IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,222

GEORGE JAMES TREPAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Mr. Trepal's motion to compel disclosure of records in the possession of the Coca-Cola Company. Mr. Trepal is currently litigating his Rule 3.850 motion before Polk County Circuit Court Judge E. Randolph Bentley.

The following symbols will be used to designate references to the record in this instant cause:

"R.II -- record on direct appeal to this Court;

"PC-R." -- record on instant appeal.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Trepal has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Trepal, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

George James Trepal was convicted and sentenced to death in Polk County, Florida. In a divided panel, this Court affirmed Mr. Trepal's convictions and sentence. ***Trepal v. State, 621 So.*** 2d 1361 (Fla. 1993), ***cert. denied, 114 S.*** Ct. 892 (1994). In dissenting from the affirmance of the first-degree murder conviction and sentence of death, Justices McDonald and Overton wrote that Mr. Trepal's case is "intriguing and frightening," ***Trepal, 621 So.*** 2d at 1367 (McDonald and Overton, JJ., dissenting), and concluded that "[t]he evidence is insufficient to conclusively find that Trepal had a clear and conscious intent to effect the death of anyone." *Id.* at 1368.

In order to fully investigate Mr. Trepal's case and in furtherance of his obligation to seek and obtain all public records in this case, Mr. Trepal's collateral counsel sought the records in the possession of the Coca-Cola Company, an agency which, by virtue of the law enforcement role it assumed in investigating the Carr homicide, Mr. Trepal contended subjected it to disclosure under Chapter 119. A written request was made directly to the Coca-Cola Company on February 7, 1995 (PC-R. 2). In a February 27, 1995, letter, a representative from the Coca-Cola Company "declined" to comply with Mr. Trepal's records request, indicating "[w]hatever relevant information we had in this matter was turned over to Florida prosecuting authorities some years ago, and we would refer you to those authorities for

copies of anything that you may now be entitled to under applicable state law" (PC-R. 31).

Mr. Trepal filed a Rule 3.850 motion on June 15, 1995. One (1) month earlier, Mr. Trepal filed a Motion to Compel Disclosure of Documents Pursuant to Chapter 119.01 Et. Seq. and Chapter 57.081, Florida Statutes (PC-R. 1-50). That motion included a claim regarding Mr. Trepal's entitlement to the Coca-Cola records (PC-R. 2-13). A hearing was conducted on September 15, 1995, on Mr. Trepal's motion, but Judge Bentley determined that Coca-Cola had not been properly served, and ordered that proper service be effected (PC-R. 55-57). The matter of Coca-Cola's records was then re-set for October 20, 1995. On October 20, 1995, the day of the hearing before Judge Bentley, Coca-Cola filed a Response to Mr. Trepal's motion to compel (PC-R. 68-78).

Following the argument of counsel, Judge Bentley orally denied Mr. Trepal's request for an order compelling disclosure of Coca-Cola's records (PC-R. 117-122). A written proposed order was submitted by the Coca-Cola Company and subsequently signed by Judge Bentley on November 3, 1995 (PC-R. 144-46). A notice of appeal was timely filed (PC-R. 148).

SUMMARY OF ARGUMENT

The lower court erred in denying Mr. Trepal's motion to compel disclosure of the records in the possession of the Coca-Cola Company, in violation of Chapter 119, Florida Statutes, as well as the United States Constitution. The Coca-Cola Company assumed a law enforcement role in this case and therefore is subject to the provisions of Florida's public records law. The factors listed in the totality-of-the-factors test announced by this *Court* in *News and Sun Sentinel Company, et. al., v. Schwab, et. al.* are not limited to those factors listed in the Court's opinion. The lower court failed to consider the fact that this matter concerns a capital criminal prosecution and that the records sought were generated by an entity which, at the direction of law enforcement, engaged in a governmental function, namely, critical laboratory testing. The information gathered by the Coca-Cola Company, at the direction of the Polk County Sheriff's Office, was used by the State of Florida against Mr. Trepal, and Mr. Trepal was convicted of first-degree murder and sentenced to death based on that information. To the extent that Chapter 119 does not apply to the Coca-Cola Company, notions of fundamental fairness and due process dicate that Mr. Trepal should nonetheless be entitled to these records.

ARGUMENT

THE LOWER COURT ERRED IN REFUSING TO ORDER THE DISCLOSURE OF THE RECORDS IN THE POSSESSION OF THE COCA-COLA COMPANY TO MR. TREPAL'S COLLATERAL COUNSEL, IN CONTRAVENTION OF CHAPTER 119 AS WELL AS THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS.

On June **15, 1995,** Mr. Trepal, through his collateral counsel, filed a Rule 3.850 motion seeking the vacation of Mr. Trepal's convictions and sentence of death. In order to fully investigate Mr. Trepal's case and in furtherance of his obligation to seek and obtain all public records in this case, Mr. Trepal's collateral counsel sought the records in the possession of the Coca-Cola Company, an agency which, by virtue of the law enforcement role it assumed in investigating the Carr homicide, counsel contended subjected it to disclosure under Chapter 119. To the extent that Chapter 119 may not apply to the Coca-Cola Company, Mr. Trepal is nonetheless entitled to the records of the Coca-Cola Company under the United States Constitution. Failure to provide these records to Mr. Trepal violates fundamental notions of due process. The results of the laboratory testing done by Coca-Cola, at the request of the Polk County Sheriff's Office, were used against Mr. Trepal at his trial. Fairness dictates that he be given access to the materials generated by the Coca-Cola Company in conducting these tests.

