IN THE SUPREME COURT OF FLORIDA

Case No. 92,442

On Appeal From the Ninth Judicial Circuit
In and For Orange County, Florida

STATE OF FLORIDA,

Appellant,

v.

JUDY A. BUENOANO,

Appellee.

ANSWER BRIEF OF INTERVENORS NEW YORK TIMES REGIONAL NEWSPAPERS AND SENTINEL COMMUNICATIONS CO.

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STATEMENT OF THE CASE

Reduced to its essentials, the State of Florida argues that this Court and the trial court below should seal judicial records for no other reason than the prosecutor made a mistake. The State says it promised confidentiality to the U.S. Department of Justice, then inadvertently broke its promise by giving the records to the Appellee, Judy A. Buenoano ("Buenoano"), and by filing the records in the court file. The State now seeks the power of this Court to remedy its carelessness.

But what the State has never shown this Court, or any other court, is any compelling interest to close these files that is sufficient to overcome the standards enunciated in this Court's own rules. Nor has the State demonstrated any statutory entitlement to closure. So found the trial court below, and so should this Court rule.

STATEMENT OF FACTS

The State asks this Court to prevent the disclosure of ten judicial and public records based on its own admitted error in releasing these records.

Buenoano faces execution in Florida's electric chair on March 30, 1998, for her first-degree murder conviction and death sentence in the arsenic poisoning of her husband. As part of the post-conviction relief process, Buenoano's counsel has sought access to various public records. (1R 2-4, 1R 31-70, 1R 128-131.)[1]

In December 1997, the State received documents from the U.S. Department of Justice. Accompanying the records was a letter from the federal government explaining that the documents were not public. In addition, the letter stated:

> This material may contain reference to individuals whose identification is protected by the Privacy Act, and to other sensitive matters.

(2R 428) (emphasis added).

The records-at issue apparently include information about an FBI chemist who performed work that is likely material to Buenoano's conviction and sentence. The chemist, Roger Martz, is a former chief of the FBI's chemical toxicology unit. Martz was

[1] The New York Times and the Sentinel adopt the record designations that the State used in its Initial Brief. Thus, the designation (1R -) refers to the record on appeal prepared on January 27, 1998. The designation (2R -) refers to the record on appeal prepared on February 25, 1998.

strongly criticized last year in a U.S. Justice Department report on the FBI crime laboratory.

Apparently uncertain whether it was obligated to produce these records to Buenoano, the State asked the trial court to conduct an in-camera inspection of these records. (1R 187-188.) After conducting an in-camera review, the trial court determined that the State was not required to produce any of the material pursuant to Brady v. Maryland, 373 U.S. 83 (1963). (1R 332-338.)

At some point in January 1998, however, the State disclosed documents to Buenoano and filed records with the court. (2R 24.) Claiming that it had erroneously released the records, the State filed an emergency request for a protective order with this Court on February 4, 1998. One day later, this Court ordered the sealing of the judicial records that had been placed into the court file. (2R 339-340.) The Court also directed Buenoano's counsel, experts, and investigators not to disclose any documents ordered sealed. (2R 339.)

After this Court's February 5 order, the New York Times Regional Newspapers ("The New York Times")[2] and Sentinel Communications Co., publisher of The Orlando Sentinel ("the

[2] The New York Times newspapers are: Fernandina Beach News-Leader, Inc., publisher of the News-Leader; Gainesville Sun Publishing Co., publisher of the Gainesville Sun; Lake City Reporter, Inc., publisher of the Lake Citv Reporter; Lakeland Ledger Publishing Corp., publisher of The Ledger; Ocala Star-Banner Corp., publisher of the Ocala Star-Banner; The Palatka Daily News, Inc., publisher of The Daily News and Marco Island Eagle; Sarasota Herald-Tribune Publishing Co., publisher of the Sarasota Herald-Tribune; and Sebring News-Sun, Inc., publisher of The News-Sun.

Sentinel"), moved to intervene for the limited purpose of opposing the closure of records. (2R 445-450; 2R 390-397.) On February 9, 1998, this Court remanded all proceedings to the trial court in Orange County. (2R 532-533.)

On February 11, 1998, the State filed with the trial court its motion for a-protective order, seeking closure of both judicial and nonjudicial public records. (2R 417-428.) The State asserted that the records were exempt from disclosure under an exemption in the Public Records Act for criminal investigative or intelligence information. See § 119.072, Fla. Stat. (1997). (2R 418.) Because neither the State nor Buenoano objected, the trial court granted the motions of The New York Times and the Sentinel to intervene for the limited purpose of opposing closure of records. (2R 415-416; 2R 451-453; 2R 454-456; 2R 421-428.)

