IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA, Case No.: CRC14-00216CFAES

v.

CURTIS J. REEVES, Division: 1
Defendant.
_____/

MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING DEFENDANT'S MOTION TO PREVENT ACCESS TO ALL PRE-TRIAL DISCOVERY MATERIAL AND STATE'S REQUEST FOR DECLARATORY JUDGMENT ON DISCOVERY AND PUBLIC RECORDS

The Associated Press; Cable News Network, Inc. (CNN); The First Amendment Foundation, Inc.; Media General Operations, Inc., d/b/a WFLA-TV; The New York Times Company; Tampa Media Group, Inc., d/b/a *The Tampa Tribune* and *Hernando Today*; Orlando Sentinel Communications Company, LLC; Scripps Media, Inc., d/b/a WFTS-TV; and Sun-Sentinel Company, LLC (collectively "Media Intervenors") hereby move to intervene in this action for the limited purpose of opposing Defendant Curtis J. Reeves' Motion to Prevent Access to All Pre-Trial Discovery Material (the "Closure Motion"). The Media Intervenors concurrently move to intervene to oppose the State of Florida's Request for Declaratory Judgment on Discovery and Public Records (the "Video Motion"). As grounds for this Motion, the Media Intervenors state:

1. The Media Intervenors in this case comprise local, state and national news organizations that have covered the January 13, 2014, shooting death of Chad Oulson in a Wesley Chapel, Florida, movie theater and the subsequent arrest and criminal trial proceedings in connection with the shooting. In their role as surrogates for keeping the public informed about this case, the Media Intervenors will continue to report on this case, attend court proceedings and

rely on state, county and local public records, as well as judicial records, to further the newsgathering process. Intervenor The First Amendment Foundation, Inc., is a non-profit organization that advocates for public access to government, including the court system.

2. The Defendant's Closure Motion requests that the Court order blanket closure of all discovery materials in this case. Similarly, the State's Video Motion seeks this Court's guidance on the application of a public records exemption to the theater surveillance video.

3. Both motions directly affect the media's and the public's right to monitor this important proceeding. As such, the Media Intervenors have standing to intervene in this matter to oppose closure. Despite not being a party to this litigation, the news media can challenge any court order that would restrict its ability to gather news. See Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 4 (Fla. 1982). "The news media has been the public surrogate on the issue of courtroom closure. Therefore, the news media must be given an opportunity to be heard on the question of closure prior to the court's decision." Lewis, 521 So. 2d at 7.

4. The Media Intervenors request to be heard in this matter and assert why such a blanket request should be denied and why the public has a right to access specific records contained in the pre-trial materials, including the movie theater security video from the day of the shooting.

Argument

This case has garnered substantial local and national attention and has had a significant impact on the public. That the community has a strong need to keep informed on the progress of this prosecution is an understatement. Defendants in high profile cases like this one, however, often ask Florida courts to entertain orders limiting the information that may be released to the

public. Courts must remain vigilant in protecting the public's interest in open criminal prosecutions, as well as a fair justice system.

I. The Defendant's Closure Motion Should be Denied.

The Defendant claims that an order barring release of *all* discovery is necessary to ensure his right to a fair trial. However, before discovery records may properly be closed on fair trial grounds, the Florida Supreme Court requires application of the three-part test referenced in Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 35 (Fla. 1988), and established in Miami Herald Pub. Co. v. Lewis, 426 So. 2d 1 (Fla. 1982). "A finding of cause to restrict or defer disclosure of [discovery] records cannot rest in air." McCrary, 520 So. 2d at 35. Such findings can only be made after careful analysis of the following factors:

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

Lewis, 426 So. 2d at 6; McCrary, 520 So. 2d at 35. Here, the Defendant has not even addressed, much less attempted to meet, this burden. Instead, the Defendant simply seeks wholesale closure.

A. Secrecy is Not Necessary.

The defense has not specified what information might threaten the Defendant's fair trial rights and instead seeks a drastic and extreme remedy – closure of *all* discovery records. However, the Defendant has not established that the potential release of any record poses an imminent threat to his fair trial rights. The blanket closure of *all* pre-trial discovery in a Florida criminal court proceeding is unprecedented.

