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March 30, 2005

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Comment to Proposed Changes to Florida Rule of Judicial Administration 2.170 - Case No. SC05-173

Dear Mr. Hall:

We file this comment on behalf of Cable News Network LP, LLLP (CNN); The E. W. Scripps Companies properties in Florida, including WFTS (Tampa–St. Petersburg), WPTV (West Palm Beach), the *Naples Daily News*, the *Stuart News*, *The Tribune* (Ft. Pierce), and the *Vero Beach Press Journal*; Media General Operations, Inc., d/b/a *The Tampa Tribune* and WFLA-TV (Tampa-St. Petersburg); Post-Newsweek Stations Florida, Inc., d/b/a WPLG/Channel 10 (Miami-Ft. Lauderdale), WJXT (Jacksonville) and WKMG (Orlando); and Sunbeam Television Corporation, d/b/a WSVN/Channel 7 (Miami-Ft. Lauderdale) (collectively referred to as the "Media"). The Media routinely use still or television cameras in gathering news and informing the public about civil and criminal proceedings throughout the State of Florida. We file this comment concerning the proposed changes to Florida Rule of Judicial Administration 2.170, governing cameras in the courtroom.

Specifically, the Media oppose proposed subsection 2.170(a)(iii), investing judges with broad discretion to deny camera access to protect "rights of privacy" and "privileged and confidential matters."[1] The Media also object to proposed new section 2.170(b), which permits courts to attempt to provide juror anonymity without any hearing or any guiding standard beyond unfettered discretion.[2] Both provisions revisit concerns that were long ago put to rest by an unbroken line of federal and state cases, most particularly by this Court in *In re Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (Fla. 1979). The Media are aware of no systemic issues that would provoke these sweeping revisions to the current camera access model. [3]

These amendments would effect a radical change in the presumptions that have governed the public's right of access to judicial proceedings since 1979. Under current law, limited restrictions on camera coverage of court proceedings can be imposed when necessary on a case-by-case basis. The revised rule assumes that such closures are routinely necessary and would empower trial courts to impose such restrictions without any guiding standards. No justification

[1] The proposed language reads:

> Subject at all times to the authority of the presiding judge to: (i) control the conduct of the proceedings before the court; (ii) ensure decorum and prevent distractions; (iii) protect rights of privacy and prevent disclosure of privileged and confidential matters; and (iv) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed . . .

[2] New subsection (b) provides, in full:

> **Photographing Jurors' Faces.** It shall be within the sound discretion and authority of the trial judge to prohibit the photographing, either by movie, video, or still camera, of the faces of the prospective or seated jurors, either individually, jointly, or collectively. Such prohibition shall not be construed as an exclusion of electronic media coverage or as exclusion of coverage of a particular participant, and no evidentiary hearing will be required.

[3] The Media also oppose the addition of section 2.170(b)(5) to the rule, and adopt the comment filed by Jonathan D. Kaney Jr. on behalf of the First Amendment Foundation. At a minimum, that provision violates Article I, Section 24(c) of the Declaration of Rights of the Florida Constitution, by unlawfully exempting a court record from access.

exists for abandoning the standards that have been imposed by this Court since 1979. As discussed below, the *Post-Newsweek* standard remains a tested framework for balancing competing interests. The proposed rule changes should be rejected.

I. Background on Camera Access

More than two decades ago, motivated by this state's commitment to open government, this Court became the first in the country to allow electronic media coverage of judicial proceedings. In doing so, the Court created clear and specific guidelines governing limitations on electronic coverage of those proceedings. A judge may exclude electronic coverage only upon a finding that such coverage will have a substantial effect upon a trial participant that would be qualitatively different from the effect on members of the public in general, and the effect must also be qualitatively different from that resulting from coverage by other types of media. *Id.* at 779.