A. THE COCA-COLA COMPANY ASSUMED A LAW ENFORCEMENT ROLE AND IS SUBJECT TO CHAPTER 119

Because the Coca-Cola Company assumed a law enforcement role in investigating the crime for which Mr. Trepal was eventually convicted and sentenced to death, its records generated as a result of its involvement are public records disclosable under Chapter 119. The record unequivocally establishes that the Coca-Cola Company assumed a law enforcement role in the Carr homicide investigation, a role delegated to it by the Polk County Sheriff's Department.

Upon examination of the role undertaken by the Coca-Cola Company in Mr. Trepal's case, the inescapable conclusion is that it played a law enforcement role in this case. In late October, 1988, Peggy Carr fell ill and was hospitalized. After initially being released from the hospital because she was feeling better, Mrs. Carr was soon re-hospitalized, as were family members Duane Dubberly and Travis Carr. Three days into her second hospitalization, it was discovered that Peggy Carr was suffering from thallium poisoning. On November 3, 1988, the Polk County Sheriff's Office was notified of the poisonings. On November 22, 1988, four (4) empty bottles of Coca-Cola were found in and seized from the Carr home and sent off for testing by the Health and Rehabilitative Services Laboratory in Jacksonville, Florida. On December 2, 1988, the laboratory concluded that there was thallium in the empty bottles; that same day, three (3) full bottles and an additional empty bottle of Coca-Cola were taken

from the Carr house and delivered to the Federal Bureau of Investigation Laboratory.

On December 5, 1988, Frank Hynes and L. G. Cunningham of the Coca-Cola Company arrived in Bartow. Throughout the week of December 5, 1988, the Coca-Cola executives and members of the Polk County Sheriff's Office toured various Coca-Cola bottling plants in Florida in order to determine whether any product tampering within the Coca-Cola Company occurred. The Coca-Cola Company also provided air transportation for the Polk County Sheriff's Office detectives in assisting them in transporting the bottles to the laboratories in Jacksonville and Washington, D.C. Coca-Cola Company Vice-President L.G. Cunningham testified at Mr. Trepal's trial not only to the initial involvement by Coca-Cola, but to subsequent involvment by that company after it had already determined that no Coca-Cola employee was responsible. Mr. Cunningham testified:

> Q [State Attorney] Tell the jury how you at corporate headquarters in Atlanta, whether it was you yourself or some other person, first got notified and how you first became involved?
>
> A [L. G. Cunningham] We got a call on Saturday morning -- the security people at the office who answer the emergency phones got a call on Saturday morning, and I believe that was December 2nd or 3rd, saying that the local bottler had been notified by the Polk County Sheriff's Department that they had an apparent product tampering and that our product was involved and that there were people hospitalized. And the security agent immediately wrote that up and then started to call the emergency numbers and get those of

us who would be involved into the office as soon as possible.

* * *

Q What's the first thing that the three of you main players did in response to this call?

A Well, the first think we tried to do was to ascertain what the facts were. One of the things that you learn about crisis management is that the first facts ***are*** never correct . They may be better or worse than they sound, but they're never correct.

So we started trying to contact the Sheriff's Office and the local bottler to get as much information as we could about the circumstances. And we started monitoring the press to see what was in the local and Tampa and Orlando media. And then Saturday afternoon we sent Rob Martin, who is one of our public relations people, to Polk County to be on the scene so that he could immediately monitor what the media was saying.

Q Did there come a time when you and Mr. Hines traveled to Florida?

A We came to Polk County on Monday morning of that week.

Q And what's the first thing that you all did?

A ***The first thing that we did was visit the Sheriff's Office and offer our assistance to them in any way that we could assist them.***

Q Is that the standard practice of the crisis team, if law enforcement is involved to offer them assistance?

A Absolutely.

* * *

Q When you met with the police then on Monday, was there any particular service

that you offered of gave to them through Coca-Cola?

A **Yes.** Monday morning when we arrived, in the first conference with the people they said that they had **samples that needed** to be in the FBI laboratory in Washington, and that there were samples in Jacksonville that needed to be picked up and taken to the FBI lab in Washington.

We agreed to provide the transportation for that trip.

Q And in what fashion did you provide that transportation?

A We took the company plane.

* * *

Q Did there come a time when your company provided any additional assistance in the way of transportation of items out of the Central Florida area?

A Yes. On Tuesday of that first week -- well, on Monday at the FBI laboratory in Washington they asked for some additional samples from the Tampa plant. And we again provided transportation to take those back on Tuesday.

* * *

Q ***Did you have any hand in requesting that any testing be done on*** **Coca-Cola** ***in Atlanta at the corporate lab as a result of this case?***

A ***I did. I made a request that product*** be ***prepared with various thallium salts in order to see the reaction*** **between** ***the salt and the product and to see how the product behaved, if there was anything unique*** **about** ***the characteristics. Just background information so that we would know whether this could or could not be done, first of all. And then if it could be, what was the reaction.***

* * *

> Q *Now, did there come a time subsequently when you had some contact with the police with regard to testing specific thallium salts in the Coca-Colas?*
>
> A *After we completed the testing we found some reactions that were unique and we thought might be important to the investigation and we, therefore, shared them with the Polk County Sheriff's Department.*

(R. 3379-82; 3384; 3388-89) (emphasis added). Additional personnel from the Coca-Cola Company testified at Mr. Trepal's trial to that company's involvement in the investigation. See, e.g. R. ***3113 et. seq.;*** R. 3126 et. ***seq.; R. 3133 et. seq.;*** R. 3396 ***et. seq.***

During a pre-trial hearing, Assistant State Attorney Aguero explained the initial role undertaken by the Coca-Cola Company:

> MR. AGUERO: The depositions have been taken of the Coca-Cola people that are involved. Mr. Cunningham particularly is the director of security for Coca-Cola USA in Atlanta.
>
> The way that this case progressed, when the Coca-Cola became discovered as the vehicle of the poison, Coca-Cola became concerned and came to Polk County. They were present when the inspections were done. They were involved to that limited degree for a period of time. I can't give you an exact period of time. It was quickly found out, the information that I just gave you, that it couldn't have come from the plant. Coca-Cola then backed out of that part of it.

