at A. 123 - 130; September 4 Transcript. Instead, the trial court methodically addressed the merits of both the Does' and the Willetses'[24/] Closure Motions, and, with respect to the Does in particular, rejected their claim to an overriding right to privacy and found they failed to meet their burden of proof. September 11 Order at 4 - 6; A. 4-6; Amended App. at A. 126 - 128. The Does thus have no basis for claiming Petitioners or anyone else "convinced" the court to undertake an erroneous reading of the statute and rule the way it did.

[24/] As described more fully in Petitioners' Brief, the Willetses sought to prohibit disclosure of discovery material and to control pretrial publicity. Petitioners' Brief at 4. However, the Willetses were not a party to the proceedings before the Fourth District and are not a party here,

As for the Does' second asserted error regarding application of the Lewis test, the Does ignore that the Order addresses both the Does' motion for protective order and the Willetses' motion to curb pretrial publicity predicated on alleged sixth amendment concerns. It is undisputed that the Order properly applied the Lewis test to the Willetses' motion. Florida Freedom Newspapers v. McCrary, 520 So.2d 32, 35 (Fla. 1988). The Does assert the Court erred in stating: "neither the Defendants nor the Interested Witnesses [the Does] have met the closure burden of Lewis." September 11 Order at 4; A. 4; Amended App. at A. 126. But, they ignore that the court went on to say it "finds no justification" in the Does' claim of a privacy right sufficient to prevent release of their names and addresses. September 11 Order at 5 - 7; A. 5-7; Amended App. at A. 127 - 129. While the phrasing of the Order may be ambiguous in that the court was attempting to dispose of both the Willetses' and the Does' Closure Motions simultaneously, both the Order and the September 4 Transcript reflecting the court's oral ruling make clear that the central issue for the court with respect to the Does was whether they had satisfied their burden of proof. Regardless of the standard applied, the essence of the trial court's ruling is the Does' utter failure to prove a basis for nondisclosure of public records.

Even assuming the two to be errors of the type the Does describe (which Petitioners nevertheless dispute), the Does' position deviates from the well-established rule of this Court on the scope of review: the reason or theory articulated by a trial

court is not controlling upon review, and the appellate court will affirm the judgment below if the record as a whole reveals any basis to support it. In re Estate of Yohn, 238 So.2d 290, 295 (Fla. 1970); Rupp v, Jackson, 238 So.2d 86, 89 (Fla. 1970) (holding, on certified question review, court is "privileged to review entire decision and record") (emphasis added); Zirin V. Charles Pfizer & Co,, 128 So.2d 594, 596 (Fla. 1961). Accordingly, as more fully described in Petitioners' Brief, because the record supports affirmance of the trial court based on the Does' failure to carry their burden of proving a statutory exemption to disclosure, this Court may properly affirm based on that issue and therefore answer the second certified question in the negative. The Does cite no decision to support their position.

C. Contrary To The Does' Assertions, This Court's Decision In Barron v. Florida Freedom Newspapers, Inc. Is Inapplicable Here.

The Does contend the trial court erred in refusing to keep public records containing their names and addresses from public view by not evaluating the Does' claim on the basis of this Court's decision in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988). Does' Brief at 26 - 35. Even assuming such alleged failure could provide the basis for reversal, which, as discussed above it cannot,[25/] Barron has no application to any issue before this Court on the certified questions.

[25/] See Part II.B. above.

At issue in Barron was access to judicial records under the common law (or even the First Amendment),[26] not public records[27] to which access is controlled by the Public Records Act. Where there is a common law or constitutional right of access, the Barron test applies. But where there is a statutory right of access as there is here, this Court has previously held that judicial policy concerns (such as may determine access to judicial records) cannot supplant the Public Records Act. Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979); North Miami v. Miami Herald Pub. Co., 468 So.2d 218, 219-220 (Fla. 1985) (in refusing to create judicial exception for privileged communications, finding "the Legislature, not this Court, regulates disclosure of public records''); Neu V. Miami Herald Pub. Co., 462 So.2d 821, 826 (Fla. 1985); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980). At no time did this Court in Barron apply Chapter 119, the Public Records Act, to court files.

Nevertheless, the Does assert that Barron supports their position that the privacy amendment to Florida's Constitution, Article I, Section 23, "'could form a constitutional basis for closure'". Does' Brief at 29, quoting Barron, 531 So.2d at 118.

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[26] Specifically, the case involved access to the court file in the dissolution proceedings involving State Senator Dempsey Barron and his wife.

[27] In the Barron opinion, the Court uses the phrase "public records" not as a defined term in accordance with Chapter 119, Florida Statutes, the Public Records Act, but only as a shorthand way of stating that court files are "records" which are "public" because of the common law presumption of openness attaching to judicial proceedings and documents. See Barron, 531 So.2d at 118.

But that argument ignores a fundamental point. Florida's Constitution expressly and unambiguously forbids any privacy-based limitation on "access to public records . . . as provided by law." See Art. I, § 23, Fla. Const. (emphasis added).[28] Because the phrase "as provided by law" has been interpreted to mean statutory law, not common law, Wait, 372 So.2d at 424, Florida's privacy amendment cannot be applied to deny Chapter 119 access to the public records at issue here on the certified questions, but it could be applied to deny a common law right of access to the court files at issue in Barron. Id.

The Does further assert that the Barron decision somehow 'overrules' this Court's earlier opinions in Forsberg V. Housing Authority of Miami Beach, 455 So.2d 373 (Fla. 1984), and Michel V. Douslas, 464 So.2d 545 (Fla. 1985), and rely on Justice Ehrlich's concurrence in Barron (which cites Forsberg) as proof of such proposition. Does' Brief at 29 - 30. This, too, is fallacious.[29] The Does misstate the contents of Justice

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[28] Article I, Section 23 reads:

> Right of Privacy. -- Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const. The phrase "as provided by law" refers to statutory law, not common law or constitutional law. Wait.

[29] Similarly, the Does also cite Justice Barkett's Barron special concurrence. But, there Justice Barkett expressed her concern that "dissolution proceedings [be] entitled to some special (continued...)

Ehrlich's concurrence and the majority opinion. First, the Barron majority never addressed the question of access to public records under Chapter 119, the question before the Court in Forsberg and Michel, and that question was not before it. Second, Justice Ehrlich wrote separately merely to express his belief that there can be no expectation of privacy "in connection with civil proceedings and court files which historically have been open to the public", and thus privacy concerns, specifically the privacy amendment to the Florida Constitution, are not implicated. Barron, 531 So.2d at 120 (concurrence of Ehrlich, C.J.). Justice Ehrlich cited Justice Overton's concurrence -- not the majority opinion -- in Forsberg which recognized that "there is traditionally no expectation of privacy [in] court files". Forsberg, 455 So.2d 373, 375 (Fla. 1984) (concurrence of Overton, J.), cited in Barron, 531 So.2d at 120 (concurrence of Ehrlich, C.J.). However, Justice Overton further wrote that the facts before the Court in Forsberg did not concern such judicial records and, agreeing with the majority, wrote that the

> unambiguous language of [Article I, Section 23] makes it clear that courts may not construe the provision in a manner which would impair the public's right of access to public records and meetings to assure governmental accountability.

