IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1396

____

MEDIA GENERAL CONVERGENCE, INC., and
MEDIA GENERAL OPERATIONS, INC.,

Petitioners,

vs.

CHIEF JUDGE OF THE THIRTEENTH JUDICIAL CIRCUIT

Respondent.

____

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
Case No. 2D00-1346

____

INITIAL BRIEF ON THE MERITS

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STANDARD OF REVIEW

Review of the certified question is an issue of law to be reviewed *de novo*. *See, e.g.*, *Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2000).

INTRODUCTION

> *It is essential that the populace have confidence in the [judicial] process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance. Consequently, public understanding of the judicial system, as opposed to suspicion, is imperative. . . .*
>
> *We have no need to hide our bench and bar under a bushel. Ventilating the judicial process . . . will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system.*

In re Petition of Post-Newsweek Stations, Florida, Inc., for Change in Code of Judicial Conduct, 370 So. 2d 764, 780-81 (Fla. 1979) (citations omitted)

> *Public access [to judicial records] serves as a check on corrupt practices by exposing the judicial process to public scrutiny.*

Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1, 7 (Fla. 1982)

* * * * * *

This appeal is about the public's right to know – its right to know how the judicial branch of Florida's government operates, its right to know if the judicial branch can and will police its own conduct, and its right to know whether the judiciary obeys the very laws that it is charged with upholding and that the other

two branches of Florida's government abide by everyday.

The Respondent, the Honorable F. Dennis Alvarez, denied the Petitioners access to judicial records he created or received in his administrative role as Chief Judge of the Thirteenth Judicial Circuit.[1]

Although the records the Petitioners seek contain sensitive information – concerning, among other things, alleged sexual misconduct by one or more judges of the Thirteenth Judicial Circuit – these documents are, nevertheless, "judicial records." The Petitioners' Brief will establish that those judicial records are not shielded from disclosure under any rule, statute, or constitutional exemption and, as a result, that Chief Judge Alvarez was under a duty to disclose them. The Petitioners' Brief also will show that the majority opinion of the Second District Court of Appeal denying access to those records is premised on an overly restrictive construction of the term "judicial records" and a mistaken reliance on sexual harassment complaint procedures that have no application in this case. Quite simply, the Court of Appeal found itself in "uncharted waters" and failed to navigate the proper course.

The State of Florida has a vibrant, long-standing, and strictly followed public

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[1] On June 30, 2001, Chief Judge F. Dennis Alvarez retired as a circuit court judge.

policy in favor of open government, or government "in the sunshine." Despite this public policy, the specific issues raised by this case have seldom if ever been faced directly by Florida's courts. This appeal, then, presents a rare opportunity for this Court to delineate the procedures to be followed by the district courts of appeal in assessing petitions for access to judicial records, and to make clear that Florida's judicial branch conducts its business as it is constitutionally required to do – not in the dark, but in the bright sunlight.

STATEMENT OF THE CASE

Background Facts

C The Parties

Petitioner Media General Convergence, Inc. was until recently owner of WFLA-TV/News Channel 8 ("WFLA"), a broadcaster of news programming in Hillsborough County and the surrounding counties.[2] Petitioner Media General Operations, Inc. is the publisher of *The Tampa Tribune* (the "Tribune"), a newspaper of general circulation in Central Florida. (*See Petition for Writ of Mandamus, or, in the Alternative, Petition for Review of Orders Denying Access to Judicial Records* [hereinafter, "Petition for Mandamus"] at 4.) The newsgathering efforts of WFLA and the Tribune regularly involve coverage of the judicial branch of government. (*Id.*) Respondent Chief Judge Alvarez was Chief Judge of the Thirteenth Judicial Circuit at all times relevant hereto. On June 30, 2001, Respondent retired as a Circuit Judge.

CThe Judicial Records

This appeal concerns requests the Petitioners made to Chief Judge Alvarez in late

[2] Media General Convergence, Inc. no longer exists. WFLA-TV/News Channel 8 is now owned by Petitioner Media General Operations, Inc.

1999 and early 2000 for two groups of judicial records. The first group of documents are judicial records that were made or received by the Chief Judge, his staff, the Court Administrator of the Thirteenth Judicial Circuit, his staff, or Court Communications & Technology Services personnel relating to alleged misconduct by (former) Circuit Judge Edward H. Ward of the Thirteenth Judicial Circuit (the "Judge Ward Records"). (*Id.* at 4-6.)

The second group of documents are judicial records that were made or received by the Chief Judge, his staff, the Court Administrator, or his staff concerning fraternization, romantic relationships, or sexual contact between any Thirteenth Judicial Circuit Judge and courthouse personnel (the "Fraternization Records"). (*Id.* at 8.)

CWFLA's and The Tribune's Efforts to Obtain The Judge Ward Records

As early as October 11, 1999, the Tribune made a written request to Chief Judge Alvarez for the Judge Ward records, asking for "information about complaints of sexual harassment and/or sexually inappropriate comments or behavior made against Hillsborough Circuit Judge Edward Ward." (*Id.* at 5, Tab B.) Chief Judge Alvarez did not disclose any records. Instead, he responded by letter on October 18, 1999, stating that he *did not have any such records in his*

custody and was not aware of such records. (*Id.*, Tab C.)

Apparently during late 1999 or early 2000, Florida's Judicial Qualifications Commission ("JQC") began an investigation of Judge Ward. The JQC found probable cause to believe that Judge Ward had sent sexually explicit e-mails and made inappropriate overtures to two female Hillsborough County Circuit Judges and two female Judicial Assistants. The JQC filed formal charges against Judge Ward on March 1, 2000, and on that same day the Tribune again requested the Judge Ward Records in writing from Chief Judge Alvarez; on March 2, 2000, WFLA requested the Judge Ward Records telephonically. (*Id.* at 4-5, Tabs A, D.)

Responding to both requests by letter dated March 6, 2000, Chief Judge Alvarez then indicated that such records *did* exist, but that "any records in my custody pertaining to your request have already been furnished to the Florida Judicial Qualifications Commission (JQC) pursuant to its request." Chief Judge Alvarez stated that because the Judge Ward Records had been transferred to the JQC, they were confidential until their admission into evidence at a JQC proceeding and would not be disclosed. (*Id.* at 5, Tab E.)

Because WFLA and the Tribune were seeking records that *Chief Judge Alvarez himself* had made or received – and were not seeking anything directly or indirectly from the JQC – they again requested the Judge Ward Records from

Chief Judge Alvarez on March 8, 2000:

> Pursuant to Article I, Section 24 of the Florida Constitution and Florida Rule of Judicial Administration 2.051(a), we request the opportunity . . . to inspect and to copy certain judicial records. Specifically, access is requested to any records, including e-mail correspondence, you, your staff, the Court Administrator, his staff, or Court Communications & Technology Services personnel obtained, received, or reviewed and that contain or refer to the text of any e-mail messages among Judge Edward Ward and any of the following people: Judge Claudia Isom, Judge Vivian May, Michelle Boylan or Dee Dee Agostini. Access is also requested to any records, including e-mail messages, between you (or your staff) and any other Hillsborough County Circuit Court Judge, County Court Judge or court staff member concerning Judge Ward.