Rule 2.170 was the product of an initial limited experiment, a year-long pilot program, a participants' survey, a survey by the conference of Circuit Judges of its members, and a review of the experience of other branches of government, including the gavel-to-gavel coverage of the Florida Legislature. The Court received comments, reports and exhibits numbering thousands of pages. The respondents to the Post-Newsweek petition, intervenors and amici curiae included the Florida Association of Broadcasters, the Florida Conference of Circuit Judges, The Florida Bar, the Attorney General, Rommie L. Loudd, the Trial Lawyers Section of the Bar, the Society of Professional Journalists, Sigma Delta Chi chapters, the Florida Prosecuting Attorneys Association, the Florida Public Defenders Association, the Academy of Florida Trial Lawyers, and Sunbeam Television Corporation.

The opinion adopting the rule itself contained sixteen pages of analysis of the issues, plus an eight-page appendix. Much of that analysis focused on privacy issues and concerns with jurors. In fact, the Court dispensed with rehearing in *Post-Newsweek* "[b]ecause of the protracted and deliberate consideration afforded this matter." *Id.* at 782.

Now, without any problems with electronic media coverage, the proposed amendments revisit the very issues meticulously reviewed prior to the rule's

adoption and rejected by this Court after careful study. The revisions ignore the test articulated in *Post-Newsweek,* as well as subsequent pronouncements by this Court which specify the circumstances under which camera access can be denied. The amendments will inject uncertainty into a working system and spur the filing of camera closure requests. Rule 2.170 should remain unchanged.

II. The Proposed Rule Change Relating to Privacy Concerns

Twenty-five years ago, this Court specifically rejected the contention that compelling a witness or juror to appear in a judicial proceeding then exposing that participant to unwanted publicity violated any right of privacy. *Id.* at 779.[4] The Court noted there was no federal privacy right in the context of a judicial proceeding. The Court went on to note there was no Florida constitutional right of privacy that applied. The subsequent adoption of Article I, Section 23 of the Declaration of Rights of the Florida Constitution in 1980 did not generally create any privacy interests protectable in public judicial proceedings. *See Palm Beach Newspapers, Inc. v. Doe*, 612 So. 2d 549, 552 (Fla. 1992). In fact, the Court, in *Post-Newsweek,* recognized that judicial proceedings are "public event[s] which by [their] very nature [deny] certain aspects of privacy." *Post-Newsweek,* 370 So. 2d at 779.

In fact, Article I, Section 23 specifically provides that Florida's constitutional right of privacy "shall not be construed to limit the public's right of access to public records and meetings as provided by law." Thus, as important as privacy may be to the citizens of this state, in balancing privacy against the public interest in open government, the public long ago chose open government.

[4] The impetus cited for the "privacy" amendment appears to be a lengthy political dispute in the Ninth Judicial Circuit between the court and the State Attorney over the broadcast of judicial proceedings via the Internet. The State Attorney has pushed for Internet broadcast of all proceedings, while the judges there have been reluctant to do so. Following receipt of a letter from The Honorable Belvin Perry, then-Chief Justice Anstead referred his question about the potential for Internet broadcast of audio and video captured via court security cameras to the Rules of Judicial Administration Committee for study. Now, due to a political debate in a single circuit over security camera footage, the committee suggests this Court overhaul Rule 2.170 to address privacy concerns broadly – with no suggestion that there have been systemic privacy issues related to the presence of still and video cameras in particular proceedings. Such a dispute provides no foundation for significant changes to a rule that has operated smoothly for years.

The proposed amendment is not only antithetical to the *Post-Newsweek* decision, but is also contrary to the fundamental belief in an open judiciary that is cherished in this state. Privacy has been often proffered – and rejected – as a justification for closing court proceedings and records. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)(statute requiring mandatory closure of criminal proceedings in cases involving the rape of minors unconstitutional, despite privacy interests at stake). Generalized privacy concerns have never been the starting point for evaluating competing interests between access to the judiciary and privacy. Privacy interests have rarely justified court closures and cannot justify wholesale denials of camera coverage of court proceedings. *See, e.g.,* Fla. R. Jud. Admin. 2.051(c)(9)(a privacy right generally inherent in the specific type of proceeding sought to be closed cannot justify closure of court records).