Forsberg, 455 So.2d at 378 (concurrence of Overton, J.) (emphasis added). Thus, Forsberg and Michel continue to be good law, and

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29/ (...continued)
considerations", contrary to the majority's view -- again, all in the context of judicial records and proceedings, not statutorily controlled public records.

nothing in this Court's Barron decision or elsewhere[30/] can support the Does' tortured interpretation of the decisional authority.

Similarly, the Does cite to the First District's decision in Pevton v. Browning, 541 So.2d 1341 (Fla. 1st DCA 1989), for their proposition that "the Barron privacy test can coexist well with the Rules of Criminal Procedure and the privacy amendment." Does' Brief at 33 - 34. That argument still fails because, like Barron, the issue in Pevton was access to judicial records, specifically, the court file in a dissolution proceeding, not records in the custody of an agency (public records) under the Public Records Act. In Peyton, the First District reversed the trial court's ruling which had made public the financial affidavits and other financial information filed by the Peytons in connection with their dissolution of marriage proceedings. The trial court had initially sealed that portion of the court file containing the financial affidavits and other financial information in accordance with Rule 1.611 (entitled **Dissolutionof Marriage (Divorce)") of the Florida Rules of Civil Procedure. After Barron was decided,

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30/ The Does also attack Petitioners' citation to Cape Publications. Inc. v. Hitchner, 549 So.2d 1374 (Fla. 1989), a private facts tort case, in the Response of Post-Newsweek [a Petitioner here] to Petition for Writ of Certiorari (the "Response") filed in the Fourth District. Does! Brief at 30 - 31. Petitioners merely cited Cape Publications in the Response for the proposition that public disclosure of private facts of legitimate public interest does not constitute an invasion of privacy, drawing the analogy to the Does who, whether wittingly or unwittingly, are involved in matters of public concern and no longer can assert any common law right to privacy regarding those matters. Response at 5 - 6; A. 33-34. The Does have produced no competent evidence to the contrary.

the trial court unsealed those documents. The First District reversed based on the judicially created -- that is, by Rule 1.611 promulgated by the Supreme Court -- public policy of protecting personal financial matters disclosed in connection with dissolution proceedings against unnecessary public disclosure. Peyton, 541 So.2d at 1344. Here, because the certified questions before this Court concern legislatively created public records, the judiciary may not devise exemptions to disclosure. Wait, 372 So.2d at 424.

Accordingly, Barron and its progeny have no application to the issues before this Court on the certified questions and such decisions cannot, as the Does urge, form the basis for reversing the trial court's order directing release of the Does' names and addresses appearing in public records.[31/]

III. THE DOES ERR IN CLAIMING A CONSTITUTIONALLY PROTECTED PRIVACY INTEREST AND THUS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRESS AND PUBLIC ACCESS TO PUBLIC RECORDS CONTAINING THE DOES' NAMES AND ADDRESSES.

Throughout their brief the Does insist they have a constitutionally protected privacy interest in public records containing their names and addresses[32/] sufficient to prohibit

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31/ Even assuming the Barron test does control the result here, the Does did not satisfy that test. The Does ignore the fact that even Barron requires that the person seeking protection against disclosure bears the burden of proving a basis for it. Barron, 531 So.2d at 118. And, as described elsewhere in this brief and in Petitioners' previous brief, the Does have wholly failed to carry any such burden, whatever the particulars of the test.

32/ As discussed above, such "personal details" as "the alleged size of their genitals and other personal information", (continued..)

public access to those public records. In support of their position the Does repeatedly direct this Court to Article I, Section 23 of Florida's Constitution. However, notwithstanding their protestations to the contrary, any asserted privacy interest cannot provide them with the relief they seek.

As an initial matter, the Does boldly declare that disclosure will invade their privacy. Does' Brief at 36-42. However, at no time did they ever prove such to be the case. See Petitioners' Brief at 25-27. 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.

First, the Does ignore the plain language of Article I, Section 23:

> Right of Privacy. -- Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const. (emphasis added). The section unambiguously prohibits courts from limiting access to public records on the basis of any privacy interest arising from

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32/ (...continued)
Does' Brief at 36, are not at issue here. The trial court ordered release only of the Does' names and addresses, and ruled that it would review such other information in camera, which, to date, has never been done. See Petitioners' Brief at 8; September 11 Order at 7; A. 7; Amended App. at A. 129.

information they contain, whether such privacy interest is real or illusory (as is the situation with the Does). No other construction is possible. Fully aware of the potential conflict between the accessibility of public records and a person's right to privacy, the amendment's drafters -- and the people of the State of Florida -- made the choice: any right to privacy must give way to the unimpeded access to public records as provided *for* under the Public Records Act.[33/] Even Justice Overton's concurrence in Forsberg (cited in Justice Ehrlich's Barron concurrence which the Does claim to be supportive of their position), agrees no other construction is possible. Forsberg, 455 So.2d at 378 (concurrence of Overton, J.); see page 30 above.

Moreover, this Court has considered this very issue several times before, and in each instance rejected attempts to carve out a privacy exception to the Public Records Act -- the approach the Does urge here. Shevin v. Byron, Harless. Schaffer, Reid & Associates. Inc., 379 So.2d 633 (Fla. 1980) (before adoption of Article I, Section 23); Forsberg v. Housing Authority of Miami Beach, 455 So.2d 373 (Fla. 1984) (holding, after adoption of privacy amendment, no right of disclosural privacy exists in connection with public records either under state or federal constitutions); Michel V. Douglas, 464 So.2d 545 (Fla. 1985) (same).

[33/] See Petitioners' Brief at 30 - 32 for a more detailed discussion of the privacy amendment and its drafting history.

The case law the Does cite is inapposite, and the Does omit salient facts and findings of the courts in those decisions. For example, in James v. City of Doualas, Ga., 941 F.2d 1539 (11th Cir. 1991), relied upon by the Does, the asserted right of privacy arose out of a promise of confidentiality. There, police in an arson investigation seized a clandestine videotape of James and her boyfriend engaging in sexual activity, a tape the boyfriend was using as a way of extorting insurance proceeds from James. The police had assured James "that if she cooperated the police would handle the tape discreetly." James, 941 F.2d at 1541. However, the police allowed department personnel and others to view the tape numerous times, allegedly for their own personal enjoyment. Here, in contrast, there is no and has never been a pledge of secrecy, and the Does have no expectation of privacy in engaging in the type of activity in which the Does are implicated. As more fully described above, they have not disproved that they somehow are participants in (and, at minimum, witnesses to) a sex-for-hire scheme involving a law enforcement officer and his wife. Furthermore, unlike the situation in James, the issue before this Court on the certified questions involves an asserted privacy right in information contained in public records, a right the Legislature and the people of this state have determined must, if it exists, yield to the right of unimpeded access to such records.