(*Id.* at 6, Tab F.) WFLA and the Tribune further requested that, to the extent that Chief Judge Alvarez had transferred his records to the JQC, he retrieve or make copies of the records for review. (*Id.*)

On March 15, 2000, Chief Judge Alvarez responded to this letter. Again, he indicated that he had furnished the Judge Ward Records, or copies of the Judge Ward Records, to the JQC. (*Id.*, Tab G.) To date, Chief Judge Alvarez has not disclosed to WFLA or the Tribune any of the Judge Ward Records.

As a result of the JQC's investigation of Judge Ward, however, *the JQC* released documents relating to Judge Ward's alleged sexual misconduct. Those records indicate that Chief Judge Alvarez was aware of allegations of sexual misconduct by Judge Ward at least as early as August 1998, more than *one year*

before the Tribune first requested records relating to such allegations. (*See* Affidavit of Michelle Boylan, attached to *Response of the Honorable F. Dennis Alvarez to Petition for Writ of Mandamus, or, in the Alternative, Petition for Review of Orders Denying Access to Judicial Records* [hereinafter, "Response"], Tab 17, at J-00059.) The documents released by the JQC also indicate that Chief Judge Alvarez likely had in his possession, by August 1999, two affidavits from judicial assistants concerning Judge Ward's inappropriate conduct. (*See id. See also* Affidavit of D.D. Agostini, attached to Response, Tab 17, at J-00062-63.) As indicated above, on October 18, 1999 (less than two months after Chief Judge Alvarez received the second affidavit), he responded to the Tribune's request for the Judge Ward Records by stating *that he did not have any such records in his possession and was not aware of them*.

C WFLA's and The Tribune's Efforts to Obtain The Fraternization Records

On March 8, 2000, WFLA and the Tribune wrote to Chief Judge Alvarez requesting a second group of documents, the Fraternization Records. In particular, WFLA and the Tribune sought access to:

> Records made or received by the Chief Judge's Office or the Court Administrator's Office concerning fraternization, romantic relationships or sexual contact between any Hillsborough County Circuit Court or County Court Judge, and any personnel assigned to

> any courthouse located in Hillsborough County, whether such personnel are employed by the state of Florida, Hillsborough County, the Hillsborough County Sheriff's Office, or some other private or governmental entity.

(Petition for Mandamus at 8, Tab. I.)

Chief Judge Alvarez responded to this request on March 15, 2000. Without stating whether the Fraternization Records actually existed or whether they were in his possession or custody, he stated that *if* such records existed, they would be exempt from disclosure. (*Id.*, Tab L.) To date, Chief Judge Alvarez has not disclosed the Fraternization Records.

<u>Proceedings Before the Second District Court of Appeal</u>

On April 18, 2000, WFLA and the Tribune filed with the Second District Court of Appeal their Petition for Mandamus. Florida Rule of Judicial Administration 2.051(d)(1) requires that in circumstances such as these, "[w]here a judge has denied a request for access to records in the judge's possession or custody, the action [for mandamus] shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access." Thus, WFLA and the Tribune filed their Petition for Mandamus as an original action in the Second District. On May 2, 2000, Chief Judge Alvarez filed his Response, and the Petitioners subsequently filed their *Reply* on May 9, 2000.

[3]

No discovery ever occurred while this case was pending before the Second District (although such discovery was requested by the Petitioners). Moreover, despite the Petitioners' repeated requests that he do so, Chief Judge Alvarez never provided any records *in camera* to the District Court of Appeal. In response to the Petitioners' efforts to take his deposition, Chief Judge Alvarez sought and received an order from the Second District prohibiting the deposition. (*See* Order, Oct. 13, 2000.) Thus, the Petitioners were prevented in the District Court of Appeal from developing any record involving actual facts or documentation.

On May 25, 2001, more than a year after the Petitioners filed their Petition for Mandamus, and without discovery, a hearing, or oral argument, a divided panel for the Second District issued its opinion in this matter denying access to the records. The majority made little mention of the Fraternization Records and instead focused on the Judge Ward Records. Without ever reviewing the records Chief Judge Alvarez had in his possession, the majority held that most of the Judge Ward Records were not "judicial records" subject to disclosure because Chief Judge

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[3] Prior to filing their Petition for Mandamus in the Second DCA, the Petitioners filed a *Petition for Access to Judicial Records, Request for Expedited Hearing, and Supporting Argument* ("Petition for Records") in the Thirteenth Judicial Circuit in Hillsborough County. The Petition for Records was dismissed for lack of subject matter jurisdiction in the Circuit Court.

Alvarez was not *required* by "rule, law or ordinance" to investigate Judge Ward. Opinion at 3. Thus, according to the majority, the Judge Ward Records could not be "judicial records." The majority further held that even those limited number of records that were "judicial records" were exempt from disclosure, apparently pursuant to the *Supreme Court Civil Rights Complaint Procedures*.[4] *Id.* at 6-8. The majority did not specifically address the propriety of disclosing the Fraternization Records.

In dissent, Acting Chief Judge Fulmer concluded that the records were "judicial records," and that the confidentiality provisions of the *Supreme Court Civil Rights Complaint Procedures* had no application because those procedures were never invoked or actually used in this matter. *Id.* at 9, 14-15 (Fulmer, J., dissenting). Acting Chief Judge Fulmer concluded that Chief Judge Alvarez had a duty to disclose the records and that a writ of mandamus should issue.

Despite its conclusion that WFLA and the Tribune were not entitled to access to the records, the majority acknowledged that it maintained doubts about its decision: "We recognize that this dispute has launched us into uncharted waters, and that we have navigated a course based on assumptions regarding the

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[4] The *Supreme Court Civil Right Complaint Procedures* were adopted and incorporated as part of the *State Courts System Personnel Rules and Regulations* by Administrative Order, dated September 23, 1993.

scope of a chief judge's administrative authority." *Id.* at 8. Because of this doubt, and because of the importance of the public's right of access to judicial records, the Second District Court of Appeal certified to this Court the following question as being of great public importance: "Under what circumstances are documents reflecting social, romantic, or sexual relationships of judges deemed to be judicial records subject to public disclosure under Florida Rule of Judicial Administration 2.051?" *Id.* at 8-9.

On June 8, 2001, after the Second District issued its opinion, the Attorney General of the State of Florida filed his *Emergency Motion of Attorney General to Intervene* ("Motion to Intervene"). Concurrently, the Attorney General filed a *Motion for Rehearing* and a *Motion for Rehearing En Banc*, and argued that the District Court of Appeal misapprehended or overlooked the controlling law. The Attorney General asked that the court withdraw its opinion and adopt the dissenting opinion of Acting Chief Judge Fulmer.