This Court has been vigilant in protecting access in the face of privacy assertions. The landmark access case of *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988), involved medical records in a dissolution proceeding, doubly impacting areas that raise privacy concerns. Dempsey Barron asserted that the medical reports at issue, involving his physical condition, should be protected private information. The Court responded:

> The undisclosed matter primarily concerns medical reports regarding one party's physical condition. That party asserted the condition to justify certain actions and conduct. Although generally protected by one's privacy right, medical reports and history are no longer protected when the medical condition becomes an integral part of the civil proceeding, particularly when the condition is asserted as an issue by the party seeking closure . . . Accordingly, we conclude that the medical information is an inherent part of these proceedings and cannot be utilized as a proper basis for closure.

Id. at 119. Consequently, though sensitive information may be involved in court proceedings and records, this Court has spurned closure requests when the information is relevant to a disputed issue in a case.[5]

Under the *Barron* standard, most information participants would wish secret will likely be introduced in an open court proceeding. The amendments to Rule 2.170 cannot change that. And there is little purpose to be served by attempting to limit all camera access when the underlying information will be presented in open court and made known to the public.[6]

Moreover, the *Post-Newsweek* decision already supplies the mechanism for closing camera coverage of proceedings where camera access results in a distinct, separate harm. That harm, however, must be evaluated in a precise and non-speculative way. The revised rule invites routine denials of camera access whenever privacy concerns are invoked. The system has worked for twenty-five years now, and the competing rights have been successfully balanced.

The very language of the proposed provision would inject great uncertainty into an otherwise well-established system. The terms used are broad, undefined and elastic. What is private? What matters involve privileged or confidential material? The terms used are so broad that they could effectively gobble up the access right conferred by the rule. This Court's *Post-Newsweek* decision provides an effective, time-tested mechanism for evaluating the interests advanced for denying camera closure. That balancing mechanism has worked well and provides trial judges with the tools needed to evaluate camera closure requests in individual cases – whatever the interest in closure asserted.

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[5] The *Barron* case is not the only time the Court has grappled with the release of information an individual asserted was private and embarrassing. For example, in *Post-Newsweek Stations, Florida, Inc. v. Doe., 612* So. 2d 549 (Fla. 1992), third-parties to a criminal proceeding where the defendant was charged with prostitution sought to deny access to discovery materials to be made public under Section 119.07(3)(c)(5), Florida Statutes. The "Does," purported johns of the defendant, asserted privacy interests in any lists bearing their names and addresses. The Court recognized the Does had no privacy interest, including any interest under Article I, Section 23, requiring the protection of that relevant discovery information.

[6] Of course, if under *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), or *Barron*, a proceeding is completely closed, then there would be no electronic recording of that proceeding either. This Court's decision in *Lewis* laid out the definitive standards for analyzing the closure of any criminal proceeding, as the *Barron* decision enunciated closure standards for civil proceedings.

The proposed rule change concerning privacy should be rejected.

III. The Proposed Rule Change Concerning Jurors

The proposed rule change prohibiting the photographing of jurors likewise circumvents the *Post-Newsweek* standard, as well as this Court's decisions in *State v. Green*, 395 So. 2d 532 (Fla. 1981), and *State v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544 (Fla. 1981).

The change adopts the dissenting opinion in *WFTV, Inc. v. State*, 704 So. 2d 188 (Fla. 4th DCA 1997). The proper view, however, is that expressed by the majority in the *WFTV* decision. The majority merely cites and follows this Court's dictates in *Post-Newsweek, Green* and *Palm Beach Newspapers*. The new rule based on the *WFTV* dissent should not be adopted for several reasons.