The trial court conducted a hearing in Orange County on February 18, 1998. (2R 18-94.) Although the State maintained that the federal-government had privacy interests at stake, no one appeared at the hearing on behalf of the federal government. In addition, no one presented any evidence to demonstrate what particular, specific harm would befall the federal government if these documents were released.[3]

During the February 18 hearing, the State explained that it sought to protect only eleven records from disclosure. (2R 5.) The trial court subsequently issued an order unsealing the

[3] The federal government has filed a motion to intervene with this Court, but it still has not articulated any specific harm that would occur if the documents were released.

documents that the State did not wish to remain sealed. (2R 757-761.)

After reviewing the remaining documents in-camera, the trial court denied the State's motion for protective order and determined that ten records should be released. (A copy of the trial court's order of February 20, 1998, is attached as Appendix A.[4]) Specifically, the trial court found:

1. The records are not exempt from disclosure under Section 119.072, Florida Statutes (1997), as criminal intelligence or criminal investigative information because they were voluntarily given to Buenoano. (App. A-5.) Further, once the State gave the records to Buenoano, it could not assert an after-the-fact exemption.

2. Because the records at issue were filed with the clerk, they are "judicial records" whose disclosure is governed by Florida Rule of Judicial Administration 2.051. (App. A-8.)

3. The records should be disclosed because the State did not meet any of the criteria for exemption found in Rule 2.051(c)(9). (App. A-9.)

The State disclosed an eleventh document that it sought to keep protected to Buenoano on February 20. (2R 780-784.)

The State filed its notice of appeal on February 23, 1998. (2R 778-779.)

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[4] Citations to Appendix A will be made by the phrase "App. A-," followed by the page number.

S-Y OF THE ARGUMENT

The trial court was correct in denying the State's motion for a protective order.

First, the trial court correctly determined that the exemption in Section 119.072, Florida Statutes (1997), for criminal intelligence or investigative information does not apply because these records have already been disclosed to Buenoano.

Second, the trial court correctly determined that because the documents at issue were filed with the clerk of the court, they are "judicial records" whose disclosure is governed by Florida Rule of Judicial Administration 2.051--and not the Public Records Act.

Third, the trial court correctly determined that the State did not establish any of the criteria set forth in Rule 2.051(c) (9) that'would justify making confidential the records at issue. As for the State's contention that disclosure of these documents would harm the federal government, there has been no particularized evidentiary showing that the federal government would suffer any harm if the records were released.

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED THE STATE'S MOTION FOR A PROTECTIVE ORDER.

Rather than demonstrate any compelling interest that justifies closure of the records at issue, the State has simply reiterated its excuse that the records should be sealed because they were released in error.

Under Florida law, records that have been placed in court files or made available to a criminal defendant cannot subsequently be pulled from the public view based merely an after-the-fact admission of error. The State should not be allowed to turn its own mistake into a shield that prevents public disclosure.

After conducting its in-camera review of these records, the trial court correctly recognized that the State cannot "take back" these records. Whether the State seeks to seal the records by its misplaced attempt to assert an exemption to Chapter 119, the Public Records Act, Florida Statutes (1997) or by its invocation of Florida Rule of Judicial Procedure 2.051, the trial court reached the correct result in ordering the release of these records.

The State has failed to demonstrate that releasing these records would jeopardize any compelling governmental interest. To the contrary, disclosure would further Florida's established policy of open government records. Because the records apparently relate to the conviction and sentence of a condemned inmate, full access to these records is particularly important.

In both the trial court and this Court, the State erroneously contended that Section 119.072, a provision that exempts from disclosure criminal intelligence or criminal investigative information obtained from out-of-state agencies, dictated that the previously released records should now be sealed.[5] The trial court correctly determined that the State's after-the-fact attempt to assert an exemption failed for the three reasons discussed below.

1. ***Section 119.072 does not apply to these records because*** they ***were voluntarily disclosed to Buenoano*** and ***placed in a court file.***

Once the State gave documents to Buenoano, any exemption that could have been asserted expired. See Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 36 (Fla. 1988). Even though Section 119.072 provides an exemption for criminal intelligence or investigative information, any such information becomes accessible to the public once it is disclosed to the accused. See § 119.011(3)(c)5., Fla. Stat. (1997)[6]; see also

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[5] Section 119.072 of the Public Records Act provides:

> Whenever criminal intelligence or criminal investigative information held by a non-Florida criminal justice agency is available to a Florida criminal justice agency only on a confidential or similarly restricted basis, the Florida criminal justice agency may obtain and use such information in accordance with the conditions imposed by the providing agency.