On June 12, 2001, the Second District granted the Attorney General's Motion to Intervene for the purpose of requesting review of the certified question by this Court. The court refused to docket or consider the motions for rehearing.

On June 19, 2001, WFLA and the Tribune filed their *Notice to Invoke Discretionary Jurisdiction*. On the same day the Attorney General filed his *Notice*

to Invoke Discretionary Jurisdiction. And on June 20, 2001, Chief Judge Alvarez filed his *Agreement of Chief Judge of the Thirteenth Judicial Circuit to Invoke Discretionary Jurisdiction of Florida Supreme Court.*

SUMMARY OF ARGUMENT

The records at issue in this case are "judicial records." They were made or received by Chief Judge Alvarez not in his private capacity, as a mere citizen, but in his official public capacity, as Chief Judge of the Thirteenth Judicial Circuit. Indeed, they were made or created in the Hillsborough County Courthouse, with the use of courthouse facilities and personnel, and pursuant to the expenditure of public funds. Thus, the Second District was absolutely wrong when it concluded that most of the records were not judicial records.

The Second District also was wrong when it found that all of the records were exempt from disclosure pursuant to certain sexual harassment complaint procedures. Those procedures were never invoked or relied upon by anyone in this matter. More significantly, the complaint procedures cannot, as a matter of law, create exemptions to Rule 2.051(a) or Article I, Section 24 of the Florida Constitution. Thus, the records were not exempt from disclosure and the Second District should have granted WFLA's and the Tribune's request for a writ of mandamus.

Finally, the procedures to be used when litigating a request for access to judicial records in the district courts of appeal are at best unclear, and at worst non-existent. Because cases of this type are likely to arise again, WFLA and the

Tribune respectfully suggest that the Court take this opportunity to set forth the procedures to be followed when a petition for access to judicial records is brought as an original action in a district court. By enunciating those procedures, this Court could help to ensure that the district courts render the proper decisions reflecting Florida's deep-seated public policy in favor of open government, and that they do so in an expeditious manner.

ARGUMENT

At its most basic, this case turns on two fundamental questions. First, are the Judge Ward Records and Fraternization Records "judicial records"? Second, if they are "judicial records," is there any legitimate exemption that would prohibit their disclosure? As the Petitioners will demonstrate below, these documents are judicial records and are not exempt from disclosure.

Above and beyond the specific factual and legal questions at issue here, however, this case raises fundamental questions about the appropriate procedures the district courts of appeal should employ when ruling on a petition for access to judicial records. Rule 2.051(d)(1), Florida Rules of Judicial Administration, requires that a party attempting to obtain judicial records from a circuit court litigate the dispute in the district court. But, unlike the circuit courts, the district courts of appeal do not have thorough and well-settled procedures for resolving factual disputes or supervising discovery. Nor are they well-equipped to oversee day-to-day litigation disputes. Thus, the Petitioners respectfully suggest that this case presents an ideal forum in which this Court can and should enunciate discovery guidelines for parties petitioning the district courts for access to judicial records.

I. THE JUDGE WARD RECORDS AND FRATERNIZATION RECORDS ARE "JUDICIAL RECORDS"

The records WFLA and the Tribune seek are "judicial records" and are open to public review as mandated by Article I, Section 24 of the Florida Constitution.

[5] As defined by Florida Rule of Judicial Administration 2.051(b), "judicial records" include all records 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. Judicial Admin. 2.051(b)(emphasis added). This broad definition encompasses both the Judge Ward Records and the Fraternization Records because those records were made or received by Chief Judge Alvarez in his administrative capacity as Chief Judge of the Thirteenth Judicial Circuit and in connection with his review of allegedly inappropriate conduct within the court.

WFLA and the Tribune identified and defined the Judge Ward Records and the Fraternization Records with specificity. For example, with respect to the Judge

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[5] Article I, Section 24(a) of the Florida Constitution provides for the "the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . This section specifically includes the legislative, executive, and *judicial branches* of government." (Emphasis added.)

In addition, judicial records are open pursuant to Florida Rule of Judicial Administration 2.051(a): "[t]he public shall have access to all records of the judicial branch of government and its agencies, except as provided below."

Ward Records, WFLA and the Tribune sought access to, among other things, records created, received, or maintained by Chief Judge Alvarez relating to e-mail messages between Judge Ward and certain other judges and judicial assistants. (*See* Petition for Mandamus at 4-6.) The only reason that Chief Judge Alvarez would have copies of such e-mails in his possession would be if he was investigating or reviewing the conduct of Judge Ward. As it turns out, Chief Judge Alvarez did in fact review Judge Ward's conduct and made and received judicial records relating to that review. (*See, e.g.*, Response, Tab 17, at J-00059 (Affidavit of Michelle Boylan); *id.*, Tab 17, at J-00062-63 (Affidavit of D.D. Agostini).)

That such records constitute "judicial records" is beyond dispute. Rule 2.051(b) defines "judicial records" as records "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." (Emphasis added). Chief Judge Alvarez reviewed Judge Ward's conduct, and this review occurred in the offices of the Hillsborough County Courthouse, with the assistance of staff employed by the Hillsborough County Court, and pursuant to the expenditure of public funds. Certainly, therefore, this review was made *in connection with* the transaction of official business.

In fact, in the course of this proceeding, Chief Judge Alvarez has never taken

the position that the Judge Ward Records were not "judicial records." Rather, he has consistently argued that the Judge Ward Records are exempt from disclosure because they fall within an exception to Rule 2.051. (*See* Response at 7-10.) Thus, at this late stage, Chief Judge Alvarez should not be heard to argue that the Judge Ward Records are not "judicial records."

With respect to the Fraternization Records, on the other hand, Chief Judge Alvarez has consistently argued that they are *not* "judicial records" because they were not created or received in connection with the transaction of official business. For example, he has argued that if such records are judicial records, "[s]imple invitations to lunch would be subject to scrutiny. Birthday cards among colleagues would become a matter of public record. . . . Every letter, e-mail, 'post-it' note, greeting card, and telephone message among court personnel would need to be identified, collected, preserved, and readied for possible production to the public and press." (*Id.* at 13-14.) This argument is nonsense.

WFLA and the Tribune defined the Fraternization Records as records made or received *by Chief Judge Alvarez's office*. To the extent that a judge of the Thirteenth Judicial Circuit gave a birthday card to a staff member, that card would not be encompassed by the Petitioners' request, *unless* Chief Judge Alvarez had obtained the card in connection, for example, with his administrative review of the

conduct of the judge who sent the card. If Chief Judge Alvarez conducted such a review, the hypothetical birthday card would be a "judicial record" and would be subject to disclosure. WFLA's and the Tribune's request for Fraternization Records would not require Chief Judge Alvarez to collect and maintain greeting cards, "post-it" notes, and telephone messages, *unless he was already doing so in his administrative role as chief judge.*

Rule 2.050(b), Rules of Judicial Administration, establishes that a chief judge has general authority to "exercise administrative supervision of all courts within the judicial circuit . . . and over all judges and officers of the courts." *See* Fla. R. Judicial Admin. 2.050(b)(2). It is precisely this administrative supervision that Chief Judge Ward was engaged in when he obtained the Judge Ward Records and Fraternization Records. As such, those records were "judicial records" and were subject to disclosure. Nevertheless, the two-judge majority of the Second District concluded that "[b]y and large, none of the documents requested by the petitioners is a 'judicial record.'" Opinion at 3. Remarkably, this decision was reached without the benefit of any review whatsoever of the actual records held by Chief Judge Alvarez. Moreover, the decision is belied by the facts and represents an extraordinarily restrictive and impermissible reading of Rule 2.051 and the Florida Constitution that cannot be justified.