Similarly, the Fifth Circuit's decision in Fadio V. Coon, 633 F.2d 1172 (5th Cir. Unit B. 1981), cited by the James court and relied upon by the Does in their brief, also does not support their

position. The Does suggest Fadjo requires a finding that the state's interest in disclosure of the public records containing their names and addresses is "far outweighed by the infringement on [their] privacy interest [sic]." Does' Brief at 37 - 38. However, as in James, the claimant in Fadjo had an expectation of privacy based on a pledge of confidentiality. There, to encourage Fadjo's cooperation in an investigation, the state attorney "assur[ed]" Fadjo that "the contents of his testimony would be revealed to no one." Fadjo, 633 F.2d at 1174. Here, again, however, there is no such promise concerning the Does. And, unlike the situation in Fadjo, the issue before this Court concerns the disclosure of information in public records.

None of the other cases the Does cite in support of their privacy argument sustains their position, either. For example, the Does rely on this Court's decision in Palm Beach Newspapers v. Burk, 504 So.2d 370 (Fla. 1987). Does' Brief at 40 - 41. However, the documents at issue there had not reached the status of public records, a point the Court later in Florida Freedom Newspapers v. McCrary found dispositive:

> Unlike Burk, the material here reached the status of a public record and it is necessary to determine what standard will apply in determining cause to temporarily seal [public records]. A finding of cause to restrict or defer disclosure of such records cannot rest in air . . . .

McCrary, 520 So.2d 32, 35 (Fla. 1988). Also, unlike the situation with the Does, in McCrary a clear constitutional right was at stake, specifically, a criminal defendant's right to due process

and a f ir tri 1. In addition, the Does liken their situation to the plaintiffs in a civil defamation action in Seattle Times v. Rhinehart, 104 S.Ct. 2199 (1984), and contend disclosure of discovery material (the public records here) will invade their privacy. Does' Brief at 38 - 40.[34/] In Rhinehart, the Supreme Court prohibited newspapers, defendants in a civil defamation action, from publishing information they had acquired through discovery. However, the information in Rhinehart also had not become "public" and such restraints were "not a restriction on a traditionally public source of information." Rhinehart, 104 S.Ct. at 2208 (emphasis added). In contrast, the documents here have reached the status of public records by act of the Legislature.

In short, none of the federal or Florida decisions the Does contend are dispositive disturb the well-established rule in this state: an asserted right of privacy cannot limit access to public records. Art. I, § 23, Fla. Const.; Forsberg; Michel. See also Shevin. Accordingly, this Court must answer the second certified question in the negative.

CONCLUSION

For the foregoing reasons and the reasons contained in Petitioners' previous brief, this Court should (i) answer the first

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[34/] Although correctly stating that in Rhinehart the trial court had entered a protective order "upon a showing of good cause", Does' Brief at 39 (emphasis added), the Does, not surprisingly, gloss over that point and continue to ignore the most fundamental of principles: that regardless of the context, the person seeking a protective order must prove that a basis for one exists.

certified question as described in Petitioners' Brief with a qualified yes, and answer the second certified question in the negative; and (ii) affirm the judgment of the trial court directing the State Attorney to make the public records containing the Does' names and addresses available to the public for inspection and copying.

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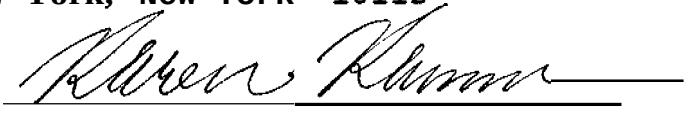
By: 

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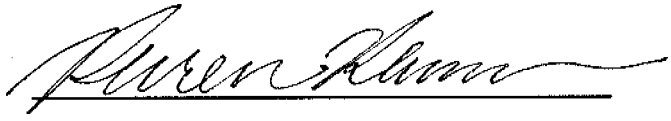

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IN THE CIRCUIT COURT OF THE
17th JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO: 91-14131CF8

JUDGE JOHN A, FRUSCIANTE

STATE OF FLORIDA,

Plaintiff,

v.

JEFFREY WILLETS and
KATHY WILLETS,

Defendants.

JOHN DOE,

Interested Party/Witnesses.

ORDER GRANTING THE PRESS AND PUBLIC ACCESS TO PRETRIAL PROCEEDINGS.

THIS CAUSE comes before the Court upon tho Defendants' Motion To Control Prejudicial Pretrial Publicity to Prevrnt Public Disclosure, and the Interested Party/Witnesses, a/k/a Jchn Docs, Motions for Stay of Proceedings and to Control Prejudicial Pretrial Publicity, and tho Court having heard oral argument from counsel, having carefully reviewed all applicable case law and being duly advised in its premise hereby finds the following conclusions *of* fact and law:

CONCLUSIONS OF'FACT;

Defendants, are charged with living off the earnings of prostitution, contrary to ~~F.S. 796.05~~, violation of security *of* communications, contrary to ~~F.S.~~ 934.03(1)(a)

A.l

and F.S. 777,011, and prostitution, contrary to F.S. 796.07(3)(a).

Defendants, in their Motion, moved this court to enter an order closing the pretrial discovery proceedings in this case from Public view, and a protective order pursuant to Florida Rule of Criminal Procedure 3.220(h), prohibiting the State Attorney from disclosing to the public, via the media network, any discovery documents, whether furnished to the Defendants or not, without first submitting them to the Court for in-canera inspection for the purposes of determining whether the Defendants' Constitutional rights would be adversely prejudiced by public disclosure.

The interested party/witnesses, a/k/a John Does, also moved this Court for pretrial closure of discovery, on the premise that their individual rights to privacy and equal protection would be violated by a publication of the names, addresses, sexual preferences, tape recordings and "client lists," seized by Broward County Sheriff's Office pursuant to Defendants' *arrest,*

The Media's interest in this action is to report to the public the facts and circumstances involved in the case. Thus, the Media argued in response to the John Does' Motion, that first and foremost the John Does lacked any standing to challenge the release of information under Florida Statutes section 1'19, as this chapter clearly mandates public access to public records. Furthermore, the press claims fhat any rights of privacy dissipated with the John Does involvement

in a public event, or in some cases a criminal act. In response to the Defendants' claims of tendentious pretrial publicity, the Media Intervenors urged this Court that Defendants actions relating to press conferences and radio interviews, acted as a waiver to any claim of prejudicial publicity.

The State had no objection to the release of soy discovery information to the Media, claiming that the Defendants' actions in initiating pretrial publicity vitiated their claims that pretrial publicity would result in a prejudicial trial. The State's position *is* that their investigation and discovery is ongoing, and that once the documents are released to the Defense, they become public dcmain.

CONCLUSIONS OF LAW:

This Court has carefully balanced and analyzed the Constitutional rights of tho Media, the Defendants, and Interested party/witnesses through a detailed examination of the relevant case law, as well *us* statutory authority.