A. The *Post-Newsweek* decision itself rejects the concerns underlying the proposed rule.

As discussed, the *Post-Newsweek* decision relies on an exhaustive survey of trial participants – attorneys, witnesses, *jurors*, and court personnel – who participated in trials covered by electronic media. *Id*. at 768. Clearly, jurors thereby fall within the category of trial participants covered by the *Post-Newsweek* standard. *See Sunbeam Television Corp. v. State*, 723 So. 2d 275, 280 (Fla. 3d DCA 1998), *rev. denied*, 740 So. 2d 529 (Fla. 1999). Indeed, "[n]othing in Rule 2.170, *Post-Newsweek*, or any other supreme court opinion suggests that jurors are to be treated differently from other types of trial participants – such as attorneys, witnesses, or court personnel – for the purposes of publishing or broadcasting their images." *WFTV*, 704 So. 2d at 191.

Moreover, the *Post-Newsweek* decision specifically dealt with concerns over identification of jurors on an electronic broadcast. Opponents of the rule argued that jurors would fear for their personal safety, be subjected to influence by members of the public, or attempt to conform their verdict to community opinion. *Post-Newsweek*, 370 So. 2d at 775. However, the Court opined that such "assertions are but assumptions unsupported by any evidence." *Id.* The survey actually refuted such concerns. Electronic media coverage: (1) made jurors feel slightly more responsible for their actions; (2) did not cause participants (including jurors) to fear being harmed; and (3) did not cause jurors

concern that persons would attempt to influence their testimony. *Id.* at 768-69. An overwhelming majority of circuit court judges further indicated that "*jurors*, witnesses, and lawyers were not affected in the performance of their sworn duty by the presence of electronic media." *Id*. at 770 (emphasis added). There is no suggestion, much less any data, that 25 years of actual experience have done anything but validate the survey results.

The Court also addressed jurors' privacy concerns. Opponents argued it was an invasion of privacy not only to compel a witness but also a juror to appear in a judicial proceeding by legal process, "then expose him against his will to the notoriety or publicity attendant to his image appearing in a newspaper, magazine, or television broadcast." *Id.* at 779. The Court rejected this argument because a trial is a public event that rebuffs certain aspects of privacy, and there is no right of privacy in judicial proceedings. *Id.* Indeed, "any fair minded person would share [these concerns] because they would, certainly in combination, be antithetical to a fair trial . . . The fact remains, however, that the assertions are but assumptions unsupported by any evidence." *Id.* at 775-76.

B. Subsequent opinions construct the proper framework for making juror access decisions.

The proposed jury rule permits the trial court, without benefit of any hearing or standard, to prohibit the photographing of jurors. This amendment would undo the guidelines painstakingly established by this Court in *Post-Newsweek* and its progeny. A review of the Court's pronouncements, beginning with the companion opinions in *State v. Green* and *State v. Palm Beach Newspapers* and culminating in the Court's juror access decision in *Chavez*, illustrates that this Court has already erected a substantial framework for making camera access determinations involving any trial participant. No amendments to Rule 2.170 are needed, much less any amendments that overrule such extensive precedent.

In 1981, two years after the *Post-Newsweek* decision, the Court issued two companion opinions designed to guide trial courts in making determinations under the *Post-Newsweek* qualitatively different test. Both discussed the type of hearing and findings necessary to exclude camera coverage. First, in *State v. Green*, defense counsel claimed that his client would be rendered incompetent to stand trial if cameras were present in the courtroom, thereby violating her due

process rights. The trial court failed to hold an evidentiary hearing on the impact of the cameras on the defendant's competency. In deciding the impact of camera coverage on a defendant's competency, trial courts must conduct evidentiary hearings. *Green*, 395 So. 2d at 538. However, the Court went on to note that, "the trial court in many instances could have a hearing and make a decision on the basis of affidavits after all parties have had an opportunity to be heard." *Id*.

In the companion *State v. Palm Beach Newspapers* case, this Court offered further guidance on how camera issues should be decided. There, two inmates were scheduled to testify against a fellow inmate charged with murdering a fourth inmate. Both inmate witnesses signed affidavits indicating that they feared reprisals if their trial testimony was televised. The trial judge refused to disclose those affidavits to the media for the hearing on camera closure. Cameras were banned.