For example, the majority stated that the records sought by WFLA and the Tribune "could not have been made or received by [Chief Judge Alvarez] in his capacity as chief judge pursuant to court rule, law or ordinance, or in connection with the transaction of official business." Opinion at 3. The ostensible basis for this conclusion is that a chief judge is not *specifically* imbued by the Constitution or the Rules of Judicial Administration with the authority to supervise the romantic or sexual behavior of other judges. *Id.* According to the majority, because Chief Judge Alvarez had no such authority, he could not have reviewed the alleged misconduct of Judge Ward and could not have made or received the Judge Ward Records. This reading of Rule 2.051 strains logic. But even assuming it is correct, it simply begs the question: If a chief judge has no such authority, then what was Chief Judge Alvarez doing when he used Hillsborough County Court facilities and resources to review the conduct of Judge Ward? If he was not acting in connection with the transaction of official business, what was he doing? The answer, of course, is that he was acting in his administrative role as chief judge – *i.e.*, he was acting *in connection with* the transaction of official business.
[6]

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[6] In 1987 the Rules of Judicial Administration were amended by adding the following language for the specific purpose of emphasizing the importance of a chief judge's general administrative, managerial, and leadership abilities: "The

In her dissent, Acting Chief Judge Fulmer provides a telling example of "official business" that is not specifically required by the Constitution or by the Rules of Judicial Administration:

> It is my view that any action taken by a chief judge that relates to the day-to-day functioning of the courts constitutes the transaction of official business, whether or not the action is expressly listed as a duty in Florida Rule of Judicial Administration 2.050. For example, if a chief judge engaged in negotiations and correspondence regarding the lease of branch courthouse facilities, I assume the majority would agree that any resulting e-mail communication or other documentation would be subject to public disclosure because the chief judge would be carrying out an administrative activity in his capacity as chief judge. However, the enumerated duties of a chief judge do not include the procurement of leases for courthouse facilities.

Opinion at 13 (Fulmer, J., dissenting).

This Court has expressed essentially the same opinion and has declared that a court's administrative duties are part of its basic functions. As such, records created or received by a judge in his administrative capacity are very much "judicial records" and are open to public review:

> The amendments to the Florida Rules of Judicial Administration are

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selection of the chief judge should be based on managerial, administrative, and leadership abilities." *See In re: Amendment to Rules of Judicial Admin. – Rules 2.040(a)(2) and 2.05(c)*. Thus, Rule 2.050 envisions broad administrative and managerial duties for the chief judge, even though it does not specifically enumerate each and every activity or function in which a chief judge will engage.

> intended to reflect the judiciary's responsibility to perform both an administrative function and an adjudicatory function. In its administrative role, the judiciary is a governmental branch expending public funds and employing government personnel. Thus, records generated while courts are acting in an administrative capacity should be subject to the same standards that govern similar records of other branches of government.

In re Amendments to the Florida Rules of Judicial Administration, 608 So. 2d 472 472-73 (Fla. 1992).

The district court majority's conclusion that Chief Judge Alvarez could not have been acting in connection with the transaction of official business when he received the Judge Ward Records cannot withstand scrutiny. Indeed, the majority's reasoning would require that, when considering the question of whether documents constitute "judicial records," a court disregard the undisputed facts. Under the majority's reasoning, whether the records actually were made or received would not be the relevant question. Instead, the relevant question would become: Based upon a judge's specifically enumerated duties, would a hypothetical judge have made or received the requested records? If the answer is "no," then the records are not judicial records, regardless of the events that actually transpired. But this cannot be the proper standard for determining whether records are "judicial records" under Rule 2.051.

As the majority admits, its conclusion that the Judge Ward Records are not

"judicial records" is really nothing more than an "assumption." Opinion at 8. But the Petitioners' right to the Judge Ward Records and Fraternization Records should not turn on assumptions. Instead, access to the records should turn on what really happened. Because the record makes clear that Chief Judge Alvarez was acting in his role as chief administrator of the Thirteenth Judicial Circuit when he obtained the records, they are "judicial records" and are subject to disclosure.

II. THE RECORDS ARE NOT EXEMPT FROM DISCLOSURE

Throughout the proceedings below, Chief Judge Alvarez argued that he was not required to disclose the Judge Ward Records because he had delivered those records to the JQC and the JQC Rules made them exempt. (*See* Response at 8.) He also argued that the Judge Ward Records constituted "complaints" of misconduct and therefore were exempt from disclosure under Rule 2.051(c)(3)(A). (*Id.*) In denying WFLA's and the Tribune's Petition for Mandamus, however, the Second District did not rely on either of these arguments. Instead, it concluded that the records were exempt pursuant to certain sexual harassment complaint procedures. *See* Opinion at 6-8. As explained below, the Second District's approach is fundamentally flawed, and Chief Judge Alvarez's arguments are not supported by the facts or the law.

A. The So-Called Complaint Procedures Do Not Create Additional

Categories Of Exempt Documents

Although the majority of the Second District panel concluded that most of the records sought by WFLA and the Tribune were not judicial records, it did acknowledge that some of them could be. Nevertheless, the court denied access to all of the records because it concluded that the records were entitled to be treated as confidential under vaguely identified sexual harassment complaint procedures, even though such sexual harassment complaint procedures had not been invoked by any alleged victim or witness in this matter. This Court should reject the Second District's reliance on these inapplicable and uninvoked sexual harassment procedures.

According to the majority, in 1993 this Court adopted a uniform policy and procedure addressing, among other things, complaints of sexual harassment by or against employees of the State Courts System, and ordered that the policy and procedure be incorporated in the *State Courts System Personnel Rules and Regulations*. *See* Opinion at 8 (citing *In re Personal Rules and Regulations*, Fla. Admin. Order (Sept. 23, 1993) [hereinafter, the "Administrative Order"].) The majority further explained that, under the complaint procedure, a court's chief judge performs certain functions when complaints of sexual harassment are lodged, such as attempting to help the parties resolve the matter informally. Without citation to

any specific "complaint procedures," the majority indicated that the procedures include a provision stating that "[w]ritten materials developed through the use of this procedure are confidential pursuant to Rule 2.051, Public Access to Judicial Records, Florida Rules of Judicial Administration." Opinion at 6 (quoting unidentified complaint procedures).