This *Court* concedes that although "the press has a common law right of access to court records, this right *is* not absolute,,," United States v. Schlette, 842 F.2d 1574 (9th Cir. 1988). Furthermore, this Court finds that the press has no First Amendment tight to pretrial discovery. (R.5). However, th8 Florida Supreme Court has enunciated that the parties seeking closure and not the Press, have tho burden of establishing its necessity by the

greater weight of the evidence. Miami Herald Publishing Co, v. Lewis, 426 So.2d 1 (Fla. 1982). The elements of closure as set forth in Lewis, supra, amount to a three-prong test as follows:

a) closure is necessary to prevent a serious and imminent threat to the administration of justice
b) no alternatives are available other than a change of venue which would protect a defendant's right to a fair trial,
c) closure would be effective in protecting the rights of the accused without baing broader than necessary to accomplish its purpose.

Lewis, supra, at 6,7.

As the Supreme Court observed, the thrrr prong test

> ...provides the best balance between the need for open government and public access, through the media, to the judicial procrss, and the paramount right of a defendant in a criminal proceeding [is] to a fair trial before an impartial jury..

Lewis, supra, at 7,

This Court finds that neither tho Defendants nor the Interested Witnesses have met the closure burden of Lewis, supra. In addition this court finds that the holding set forth in Florida Freedom Newspaper v. McCrary, 520 So.2d 32 (Fla. 1988), is consistent with Lewis, supra, standard of closure.[1]

---

[1]In Florida Freedom Newspapers Inc. v. McCrary, 520 So.2d 32, 35 (Fla. 1988), the Florida Supreme Court held that motions to prohibit release of criminal discovery material to avoid pretrial publicity and protrct fair trial tights "can not rest in air", but must rather meet the (Footnote continued)

This Court fines Florida Statute section 119.01 clearly reflects the policy of this state, which is to ensure that:

> all state, county, and municipal records shall at all times be open for a personal inspection by any person.

Defendants asked this Court to prohibit access to criminal discovery materials, and requested an in-camera inspection to determine whether their constitutional rights would be adversely prejudiced by public disclosure. However, it is well established that publicity alone, even extensive publicity doer not inexorably lead to an unfair trial. See Nebraska Press association v. Stuart, 427 U.S. 539, 554 (1976). The Interested Witnesses contend that all public access to pretrial proceedings should be prohibited. The John Does claim their rights to privacy, or to be free from embarrassment outweighs thr public's right to know the identities of the individuals involved in this case. This Court finds no justification in this argument, and fails to see why the requested names should be exempt from disclosure.

Therefore, the Court holds that the names of the "clients" as well as the State's potential witness list when provided to the Defense becomes an accessible Public Record. (R.6) This Court finds as a matter of law that the people

(Footnote Continued)
burden of satisfying each of the three prongs of the test initially 9et forth in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982).

named on the "Client list" have no reasonable expectation of privacy. It is the right of the public to monitor the criminal justice system, and the public have an interest in knowing the identities 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. See Jacova v. Southern Radio & Television Co., 83 So.2d 34, 36 (Fla. 1955). As Justice Powell eloquently stated:

> ....absent some recognized privilege of confidentiality, every man owes his testimony... [A person] may not decline *to* answer on thr grounds that his responses might prove embarrassing *or* result in an unwelcomm disclosure of his personal affairs.

United States v. Calandra, 414 U.S. 338, 38 L.Ed 26 561, 94 S.Ct. 613 (1974).

One of the primary concerns of any Court is the public's confidence in the integrity of the Criminal Justice *System.* It is thus essential that the public not feel this Court nor any Court is involved in "secret proceedings."

Therefore, every name on thr list shall be divulged *in* an ordinary manner and no preference will be given to any particular name regardless *of* position, title or status of that person in the community, Names on the witness list shall not be hand-picked but every relevant witness shall be included on the list provided to the Defense.

Without question the addresses of both the witnesses and "clients" encompass sensitive issues. In addition, this court is concerned that none of the individuals named in

this matter face unnecessary harassment or ostracism, However, despite these concerns thir Court feels that the addresses art an integral part at thr witness list and should also be included *in* the discovery provided to the Defense. It is this Court's fervent hope that the press will act responsibly with regard to its editorial decisions concerning this information.

Other discoverable material and any other information regarding thr named individuals will be revirwrd in-camera by this Court aa to whether or not thir information shall be released at a later time,

Although this Court was asked far a forty eight (48) hour stay to there proceedings, to give the Interested Witnesses time to perfect an Appeal with the Fourth District Court, case law *is* directly contrary to thir request. Tribune Co. v. Canella, 458 So.2d 1075, (Fla. 1984).[2]

Based on the foregoing,

[2]Furthermore, Florida Statutes 119.11(1) stater in pertinent part:

> Whenever an action is filed to enforce the provisions of this chapter, the Court shall set an immediate hearing giving the case priority aver ether pending cases.

IT IS ORDERED AND ADJUDGED that the aforementioned motions as *to* closure of the names and addresses of the "clients" and potential witnesses are hereby DENTED. Motions *for* in-camrra inspection of other pertinent information arc hereby GRANTED in-part until further notice.

DONE AND ORDERED this 11 day of February, 1991

John A. Frusciante
Circuit Court Judge

cc: copies to Counsel of Record

APPENDIX 1

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FMRIDA

STATE Or" FLORIDA,

Plaintiff,

CASE NO: 91-14131 CF10A
JUDGE: FRUSCIANTE

v.

JEFFREY WILLETS and
KATHY WILLETS,

Defendants.

JOHN DOE,

Interested Party/Witness.

AFFIDAVIT OF JOHN DOE

STATE OF FLORIDA)
) ss
COUNTY OF BROWARD)

COMES NOW, the Affiant, JOHN DOE, and swears under oath as follows:

1. That the Affiant in this matter shall be referred to under the pseudonym "JOHN DOE" in order to protect his identity.

2. That should the Affiant's identity be disclosed the Affiant will suffer irreparable injury.

3. That the Affiant *is* a victim and/or witness to relevant facts in the *case* at bar.

4. That the Affiant claims *a* right to privacy in all businsss cards, notes, journals, lists and/or tape recordings which refer to the Affiant.

5. That the Affiant requests this Honorable Court enter an Order prohibiting the dissemination to the public of any and all

business *cards,* notes, journals, lists and/or tape recordings seized from the WILLETS subsequent to their arrest.

6. That if the list *is* disseminated and published the Affiant would be held 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.

7. That release of the aforementioned materials would adversely affect JOHN DOE.

8. That the Affiant is a private individual, not a "public figure".

FURTHER AFFIANT SAYETH NAUGHT.

JOHN DOE

SWORN TO AND SUSSCRIBED before me on this 19th day of AUGUST, 1991.

NOTARY PUBLIC, State of Florida

my commission *expires:*

Notary Public, State of Florida
My Commission Expires May 13, 1994
Bonded thru Fain Insurance Inc.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

JEFFREY WILLETS and
KATHY WILLETS,

Defendants.

JOHN DOE,

Interested Party/Witness.