In a lengthy opinion, this Court discussed how *Post-Newsweek* issues should be resolved. Adequate notice to the media must be given. *Palm Beach Newspapers*, 395 So. 2d at 549.[7] An effective hearing should be conducted. *Id.* at 547-48. Affidavits, the Court explained, can provide a sufficient evidentiary basis for closure, and a ruling can also be supported by matters within the judicial knowledge of the trial judge. *Id.* at 547. "[E]videntiary hearing[s] should be allowed in all cases to elicit relevant facts" that go both to issues under the qualitative difference test and the question of whether less restrictive alternatives to camera closure are available. *Id.* at 548. The qualitatively different standard should be "established on the record with competent evidence whenever it is an issue and the opportunity for data-gathering is presented." *Id.*

More recently, this Court addressed the *Post-Newsweek* standard in the context of trial court orders permitting the photographing of jurors. *Chavez v. State*, 832 So. 2d 730 (Fla. 2002). The trial of Juan Carlos Chavez for the murder of nine-year-old Jimmy Ryce received extensive media coverage. The

[7] Such a hearing allows media organizations to present evidence that an asserted fear or harm is not well-grounded, or to offer evidence that provides the court with a less restrictive alternative. *Palm Beach Newspapers*, 395 So. 2d at 548. Thus, media participation enhances the trial court's decision-making capabilities. *Id.* at 548 n.7. Only after a proper evidentiary hearing can a trial judge make a reasoned and informed decision concerning restrictions on electronic media coverage. *See Chavez v. State*, 832 So. 2d 730, 758-59(Fla. 2002)(noting hearing enables court to make required evidentiary finding regarding qualitatively different effect).

media were specifically permitted to photograph the jurors during the trial. Chavez then directly appealed his first degree murder conviction and death sentence to this Court, asserting several grounds for reversal. Those grounds included a claim that his fair trial rights were impaired when, following a venue change, the trial court allowed camera coverage of the *Chavez* jurors.

The court rejected Chavez' claims and applied the *Post-Newsweek* standard to juror camera access issues. Citing with approval the *WFTV* majority decision, this Court expressly stated that trial courts must provide both notice to the media and an opportunity for the media to be heard at a hearing on the issue. The Court then fleshed out the requirements for determining camera access issues during the jury selection process, finding that an individualized voir dire of every juror is not necessary to determine camera access issues involving the entire venire. *Id.* at 759. The *Chavez* treatment of the jury photography issue makes it clear that the majority in the *WFTS* case properly applied this Court's previous decisions, and that a hearing is required to determine juror issues under Rule 2.170.

In summary, this Court has already issued several in-depth pronouncements on the *Post-Newsweek* standard. It has recognized that a juror is a "participant" within the meaning of Rule 2.170, specified the type of notice required prior to closure, discussed at length the type of hearings and evidence necessary to support camera exclusion orders, and explained the type of findings required. Barely two years ago, this Court approvingly cited the notice and hearing requirements of the *WFTV* decision, the very decision providing the impetus for changing Rule 2.170.

Just as there was no basis decades ago for excluding electronic media coverage of trials (including the jury), there is no basis today for carving out a special rule for publishing or broadcasting jurors' images. The only possible justifications for the proposed rule change are the same ones that were rejected in *Post-Newsweek*. However, such generalized and unsupported fears are mere assumptions and are insufficient to justify restricting electronic media coverage of a trial. *See Post-Newsweek*, 370 So. 2d at 775; *Maxwell v. State*, 443 So. 2d 967, 970 (Fla. 1983) ("motion to limit or exclude television coverage must attempt to show with specificity that it will deleteriously affect the trial"). The *Post-Newsweek* reasoning, therefore, should be respected. Likewise, the Court should be hesitant to disturb the hearing requirements fleshed out in its decisions. Rule 2.170 should remain intact.