Because Rule of Judicial Administration 2.051(c)(8) excludes from disclosure judicial records that are "deemed to be confidential by court rules," and because the majority apparently interpreted the "complaint procedures" as court rules, the majority concluded that the records in this case were confidential. The majority's reasoning must be rejected for numerous reasons.

1. The Supreme Court Complaint Procedures Apply To Employees Of The Supreme Court, Not To Chief Judge Alvarez

While the majority's opinion is unclear, it appears that the "complaint procedures" it relied upon are the *Supreme Court Civil Right Complaint Procedures* ("Supreme Court Complaint Procedures" or "Sup. Ct. Comp. Pro.") which were attached to and adopted as part of the Administrative Order.[7] *See* Opinion at 6. But, by their very terms, the Supreme Court Complaint

[7] On September 29, 2000, the Second District issued an Order directing Chief Justice Alvarez to supplement the Appendix to his Response with copies of

Procedures do *not* apply to Chief Judge Alvarez, the other judges of the Thirteenth Judicial Circuit, or the personnel employed at the Hillsborough County Courthouse. Rather, as the Supreme Court Complaint Procedures make clear, "[o]nly complaints of discrimination, *by and against officers and employees of the Supreme Court* . . . should be filed using the procedures described herein." (Sup. Ct. Comp. Pro. at 1 (emphasis added).)

It is beyond dispute that Chief Judge Alvarez is not an employee or officer of the Supreme Court. Nor was Judge Ward an officer or employee of the Supreme Court. Similarly, the individuals who could be the subject of certain of the Judge Ward Records (including Judge Claudia Isom, Judge Vivian May, Judicial Assistant Michelle Boylan, and Judicial Assistant Dee Dee Agostini) were not employees or officers of the Supreme Court. Because none of the interested parties were officers or employees of the Supreme Court, the Supreme Court Complaint Procedures do

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Thirteenth Judicial Circuit procedures, if any, adopted pursuant to the Administrative Order. Attached to the court's September 29, 2000, Order were certain excerpts form the Administrative Order, including a copy of the Supreme Court Complaint Procedures. (*See* Sept. 29, 2000, Order and Exhibits attached thereto.)

The Supreme Court Complaint Procedures contain the language quoted by the majority concerning confidentiality: "Written materials developed through the use of this procedure are confidential pursuant to Rule 2.051, Public Access to Judicial Records, Florida Rules of Judicial Administration." (*See* Supreme Court Complaint Procedures at 2, ¶ C.)

not apply to them.

Moreover, other provisions of the Supreme Court Complaint Procedures also make clear that they do not apply to the Chief Judge of the Thirteenth Judicial Circuit. For example, the Supreme Court Complaint Procedures require the Chief *Justice* to appoint an intake officer to receive complaints of sexual harassment. (*See* Sup. Ct. Comp. Pro. at 1, ¶ A.) They further provide that the intake officer will report to the Chief *Justice*, and they authorize the Chief *Justice* to "resolve the complaint, informally, through mutual conciliation." (*Id.* at ¶ B.2.) They make no mention of a chief *judge's* duties. Obviously, Chief *Judge* Alvarez was not the Chief *Justice* of the Supreme Court and did not act pursuant to the Supreme Court Complaint Procedures. Thus, there is no basis for invoking the Supreme Court Complaint Procedures to shield the Judge Ward Records from disclosure.

2. The Supreme Court Complaint Procedures Were Not Utilized In This Matter

The majority held that the Supreme Court Complaint Procedures are applicable to the records at issue in this case regardless of whether those Procedures were ever actually invoked or used:

> We do not believe that the intended beneficiaries of such confidentiality provisions – victim, witness, and accused alike – must lose the benefit of that important policy if one of the participants in the complaint process does not invoke it when responding to an inquiry,

or does not strictly follow the prescribed investigation procedure.

Opinion at 8. This argument must be rejected for three reasons.

First, as explained above, the Supreme Court Complaint Procedures have no application to the judges of the Thirteenth Judicial Circuit. No one involved in the collection or creation of the Judge Ward Records had any basis for invoking or relying upon the Supreme Court Complaint Procedures. It defies reason to suggest that the alleged victims or witnesses relied on procedures that plainly were not applicable to them.

Second, no interested party ever even attempted to invoke the Supreme Court Complaint Procedures or any other potentially relevant procedures. On the contrary, the alleged victims of Judge Ward's conduct specifically declined to file a complaint or pursue any formal action against him. (*See* Response, Tab 17, at J-00059 (Affidavit of Michelle Boylan); *id*., Tab 17, at J-00062-63 (Affidavit of D.D. Agostini).) As explained by Acting Chief Judge Fulmer in her dissent:

> In this case, those persons who could be protected by the confidentiality provisions have expressly stated that they do not wish to initiate any complaints. Their decision not to invoke the complaint procedures in no way effects the rights of those who do invoke the procedures to receive the protections afforded by the confidentiality provisions.

Opinion at 14-15 (Fulmer, J., dissenting).

In the context of the Public Records Act, courts must construe exemptions

narrowly. *See, e.g.*, *Krischer v. D'Amato*, 674 So.2d 909, 911 (4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987). Because the same public policy supports both the Public Records Act and Rule 2.051(a), the same requirement that exemptions be narrowly construed should apply to judicial records. Indeed, the Florida Constitution requires a narrow construction of public records exemptions. *See* Fla. Const. Art. I, Sec. 24(c) (exemptions "shall be no broader than necessary to accomplish the stated purpose of the law."). Thus, where there is doubt as to the applicability of an exemption, it should be resolved in favor of disclosure. *See, e.g.*, *Tribune Co. v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986). Here, because the Supreme Court Complaint Procedures are inapplicable and were never even invoked, they cannot hide the Judge Ward Records from disclosure, and any doubt must be resolved in favor of disclosure.

The third reason for rejecting the majority's reliance on the Supreme Court Complaint Procedures is that they are not "court rules" that can create an exception to Rule 2.051(a). Rule 2.051(c)(8) states that judicial records are exempt from disclosure if they are "presently deemed to be confidential by *court rule*." (Emphasis added.) The meaning of the term "court rule" is defined in Rule 2.020(a). The procedures for adopting "court rules" are set forth in detail in Rule

2.130. But the Supreme Court Complaint Procedures were not adopted as "court rules" pursuant to Rule 2.130. Rather, they were adopted pursuant to the Administrative Order. Rule 2.020(c) defines "administrative order" and makes clear that an "administrative order" differs from and is *not* a "court rule." Because the Supreme Court Complaint Procedures are not court rules, the Second District erred when it concluded that they made the Judge Ward Records and Fraternization Records exempt from disclosure. The majority's unfounded reliance on the Supreme Court Complaint Procedures must be rejected by this Court.

3. Personnel Manuals And Employee Handbooks Do Not Create Additional Categories Of Exempt Documents

While explaining its reasons for finding the Judge Ward Records confidential, the majority discussed but did not specifically rely upon three other documents that were part of the record below, including personnel manuals and employee handbooks.