[6] Section 119.011(3)(c)5. provides in relevant part:

> (c) "Criminal intelligence information" and "criminal investigative information" shall not include:

Fla. R. Crim. P. 3.220(l)(1). Thus, the State's admission that it released the records in error cannot turn records that are already public into sealed records.' As the trial court found, because the records were "voluntarily, even though inadvertently, given to [Buenoano], they are specifically excluded from 'criminal intelligence information' or [']criminal investigative information.'" (App. A-5.)[8]

In addition, any exemption must be asserted before information is provided to a defendant. Once the records are given to a defendant, many exemptions expire. See, e.g., Staton v. McMillan, 597 So. 2d 940, 941 (Fla. 1st DCA), review denied, 605 So. 2d 1266 (Fla. 1992); Tribune Co. v. Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986), review denied sub nom. Gillum v. Tribune Co., 503 So. 2d 327 (Fla. 1987); Satz v. Blankenship, 407 So. 2d 396 (Fla. 4th DCA 1981), review denied, 413 So. 2d 277 (Fla. 1982).

The State did not assert any exemptions until after the records had been disclosed. As the trial court found:

. . .

> 5. Documents given or required by law or agency rule to be given to the person arrested[.] . . .

[7] The State's citation to Cantanese v. Ceros-Livinsston, 599 So. 2d 1021 (Fla. 4th DCA), review denied, 613 So. 2d 2 (Fla. 1992), is misplaced. Cantanese concerned records that had not been disclosed; the records in the instant case have already been disclosed.

[8] See Wait v. Florida Power & Lisht Co., 372 So. 2d 420, 424 (Fla. 1979) (policy arguments must be addressed to the Legislature to take advantage of a statutory exemption).

> [T]he State's right to withhold disclosure of these documents was not asserted before these documents were voluntarily handed over to [Buenoano] and voluntarily filed in the court file. Therefore, this Court finds that the legislative public records exemptions cannot now be asserted by [Buenoano] since these documents have already been made public due to the fact that they were already given to [Buenoano].

(App. A-6.)

The trial court correctly found that criminal intelligence or investigative information becomes accessible to the public once it is disclosed to the accused. The State's own error in providing the records to Buenoano--without asserting any exemptions--led the trial court to conclude that the exemption found in Section 119.072 does not apply. To reach any other conclusion would'do nothing but promote confusion, uncertainty, and litigation because agencies could be allowed to release, then seek to retract, their public records at will.

2. Section 119.072 is an exemption to the Public Records Act and does not apply to the *judicial records at issue.*

Because the records were filed with the court clerk and placed in a court file, the trial court determined that these documents are "judicial records" whose disclosure is governed by Rule 2.051. (App. A-8.)[9]

Florida Rule of Judicial Administration 2.051(a) expresses a policy that "[t]he public shall have access to all records of the

[9] Judicial records include documents "created by any entity within the judicial branch . . ., that are made or received pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any court or court agency." Fla. R. Jud. Admin. 2.051(b).

judicial branch of government," with only narrow exemptions. Thus, the right of access attaches to records and other documents filed with the court or considered by the court. See, e.g., Sentinel Communications Co. v. Watson, 615 So. 2d 768, 770 (Fla. 5th DCA 1983) ("Our analysis must begin with the proposition that all civil and criminal court proceedings are public events, records of court proceedings are public records and there is a strong presumption in favor of public access to such matters.").

The disclosure of judicial records is governed by Rule 2.051--and not by the Public Records Act. See Times Publ'g Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995) (under separation of powers principles, the Public Records Act does not apply to judicial records). Rule 2.051 begins with the presumption that judicial records are public, unless they meet the rule's narrow exemptions.

The State insists in its Initial Brief that the exemption for criminal investigative or intelligence information in Section 119.072 applies to these judicial records. In a recent case dealing with Rule 2.051, the First District Court of Appeal held that Rule 2.051(c)(8) adopts all items made exempt by Florida statutes. See Florida Publ's Co. v. State, 1998 WL 25168, at *1 (Fla. 1st DCA Jan. 27, 1998). The State thus relies on Florida Publishing to try to force the exemption in Section 119,072 onto these judicial records.

Florida Publishing certainly does not dictate that the exemption in Section 119.072 for criminal investigative or

criminal intelligence information must apply. Indeed, such a reading would be contrary to this State's policy on access to records. Here, even if the federal government expected the records to remain confidential, the trial court found the fact that the State voluntarily gave these records to Buenoano excludes them as criminal intelligence or criminal investigative information. (App. A-5.)

The State's attempt to graft exemptions in the Public Records Act onto judicial records fails. To the extent that the Court is guided by the statutory exemption, it must also follow the statute **exactly.** In this case, by the clear language of Sections 119.072 and 119.011(3)(c)5., the exemption is inapplicable.