Even an order that temporarily defers disclosure of discovery records must satisfy the Lewis/McCrary standard. McCrary, 520 So. 2d at 35 (noting that a finding to "restrict or defer" disclosure of discovery must meet applicable standard). Importantly, such orders are not automatic. See State v. King, Case Nos. 2008-CF-00936 NC, *Order Denying Motion to Prohibit Release of Information in Order to Protect Defendant's Right to a Fair Trial* (Fla. 12th Cir. Ct. Jan. 29, 2008); *Order Denying Motion for Rehearing Regarding Defendant's Motion to Prohibit Release of Information and Order Denying Motion to Allow Defense Counsel and State and Opportunity to Request* In Camera *Review of Discovery Materials* (Fla. 12th Cir. Ct. Feb. 6, 2008) (copies attached as composite Exhibit A); State v. Tiner, Case No. 92-228-CF (Fla. 8th Cir. Ct. Aug. 27, 1992) (copy attached as Exhibit B).

The fact that this case is a high profile case does not provide the Defendant with a unique privilege to shut down public information. As the Florida Supreme Court has noted, pretrial publicity in topical criminal cases is inevitable. Rolling v. State, 695 So. 2d 278, 285 (Fla. 1997). Therefore, media attention alone is not a sufficient basis for secrecy. See, e.g., Provenzano v. State, 497 So. 1177, 1182 (Fla. 1986).[1] If extensive news coverage alone warrants closure of public records, the constitutional and statutory rights of access do not exist in the very cases the public is most interested in following. Heightened public attention only increases the need for the "appearance of fairness so essential to public confidence in the

[1] Jurors need not be totally ignorant of the facts of the case. They only need to be free from any preconceived notion. Rolling, 695 So. 2d at 285. And Florida courts routinely successfully select juries in even their most high profile cases. Moreover, courts have found a lack of prejudice in reporting of a factual nature. Provenzano, 497 So. 2d at 1182 Thus, the mere fact that this matter has received widespread publicity does not support the conclusion that such coverage has been hostile or prejudicial and that closure is warranted. Certainly, disclosure of purely factual material will not cause prejudice.

system." Press Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 508 (1984). Publicity is vital to an open and accountable judicial system. As former Chief Justice Warren Berger wrote: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." Id. at 509. Secret discovery was not permitted in much higher profile cases: the Gainesville murders, the Casey Anthony prosecution and the Trayvon Martin killing, to name a few.

Moreover, this case is in its infancy. The fact that trial is, at the very least, several months away diminishes the seriousness of any perceived threat. See Rolling, 695 So. 2d at 285. There is no reason to believe that the release of material now will affect the fairness of the trial. By that time, jurors likely will have forgotten any news reports (assuming that they have even read the newspaper stories or watched television accounts in the first place). See State v. Bennett, 19 Media L. Rep. 1383, 1384 (Fla. 13th Cir. Ct. Sept. 26, 1991) (copy attached as Exhibit C). Because jurors often never see news reports or often forget the reports they have seen, "the feared impact on the fair trial rights of criminal defendants often does not occur – even in matters that have extensive media coverage." Id.; see also State v. McTear, 37 Media L. Rep. 2209, 2211 (Fla. 13th Cir. Ct. June 17, 2009) ("[t]he fact that new evidence or opinions can be expected to arise during the discovery process does not militate against" the release of criminal discovery in a high profile case) (copy attached as Exhibit D). Concerns at this stage that potential jurors may be tainted by media accounts are not supportable and such concerns are insufficient to justify closure of all records in this important case.

B. Less Restrictive Alternatives Would Suffice.

Before restricting access to discovery in this case, the Court must also consider alternatives, other than a change of venue, that would protect the Defendant's right to a fair trial.