[8] Opinion at 7. So far as Chief Judge Alvarez argues that such documents prevent disclosure of the Judge Ward Records, the argument must be rejected.

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[8] These documents were provided to the Court by Chief Judge Alvarez on October 4, 2000. *See Supplement to Appendix of the Honorable F. Dennis Alvarez*, at Exhibits 20, 22, and 23.

The Florida Constitution vests the power to make rules of judicial administration and procedure solely in the Florida Supreme Court. *See* Fla. Const. Art. V, Sec. 2(a) ("The supreme court shall adopt rules for the practice and procedure in all courts . . . ."). To the extent the three other documents discussed by the majority were promulgated or adopted by entities other than the Florida Supreme Court, they obviously could not create exemptions to Rule 2.051(a)'s requirement that judicial records be open to the public. Thus, for example, the employee handbook issued by the Thirteenth Judicial Circuit's Administrative Office of the Courts (discussed in the Opinion at 7) could not, constitutionally, exclude from disclosure any judicial records that are not already excluded from disclosure under Rule 2.051(c).

Similarly, the Office of the State Courts Administrator has issued a pamphlet titled "Sexual Harassment" that was apparently adopted for use by the Thirteenth Judicial Circuit. *See* Opinion at 7. Of course, the circuit courts are *not* authorized to create their own exceptions to Rule 2.051(a), and any effort to do so would not pass constitutional muster.

Finally, as the majority explained, the Florida State Courts System Personnel Regulations Manual includes a statement reflecting the State's policy against discrimination in the workplace. Opinion at 7. Although this policy is laudable, the Personnel Regulations Manual could not create – and does not even purport to

create – an exception to Rule 2.051. Therefore, there is no applicable exception to Rule 2.051(a) contained in either the Supreme Court Complaint Procedures or the other manuals and handbooks discussed by the majority. This Court should reject the Court of Appeal's efforts to convert the Supreme Court Complaint Procedures into new exceptions to Rule 2.051(a).

B. The Records Are Not Exempt Under Rule 2.051(c)(3)(A) Because There Is No Record Evidence That A Complaint Of Sexual Harassment Or Misconduct Was Ever Lodged In This Case

Throughout this proceeding, Chief Judge Alvarez has maintained that the Judge Ward Records are exempt from disclosure under Rule 2.051(c)(3)(A), which excludes from disclosure judicial records that constitute "[c]omplaints alleging misconduct against judges, until probable cause is established." Chief Judge Alvarez's reliance on Rule 2.051(c)(3)(A) is remarkable because there is absolutely no record evidence in this case that a formal (or informal) complaint of sexual harassment or discrimination was ever lodged by anyone.

The record in this case is devoid of any assertion by Chief Judge Alvarez that he received a formal complaint of sexual harassment – or of any misconduct – against Judge Ward. Indeed, Chief Judge Alvarez stated precisely the opposite. In response to the Tribune's October 1999 request for records, Chief Judge Alvarez

stated that "I do not have custody of, nor am I aware of, any '*complaints* of sexual harassment and/or sexually inappropriate comments or behavior made against Hillsborough Circuit Judge Edward Ward.'" (Petition for Mandamus, Tab C (emphasis added).) Chief Judge Alvarez has never represented on the record that he received a formal complaint about Judge Ward from anyone.

Moreover, in the records that were obtained and released by the JQC, there was no formal complaint against Judge Ward. To the contrary, two of the purported victims executed affidavits stating that they did *not* want to file complaints against Judge Ward. (*See* Response, Tab 17, at J-00059 (Affidavit of Michelle Boylan), ¶ 4 ("I told Judge Alvarez and Judge Greco that I did not want either of them to speak with Judge Ward."); *id.*, Tab 17, at J-00062-63 (Affidavit of D. D. Agostini), ¶ 7 ("I told Judge Alvarez that I did not want to file a formal complaint against Judge Ward . . . .").) With no evidence that anyone filed a complaint with Chief Judge Alvarez concerning Judge Ward, the Judge Ward Records cannot be withheld in their entirety under the "complaints" exemption in Rule 2.051(c)(3)(A), and the Court should reject such an argument.

C. The Judge Ward Records Cannot Be Shielded From Disclosure By Transferring Them To The JQC

Throughout this proceeding, Chief Judge Alvarez also has taken the position

that the Judge Ward Records are exempt from disclosure because he provided them to the JQC. This argument is flatly contradicted by the record and must be rejected as a matter of fact and law.

It is uncontested that on October 11, 1999, the Tribune made a written request to Chief Judge Alvarez for the Judge Ward Records. It also is uncontested that as of August 1999, more than one month earlier, Chief Judge Alvarez had in his possession or custody the Affidavits of both Michelle Boyland and D. D. Agostini, two of the victims of Judge Ward's allegedly inappropriate behavior. Chief Judge Alvarez also may have had in his possession his notes regarding his meeting with Ms. Boyland and Ms. Agostini, and the notes taken by court counsel David Rowland regarding such meetings. Nevertheless, Chief Judge Alvarez did not respond to the Tribune's October 11 request by indicating that any such documents had been provided to the JQC and were now JQC records. Instead, he simply denied the existence of such records. (*See* Petition for Mandamus, Tab C.) Thus, inasmuch as Chief Judge Alvarez attempts to argue that the Judge Ward Records were in the possession of the JQC at all material times, the argument is belied by the facts.

Moreover, when Chief Judge Alvarez responded to the Petitioners' second and third requests for the Judge Ward Records on March 6 and March 15, 2000,

the JQC had already filed formal charges against Judge Ward – *i.e.*, the JQC had already found that probable cause existed that Judge Ward had engaged in misconduct. (*See* Petition for Mandamus, Tab. A.) Despite this fact, Chief Judge Alvarez still refused to disclose the Judge Ward Records. As the Court of Appeal correctly concluded, Chief Judge Alvarez certainly was not entitled to withhold the Judge Ward Records after the probable cause finding was made. *See* Opinion at 5-6.

Finally, regardless of the timing of the JQC's finding of probable cause, neither the Florida Constitution nor the Rules of Judicial Administration allow a judge to deny access to judicial records simply by transferring them to a different custodian. *Cf. Tober v. Sanchez*, 417 So. 2d 1053, 1054 (Fla. 3d DCA 1982) ("To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act."). At no point in this proceeding did the Petitioners ask Chief Judge Alvarez to disclose records that he provided to the JQC. Instead, the Petitioners always asked Chief Judge Alvarez to disclose documents *he* had made or received, regardless of whether he later transferred copies of the documents to another custodian. Whether the Petitioners could have sought and obtained the same documents from the JQC is not the question; the Petitioners sought and were

entitled to obtain documents from Chief Judge Alvarez himself.