3. *The records should be unsealed because the* State has *not met any of the narrow exemptions in Rule 2.051(c)(9).*

A party seeking closure of judicial records faces a heavy burden. See Fla. R. Jud. Admin. 2.051(c)(9). In its commentary to Rule 2.051, this Court noted that subsection (c)(9) was adopted to incorporate two stringent tests for closure of criminal and civil records. See Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988) (adopting test for closure of records in civil cases); Miami Herald Publ'g Co. v. Lewis, *426 So.* 2d 1 (Fla. 1982) (setting out three-part test for closure of criminal records).

In both Barron and Lewis, the party seeking closure must show that closure is necessary to serve a compelling interest,

that no reasonable alternatives are available to complete closure, and that any closure is the least restrictive necessary to accomplish its purpose.

As an initial step to justify closure of judicial records, Rule 2.051(c) (9) (A) requires a party to show that confidentiality is required to:

> (i) prevent a serious and imminent threat to the administration of justice;
>
> (ii) protect trade secrets;
>
> (iii) protect a compelling governmental interest;
>
> (iv) obtain evidence to determine legal issues in a case;
>
> (v) avoid substantial injury to innocent third parties;
>
> (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;
>
> (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law.

The trial court found that the State had not met any of these criteria. (App. A-9, A-10.)[10]

The State suggests in its Initial Brief that the records at issue should be kept confidential to avoid substantial injury to an innocent third party: the federal government.

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[10] In addition, a party seeking closure of a judicial record must make a showing that includes demonstrating that any closure is no broader than necessary to protect the interests in Rule 2.051(c)(9) (A) and there is no less restrictive measure to protect those interests. See Rule 2.051(c) (9) (B), (C). Because the State has not cleared the first hurdle, it certainly cannot clear the second or third.

The prevention of harm to innocent third parties can provide a basis for closing court proceedings or records. See Barron, 531 so. 2d at 118; *see also Fla. R. Jud. Admin. 2.051(c)(9)(A)(v). In Barron, however, the type of "innocent third parties" that this Court suggested deserved protection were children during divorce litigation or young witnesses who might be subject to offensive testimony. 531 so. 2d at 118. It strains credulity for the State to suggest that the federal government is so fragile or powerless that it requires the same protection of closure that might be afforded to a young and vulnerable child.

Other than its naked assertion that closure is warranted to protect the federal government, the State offers no specific evidentiary support for its conclusion that these ten records must remain sealed. This is contrary to Barron, where this Court held that any closure order must be drawn "with particularity and narrowly applied." Id. at 117.

The State suggests that the records should not be released until the federal government has an opportunity to be heard. Significantly, the federal government had this opportunity at the trial court's hearing on February 18. The record reflects that the federal government was in contact with the State before the hearing, so it surely was aware that the hearing would be held. For example, in its motion for protective order, the State attached declarations from two FBI employees explaining the nature of the documents given to the State. (2R 421 - 422)

(declaration of Bobbie Olivarri); (2R 426-427) (declaration of Lucy Thomson). Both declarations are dated February 11, 1998, or just one week before the February 18 hearing. Yet inexplicably, the federal government apparently chose not to be heard.

The State has never offered any specific facts that would cause harm to the federal government. Indeed, a letter from an FBI attorney providing the documents to the State simply states that the material "may contain references to individuals whose identification is protected by the Privacy Act, and to other sensitive matters." (2R 428) (emphasis added). This pro forma assertion cannot serve as the particularized basis required to seal judicial records. More importantly, the trial court reviewed these records and determined that no grounds existed to withhold these documents pursuant to Rule 2.051. Nothing in the record presented by the State or federal government undermines this finding of fact, The record is barren of any facts to prove the asserted federal privacy interests.

On March 2, 1998, the federal government filed a motion with this Court that attempts to assert its interests in keeping these records sealed. Even at the eleventh hour, however, the federal government never enunciates with particularity the specific harm that will result from releasing these records. Instead, there is merely an assertion that the documents belong to the government.[11]

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[11] But once the federal government turned over documents to the State, they became records subject to the Public Records Act. The courts in Florida cannot allow the maker or sender of

Neither the State, nor any other party, has shown that it can meet the burden of proving that closure is necessary to protect the rights of innocent third parties or to protect any vague privacy rights. Even if the State were able to produce such parties, those parties would bear the burden of proving that closure is necessary to prevent an imminent threat to their specific--not generalized--privacy rights. See Post-Newsweek Stations v. Doe, 612 So. 2d 549 (Fla. 1992).