(R. 1184). However, and most significantly, Aguero further explained during the pretrial hearing that, after it was determined that the tampering was not done in a Coca-Cola plant and Coca-Cola "backed out of that part of it," there came a time

when Coca-Cola was asked ***by the Polk County Sheriff's Office*** to conduct additional testing on its behalf:

> However, we did, when we found thallium in there what -- technically we, the sheriff's department. I wasn't in it back then -- wanted tests done on **Coca-Cola.** And because Coca-Cola is a product which is covered by patents, there's certain things that they could not divulge to the FBI Laboratory to be able to do the tests. So we ***asked Coca-Cola to do them to save time. Coca-Cola*** **was** ***then out of it.***

(R. 1185) (emphasis added).

At Mr. Trepal's trial, prosecutor Aguero further argued to the jury in opening argument that the Coca-Cola Company assisted local law enforcement in an investigatory capacity:

> On December the 2nd when the police are told and the health officials about the thallium and the empty Coke bottles, again a second wave of ***a*** lot of things start to happen. This is a product, Coca-Cola, which travels in interstate commerce so that possibly could be a federal offense. So they get in it.
>
> Coca-Cola is called to notify them and to get them involved so that they can inspect various things that have to do with Coca-Cola. Coca-Cola, you will find out, has a corporate security system, quite an established system, an investigative force within Coca-Cola of the United States that **goes all** over the world when things like this occur.
>
> Coca-Cola cooperates fully with everybody involved in this investigation. They help take Coke bottles up to the FBI lab with their own private airplanes, as did **a** company called Watkins Motor Lines. They have their own plane. They helped out the sheriff's department. Just a local business trying to help out, to cart things back and

forth trying to get test results as immediately as possible. Because we know we are dealing with an eight-pack of ***Coca-Cola*** that the empties have poison in them and we don't know about the full ones.

The Coke bottles are sent directly to the FBI lab. Immediately people from the Environmental Protection Agency, from the sheriff's department, from the FBI, all go to the local Coca-Cola Bottling plant, the only one that bottles 16-ounce Cokes in Tampa and inspects it. They inspect it about three different times.

* * *

There are codes on the Coca-Cola bottles which only Coca-Cola can interpret, which they do readily. This bottle was produced at this plant, it was produced in this day at this time out of this batch,

Coca-Cola, among other things in cooperation with the police and law enforcement agencies, attempts to find some other product out of that batch out on the store shelves. They can't find any. They finally find one eight-pack left in Sarasota. Keep in mind this is five or six weeks later.

* * *

That's tested. There's no thallium. There's no thallium in anything. The bottom line is after all of these tests, one of the reasons for the involvement of Coca-Cola security is, is there any ransom demand, is there any demand made of Coca-Cola? Are there any other cases that Coca-Cola, because it's involved and made aware of that perhaps our police doesn't know about? Nothing. Nothing ever happens. There is one tainted eight-pack of Coca-Cola in this world, tainted with thallium at the time this happens.

* * *

Coca-Cola is again contacted. They have a device by which they can test the carbonation in a bottle. They know the

standards for carbonation and the levels. All those things are known *only by Coca-Cola.*

So Coca-Cola sends a Man to the FBI Lab in Washington, D.C. to test the three full bottles before the caps are taken off. The carbonation level is low. The bottles have been opened. They're then opened completely after the carbonation test. They are *tested for thallium.*

* * *

The other involvement Coca-Cola had was *when they found thallium in the Coca-Cola bottles -- there are various salts, various combinations that thallium comes in. Thallium, when it was used in rat poison, as Mr. Layne will tell you, was typically thallium sulphate, sometimes it was thallium maleanate. It was never thallium nitrate.*

Coca-Cola and the FBI in concert determined that based on elevated levels of nitrate in the Coca-Colas that are tested that are full lead them the conclusion that thallium nitrate is what was put into the bottles. Coca-Cola then runs some tests.

(R. 1445-46; 1447-49; 1454) (emphasis added).

Various tests were conducted by the Coca-Cola Company, the results of which were presented by the prosecution at Mr. Trepal's trial in support of its case for guilt and for the death penalty. Detective Mincey of the Polk County Sheriff's Office confirmed that his office had in fact requested that Coca-Cola conduct testing on its behalf:

Q [State Attorney] Did you, sir, ever request that Coca-Cola run any tests for the sheriff's department on Coca-Cola?

A I did ask them to run some tests for the sheriff's office on Coca-Cola, correct.

(R. 2082).[1]

The involvement of the Coca-Cola Company as a law enforcement agency in Mr. Trepal's case is further established by the following revelations in the book POISON MIND, a nonfictional account of the investigation leading up to the arrest and conviction of Mr. Trepal. The book, co-authored by Susan Goreck, the Polk County Sheriff's Office detective who went undercover in attempt to cultivate evidence against Mr. Trepal, further corroborates the law enforcement role assumed by the Coca-Cola Company:

> By mid-January Mincey's initial disdain for Coca-Cola officials had vanished in the warmth of their cooperation. After the thallium had been discovered in the Cokes, the company jet shuttled Ernie between Florida and the FBI lab, serving him finger sandwiches en route. ***After the bottling***

"Examples of reports of the various testing performed by the Coca-Cola Company were proffered below to Judge Bentley (PC-R. 98-99). Judge Bentley, however, refused to admit them into evidence and therefore did not consider these reports in concluding that Coca-Cola did not assume ***a*** law enforcement role in this case.