As the Court knows, the JQC is a commission created by the Florida Constitution and vested with jurisdiction to investigate judges and recommend to the Florida Supreme Court the removal from office or discipline of such judges. *See* Fla. Const. Art. V, § 12(a). The JQC operates pursuant to the Florida Judicial Qualification Commission Rules. *See* Jud. Qual. Comm. R. 1 ("These rules apply to all proceedings before the Judicial Qualifications Commission involving the discipline, retirement or removal [of members of the judiciary].").

The JQC Rules set forth the procedures for the JQC to investigate allegations of misconduct concerning judges, to file formal charges against such judges, and to conduct hearings on those charges. Thus, pursuant to JQC Rules, an investigative panel of the JQC is authorized to conduct its own investigation of a judge once it receives a complaint of misconduct. The investigative panel is authorized to compile its own evidence, including subpoenaing witnesses and receiving documentary evidence. *See* Jud. Qual. Comm. R. 3(b); *id.* 6(b).

Until formal charges are filed against a judge, the JQC Rules make clear that the proceedings of the JQC investigative panel are to remain confidential. *See* Jud. Qual. Comm. R. 10(a) (upon filing of formal charges with Supreme Court, the Notice of Formal Charges and all subsequent proceedings shall be public); *id.*

23(a) (same). This Court has construed this confidentiality rule to mean that the JQC investigative panel's initial investigative proceedings, and any complaint against a judge filed with the JQC, are to be treated as confidential until probable cause is found. *In re Inquiry Concerning a Judge re Graziano*, 696 So. 2d 744, 751 (Fla. 1997); *Forbes v. Earle*, 298 So. 2d 1, 4 (Fla. 1974).

Chief Judge Alvarez denied WFLA's and the Tribune's request for the Judge Ward documents on the basis of the *JQC's Rules*. But the JQC's Rules have no bearing on this matter because WFLA and the Tribune never sought records compiled by the JQC during its investigation of Judge Ward, and they do not apply to Chief Judge Alvarez in his administrative capacity as chief judge. *See* Jud. Qual. Comm. R. 1 (defining scope of JQC rules as applying to proceedings before the JQC only). Rule 2.051(c)(8), which Chief Judge Alvarez relied upon, is similarly inapposite. Rule 2.051(c)(8)

[9] codifies the Rules of the JQC within the Rules of Judicial Administration. In other words, it provides that the JQC's records, which are themselves "judicial records," are not open to public inspection if JQC Rules require them to remain closed. But

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[9] Rule 2.051(c)(8) exempts from disclosure "All court records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission."

Rule 2.051(c)(8) does not convert judicial records made and received by the Chief Judge of the Thirteenth Judicial Circuit into JQC records.

Chief Judge Alvarez's argument about transferring the Judge Ward Records to the JQC is very similar to the argument raised and rejected in *In re Grand Jury Investigation Spring Term 1998*, 543 So. 2d 757 (2d DCA 1989). In that case, a Judge was investigated by the state attorney for the Thirteenth Judicial Circuit and by the Hillsborough County Sheriff's Office. Evidence obtained by the state attorney and the Sheriff's Office was presented to a grand jury, which returned a no true bill. The Judge then moved to have all records in the matter sealed. Among other things, the Judge argued that because evidence presented to a grand jury is confidential, and because the investigative files of the state attorney and Sheriff's Office contained information that was presented to the grand jury, such investigative files should be sealed. The court disagreed:

> It is clear to us . . . that there exist investigative records relating to investigative efforts by the state attorney for the 13th Judicial Circuit and the Hillsborough County Sheriff's Office, occurring before the grand jury probe of Judge Spicola began, that are separate or separable from records of the grand jury investigation and proceedings. These records are subject to public inspection and we cannot allow the governmental agencies involved to avoid disclosure merely by transferring them away.

Id. at 759.

The same rationale applies in this case. Chief Judge Alvarez, in his

administrative capacity as Chief Judge of the Thirteenth Judicial Circuit, made and received records relating to Judge Ward. Such records, therefore, were judicial records, and as such were subject to public inspection, regardless of whether Chief Judge Alvarez provided copies of the same records to the JQC.

[10]

To allow the Chief Judge to avoid disclosure by transferring the records away would defeat the purpose of Article I, Section 24 of the Florida Constitution and Rule 2.051(a). Indeed, in the analogous context of the Public Records Act, it is clear that a state agency may not defeat the requirement that "public records" be open by transferring them to another custodian. *See, e.g.*, *Wisner v. City of Tampa Police Dep't*, 601 So. 2d 296, 298 (Fla. 2d DCA 1992) ("The City may not allow a private entity to maintain physical custody of public records to circumvent the public records chapter."); *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487, 492 (2d DCA 1990) (city has a duty to ensure that documents that are

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[10] Because no discovery was permitted in this case, there is no clear record as to when Chief Judge Alvarez first began making or receiving the Judge Ward Records. But, based on documents dating from August 1998 and August 1999, it appears that Chief Judge Alvarez had custody of judicial records relating to Judge Ward long before the JQC began its investigation, and long before he provided records to the JQC. Thus, for a period of time (perhaps more than a year), Chief Judge Alvarez had records concerning Judge Ward that he did not, at the time, intend to provide to the JQC.

public records are maintained as public records); *Tribune Company v. Canella*, 438 So. 2d 516 (Fla. 2d DCA 1983), *rev'd on other grounds*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom.*, *DePerte v. Tribune Company*, 105 S. Ct. 2315 (1985); *Tober v. Sanchez*, 417 So. 2d 1053, 1054 (Fla. 3d DCA 1982) ("To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act.").

The same reasoning applies here. As soon as Chief Judge Alvarez made or received the Judge Ward Records (or, for that matter, the Fraternization Records), they became judicial records. Chief Judge Alvarez could not change the status of these records merely by providing copies to the JQC.

Nearly two years after the Petitioners first sought the Judge Ward Records, it is well past time for those records to see the light of day. As this Court so eloquently explained almost 20 years ago, "Public access [to judicial records] serves as a check on corrupt practices by exposing the judicial process to public scrutiny." *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1, 7 (1982). Unfortunately, the misconduct reflected in the underlying Judge Ward Records and Fraternization Records suggests that there have been "corrupt practices" in the judicial branch. By allowing public scrutiny of those records, however, this Court

can take an enormous step toward checking those practices.

III. THE COURT SHOULD ANNOUNCE PROCEDURES FOR SEEKING ACCESS TO JUDICIAL RECORDS IN THE DISTRICT COURTS OF APPEAL

This is a case of first impression for this Court. It presents critical questions not only about the definition of judicial records and the exemptions that may apply to those records, but also fundamental questions about the proper procedures for litigating judicial records disputes in the district courts of appeal. Indeed, as the majority below frankly acknowledged, "this dispute has launched the [district court] into uncharted waters." Opinion at 8.

Chief Judge Alvarez denied the Petitioners access to records not through formal litigation and a written order or judgment, but rather through a series of letters and telephone calls. Once he denied access to the records, Rule 2.051(d)(1) compelled the Petitioners to seek judicial review of his decision in the Second District. *See* Fla. R. Judicial Admin. 2.051(d)(1) ("Where a judge has denied a request for access to records in the judge's possession or custody, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access."). Thus, when this case was brought before the Second District, it was the first time the parties were able to brief their arguments fully and to present their dispute to a neutral decision-maker.