CASE NO: 91-14131 CF10A
JUDGE: FRUSCIANTE

AFFIDAVIT OF JOHN DOE

STATE OF FLORIDA)
)ss
COUNTY OF BROWARD)

COMES NOW the Affiant, JOHN DOE, and swears under oath as follows:

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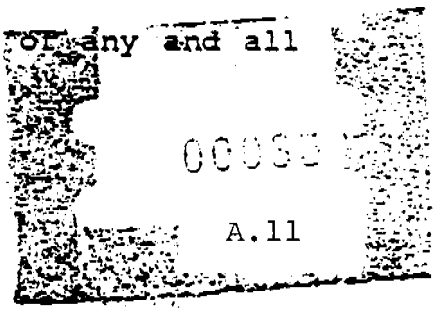
2. That should the Affiant's identity be disclosed the Affiant will suffer irreparable injury.

3. That the Affiant is a victim and/or witness to relevant facts in *the case* at bar.

4. That the Affiant claims a right to privacy in all business cards, notes, journals, lists and/or tape recordings which refer to the Affiant.

5. That the Affiant requests this Honorable Court enter *an* Order prohibiting the dissemination to the public of any and all



business cards, notes, journals, lists and/or tape recordings seized from the WILLETS subsequent to their arrest.

6. That if the list is disseminated and published the Affiant would be held 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.

7. That release of the aforementioned materials would adversely affect JOHN DOE.

8. That the Affiant *is* a private individual, not a "public figure".

FURTHER AFFIANT SAYETH NAUGHT.

John Doe
JOHN DOE

SWORN TO AND SUBSCRIBED before me on this 20th day of AUGUST, 1991.

Mary Frances
NOTARY PUBLIC, State of Florida

my commission expires:

Notary Public, State of Florida
My Commission Expires May 13, 1994
Bonded Thru Troy Fain-Insurance Inc.

IN THE CZRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO: 91-14131 CF10A
JUDGE: FRUSCIANTE

v.

JEFFREY WILLETS and
KATHY WILLETS,

Defendants.

JOHN DOE,

Interested Party/Witness.

AFFIDAVIT OF JOHN DOE

STATE OF FLORIDA)
)ss
COUNTY OF BROWARD)

COMES NOW, the Affiant, JOHN DOE, and swears under oath as follows:

1. That the Affiant in this matter shall be referred *to* under the pseudonym "JOHN DOE" *in* order to protect his identity.

2. That should the Affiant's identity be disclosed the Affiant will suffer irreparable injury.

3. That the Affiant is a victim and/or witness to relevant facts in the case at bar.

4. That the Affiant claims a right to privacy in all business cards, notes, journals, lists and/or tape recordings which refer to the Affiant.

5. That the Affiant requests this Honorable Court enter an Order prohibiting the dissemination to the public of any and all

business cards, notes, journals, lists and/or tape recordings seized *from* the WILLETS subsequent to their arrest.

6. That if the list is disseminated and published the Affiant would be held 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.

7. That release of the aforementioned materials would adversely affect JOHN DOE.

8. That the Affiant is a private individual, not a "public figure".

FURTHER AFFIANT SAYETH NAUGHT.

John Doe
JOHN DOE

SWORN TO AND SUBSCRIBED before me on this 20th day of AUGUST, 1991.

Mary O. Ferrell
NOTARY PUBLIC, State of Florida

my commission expires:
Notary Public, State of Florida
My Commission Expires May 18, 1994
Bonded Thru Troy Fain - Insurance Inc.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FMRIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO: 91-14131 CF10A
JUDGE: FRUSCIANTE

v.

JEFFREY WILLETS and
KATHY WILLETS,

Defendants.

JOHN DOE,

Interested Party/Witness.

AFFIDAVIT OF JOHN DOE

STATE Or" FLORIDA)
)ss
COUNTY OF BROWARD)

COMES NOW, the Affiant, JOHN DOE, and swears under oath as follows:

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business cards, notes, journals, lists and/or tape recordings seized from the WILLETS subsequent to their arrest.

6. That if the list is disseminated and published the Affiant would be held 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.

7. That release of the aforementioned materials would adversely affect JOHN DOE.

8. That the Affiant is a private individual, not a "public figure".

FURTHER AFFIANT SAYETH NAUGHT.

JOHN DOE

SWORN TO AND SUBSCRIBED before me on this 20th day of AUGUST, 1991.

NOTARY PUBLIC, State of Florida

my commission expires:

Notary Public, State of Florida
My Commission Expires June 13, 1994

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A.16

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FMRIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO: 91-14131 CF10A
JUDGE: FRUSCIANTE

v.

JEFFREY WILLETS and
KATHY WILLETS,

Defendants.

JOHN DOE,

Interested Party/Witness.

AFFIDAVIT OF JOHN DOE

STATE OF FLORIDA)
) ss
COUNTY OF BROWARD)

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2. That should the Affiant's identity be disclosed the Affiant will suffer irreparable injury.

3. That the Affiant *is a* victim and/or witness *to* relevant facts in the case at bar.

4. That the Affiant claims a right to privacy in all business cards, notes, journals, lists and/or tape recordings which refer to the Affiant.

5. That the Affiant requests this Honorable Court enter an Order prohibiting the dissemination *to* the public of any and all

business cards, notes, journals, lists and/or tape recordings seized from the WILLETS subsequent to their arrest.

6. That if the list *is* disseminated and published the Affiant would be held 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.

7. That release of the aforementioned materials would adversely affect JOHN DOE.

8. That the Affiant is a private individual, not a "public figure".

9. That the Affiant forwarded a letter and business card to Kathy Willets, and thereafter engaged in a telephone conversation with her. At no time whatsoevar did the Affiant meet Kathy Willets, travel to her house, or engage or attempt to engage in any illegal activity with her.

FURTHER AFFIANT SAYETH NAUGHT.

JOHN DOE

SWORN TO AND SUBSCRIBED before me on this 19th day of AUGUST, 1991.

NOTARY PUBLIC, State of Florida

my commission expires:

Notary Public, State of Florida
My Commission Expires May 13, 1994
Bonded Thru Troy Fain-Insurance Inc.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 91-14131CF10A
JUDGE: FRUSCIANTE

STATE OF FLORIDA,

Plaintiff,

vs.

JEFFREY WILLETS and
KATHY WILLETS,

Defendants.

JOWN DOE,

Interested Party/Witness.
_____/

AFFIDAVIT OF JOHN DOE

STATE OF FLORIDA)
) ss
COUNTY OF BROWARD)

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1. That the Affiant in this matter shall be referred to under the pseudonym "JOHN DOE" in order to protect his identity.

2. That should the Affiant's identity be disclosed, the Affiant will suffer irreparable injury.

3. That the Affiant is a victim and/or witness to relevant *facts* in the case at bar.

4. That the Affiant claims a right to privacy in ail business cards, notes, journals, lists and/or tape recordings which refer to the Affiant.