These documents, while not included in the record on appeal ***as*** the proffered exhibits, were attached to Mr. Trepal's Motion to Compel, and therefore are located in the record. See PC-R. 33-34; 36-38. A third document was not attached to the Motion to Compel, so counsel does not know if this exhibit ***was*** provided to the Court with the remainder of the proffered exhibits. Counsel is therefore attaching this document as Attachment A to this brief. The document, a confidential memorandum from the Coca-Cola Company concerning the Carr poisoning, reveals that as of March 7, 1989, the Coca-Cola Company was receiving "unofficial" information from Lynn Briedenbach, the Public Information Office of the Polk County Sheriff's Office, concerning the progress of the case. This is well after Coca-Cola determined that it had not been responsible for the tampering.

plant had been cleared of any role in the poisoning, Coke officials continued to help detectives find the poisoner and clear their company's name. Ernie grew especially fond of L. G. Cunningham, the Coca-Cola vice president who headed the company's crisis management team. Cunningham was a smart and powerful man, but he didn't condescend to the country cop.

More important, the chemists who worked for Cunningham were coming up with answers about the Carr family poisoning. Their experiments reinforced the idea that *the poisoner had worked with great precision and expertise.*

Before the FBI had determined which type of thallium was used to poison the soft drinks, Coke chemist Mary Ruth Walters McDonald tried placing various types of the chemical--thallium sulfate, thallium formate, and thallium malonate--into bottles of Coke. The idea was to re-create the poisoning of the Carr family's Cokes, to discover how the poisoner had spiked the beverages without changing their appearance. The first experiments failed, because the Coke foamed and gushed out of the bottles when thallium was spooned in.

Then the FBI lab determined that the Cokes had been tainted with thallium nitrate, a chemical used as a reagent in university and industrial research labs. There are different types of thallium nitrate, including thallium I nitrate and thallium III nitrate. *Recalling that thallium III nitrate could be used in drug labs such as the one George had run, Ernie asked the* Coke *lab to add some to a sixteen-once bottle of Coke. McDonald added one gram--a fatal dose--to a sixteen-ounce bottle of Coke. Once again the beverage foamed. The chemist also noted that the thallium dramatically changed the Coke's appearance, creating* a *layer of dark sediment on the bottom of the bottle and turning the beverage above a light amber. Cunningham delivered the disappointing news to Mincey: Thallium III nitrate did not appear capable of poisoning Coke without dramatically altering its appearance.*

> ***Then Cunningham called back to say that company and FBI chemist had consulted and come up with a possible answer. Thallium III nitrate decomposes to thallium I nitrate when oxidized, Cunningham said. When the Coke chemist tried adding the thallium I nitrate to Coke, the results was a beverage that looked no different from the bottles sold in stores every day.***
>
> Ernie shook his head in wonderment. It had taken a team of expert chemists more than a month of experiments to figure out which type of thallium would dissolve into Coke. Whoever poisoned the Carr family either was incredibly lucky or had a unique combination of criminal tools; extensive knowledge of chemistry, access to thallium nitrate, and a lot of time to experiment.

JEFFREY GOOD & SUSAN GORECK, POISON MIND -- THE TRUE STORY OF THE MENSA MURDERER AND THE POLICEWOMAN WHO RISKED HER LIFE TO BRING HIM TO JUSTICE (1995) (Attachment B).[2]

At the hearing conducted before Judge Bentley on October 20, **1995**, see PC-R. 79 *et.* seq., Mr. Trepal's collateral counsel argued that based on the indisputable evidence that the Coca-Cola Company was heavily involved in the investigation of Mr. Trepal's case, particularly after it had determined that the Company itself **was** not responsible for any tampering, the records of

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[2]Collateral counsel proffered this excerpt from POISON MIND to Judge Bentley as further corroboration of Mr. Trepal's argument that Coca-Cola assumed **a** law enforcement role. As with the other documents proffered below, the book excerpt was not made part of the record on appeal, and is therefore attached to this brief as Attachment B.

Judge Bentley refused to accept the passages into evidence (PC-R. 101-02). However, after counsel read a portion of the excerpt, Judge Bentley commented that "I'm not unaware from my examination of the record that **Coca-Cola** Company **was** involved. And I'm not vouching for the exact accuracy of all that **was** read, but **some** of those things clearly were going on" (PC-R. 103) .

Coca-Cola should be disclosed under Chapter 119 as Coca-Cola had assumed a law enforcement role in this case. Collateral counsel also argued that Mr. Trepal's rights under the United States Constitution demanded that he be given access to information gathered at the request of law enforcement, information which, in this case, was used by the prosecution to obtain a conviction and death sentence. While Judge Bentley found that "Coca Cola did testing and participated in the testing extensively" (PC-R. 88), he ruled that, under the factors announced by this Court in News *and Sun Sentinel Company,* et. *al., v. Schwab, et. al., 596 So.* 2d 1029 (Fla. 1992), the Coca-Cola Company was not transformed into a public agency for Chapter 119 purposes.