Lewis, 426 So. 2d at 6. This Court can protect that right by less restrictive means than sealing all discovery records. Careful measures in jury selection, including individualized voir dire, avoid even the prejudicial effects of pervasive adverse publicity. See Lewis, 426 So. 2d at 8; McTear, 37 Media L. Rep. at 2211 ("Testing the impartiality of potential jurors in this case is ultimately best left to the process of voir dire."). Stern instructions to the jury as to their sworn duty to decide the issues based only upon the evidence, sequestration of the jurors, and selections from a large panel are all traditional alternatives to change of venue. Lewis, 42 So. 2d at 8. At this stage of the proceedings, there is no reason to fear that these alternatives would be insufficient.

C. The Request for Blanket Closure is Overbroad.

Finally, any closure order must be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. Lewis, 426 So. 2d at 6. Much information about this case already has been published. As the Florida Supreme Court noted in Lewis, if information already has been made public, "there would be little justification for closing a pretrial hearing in order to prevent only the disclosure of details which had already been publicized." Id. at 8. Similarly, in this case, to the extent that prejudicial information already has been made public, closure of such details would be unnecessary and, consequently, not effective.

Additionally, the Defendant requests that this Court prevent the disclosure of *all* records – whether unfairly prejudicial or not. Clearly, such a request is overbroad and strains the obligation to protect fair trial rights. Indeed, in one of the most highly publicized capital cases in Florida history – the prosecution of the serial murder of five college students in Gainesville – the trial judge rejected just such a request. "The request for a blanket prohibition of all materials the Public Defender will receive in discovery is too broad and premature." See State v. Rolling, 20

Media L. Rep. 1127, 1129 (Fla. 8th Cir. Ct. March 10, 1992) (copy attached as Exhibit E). Similarly, in the recent high profile case of State v. Casey Anthony, the Court declined any blanket closure of information and instead considered each request for closure on a case-by-case basis – the majority of which were denied. See Composite Exhibit F (sampling of orders from State v. Casey Anthony). In this case, any closure order that is not geared only to highly and unfairly prejudicial information would be unduly restrictive. The Defendant has failed to make the necessary showing to satisfy the Lewis/McCrary standard and his request to close all pretrial discovery should be denied.

II. The Movie Theater Surveillance Video Discovery Materials are not Exempt Under Florida's Public Records Laws.

Of particular concern to the state and, presumably, the defense given its closure request, is public access to movie theater surveillance video that recorded the events leading up to, and subsequent to, the shooting for which the Defendant is charged. The State cites Section 406.136(2) of the Florida Statutes, which exempts from the public records laws recordings depicting the killing of a person, as authority to potentially withhold the video from the public in response to a public records request.[2] The same statute defines the "killing of a person" as "all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death." § 406.136(1), Fla. Stat. (2013).

[2] More specifically, "[a] photograph or video or audio recording that depicts or records the killing of a person is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse of the decedent may view and copy any such photograph or video recording or listen to or copy any such audio recording. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records." § 406.136(1), Fla. Stat. (2013).

This exemption, however, contains an exception when the record is disclosed in a criminal proceeding.[3] Once the video was provided to the Defendant in discovery, it also became accessible to the public. Times Pub. Co. v. State, 903 So. 2d 322, 325 (Fla. 2d DCA 2005). Even if applicable to discovery material in a criminal case, the exemption expressly contemplates that a video which otherwise qualifies as exempt under this law is not exempt in its entirety if any portion of it, does not "immediately" precede or follow a killing. Such a reading comports with the well-established command that exemptions to Florida's public records laws be construed narrowly. See Tribune Co. v. Public Records, P.C.S.O. No. 79-35504 Miller/Jent, 493 So. 2d 480, 483 (Fla. 2d DCA 1986). The video at issue in the present matter captured the events leading up to the shooting in question, including footage showing an initial interaction between the Defendant and the victim, whereafter the Defendant temporarily left the theater. Clearly, any footage depicting the buildup to the ultimate incident that culminated with the shooting is not material immediately preceding the killing. Likewise, there logically exists some point subsequent to the immediate aftermath of the shooting which also does not fall within the scope of the exemption, including any footage showing the Defendant relinquishing a weapon. Therefore, at best, there is only a relatively small portion of the video at issue that can be properly withheld from the public under the law.