Thus, the State has completely failed to make the particularized showing required by Rule 2.051, Lewis, and Barron to justify closure. Because the State has not met its burden, this Court should affirm the trial court's order and release the judicial records.

CONCLUSION

Florida has a long tradition of access to public and judicial records. Based on the public's right of access--and the State's failure to justify closure of these records--The New York Times and the Sentinel respectfully request this Court to deny

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documents to dictate the circumstances under which they are to be deemed confidential, unless consistent with an applicable exemption. See Gadd v. News-Press Publ'g Co., Inc., 412 So. 2d 894 (Fla. 2d DCA), review denied, 419 So. 2d 1197 (Fla. 1982). As discussed previously, the time to assert an exemption is before--not after--records are released. The claimed exemption in Section 119.072 therefore does not apply to these records.

the State's attempt to shield records from the public and to affirm the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing with the attached appendix has been furnished by facsimile and by U.S. Mail to Sylvia W. Smith, Esq., Office of CCRC, Northern Region, P.O. Drawer 5498, Tallahassee, FL 32314-5498; Paula C. Coffman, Esq., 205 N. Orange Avenue, P.O. Box 1673, Orlando, FL 32802-1673; Richard B. Martell, Esq., Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050; Lucy L. Thomson, Esq., Senior Attorney, Task Force on the FBI Laboratory, Criminal Division, U.S. Department of Justice, Washington, D.C. 20530; Elizabeth R. Beers, Esq., Assistant General Counsel, Assistant General Counsel, Federal Bureau of Investigation, 935 Pennsylvania Ave., N.W., Washington, D.C. 20535; and by U.S. Mail to Judy A. Buenoano, in care of Sylvia W. Smith, Esq., Office of CCRC, Northern Region, P.O. Drawer 5498, Tallahassee, FL 32314-5498, on this 4th day of March, 1998.

Susan L. Turner
Attorney

TPA3-516250

JNDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

CASE NO.: CR84-4741

vs.

JUDY A. BUENOANO a/k/a
JUDIAS V. BUENOANO,

Defendant.

_____/

ORDER DENYING STATE'S MOTION FOR PROTECTIVE ORDER AND ORDER STAYING THE PROVISIONS OF THIS ORDER THAT UNSEAL THE TEN DOCUMENTS AT ISSUE THROUGH MONDAY, FEBRUARY 23, 1998

THIS MATTER came before the Court for consideration of the State's Motion for Protective Order which was filed February 11, 1998. The Court has reviewed the State's Motion, Defendant's Response thereto which was tiled February 18, 1998, and the Rcsponsc of the New York Times Regional Newspapers and Sentinel Communications Co., which was filed February 17, 1998. On February 18, 1998, the Court held a hearing on the Motion. After considering the arguments presented by the State, Defendant, and the New York Times and Sentinel Communications, Co., and after being otherwise duly advised in the premises, the Court hereby finds as follows:

PROCEDURAL HISTORY OF MOTION FOR PROTECTIVE ORDER

Some time prior to February 5, 1998, the State filed a motion for protective order in the Florida Supreme Court; said motion sought a protective order covering the documents that were

sealed by this Court on January 12, 1998, and covering the State's Notice of Filing dated January 23, 1998.[1] On or around February 5, 1998, the Florida Supreme Court ordered that Defendant, her counsel, her investigators, and her experts were not to disclose the contents of the State's Notice of Filing dated January 23, 1998 until further order of the Florida Supreme Court,

On February 9, 1998, the Supreme Court of Florida transferred the matter back to this Court, and ordered that the State had until February 11, 1998 in which to file a Motion for Protective Order in this Court. The Supreme Court further ordered that Responses to said Motion had to be filed in this Court by February 17, 1998. It is said Motion that is presently before this Court for consideration.

DISCUSSION

In its Motion for Protective Order, the State requested a protective order

> covering a small number of internal documents (to be identified in camera at the hearing to be held on [the] motion), which documents were generated by the Federal Bureau of Investigation and received by the Office of the State Atlorncy, Ninth Judicial Circuit, from the Criminal Division of the United States Justice Department.

The State asserted that these documents had been disclosed to Defendant in error, and that they should be protected from public disclosure because they are covered by the exemption contained within section 119.072, Florida Statutes (1997). The State indicated that all of the other documents could be unsealed and made available for public inspection.

At the hearing on this matter, the State filed with the Clerk of this Court, and disclosed to the Court, counsel for Defendant, and counsel for the New York Times and Sentinel

[1] The State's Notice of Filing dated January 23, 1998 constitutes Volume 4 of the record on appeal for Supreme Court case number 93,233.