In *Schwab,* this Court formulated a totality-of-circumstances test to determine when a private entity's interaction with a public entity transforms that private entity into a public agency for the purposes of Chapter 119 disclosure. *Id.* at 1031-32. Mr. Trepal argued below that while *Schwab* provided a general framework for analyzing this issue, that case was "very distinguishable" and "what's important about that and the other cases that I set in my motion is that *those factors aren't dispositive nor are they exhaustive"* (PC-R. 90) (emphasis added). Rather, Mr. Trepal argued that "the critical part of the test is that each case has to be determined on a case-by-case basis" (PC-R. 89). Mr. Trepal noted that the context of this case -- a capital criminal prosecution -- served as a "very weighty factor" in determining whether Coca-Cola was a public agency under *Schwab*

(PC-R. 91), and that the Court had to consider "the fact that Coca-Cola went beyond, after it was determined, or after Coca-Cola determined that they were not responsible for the tampering at the request of the Sheriff's Office, did additional experiments that were used against Mr. Trepal by the State of Florida to obtain the conviction" (PC-R. 92).[3] Counsel further argued:

> Certainly, the types of experiments that were conducted -- if they weren't important, the State would not have put them on at the trial. The State relied heavily on the testing that was done by Coca-Cola. There was extensive involvement and interaction between members of the prosecution team, members of the Coca-Cola Corporation, members of the Federal Bureau of Investigation. Throughout the correspondence and throughout the motions and throughout the trial there was many references to flying things on airplanes, moving evidence up to various laboratories on behalf of the Sheriff's Office. And I think the key part of the analysis is that these tests were done at the requests of the Polk County Sheriff's Office.

(PC-R. 94).

Mr. Trepal also asserted that he should be granted access to the Coca-Cola materials under the United States Constitution, namely the Fifth, Sixth, Eighth, and Fourteenth Amendments (PC-R. 103). In response to Mr. Trepal's arguments, Judge Bentley

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[3]Counsel for the Coca-Cola Company argued that "the fact that information provided may have been used to the advantage of the prosecution in this case, they may have used it in trying to convict Mr. Trepal, isn't a factor that you find in the News and Sun Sentinel case" and "that is not an issue that is before this Court right not in the Public Records Act. In other words, just because it was helpful for prosecution doesn't mean it's something that there is an entitlement to the defense here to obtain under the Act" (PC-R. 109) .

responded that "[t]hat's a big chunk of the constitution for me to ***swallow*** in one bite" (PC-R. 104), and that "[y]ou clearly think that you have triggered something in me when you [say] five, eight, and 14th amendments of the constitution. You didn't trigger anything. You've got to spell out what you're talking about" (PC-R. 104). Mr. Trepal then explained how each constitutional amendment applied to the situation (PC-R. 104-05). The Court did not address these matters at all either at the hearing below or in his order denying relief (PC-R. 151).[4]

In denying Mr. Trepal's motion to compel, Judge Bentley went through the specific factors discussed in the ***Schwab*** case and found that the Coca-Cola Company "is not a Florida public agency, nor was it acting on behalf of a public agency when it conducted tests that were disclosed to the Polk County Sheriff's Office and Federal Bureau of Investigation and later used as evidence at Mr. Trepal's trial" (PC-R. 145). This finding is not supported by competent or substantial evidence, and in fact is totally contrary to the evidence. ***All*** of the evidence establishes that the Coca-Cola Company undertook to perform experiments in this case ***at the express request and direction of the Polk County***

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[4]In response to Mr. Trepal's constitutional arguments, the Coca-Cola Company responded that "we can put those constitutional issues raised aside for purposes of the main issue here" because "although, they perhaps might be relevant to overcoming an exemption under the Act, [they] do not bear on the scope of the Public Records Act and the Florida legislature's intent as to which parties that act may apply and where that may be triggered" (PC-R. 106).

sheriff's Office." Judge Bentley found as much when he stated on the record during the hearing that "I don't think there is any question . . . that Coca-Cola did testing and participated in the testing extensively" (PC-R. 88). Judge Bentley also found that "one of the activities in which The Coca-Cola Company participated, conducting lab tests, can be considered to be a traditional government function of law enforcement authorities investigating a product tampering case" (PC-R. 145). Despite these findings, the lower court denied access.

'The Coca-Cola Company's written response to Mr. Trepal's motion to compel classified its activities as "nothing more than reactions to the exercise of authority by public officials rather than the private exercise of delegated public authority" (PC-R. 72). However, Coca-Cola admitted that its involvement included "providing transportation for Coca-Cola bottles sent to the F.B.I.law in Washington, D.C., responding to law enforcement requests for manufacturing information, and providing technical knowledge to F.B.I. officials who were conducting tests" (PC-R. 72). That the Coca-Cola Company's decision to do further testing once it had eliminated its employees **as** suspected tamperers **as** an "independent decision to pursue testing" is totally contrary to *all* of the evidence in the record, such as Detective Mincey's trial testimony:

> Q [by Mr. Aguerol Did you, sir, ever request that **Coca-Cola** run any tests for the sheriff's department on Coca-Cola?
>
> A ***I did ask them to run some tests for the sheriff's office on Coca-Cola, correct.***

(R. 2082) (emphasis added). The decision to do additional testing --the very testing which was used against Mr. Trepal by the State -- was not "independent" but rather done at the request of the Sheriff's Office.