5. ,That the Affiant requests this Honorable Court. enter an Order prohibiting the dissemination to the public

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of any and all business cards, notes, journals, lists and/or tape recordings seized from the WILLETS' subsequent *to* their arrest.

6. That if the list is disseminated and published, the Affiant would be held up to public scorn, hatred and ridicule and the same would be *used* to impeach his honesty, integrity, virtue, religious philosophy an3 reputation as a person and in his profession.

7. That release *of* the aforementioned materials would adversely affect JOHN DOE.

8. That the Affiant is a private individual, not a "public figure".

FURTHER AFFIANT SAYETY NAUGHT.

John Doe
JOHN DOE

SWORN TO AND SUBSCRIBED before me *this* 6th day of September, 1991.

Jerome Rosenblum
Notary Public

My commission expires:

JEROME M. ROSENBLUM
MY COMMISSION EXPIRES
September 22, 1995
BONDED THRU TROY FAIN INSURANCE, INC

LAW OFFICE: JEROME M. ROSENBLUM, P.A. 1939 HARRISON STREET HOLLYWOOD, FLORIDA 33020

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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.,

Petitioners/Cross-respondents,

v.

JOHN DOE, et al,

Respondent/Cross-petitioner.

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

JOHN DOE'S MOTION TO STRIKE PETITIONER'S APPENDIX AND PART OF INITIAL BRIEF WHICH CONTAINS MATERIAL THAT IS NOT IN THE RECORD ON APPEAL

COMES NOW, the Respondent/Cross-petitioner, JOHN DOE, by and through his undersigned counsel, and respectfully requests this Honorable Court enter an Order striking Appellant's Appendix and the applicable portions of the Petitioner's Initial Brief because they contain material that was not in the Record on Appeal, and as grounds and in support thereof states as follows:

1. That on December 10, 1991 Petitioner filed Petitioner's Initial Brief, Appendix to Petitioner's Initial Brief, and Petitioner's Motion to Supplement the Record.

2. Included within the Appendix to Petitioner's Initial Brief was a transcript of proceedings before Judge Frusciante dated October 31, 1991 (A. 353 - 445) and pleadings and an Order on Ex-Parte Emergency Motion for Temporary Restraining Order from Doe v. State of Florida, et al, in case no: 91-6953-CIV-KEHOE in federal court. (A. 470 - 476).

3. That the transcript of proceedings before Judge Frusciante dated October 31, 1991 has been improperly included in the Appendix

LAW OFFICE OF RICHARD L. ROSENBAUM
PENTHOUSE, BARNETT BANK PLAZA, ONE EAST BROWARD BOULEVARD, FORT LAUDERDALE, FLORIDA 33301 • TELEPHONE (305) 522-7000

as it constitutes material that was not in the Record on Appeal. The Order which is the subject matter of this appeal was orally rendered on August 26, 1991, with the written Order Granting the Press and Public Access to Pretrial Proceedings being dated September 11, 1991. The October 31, 1991 proceedings were in excess of one and one-half months following entry of the Order under review. As such, the transcript does not constitute proper material to be contained within the Appendix pursuant to Rule 9.220, Florida Rules of Appellate Procedure.[1]

4. That the Order on Ex-Parte Emergency Motion for Temporary Restraining Order entered by United States District Judge Frederico A. Marino on October 31, 1991 has improperly been included in the Appendix. Neither Respondent/Cross-petitioner, JOHN DOE, nor his undersigned counsel were parties to the case styled ~~John Doe,~~ Plaintiff v. State of Florida, et al, Case No: 91-6953-CIV-KEHOE. Further, the JOHN DOE who filed the Federal lawsuit, represented by Attorneys Alan Braverman and Steve Rossi, has not sought to invoke the discretionary jurisdiction of this Court, not has he entered any appearances at the Florida Supreme Court level.

5. That the law is well settled that transcripts of proceedings in another case cannot properly be included in the Appendix to the Petitioner's Brief, and therefore should be stricken. See Mitchell v. Gillespie, 161 So.2d 842 (Fla. 1st DCA 1964).

6. That in ~~Altchiler~~ v. Department of Professional

[1] JOHN DOE has filed, simultaneously herewith, a Response to Petitioner's Motion to Supplement Record regarding the October 31, 1991 hearing.

Regulation, 442 So.2d 349 (Fla. 1st DCA 1983) the First District publicly reprimanded Appellant's counsel as a sanction for including matters in the Appellant's Initial Brief and Appellant's Appendix that were not in the Record on Appeal. The Court stated

> "It is fundamental that an appellate court reviews determinations of lower tribunals based on the records established in the lower tribunals. As we said in Hillsboro County Board of County Commissioners v. PERC, 424 So.2d 132, 134 (Fla. 1st DCA 1982):
>
> > 'An appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. *An* appellate court will not consider evidence that was not presented to the lower tribunal ...' Id. at 350.

7. In Thornber v. City of Fort Walton Beach, 534 So.2d 754 (Fla. 1st DCA 1988) the First District Court of Appeal held that subdivision (f) of Rule 9.200, Florida Rules of Appellate Procedure allowing for correcting and supplementing the record was intended to assure that any portion of the record before the lower tribunal which is material to a decision by the appellate court should be made available to the appellate court so that the appellate proceedings will be decided on their merits. Said rule was not intended to correct inadequacies in the record which result from the failure of a party to make a record before the lower tribunal. Id. at 755. At bar, the Petitioners never sought to include the federal case specified in paragraph 4, supra before the lower tribunal. As such, the Rules of Appellate Procedure do not allow the Petitioner to now supplement the Record in an attempt to make a "better" Record for the Petitioner. See also, Metal Products Co. v. Healy, 138 So.2d 96 (Fla. 3rd DCA 1962).

8. That the federal case sought to be supplemented, set forth in paragraph 4 supra, does not constitute "other authority" that could properly be included in the Appendix pursuant to Rule 9.220, Florida Rules of Appellate Procedure. See Hillsboro County Board of County Commissioners v. PERC, 424 So.2d 143 (Fla. 1st DCA 1982).

9. At bar, the Petitioner has included in the Appendix material or matters outside the Record, and has referred to such material or matters in the Brief. (AB. 10; 25; 27) As such, it is proper for the Court to strike the same. See Altchiler at 350; Gi , 388 So.2d 294 (Fla. 1st DCA 1980); Finchum v. Vogel, 194 So.2d 49 (Fla. 4th DCA 1966); Sheldon v. Tiernan, 147 So.2d 593 (Fla. 2nd DCA 1962).

10. In Altchiler, the First District stated

> "That an appellant court may not consider matters outside the Record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court." Id. at 350 (Citations omitted)

WHEREFORE, based upon the foregoing, the Respondent/Cross-petitioner, JOHN DOE, respectfully requests this Honorable Court enter an order striking Appellant's Appendix and the parts of Petitioner's Initial Brief which contain and refer to material that is not in the Record on Appeal.