Communications Co., a list that identifies the eleven documents which the State wants protected by a protective order.

Assistant State Attorney Paula Coffman stated at the hearing that ten of the documents which the State wants protected are contained within the State's Notice of Filing dated January 23, 1998. Further, Ms. Coffman stated that she assumed that the eleventh document was contained within the envelopes labeled A through F that were sealed by this Court on January 12, 1998, because said document is not contained within the State's Notice of Filing dated January 23, 1998. As this Court stated in its "Order Unsealing the Documents That the State Does Not Want Protected by a Protective Order," which was rendered February 19, 1998, this Court reviewed each and every document contained within the sealed envelopes labeled A through F, and determined that the eleventh document is not contained thcrcin. Thcrcforc, this Court will address the issue of the State's entitlement to a protective order covering the ten documents which have been identified and located by the Court.

In her Response to the Motion for Protective Order, as well as at the hearing on this matter, Defendant did not address the merits of whether a protective order is proper in this case.

In their Response to the Motion for Protective Order and at the hearing on this matter, the New York Times Regional Newspapers and Sentinel Communications Co. (Newspapers), set forth three reasons upon which they contend the State's Motion should be denied. In essence, the Newspapers assert that:

> 1) The exemption contained within section 119.0 11(3)(c)(5), Florida Statutes, which is being claimed by the State, is inapplicable because these records have already been disclosed to Defendant;
>
> 2) The records at issue are contained within the record on

> appeal, and are therefore judicial records that are not controlled by Florida public records law; conscqucntly, access to these records is governed by Florida Rule of Judicial Administration 2.05 1, which has no exemptions for criminal intelligence or investigative information; and
>
> 3) The State has failed to meet the three-part test for closure of judicial records that was enunciated by the Florida Supreme Court in Miami HeLewPublishing Co. v. is, 426 So. 2d I (Fla 1982).

The Court begins its analysis of this matter by reiterating the policy of the State of Florida with regard to public records: "It is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person." $119.0 1, Fla. Stat. (1997). All "public records" are subject to disclosure unless a specific statutory exemption applies. § 119.07(2)(a), Fla. Stat. (1997).

The exemptions that are set forth in section 119.07(3) include an exemption for "active criminal intelligence information" and "active criminal investigative information." §119.07(3)(b), Fla. Stat. (1997). "Criminal intelligence information" means "information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prcvcnt, or monitor possible criminal activity." § 119.0 11 (3)(a), Fla. Stat. (1997). "Criminal investigative information" means

> information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

§119.011(3)(b), Fla. Stat. (1997). **"Criminal intclligcncc information" and "criminal**

investigative information" shall not include:

> 5. Documents given or required to bc given by law or agency rule to be given to the person arrcstcd, except as provided in s. 119.07(3)(f), and except that a court in a criminal case may order that certain information required by law or agency rule to be given to the person arrested be maintained in a confidential manner and exempt from the provisions of s. 119.07(1) until released at trial if it is found that the release of such information would:
>
> a. Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and
>
> b. Impair the ability of a state attorney to locate or prosecute a codefendant.

§ 119.0 11(3)(C)5, Fla. Stat. (1997) (emphasis added).

Additionally, the disclosure of "criminal intelligence information" or "criminal invcstiyativc information" may be restricted to the extent that

> [w]henever "criminal intclligcnce information" or "criminal investigative information" held by a non-Florida criminal justice agency is available to a Florida criminal justice agency only on a restricted basis, the Florida criminal justice agency may obtain and use such information in accordance with the conditions imposed by the providing agency.

$119.072, Fla. Stat. (1997).

After reviewing and considering these statutory provisions, the Court believes that the materials at issue are not legislatively exempt from disclosure as "criminal intelligence information" or criminal investigative information." To begin with, this Court believes the documents are not exempt from disclosure because they were voluntarily given to Defendant. Since they were voluntarily, even though inadvertently, given to Defendant, they are specifically excluded from "criminal intelligence information" or criminal investigative information." See § 119.0 11(3)(c)5, Fla. Stat. (1997).

Furthermore, the Court does not believe the provisions of section 119.072 apply, Section 119.072 may indeed have provided a statutory basis which would have entitled the State to withhold disclosure of these materials to Defendant; however, the State's right to withhold disclosure of these documents was not asserted before these documents were voluntarily handed over to Defendant and voluntarily filed in the court file. Therefore, this Court finds that the legislative public records exemptions cannot now be asserted by Defendant since these documents have already been made public due to the fact that they were already given to Defendant. This is not to say that the State could not assert the exemption contained within section 119.072 when presented with a public records requests from another person; however, said exemption does not apply to the present situation.