That the **Coca-Cola** Company did not conduct testing at the request of the Sheriff's Department is flatly contradicted by prosecutor Aguero's representation during ***a*** pre-trial hearing:

> However, we did, when we found thallium in there what -- technically we, the sheriff's department. I wasn't in it back then -- wanted tests done on Coca-Cola. And because Coca-Cola is a product which is covered by patents, there's certain things that they could not divulge to the FBI Laboratory to be able to do the tests. So we ***asked Coca-Cola to do them to save time. Coca-Cola was then out of it.***

(R. 1185) (emphasis added).

That the Coca-Cola Company did not conduct testing at the request of the Sheriff's Department is flatly contradicted by prosecutor Aguero's opening argument to the jury at Mr. Trepal's trial:

> Coca-Cola cooperates fully with everybody involved in this investigation. They help take Coke bottles up to the FBI lab with their own private airplanes, as did ***a*** company called Watkins Motor Lines. They have their own plane. They helped out the sheriff's department. Just a local business trying to help out, to cart things back and forth trying to get test results as immediately ***as*** possible. Because we know we are dealing with an eight-pack of Coca-Cola that the empties have poison in them and we don't know about the full ones.
>
> The Coke bottles are sent directly to the FBI lab. Immediately people from the Environmental Protection Agency, from the sheriff's department, from the FBI, all go to the local **Coca-Cola** Bottling plant, the only one that bottles 16-ounce Cokes in Tampa and inspects it. They inspect it about three different times.
>
> * * *

There are codes on the Coca-Cola bottles which only Coca-Cola can interpret, which they do readily. This bottle was produced at this plant, it was produced in this day at this time out of this batch.

Coca-Cola, among other things in cooperation with the police and law enforcement agencies, attempts to find some other product out of that batch out on the store shelves. They can't find any. They finally find one eight-pack left in Sarasota. Keep in mind this is five or six weeks later.

* * *

That's tested. There's no thallium. There's no thallium in anything. The bottom line is after all of these tests, one of the reasons for the involvement of Coca-Cola security is, is there any ransom demand, is there any demand made of Coca-Cola? Are there any other cases that Coca-Cola, because it's involved and made aware of that perhaps our police doesn't know about? Nothing. Nothing ever happens. There is one tainted eight-pack of Coca-Cola in this world, tainted with thallium at the time this happens.

* * *

Coca-Cola is again contacted. They have a device by which they can test the carbonation in a bottle. They know the standards fox carbonation and the levels. All those things are known only by Coca-Cola.

So Coca-Cola sends a man to the FBI Lab in Washington, D.C. to test the three full bottles before the caps are taken off. The carbonation level is low. The bottles have been opened. They're then opened completely after the carbonation test. They are tested for thallium.

* * *

The other involvement Coca-Cola had was when they found thallium in the Coca-Cola bottles -- there are various salts, various combinations that thallium comes in.

Thallium, when it was used in rat *poison, as Mr. Layne will tell you, was typically thallium sulphate, sometimes it was thallium maleanate. It was never thallium nitrate.*

Coca-Cola and the FBI in concert determined that based on elevated levels of nitrate in the Coca-Colas that are tested that are full lead them the conclusion that thallium nitrate is what was put into the bottles. Coca-Cola then runs some tests.

(R. 1445-46; 1447-49; 1454) (emphasis added).

That the Coca-Cola Company did not conduct testing at the request of the Sheriff's Department is flatly contradicted by Coca-Cola Vice-President L.G. Cunningham when he testified at Mr. Trepal's trial:

Q *Did you have any hand in requesting that any testing be done on Coca-Cola in Atlanta at the corporate* lab *as a result of this* case?

A *I did. I made a request that product be prepared with various thallium salts in order to see the reaction between the salt and the product and to see how the product behaved, if there was anything unique about the characteristics. Just background information so that we would know whether this could or could not be done, first of all. And then if it could be, what was the reaction.*

* * *

Q *Now, did there come a time subsequently when you had some contact with the police with regard to testing specific thallium* salts *in the Coca-Colas?*

A *After we completed the testing we found some reactions that were unique and we thought might be important to the investigation and we, therefore, shared them with the Polk County Sheriff's Department.*

(R. 3388-89) (emphasis added) .

That the Coca-Cola Company did not conduct testing at the request of the Sheriff's Department is flatly contradicted by the testimony of Detective Ernest Mincey's testimony at Mr. Trepal's trial:

> Q [by Mr. Aguero] Did you, sir, ever request that Coca-Cola run any tests for the sheriff's department on Coca-Cola?
>
> A ***I did ask them to run some tests for the sheriff's office on Coca-Cola, correct.***

(R. 2082).

That the Coca-Cola Company did not conduct testing at the request of the Sheriff's Department is flatly contradicted by the nonfictional account of the investigation as portrayed in Susan Goreck's book POISON MIND:

> By mid-January Mincey's initial disdain for Coca-Cola officials had vanished in the warmth of their cooperation. After the thallium had been discovered in the Cokes, the company jet shuttled Ernie between Florida and the FBI lab, serving him finger sandwiches en route. ***After the bottling plant had been cleared of any role in the poisoning, Coke officials continued to help detectives find the poisoner and clear their company's name.*** Ernie grew especially fond of L. G. Cunningham, the Coca-Cola vice president who headed the company's crisis management team. Cunningham **was a** smart and powerful man, but he didn't condescend to the country cop.
>
> ***More important, the chemists who worked for Cunningham were coming up with answers about the Carr family poisoning. Their experiments reinforced the idea that the poisoner had worked with*** **great** ***precision and expertise.***
>
> Before the FBI had determined which type of thallium was used to poison the soft

drinks, Coke chemist Mary Ruth Walters McDonald tried placing various types of the chemical--thallium sulfate, thallium formate, and thallium malonate--into bottles of Coke. The idea was to re-create the poisoning of the Carr family's Cokes, to discover how the poisoner had spiked the beverages without changing their appearance. The first experiments failed, because the Coke foamed and gushed out of the bottles when thallium was spooned in.