Respectfully submitted,

LAW OFFICES OF RICHARD L. ROSENBAUM
ATTORNEY FOR RESPONDENT
ONE EAST BROWARD BLVD., PH
FORT LAUDERDALE, FLORIDA 33301
(305) 522-7000
FLA. BAR NO: 394688

RICHARD L. ROSENBAUM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 20TH day of DECEMBER, 1991 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; the Office of the Attorney General, 111 Georgia Avenue, #204, West Palm Bch., FL 33401 and the Honorable John A. Frusciante, Broward County Circuit Court Judge, 201 SE 6th Street, Room 822, Ft. Lauderdale, FL 33301.

RICHARD L. ROSENBAUM

JOEL LAZARUS, ESQ.
Office of the State Attorney
201 SE 6th Street, 6th Flr.
Ft. Laud., FL 33301

ELLIS RUBIN, ESQ.
333 NE 23rd Street
Miami, FL 33137

MARK BERMAN, ESQ.
2450 Hollywood Blvd., #401
Hollywood, FL 33020

STEVE ROSSI, ESQ.
625 NE 3rd Avenue
Ft. Laud., FL 33304

TOM CAZEL, ESQ.
1177 SE 3rd Avenue
Ft. Laud., FL 33316

MARK LEBAN, ESQ.
200 S. Biscayne Blvd.
suite 2720
Miami, FL 33131-5302

NORMAN KENT, ESQ.
805 E. Broward Blvd. #300
Ft. Laud., FL 33301

JEFFREY M. HARRIS, ESQ.
One E. Broward Blvd., PH
Ft. Laud., FL 33301

MARK K. LEBAN, ESQ.
200 S. Biscayne Blvd.
suite 200
Miami, FL 33131-5302

GAYLE C. SPROUL, ESQ.
30 Rockefeller Plaza
New York, NY 10112

JEROLD I. BUDNEY, ESQ.
One Herald Plaza
Miami, FL 33131

RAY FERRERO, ESQ.
JOANNA FINIZI, ESQ.
P.O. Box 14604
Ft. Laud., FL 33302

DAVID BOGENSCHUTZ, ESQ.
633 SE 3rd Avenue, #4F
Ft. Laud., FL 33301

SANFORD L. BOHRER, ESQ.
KAREN W. KAMMER, ESQ.
One SE Third Avenue, #1700
Miami, FL 33131

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Supreme Court of Florida

FRIDAY, JANUARY 10, 1992

POST-NEWSWEEK STATIONS, ET AL.

Petitioners,

vs. Case No.78,915

JOHN DOE, ET AL.

Respondents.

* * * * * * * * * * * *

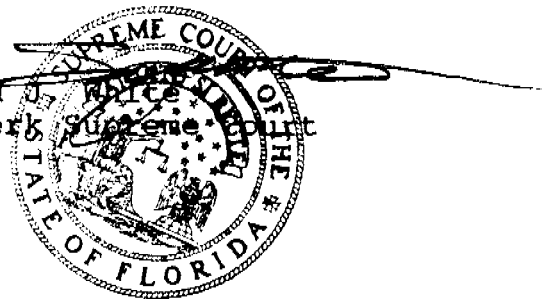
Petitioner's Motion To Supplement The Record is granted in part and denied in part. The record may be supplemented as to the transcript of September 4, 1991. The record may not be supplemented with the transcript of October 31, 1991.

Respondent's Motion *To* Strike Petitioner's Appendix and Part of Initial Brief Which Contains Material That Is Not In The Record On Appeal is granted.

Petitioner shall file an amended brief and appendix on or before January 21, 1992.

A TRUE COPY

TEST:



Sid J. White
Clerk, Supreme Court

bdm

c: Sanford Bohrer, Esq.
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_____ APPENDIX 1

_____ APPENDIX 2

_____ APPENDIX 3

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FLORIDA 33402

CASE NO.: 91-2550

L.T. CASE NO.: 91-14131 CF 10A

JOHN DOE,

Petitioners,

v.

STATE OF FLORIDA; NEWS AND SUN-SENTINEL COMPANY; THE MIAMI HERALD PUBLISHING COMPANY; NBC SUBSIDIARY (WTVJ-TV), INC.; POST-NEWS-WEEK STATIONS, FLORIDA, INC., d/b/a WPLG; KING COMMUNICATIONS, INC., d/b/a WFIL RADIO; JEFFREY WILLETS and KATHY WILLETS,

Respondents.

RESPONSE OF POST-NEWSWEER TO PETITION FOR WRIT OF CERTIORARI

The only issue before this Court is whether Florida's Public Records Act, Chapter 119, Florida Statutes, permits a person who is neither the custodian of a public record nor a criminal defendant to block disclosure of public records, Respondent Post-Newsweek Stations, Florida, Inc., d/b/a WPLG Channel 10, ("Post-Newsweek") submits this response to the John Does' Petition for Writ of Certiorari (the "Petition") to address that issue, and asks this Court to deny the Petition.[1]

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[1] Post-Newsweek also adopts the arguments made by co-respondents The News & Sun Sentinel; NBC Subsidiary (WTVJ); and The Miami Herald Publishing Co., a division of Knight-Ridder.

1. **Florida's Public Records Act controls the release of the public records at issue here and does not permit the John Does to object to their disclosure.**

In their Petition, the John Does argue that Judge Frusciante erred in finding they had no standing to challenge the release of the public records at issue here under the Public Records Act. However, the judge ruled correctly.

Once criminal defendants, such as the Willets here, make a request for discovery under Rule 3.220 of the Florida Rules of criminal Procedure, such material automatically becomes a public record. It is then that the materials are "required by law . . . to be given to the person arrested" and thus immediately available for any person to inspect and copy.[2] Sections 119.011(3)(c)5 and 119.07(1)(a), Florida Statutes. Even the John Does acknowledge that the matter before this Court "involves public records". See John Doe's Emergency Motion to Stay Proceedings at Lower Tribunal ("Emergency Motion to Stay"), par. 14 at 5.

The Florida Supreme Court has held that only the custodian of a public record (here, the State Attorney and/or the Sheriff's office) has standing to assert any statutory exemptions:

> The only challenge permitted by the Act at the time a request for records is made is the assertion of a statutory exemption pursuant to section 119.07. The only person with the power to raise such a challenge is the custodian.