C. A hidden jury is particularly antithetical to our judicial tradition.

Since the development of trial by jury, the process of selecting jurors has been presumptively open. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 505 (1984). Such openness "is no quirk of history." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). Rather, open court proceedings always have been an indispensable attribute of the American trial by ensuring that the proceedings are conducted fairly and by discouraging decisions based on secret bias or partiality. *Id.*

This is true because there is nothing more basic to our democracy than trial by jury:

> "[One] great right is that of trial by jury. This provides, that neither life, liberty nor property can be taken from the possessor, until twelves of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial and full enquiry, face to face, in open Court, before as many of the people as chuse to attend, shall pass their sentence upon oath against him."

Id. at 568-69 (quoting 1 Journals of the Continental Congress, 1774-1789, p. 107 (1904)). Indeed, determinations of guilt and innocence are the work of the jury. It would be absolutely unheard of in our system to have an "anonymous" judge. The proposed rule, however, condones secret juries.[8]

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[8] The biennial report cites Recommendations 11 and 48 of the Jury Innovations Committee Report as supporting a "public policy favoring the protection of jurors' privacy interests." *See In Re Biennial Amendments to the Florida Rules of Judicial Administration* at p. 7. The Jury Innovations Committee recommendations, however, do not favor broad privacy protections for jurors over "the public access rights of defendants, plaintiffs, the media, and others." *See* Discussion, Recommendation 48 (Juror Privacy), Jury Innovations Committee Report, p.90. Instead, Recommendation 11 deals with "certain exceptional cases" where it may be "necessary to empanel an anonymous jury." *See* Discussion, Recommendation 11 (Anonymous Juries), Jury Innovations Committee Report, p. 34. Those "exceptional cases" might include, for example, an organized crime trial where the jurors' safety was threatened. *See, e.g., United States v. Krout*, 66 F. 3d 1420 (5th Cir. 1995), *cert. denied*, 516 U.S. 1136 (1996)(anonymous jury warranted where defendants were leaders of a mafia organization that admittedly tried to murder or interfere with potential witnesses); *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985)(organized crime defendants alleged to have murdered government witness and bribed juror

In today's society, public understanding of trials is achieved through the media. It is simply impractical for citizens to observe personally what transpires in open court. *See Richmond Newspapers*, 448 U.S. at 572-73. As this Court knows, "[i]t is essential that the populace have confidence in the 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." *Post-Newsweek*, 370 So. 2d at 780-81 (citations omitted).

The proposed rule revives fears long ago put to rest and invests trial judges with the discretion to ban the photographing of jurors. It does so without requiring the least evidentiary showing. Judges will enter juror closure orders as a matter of course. This result is antithetical to First Amendment values and particularly inappropriate in Florida.

The commitment of the Florida judiciary to operate in the "sunshine" is unparalleled by any other jurisdiction. In opening up Florida courtrooms to camera access, this Court observed that our courts should operate in the sunshine because we have a judicial system in which we can take pride. *Post-Newsweek*, 370 So. 2d at 781. "Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." *Id.*

The proposed rule will erode the dedication this State has to ensuring public understanding of the judicial system. The work of every trial participant should be open to the public. Jurors, whose decisions literally involve matters of life and death, should be held to at least the same standard as other trial participants.

IV. The standards articulated in *Post-Newsweek* and its progeny are necessary to ensure camera access issues are properly decided.

Of course, to say that camera coverage should be allowed in most cases is not to say that trial courts may never impose appropriate limitations. *Post-*

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in prior trial). Recommendation 48 deals only with juror questionnaires and expressly recognizes that trial courts must balance a juror's interest in the privacy of personal information against the right in public access to court records. That recommendation is not designed to promote broad juror secrecy.

Newsweek implicitly recognized that certain occasions may warrant limited camera coverage because of privacy concerns or justify restrictions on photographing jurors' faces. However, as the *Post-Newsweek* decision recognized, the fact that particular participants may encounter unique problems does not justify giving trial judges unfettered discretion to restrict electronic coverage.