Then the FBI lab determined that the Cokes had been tainted with thallium nitrate, a chemical used as a reagent in university and industrial research labs. There are different types of thallium nitrate, including thallium I nitrate and thallium III nitrate. ***Recalling that thallium III nitrate could be used in drug labs such as the one George had run, Ernie asked the Coke lab to add some to a sixteen-once bottle of Coke. McDonald added one gram--a fatal dose--to a sixteen-ounce*** *bottle of* Coke. ***Once again the beverage foamed. The chemist also noted that the thallium dramatically changed the Coke's appearance, creating a layer of dark sediment on the bottom of the bottle and turning the*** *beverage* ***above a light amber. Cunningham delivered the disappointing news to Mincey: Thallium III nitrate did not appear capable of poisoning*** *Coke* ***without dramatically altering its appearance.***

Then Cunningham called back ***to say that company and FBI chemist had consulted and come up with a possible answer, Thallium III nitrate decomposes to thallium I nitrate when oxidized, Cunningham said. When the Coke chemist tried adding the thallium I nitrate to Coke, the results was*** *a beverage* ***that looked no different from the bottles sold in stores every day.***

Ernie shook his head in wonderment. It had taken a team of expert chemists more than a month of experiments to figure out which type of thallium would dissolve into Coke. Whoever poisoned the Carr family either was incredibly lucky or had a unique combination of criminal tools; extensive knowledge of chemistry, ***access*** to thallium nitrate, and ***a*** lot of time to experiment.

JEFFREY GOOD & SUSAN GORECK, POISON MIND -- THE TRUE STORY OF THE MENSA MURDERER AND THE POLICEWOMAN WHO RISKED HER LIFE TO BRING HIM TO JUSTICE (1995) (Attachment B).

Contrary to the findings of the lower court -- findings which in no way explained or even mentioned the aforementioned evidence presented by Mr. Trepal -- the Coca-Cola Company performed essential testing on behalf of the State at the request and direction of the Polk County Sheriff's Office, testing which was used by the State at Mr. Trepal's trial and which resulted in a first-degree murder conviction and death sentence. Under Chapter 119 as well as the Constitution, Coca-Cola must disclose the information in its possession to Mr. Trepal at this time.

B. MR. TREPAL IS ENTITLED TO THE COCA-COLA COMPANY RECORDS

Because the Coca-Cola Company performed essentially a governmental function in investigating the Carr homicide and providing various degrees of assistance to the local law enforcement agencies, it became a "public agency" for purposes of public records law, and therefore any of the company's records generated in this matter are disclosable under Chapter 119 of the Public Records Act. While "[t]he public records act does not define the type of conduct which is essential for a private business entity to become an 'agency' acting 'on behalf of' a public agency[,] . . . [i]n the absence of a statutory exemption or a competing right of privacy, [] the courts have liberally construed this act in favor of public access." ***Sarasota*** *Herald-* ***Tribune Co. v. Community Health Co., 582 So.*** 2d 730, 732 (Fla. 2d

DCA 1991).[6] A totality-of-the-circumstances test is utilized in order to determine whether a private entity is subject to the public records act. ***News and Sun Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.*** 2d 1029 (Fla. 1992).

The list of factors set forth in ***Schwab*** are not exclusive nor determinative of the issue in any given case. ***Schwab, 596*** So. 2d at 1032 ("we note that because the relevant factors and circumstances vary from case to case, the above-listed factors are not intended to be all-inclusive"). However, Coca-Cola and the lower court relied exclusively on the list of factors set forth in ***Schwab*** in determining that Coca-Cola was not a public **agency.** When Mr. Trepal argued that the fact that this case involved a capital criminal proceeding should be taken into consideration under the ***Schwab*** analysis, the Coca-Cola Company argued that "there is nothing in the News and Sun Sentinel case or the legislative history to suggest that the Act should be extended to this sort of situation" (PC-R. 109). The Court

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[6]Below, the Coca-Cola Company asserted that it has "a substantial economic interest at stake and substantial trade secret interest at stake, too' (PC-R. 110), and that "the Coca-Cola Company should be entitled to have its own confidential records to document this involvement as it sees fit and not to have to disclose that to a public body at some point or to a public audience" (PC-R. 112). However, any claimed privacy interest would be of insufficient magnitude to outweigh disclosure under Florida's public records statute, particularly in this case, which involves an instance where the information gathered by Coca-Cola was used to obtain a death sentence. See ***Shevin v. Byron, Harless, etc. et. al., 379 So.*** 2d 633, 638 (Fla. 1980) ("The Supreme Court may some day breathe life into the privacy interest asserted by respondents, but, until that occurs, we conclude that there does not exist . . . a constitutionally protected interest sufficient to prevent the public from seeing the [requested] papers").

simply agreed with the **Coca-Cola** Company and found in its order that this factor could not be added to the Schwab analysis (PC-R. **146).**