There is in fact good cause here to permit disclosure of the video and the law expressly permits those seeking access to show cause why it should be released. See § 406.136(4)(a), Fla. Stat. (2013). Given the recent national attention on mass shootings, including the James

[3] "A criminal or administrative proceeding is exempt from this section but, unless otherwise exempted, is subject to all other provisions of chapter 119, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of a killing, crime scene, or similar photograph or video or audio recordings in the manner prescribed herein." § 406.136(6)(c), Fla. Stat. (2013).

Holmes movie theater shooting in Aurora, Colorado, the ongoing national debate over gun control and the in-state and national controversy surrounding George Zimmerman's murder trial, the current case is of great public interest. The public has a right to judge the video depicting the events at issue in order to better understand and scrutinize the State's charging decisions and ultimate prosecution of this matter. Moreover, the video can help shed light on, for example, the exact timeline of events, whether there was any real threat to the Defendant, and what if anything could have been done to prevent the situation from escalating. The public is also struggling to understand how to protect itself – and our children – from the dangers lurking in everyday events, like catching a matinee. There is ample good cause supporting release of the portions of the video showing what happened just before and after the shooting.

III. Any Video Presented to the Court must also be Available to the Public.

The State has indicated that it intends to show portions of the video at issue at the Defendant's bond hearing scheduled on February 5, 2014. Even if the Defendant and the State had carried the burden to establish closure of discovery – which they have not – there is no basis to shield evidence that is presented to the Court or the jury. Therefore, if any portion of the video is presented to this Court or the jury for consideration it must be done in open court and be accessible to the public.

The public enjoys a presumptive right of access to court proceedings and records that is rooted in both constitutional and common law. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). These rights attach to all phases of criminal proceedings. See, e.g., Press Enterprise v. Superior Court, 464 U.S. 501, 508 (1984) ("Press Enterprise I") (Openness in criminal proceedings "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."); Press Enterprise v. Superior Court,

478 U.S. 1 (1986) ("Press Enterprise II")). "Public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system." Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982).

This presumptive right of access also attaches to any evidence considered by this Court. For example, in Sarasota Herald-Tribune v. State, 924 So. 2d 8 (Fla. 2d DCA 2005), the Second District Court of Appeal granted the media's challenge to a trial court order banning public access to crime scene and autopsy photographs that were admitted during a child murder trial. In disapproving of the use of "secret evidence" during a criminal trial, the court opined:

> Secret evidence is the hallmark of an oppressive regime; it is not a policy generally acceptable in a free society with courts that must be open to the people to assure the legitimacy of those courts and the fairness of the proceedings that occur therein.

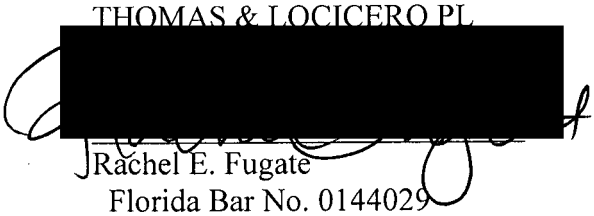
Id. at 12-13. Similarly, any video presented to this Court or the jury must also be accessible to the public.

Conclusion

The Defendant's request for blanket closure of discovery seeks a drastic and overbroad remedy. Closure of judicial or public records in Florida should only be ordered on a specific basis when there is a manifestly overwhelming threat to the Defendant's right to receive a fair trial. And even then, alternatives must be considered and restrictions must be narrow. This criminal case has already raised serious questions – from all sides – about the ability of government to do its job and protect its citizens. Florida's historically open and transparent judicial system should not compound such suspicions by operating in the dark in this case.