This finding does not, however, mean that there is not some other means by which these documents may be sealed from public disclosure. In Florida, both criminal and civil court proceedings and court records are public and are open to individual members of the public, as well as the media. Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988). Although there is a strong presumption in favor of open court events and court records, the law has established two categories of exceptions under which the judiciary may order closure of court proceedings and court records. Id. These categories are: 1) where closure is necessary to ensure order and dignity in the courtroom; and 2) where closure of the information is appropriate due to the content of the information. Id. The party seeking closure has the burden, at not only the trial court level but also through the appellate review process, to justify closure. Id.

In Miami Herald Publishing v. Lewis, 426 So. 2d I, 6 (Fla. 1982), the Florida Supreme Court directed that trial judges should employ the following test when evaluating whether closure of

criminal court proceedings or records is appropriate:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
> 2. No alternatives are available, other than a change of venue, which would protect the defendant's right to a fair trial; and
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

In Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d at 118, the Florida Supreme Court opined that closure of civil proceedings or records is appropriate only when necessary:

> a) to comply with cstablishcd public policy set forth in the constitution, statutes, rules, or case law;
> b) to protect trade secrets;
> c) to protect a compelling governmental interest [e.g. national security; confidential informants];
> d) to obtain cvidcncc lo properly determine legal issues in a case;
> e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or
> f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.

Additionally, the court in Barron stated that "the constitutional right of privacy cstablishcd in Florida by the adoption of article I, section 23, could form a constitutional basis for closure under (e) or (f)." Id. at 118. Furthermore, the court stated that "it is generally the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted." Id. The court in Barron concluded by stating that before entering a closure order, the trial court shall determine that no rcasonnblc alternative is available to accomplish the desired result, and if no reasonable alternative exists, that the trial court must use the least restrictive closure necessary to accomplish its purpose. Id.

The holdings of Lewis and Barron were incorporated in Florida Rule of Judicial Administration 2.05 1(c)(9), which states that the following is confidential:

> Any court record determined to be confidential in case decision or court rule on the grounds that
>
> (A) confidentiality is required to
>
> (i) prevent a serious and imminent threat of the fair, impartial, and orderly administration of justice;
>
> (ii) protect trade secrets;
>
> (iii) protect a compelling governmental interest;
>
> (iv) obtain evidence to determine legal issues in a case;
>
> (v) avoid substantial injury to innocent third parties;
>
> (vi) avoid substantial injury to a party by disclosure of matters protected by a common law *or* privacy right not generally inherent in the specific type of proceeding sought to be closed;
>
> (vii) comply with established public policy set Forth in the Florida or United States Constitution or statutes or Florida rules or case law;
>
> (B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A);
>
> (C) no less restrictive measures are available to protect the interests set forth in subdivision (A); and
>
> (D) except as provided by law or rule of court, reasonable notice shall be given to the public of any prder closing any court record.

See Commentary to 1995 Amendment to Fla. R. Jud. Admin. 2.05 1. Since the documents at issue were filed with the Clerk of this Court, they fall within the definition of "judicial records," and their disclosure is therefore governed by rule 2.05 1. Fla. R. Jud. Admin. 2.05 1 (b).

The Court notes that the provisions of rule 2.05 I, which permit a court to limit disclosure Of judicial records, do not conflict with the provisions of Chapter 119, which require disclosure Of public records unless a specific statutory exemption exists, because as stated in section 119.07(4),

> [n]othing in this section [119.071 shall be construed to exempt

> from subsection (1) a public record which was made a part of a court file and which is not specifically closed by order of a court, except as provided in paragraphs (c), (d), (e), (k), (l), and (o) of subsection (3) and except information or record which may reveal the identity of a person who is a victim of a sexual offense as provided in paragraph (f) of subsection (3).

This Court finds that if there is any basis for nondisclosure of the records at issue in this case, it would be pursuant to rule 2.051. However, in order for a record to be deemed confidential under rule 2.051, one of the criteria set forth in rule 2.051 (c)(9) must be met. Although the State asserts these documents should be protected "because of the potential for the invasion of personal privacy of individuals, the revelation of information concerning pending investigations and sensitive law enforcement methods and techniques, and the revelation of certain classified information," this Court finds the State did not establish any one of the criteria set forth in rule 2.051(c)(9), or any of the basis upon which it requests that these documents be made confidential.