In contrast, the new rule invites courts to enter orders denying camera coverage of large aspects of public court proceedings to address mere fears labeled as privacy concerns. It invites courts to enter orders prohibiting the photographing of jurors as a matter of course and simply because it is the easier route. Secrecy is always the easiest option. But secrecy breeds mistrust. To be sure, when a government operates in the sunshine, occasional abuses are unavoidable. As recognized by this Court, "there are risks in any system of free and open government. A democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when its citizens are informed about its workings." *Post-Newsweek*, 370 So. 2d at 781. No compelling reason or abuse has been advanced for overturning *Post-Newsweek* now.

The proposed changes, in practice, will not even be effective. For example, the amended rule would allow courtroom artists to sketch jurors. Identifying information can still be published.[9] Photographs of the jurors leaving the courthouse or in the parking lot can still be published.[10] And, of course, anyone present in the courtroom would be free to tell friends, neighbors and

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[9] Juror records are presumptively open. *See* Art. I, § 24, Fla. Const.; *Miami Herald Publ'g Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982); *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988); Fla. R. Jud. Admin. 2.051. Therefore, prohibiting photography of faces will not shield juror identities. In fact, in 1995, the Florida Legislature rejected a proposal to make confidential judicial records containing juror information. General Bills S2166, H109. As recently as this October, the First District Court of Appeal directed the release of the names and addresses of two juries to a criminal defendant. *Kever v. Gilliam*, 886 So. 2d 263 (Fla. 1st DCA 2004).

[10] The proposed rule is silent as to its scope – it merely allows trial courts to prohibit photographing jurors. If the rule allows judges to reach beyond the courtroom, the rule would be unconstitutional absent (at a minimum) an imminent threat to the administration of justice. *Times Publ'g Co. v. State*, 632 So. 2d 1072, 1076 n.4 (Fla. 4th DCA 1994). Moreover, to the extent that the rule would authorize a trial court to prohibit publication of juror photographs the media obtain elsewhere (e.g., a photo of a juror from his high school yearbook), the rule would impose an unconstitutional prior restraint. *Id.* at 1075-76.

strangers who is on the jury. Consequently, "newsworthy trials will continue to be covered by the electronic media [and others] from without the courtroom" even if camera coverage of jurors is forbidden. *Id.* at 781.

Similarly, most information described as "private" or "privileged" or "confidential" will still be disclosed in open court. The media remains free to publish it, the public free to hear and repeat it. The proposed changes will, in effect, do little to protect the underlying information. The changes will only limit the media's ability to show the witness actually disclosing the information, for example, during an evening newscast. What better way for the public to evaluate testimony than for them to see the actual witness on the stand? Any information or evidence that is the subject of a properly closed proceeding, in contrast, would never be photographed anyway. The suggested changes simply do not serve any compelling interests. They would be ineffective in achieving the interests advanced for closure.

V. Conclusion

The current rule and case law take into consideration the right of access to court proceedings and further Florida's commitment to an open judiciary. At the same time, the current standard adequately safeguards participants from potential harm. Based upon unsupported assumptions that additional privacy protections are needed and that juror identities should be shielded from the electronic media (assertions rejected by the Court), the new rule virtually swallows the right of access and devours the judiciary's dedication to operate in the sunshine.

The proposed rule changes should be rejected.

We thank you for this opportunity to address the Court, and would be pleased to provide additional information.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished by U.S. Mail on the ___ day of March, 2005, to The Honorable Claudia R. Isom, 13th Judicial Circuit, 800 East Twiggs Street, Suite 513, Tampa, FL 33602-3556; John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; J. Craig Shaw, Bar Staff Liaison, Rules of Judicial Administration Committee, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; and Steven Patrick Combs, Duval County Courthouse, 330 East Bay Street, Room 222, Jacksonville, FL 32202.

_____
Attorney