For obvious **reasons, and as** Mr. Trepal argued below, the factors which formed the general framework in ***Schwab*** are inapplicable to the instant **case.** None of the **cases** in this area have addressed the issue in the context of a criminal prosecution. However, the one factor that is part of the explicit test found in ***Schwab*** -- whether the private entity is performing **a** governmental function or a function which the public agency otherwise would perform -- is the critical (and dispositive) factor in analyzing Mr. Trepal's case precisely because this is **a** criminal prosecution. Judge Bentley acknowledged at the hearing below that the testing done by the Coca-Cola Company in this **case was** "something the government normally does, because normally these things are done by FDLE" (PC-R. 120), and found in his order that "one of the activities in which the Coca-Cola Company participated, conducting lab tests, can be considered to be a traditional government function of law enforcement authorities investigating **a** product tampering case" (PC-R. 145). This being the case, these materials must be disclosed to Mr. Trepal in this criminal proceeding. ***Anderson*** *v.* ***State,*** 627 So. 2d 1170, 1171 (Fla. 1993) ("This Court has made clear that a prisoner whose conviction and sentence of death has become final on direct review is generally entitled to criminal investigative public records as provided in chapter 119");

Ventura v. State, 21 Fla. L. weekly S15, S16 (Fla. Jan. 11, 1996) ("This Court has repeatedly found that capital post-conviction defendants are entitled to public records disclosure"). The results of the laboratory testing done by Coca-Cola, at the request of the Polk County Sheriff's Office, were used against Mr. Trepal at his trial. Fairness dictates that he be given access to the materials generated by the Coca-Cola Company in conducting these tests. ***See generally Brady v. Maryland, 373*** U.S. ***83 (1963); Davis v. Alaska, 415*** U.S. 308 (1974); ***Pennsylvania v. Ritchie, 480*** U.S. 39 (1987).

It is clear from the foregoing discussion, as well as from a review of the record, that the **Coca-Cola** Company "became" a Florida public agency as **a** result of its investigatory role in Mr. Trepal's case. Further, in its February 27, 1995, letter responsive to Mr. Trepal's records request, the Coca-Cola Company does not claim that it is not subject to the Florida public records law; rather, it indicated that it had already provided the Florida authorities with all "relevant" information (PC-R. 31). By providing the Polk County Sheriff's Office and the State Attorney's Office with its records, the Coca-Cola Company may not now claim an exemption from Chapter 119 disclosure. In ***Downs v. Austin,*** 522 So. 2d 931 (Fla. 1st DCA 1988), the court addressed a situation where a state agency was refusing to disclose records which it had previously used in open court to its advantage. The court first noted that "[e]xemptions from disclosure [of public records] are to be construed narrowly and limited to their stated

purposes." ***Downs, 522*** So. 2d at 933 (citing *Miami* ***Herald Publishing Co. v. City*** *of North Miami, 452 So.* 2d 572 (Fla. 3d DCA 1984)). The court went on to order disclosure of the records in question because the records had been used by the prosecution to its advantage during a court proceeding, thus stripping the records of their exemption and the agency's ability to claim such an exemption:

> An additional factor supports our determination that Downs should be permitted to examine Johnson's polygraph tests. Although the State vigorously resists all of Downs' efforts to examine Johnson's test results, State Attorney Austin has already made these results public knowledge on two different occasions--at Downs' sentencing hearing, and before the Clemency Board. In *Satz v.* ***Blankenship, 407 So.*** 2d 396, 407 (Fla. 4th DCA 1981), the Fourth DCA, interpreting the provisions of the Public Records Act, found that once access to documents has been given to a criminal defendant, the legislature intended "an end to secrecy about those documents." The Fourth DCA later reaffirmed this conclusion in ***Bludworth v. Palm Beach Newspapers, Inc.,*** 476 so. 2d 775 (Fla. 4th DCA 1985). *Satz* and ***Bludworth*** evince a judicial recognition that once the State has gone public with information with information which could have previously been protected from disclosure under the Act's exemptions, no further purpose is served by preventing full access to the desired documents or information. Since the State has twice publicly disclosed the results of the polygraph tests to its advantage, there remains little to be hidden from disclosure, . . . given the Florida Public Records Act's overwhelming preference for complete public access to documents[.]

Downs, 522 So. 2d at 935 (emphasis added). ***See*** **also** *Staton* ***v.*** *McMillan,* ***et. al., 597 So.*** 2d 940, 941 (Fla. 1st DCA 1992) ("the statutory exemptions do not apply if the information has already

been made public"); GOVERNMENT-IN-THE-SUNSHINE MANUAL at 104 ("Th [e] [Attorney General's] [O]ffice has recognized that the exempt status of **a** record in the possession of the custodian does not, absent statutory authority, continue when such record is transferred to another public agency"). It is therefore clear that these documents, having been used publicly in open court to the State's advantage, are not exempt under the public records law. To the extent that they may be exempt, any exemption must yield to Mr. Trepal's significant constitutional rights in this matter, as even the **Coca-Cola** Company recognized below (see PC-R. 106) (constitutional arguments "might be relevant to overcoming an exemption under the [Public Records] Act").

Based on the foregoing discussion, Mr. Trepal submits that the lower court erred in denying Mr. Trepal's motion to compel the Coca-Cola Company to disclose all its records generated as **a** result of its role in the incident for which Mr. Trepal was convicted and sentenced to death. Failure to so order would preclude Mr. Trepal from adequately presenting his claims for postconviction relief and conflict with collateral counsel's duty to seek and obtain all records generated in this case, as well as violate fundamental notions of due process and fair play. The results of the laboratory testing done by Coca-Cola, at the request of the Polk County Sheriff's Office, were used against Mr. Trepal at his trial. Fairness dictates that he be given access to the materials generated by the Coca-Cola Company in conducting these tests.

CONCLUSION

Mr. Trepal requests that the Court reverse the order of the lower court and order that the records of the Coca-Cola Company be disclosed to Mr. Trepal so that he can properly investigate his postconviction case.

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 12, 1996.

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