Respectfully Submitted,

THOMAS & LOCICERO PL



Rachel E. Fugate
Florida Bar No. 0144029
601 South Boulevard
Tampa, Florida 33606
rfugate@tlolawfirm.com
(813) 984-3060
(813) 984-3070 (Fax)

Attorneys for Media Intervenors

CERTIFICATE OF SERVICE

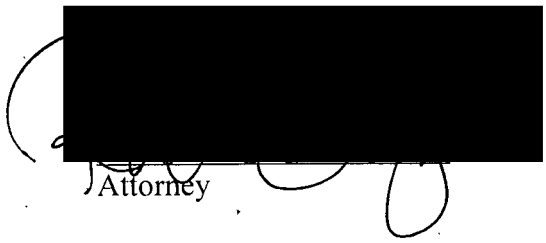
I HEREBY CERTIFY that on February 4, 2014 a true and correct copy of the foregoing has been served via electronic mail and on February 5, 2014 via hand delivery on the counsel listed below:

Richard Escobar, Esq.
Escobar & Associates
2917 W. Kennedy Blvd., Ste. 100
Tampa, FL 33609
rescobar@escobarlaw.com

Office of the State Attorney
Damien N. Kraebel, ASA
Post Office Box 5028
Clearwater, FL 33758
SA6eService@pinellascounty.org

Anne H. Arsenault, Esq.
535 Central Avenue
St. Petersburg, FL 33701
aarsenault@rahdertlaw.com

T.J. Grimaldi
McIntyre, Panzarella, Thanasides, et al., P.A.
6943 East Fowler Avenue
Temple Terrace, FL 33617
tj@mcintyrefirm.com



Attorney

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 2008 CF 936 NC
2008 CF 1087 NC

vs.

MICHAEL KING,

Defendant.
_____/

ORDER DENYING MOTION TO PROHIBIT RELEASE OF INFORMATION IN ORDER TO PROTECT DEFENDANT'S RIGHT TO A FAIR TRIAL

This matter is before the court on Defendant's Motion to Prohibit Release of Information in Order to Protect Defendant's Right to a Fair Trial (the "Motion") filed on January 24, 2008. The court held a hearing on the Defendant's Motion on January 28, 2008. The court has carefully considered the Motion, argument of counsel, reviewed the court file, and is otherwise duly advised in the premises.

The Defendant's Motion is denied. The court finds that after considering the factors established in Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982), that prohibition on disclosure is not necessary to protect the Defendant's right to a fair trial. The court strongly advises the attorneys and staff of both the Office of the State Attorney and the Office of

CUMULATIVE
EXHIBIT "A"

the Public Defender to adhere to the requirements of Rule 4-3.6(a) and (b), Rules Regulating the Florida Bar, with regard to extrajudicial statements. The Office of the State Attorney is further directed to explain those restrictions to the law enforcement agencies involved in this matter.

Therefore, it is **ORDERED** and **ADJUDGED**:

The Motion, file and record establish that the Defendant is entitled to no relief, and the Defendant's Motion Prohibit Release of Information in Order to Protect Defendant's Right to a Fair Trial is denied.

DONE and **ORDERED** in chambers in Sarasota, Sarasota County, Florida, on this 29th day of January, 2008.

[redacted]

Deno G. Economou, Circuit Judge.

Copies furnished by Judge's Office to:

Lon Arend, Assistant State Attorney (faxed 1/29/08)

John Scotese, Assistant Public Defender (faxed 1/29/08)

Rachel E. Fugate, Esquire (faxed 1/29/08)
Thomas & Locicero, P.L.
400 N. Ashley Drive, Suite 110
P.O. Box 2602 (33601)
Tampa, Florida 33602

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA, **CASE NO. 2008 CF 936 NC**
2008 CF 1087 NC

vs.