Furthermore, the Court has examined each of the documents that the State seeks to protect, and when considering the content of these documents in conjunction with the content of the documents which were previously unsealed without objection by the State, this Court finds that none of the criteria set forth in rule 2.051(c)(9) has been met. Specifically, when the content of the documents at issue is considered in conjunction with the content of the documents that the State does not seek to protect with a protective order, confidentiality of these records is not required in order to:

> (i) prevent a serious and imminent threat of the fair, impartial, and orderly administration of justice;
> (ii) protect trade secrets;
> (iii) protect a compelling governmental interest;

(iv) obtain evidence to determine legal issues in a case;
(v) avoid substantial injury to innocent third parties;
(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed; or
(vii) comply with established public policy set forth in the Florida or United States Constitution or statutes *or* Florida rules *or* case law.

THEREFORE, based uponthc foregoing, it is hereby **ORDERED** and **ADJUDGED** that:

1) The State's Motion for Protective Order is **DENIED.** However, the Notice of Filing dated January 23, 1998, which was filed by the State with the Clerk of this Court on January 26, **1998,** and Volume 4 of the record on appeal in Suprcmc Court case number 92,233 shall remain scaled until 8:00 AM, Tuesday, February 24, 1998. Additionally, the conditions previously imposed by this Court, which state that Judy A. Bucnoano hcrsclf, her counsel, her investigators, and her experts shall not disclose to anyonc the documents identified on the list of documents for which the State seeks a protective order, shall remain in effect until 8:00 AM, Tuesday, February 24, 1998.

2) The State has until 5:00 PM, Monday, February 23, 1998, in which to file with the Clerk of this Court a written notice of appeal thereby indicating its intention to seek appellate review of this Order.

If the State files a written notice of appeal with the Clerk of this Court by 5:00 PM, Monday, February 23, 1998, the Notice of Filing dated January 23, 1998, which was filed by the State with the Clerk of this Court on January 26, 1998, and Volume 4 of the record on appeal in Supreme Court case number 92,233 shall remain scaled until the Florida Suprcmc Court rules on said appeal.

Further, if the State files a written notice of appeal with the Clerk of this Court by 5:00 PM, Monday, February 23, 1998 the conditions previously imposed by this Court, which state that Judy A. Buenoano herself, her counsel, her investigators, and her experts shall not disclose to anyone the documents identified on the list of documents for which the State seeks a protective order, shall remain in effect until the Florida Supreme Court rules on said appeal.

If the State does not file a written notice of appeal with the Clerk of this Court by 5:00 PM, Monday, February 23, 1998, the conditions prevcntiog Judy A. Buenoano, her counsel, her investigators, and her experts from disclosing to anyone the documents identified on the lost of documents for which the State seeks a protective order shall expire, and the Notice of Filing dated January 23, 1998, which was filed by the State with the Clerk of this Court on January 26, 1998, and Volume 4 of the record on appeal in Supreme Court case number 92,233 shall be unscaled at 8:00 AM, Tuesday, February 24, 1998.

3) NO MOTION FOR REHEARING IS ALLOWED.

DONE and ORDERED in Chambers, at Orlando, Orange County, Florida, on 20th day of February, 1998.

REGINALD K. WHITEHEAD
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail and facsimile transmission on this 20 day of February, 1998, to:

1) Holland & Knight LLP, David S. Bralow, Esq., and Jennifer Hcrndon McCrae, Esq., P.O. Box 1526, Orlando, Florida 32802, Fax (407) 244-5288;

2) Holland & Knight LLP, Gregg D. Thomas, Esq., and Kimberly A. Stott, Esq., P.O. Box 1288, Tampa, Florida 3360 1, Fax (8 13) 229-0 134;

3) Holland & Knight LLP, George D. Gabel, Jr., Esq., and Brooks C. Rathct, Esq., 76 S. Laura Street, Suite 1600, Jacksonville, Florida 32202, fax (904) 358-1637;

4) Adam Liptak, Esq., The New York Times Company, Legal Department, 229 West 43rd Street, New York, New York 10036, Fax (2 12) 556-4634;

5) Paula Coffman, Assistant State Attorney, Office of the State Attorney, P.O. Box 1673, Orlando, Florida 32801, Fax (407) 836-2333/(407) 836-2332;

6) Candancc M. Sabella, Esq., and Katherine V. Blanco, Esq., Office of the Attorney Gcncral, Department of Legal Affairs/Tampa Office, 2002 N. Lois Avcnuc, Suite 700, Tampa, Florida 33607-2366, Fax (813) 873-4771;

7) Sylvia Smith; Assistant CCR, and Robert Friedman, Assistant CCR, Office of the Capital Collateral Counsel - Northern Division, P.O. Drawer 5498, Tallahassee, Florida 32314-5498; Fax (850) 487-1682; and

8) Tanya Carroll, Capital Cases Deputy Clerk, Clerk of the Suprcmc Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, Fax (850) 488-2100.

Judicial Assistant