Tribune Co. v. Cannellg, 458 So.2d 1075, 1078-79 (Fla. 1984). The court in Cannella wrote that to allow even the subject of such

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[2] Because Defendants' request was served on or about August 30, 1991, the State has until September 16, 1991 to comply.

records -- arguably an interested person -- time to raise a constitutional or other claim for closure, "would cause us to write into the statute something that is not there." Id. at 1078. The court recognized

> the purpose of the Act would be frustrated if, every time a member of the public reaches for a record, he or she is subjected to the possibility that someone will attempt to take it off the table through a court challenge. . . . The legislature has placed the books on the table; only it has the power to alter that situation,

Id. at 1079 (emphasis added). Thus, the John Does have no standing to assert statutory exemptions, the exclusive prerogative of the custodian. Likewise, the John Does have no Sixth Amendment rights to balance where they are not defendants in this criminal matter. *See* Gannett Co. v. De Pasquale, 443 U.S. 368 (1979). As harsh as it might seem, neither this Court nor the John Does may 'amend' the Public Records Act to provide them the relief they seek; only the legislature may do so and it has not. See also Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979) (finding only the Legislature may add exemptions to the Act).[3]

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[3] The John Does err in arguing that Chapter 119 does give courts the authorityto prohibit access to public records. Petition at 11. The John Does rely on Section 119.07(4) as providing that authority. However, the language of that section is clear: it merely prohibits any exemptions to disclosure other than those described elsewhere in the Act. In addition, in Wait, the Florida Supreme Court expressly rejected any attempt to layer any judicially-created exemption onto the provisions of the Act. Wait, 372 So.2d 420; McCrary, 520 So.2d at 34.

Nevertheless, the John Does argue there is "good cause"[4] to prohibit disclosure of the public records under Rule 3.220(l) of the criminal discovery rules. Emergency Motion to Stay at 3; Petition at 8. The only evidence submitted to the trial court was the testimony of a psychologist, various John Doe affidavits asserting privacy interests (whose affiants were not subject to cross examination by any of the counsel for the Respondents), and an audiotaped plea by one John Doe asking the Judge not to release his name (again, this John Doe was not subject to cross examination). None of this evidence contained facts establishing "good cause".

The Florida Supreme Court has held that the "cause" a person seeking a protective order under the criminal discovery rules must show is the three-part test enunciated by the Supreme Court in ~~Miami wi~~, 426 So.2d 1 (Fla. 1982). See ~~Miami Freedom Newspapers v. McCrary~~, 520 So.2d 32, 35 (Fla. 1988) (holding a "finding of cause to restrict or defer

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[4] Contrary to the assertion of one of the attorneys for the John Does at the September 4 hearing, this is not the first time a nonparty has sought protection from release of public records. William Hutchins, the alleged ex-boyfriend of the complainant in State v. William Kennedy Smith, Case No. 91-5482-CFA 02 (pending), sought to seal portions of his deposition transcript. Judge Lupo heard arguments by the undersigned and other attorneys for various media organizations that for the court to find "cause", Mr. Hutchins had to meet the three-part test outlined in ~~Miami Herald~~ Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), as the Florida Supreme Court in ~~Florida Freedom Newspapers~~ v. McCrary, 520 So.2d 32, 35 (Fla. 1988), required. Judge Lupo denied Mr. Hutchins' motion, except she granted it as to portions of one page of the transcript.

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disclosure of [public records] cannot rest in air" but must be based on a consideration of the factors "set out in the three-pronged Lewis test"). Judge Frusciante's Order sets forth the elements of the Lewis test and they therefore will not be repeated here. Judge Frusciante correctly found that the John Does had not met their burden. Release of the "client list" and other public records will not impede the Defendant Willets' right to a fair trial or otherwise pose a "serious and imminent threat to the administration of justice", there are less restrictive alternatives to closure, and closure would not be effective in providing the John Does the comfort they seek (in fact, once they are subpoenaed to testify or charged with a crime, the word will spread).

The John Does' assertions of an overriding right to privacy are similarly unavailing. The public's right of access to these materials under Chapter 119 is no mere talisman or banner waved by the press so it can attract more viewers or sell more newspapers. It is the means by which the public can learn why the State has elected to bring charges and spend public funds to prosecute this case. It is this right of the public to monitor the criminal justice system and to hold public officials accountable for their actions and inaction which lies at the core of the right of access to these materials under the Public Records Act and the First Amendment. The public has an interest in knowing, at minimum, whether any public officials, medical practitioners or persons holding themselves out as setting a moral role model 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 those matters. See Jacova v. Southern Radio & Television Co., 83 So.2d 34, 36 (Fla. 1955). The Florida Supreme court has previously ruled that there is no constitutional right to privacy with respect to public records. ~~Forsberg v. Housing~~ Authority of City of Miami Beach, 455 So.2d 373 (Fla. 1984); Art. I, § 23, Fla. Const.; ~~see also Cape Publications, Inc. v. Hitchner~~, 549 So.2d 1374 (Fla. 1989) (public disclosure of private facts of legitimate public interest is not invasion of privacy).

The John Does cite several cases in support of their privacy argument, none of which sustains their position. In Seattle Times v. Rhinehart, 104 S.Ct. 2199 (1984), the Supreme Court prohibited newspapers, defendants in a civil defamation action, from publishing information they had acquired through discovery. However, the information in Rhinehart had not become "public" and such restraints were "not a restriction on a traditionally ~~public source of information~~." Rhinehart, 104 S.Ct. at *2208* (emphasis added). In contrast, the documents here have reached the status of public records. The John Does also rely on the Florida Supreme Court decision in Palm Beach Newspapers v. Burk, 504 So.2d 370 (Fla. 1987). However, the documents at issue

there also had not reached the status of public records, a point the Court later, in McCrary, found dispositive. See McCrary, 520 So.2d at 35.

The John Does would have the trial court and this Court act as editor for every media organization and as conscience for every member of the public. Yet it is not the courts' function to dictate when to publish, what to publish, or how to publish.

2. Judge Frusciante properly refused to stay his Order, and this Court likewise should decline to enter a stay.

Judge Frusciante properly refused to stay his Order because only an appellate court may stay an order under the Public Records Act. Section 119.11, Florida Statutes. The John Does err in suggesting that because this case involves public records, all they need do to obtain "an automatic" 48-hour stay from this Court is to file a "notice of appeal!! under Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure. Emergency Motion to Stay at 5. On the contrary, it is not the subject of the appellate review, but rather the identity of the person or entity seeking it. The only "automatic" 48-hour stay occurs when the public agency which is the custodian of public records -- not some other allegedly interested person -- seeks appellate review of an order under the Public Records Act. See Wait v. Florida Power & Light Co., 372 So.2d 420, 423 (Fla. 1979); Rule 9.310(b)(2). The John Does are not the custodians of the public records at issue here and thus the

rule of law upon which they rely to obtain an automatic stay cannot help them.

In addition, rather than restore the status quo, as the John Does argue, a stay by this Court would irrevocably altar it. Emergency Motion to Stay at 4-5. As described above, the criminal discovery materials at issue here are public records which are now available for inspection and copying by any member of the public. Section 119.011(3)(c)5 and 119.07(1)(a), Florida Statutes. To issue a stay and deny the public that statutorily-granted right in effect revokes the right which currently exists. As the Florida Supreme Court noted, "news delayed is news denied." State ex rel. Miami Herald Publishing Company V. McIntosh, 340 So.2d 904, 910 (Fla. 1977).

CONCLUSION

For the foregoing reasons, Respondent Post-Newsweek asks this Court to (i) lift the stay of Judge Frusciante's order refusing to prohibit the release of the Willets' "client list" and other criminal discovery material to the public, and (ii) deny the John Does' Petition for Writ of Certiorari.

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