Despite Rule 2.051(d)(1)'s requirement that this action be brought in the district court of appeal, the district courts of appeal are not well equipped to oversee the litigation of original actions. The necessity of three judge panels in the district courts makes it cumbersome to resolve day-to-day litigation disputes. Moreover, unlike the circuit courts, the district courts do not operate pursuant to a set of procedural rules that govern the use of interrogatories, requests for admission, requests for production, or depositions. And yet, as this case vividly illustrates, if the Petitioners had been afforded the opportunity to take discovery, additional evidence could have been presented to the district court. Instead, in the absence of a record, the majority below based its decision on "debatable" assumptions. Opinion at 8. But assumptions are not a proper basis for adjudicating legal disputes, particularly those, like this case, involving matters of paramount public interest.

In the future, other district courts will be faced with the same problems the Second District faced in this case. In order to eliminate the risk that those courts too will be forced to render decisions based upon debatable assumptions, the Petitioners respectfully suggest that the Court take this case as an opportunity to announce the proper procedures for district courts to follow when considering petitions for access to judicial records. In particular, the Petitioners make the

following suggestions:

1. The Custodian Of The Records Must Provide The Records *In Camera* To The District Court. The key to ruling on a petition for access to judicial records is understanding what the records are. And the best way for the court to understand what the records are is to receive the records for review. Moreover, by providing the records *in camera*, any concerns about disclosing purportedly exempt materials will be avoided. Indeed, in the analogous context of the Public Records Act, *in camera* review is specifically mandated. *See* § 119.07(2)(b), Fla. Stat. (in civil actions for access to public records, purportedly exempt records shall be submitted to court *in camera*).

In this case, the Petitioners repeatedly requested that Chief Judge Alvarez deliver the records in question *in camera* to the Second District for review. Chief Judge Alvarez refused to do so. By requiring judges and other judicial personnel, in the future, to deliver the records to the district court, this Court would undoubtedly further the dual goals of proper decision making and expedited consideration of requests for access to judicial records. *See, e.g.*, Fla. R. Judicial Admin. 2.051(d) (stating that review of denials of access to judicial records should be expedited). Thus, the Petitioners believe that delivery of the records *in camera* is the single most important step in assuring proper decision-making in the future.

2. The District Court Should Appoint A Special Master To Oversee Discovery And To Review The Records And Report To The Court. In order to avoid bogging down the district courts by requiring them to spend significant amounts of time hearing discovery disputes and reviewing documentary evidence, the district court could be required or encouraged to appoint a special master for those purposes. Like magistrate judges in the federal system, special masters could be assigned to hear and render reports and recommendations on discovery disputes. *See, e.g.*, 28 U.S.C. § 636(b) (describing duties that may be carried out by magistrate judges). The final authority to issue orders on discovery motions would, of course, remain with the district courts.

Similarly, after reviewing the records provided *in camera* to the court, the special master would be required to provide to the court a confidential report and recommendation concerning the records. Based on its own review of the record, the court could adopt the special master's report, adopt it with changes, or reject it and render a different opinion.

Throughout this matter the Petitioners asked that a special master be appointed. The Second District never ruled on that request and never appointed a special master.

3. The District Courts Should Permit Limited Discovery Consistent With

The Florida Rules Of Civil Procedure and the Florida Public Records Act.

Although the most important evidence for the district court to consider is the records themselves, other critical evidence likely could be developed through interrogatories, requests for admission, and depositions. The Florida Rules of Civil Procedure already provide detailed standards for conducting discovery. Those rules, and the rules utilized under the Public Records Act – *see, e.g.*, § 119.07, Fla. Stat. – could easily be employed by the district courts to govern discovery and procedure relating to petitions for access. The Petitioners respectfully suggest that the only significant change that should be made to the Rules is that the time for responding to discovery be reduced (from 30 days to 10 days) to facilitate expedited review of the petition for access.

Here, WFLA and the Tribune sought to take the deposition of Chief Judge Alvarez. Chief Judge Alvarez asked the district court to prohibit his deposition, which the district court did. Thus, WFLA and the Tribune were precluded even from asking general questions about the timeframe during which the records were made or received by Chief Judge Alvarez, the purpose of making or receiving the records, and whether public funds were spent in making or receiving the records. The answers to these questions would not disclose the substance of the records themselves, but would provide a proper basis for assessing whether the records

actually were judicial records.

4. This Court Should Stress To The District Courts The Importance Of Expedited Review Of Petitions For Access. Rule 2.051(d) requires that district courts provide expedited review of denials of access to judicial records. The analogous Public Records Act makes this requirement even more concrete: whenever an action is filed to enforce the right of public access, "the court shall set an immediate hearing, giving the case priority over other pending cases." *See* § 119.11(a), Fla. Stat. Despite Rule 2.051(a)'s requirement of promptness, in this case the Second District took more than one year to issue an opinion. Such a delay violates both the letter and the spirit of Rule 2.051(d) and should not be countenanced. As this Court already has made abundantly clear, "News delayed is news denied. To be useful to the public, news events must be reported when they occur." *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976). The Petitioners respectfully ask that the Court use this case as an opportunity to remind the district courts that expedited review of petitions for access is not just an aspirational goal, but a legal necessity.

CONCLUSION

Because Chief Judge Alvarez had a duty to disclose the Judge Ward Records and Fraternization Records, and because he failed to fulfill that duty, WFLA and the Tribune were entitled to a writ of mandamus compelling disclosure of the records. The Court should reverse the District Court of Appeal and direct that a writ of mandamus be issued. The Petitioners also respectfully suggest that the Court should set forth for the district courts the proper procedures to follow in reviewing petitions for access to judicial records in the future.

For all of these reasons, the Second District Court of Appeal's decision denying the Petition for a Writ of Mandamus should be reversed with directions to the Second District Court of Appeal to grant the Petition for Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by U.S. Mail to C. STEVEN YERRID, ESQ. and RICHARD C. ALVAREZ, ESQ., Yerrid, Knopik & Krieger, P.A., 101 E. Kennedy Blvd., Suite 2160, Tampa, FL 33602-5148; THOMAS E. WARNER, ESQ., Solicitor General on behalf of Robert A. Butterworth, Attorney General, Office of the Attorney General, The Capitol, PL01, Tallahassee, FL 32399-1050; W. ROBERT VEZINA, III, ESQ., Vezina, Lawrence & Piscitelli, P.A., 318 N. Calhoun Street, Tallahassee, FL 32301; and to W. DEXTER DOUGLASS, ESQ., Douglass Law Firm, P.A., 211 East Call Street, P.O. Box 1674, Tallahassee, FL 32302, this _____ day of August, 2001.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief, typed in 14 point (proportionately spaced) Times New Roman, complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Attorney

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