MICHAEL KING,

Defendant.
_____/

ORDER DENYING MOTION FOR REHEARING REGARDING DEFENDANT'S MOTION TO PROHIBIT RELEASE OF INFORMATION AND ORDER DENYING MOTION TO ALLOW DEFENSE COUNSEL AND STATE AN OPPORTUNITY TO REQUEST AN *IN CAMERA* REVIEW OF DISCOVERY MATERIALS

This matter is before the court on Defendant's Motion for Rehearing Regarding Defendant's Motion to Prohibit Release of Information and Motion to Allow Defense Counsel and State an Opportunity to Request an *In Camera* Review of Discovery Materials (the "Motion") filed on January 30, 2008. The court held a hearing on the Defendant's Motion on February 4, 2008. The court has carefully considered the Motion, argument of counsel, reviewed the court file, and is otherwise duly advised in the premises.

The Defendant's Motion for Rehearing is denied. The court's prior ruling dated January 29, 2008 is hereby reaffirmed.

With respect to the Defendant's Motion to Allow Defense Counsel and State an Opportunity to Request an *In Camera* Review of Discovery Materials, the court finds that the Defendant has not met the standard established in Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 35 (Fla. 1988) and Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 7-8 (Fla. 1982) for temporary closure and the Motion is denied.

The court retains jurisdiction to revisit this ruling should the attorneys, law enforcement personnel and others involved in this case fail to adhere to the dictates of Rule 4.3-6.

Therefore, it is **ORDERED** and **ADJUDGED**:

The Motion, file and record establish that the Defendant is entitled to no relief, and the Motion for Rehearing Regarding Defendant's Motion to Prohibit Release of Information and Motion to Allow Defense Counsel and State an Opportunity to Request an *In Camera* Review of Discovery Materials are denied.

DONE and **ORDERED** in chambers in Sarasota, Sarasota County, Florida, on this 6th day of Feb., 2008.

[redacted]

Deno G. Economou, Circuit Judge.

Copies furnished by Judge's Office to:

Lon Arend, Assistant State Attorney (faxed 2/6/08)

John Scotese, Assistant Public Defender (faxed 2/6/08

Rachel E. Fugate, Esquire (faxed 2/6/08)
Thomas & Locicero, P.L.
400 N. Ashley Drive, Suite 110
P.O. Box 2602 (33601)
Tampa, Florida 33602

IN THE CIRCUIT COURT FOR THE EIGHTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
LEVY COUNTY
CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

CASE NO. 92-228-CF

VS.

DAVID TINER,

Defendant.
_____/

ORDER DENYING TINER'S MOTION TO PROHIBIT
PUBLIC DISCLOSURE OF INFORMATION AND MATERIAL

On Friday, June 12, 1992, Defendant David Tiner's ("Tiner") Motion to Prohibit Disclosure of Information and Material was heard. At the same time, the Gainesville Sun Publishing Company's ("Gainesville Sun") motion to intervene was also heard. There was no objection from counsel for Tiner or the State to the Gainesville Sun's motion to intervene and it was, consequently, GRANTED.

The Court heard argument by counsel for Tiner, counsel for the Gainesville Sun and the State concerning Tiner's motion. The Court reviewed Tiner's motion, the Gainesville Sun's memorandum in opposition to Tiner's motion, the news articles attached to the Gainesville Sun's memorandum and the additional articles introduced into evidence at the hearing by counsel for Tiner. A total of 17 news articles was introduced. The Court has also reviewed the case file, the other materials introduced by Tiner at the hearing, and is otherwise advised in the matter.

In the motion, Tiner requests this Court enter an order prohibiting members of the State Attorney's Office, the Florida

EXHIBIT "B"

Game and Fresh Water Fish Commission, the Levy County Sheriff's Department and the Florida Department of Law Enforcement from commenting on the facts and alleged facts surrounding the boating accident underlying the charges against Tiner; prohibiting the disclosure of public records provided to the defense in the course of discovery; and closing discovery depositions. During the course of the hearing, Tiner argued that the most troublesome information released to the media was that released by the Florida Game and Fresh Water Fish Commission concerning Tiner's alleged blood alcohol level at the time of the boating accident, and witnesses' statements about the positions of the boats. Tiner also anticipates that the State will obtain expert reports relating to, among other things, reconstruction of the boating accident.

The Gainesville Sun conceded that Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987), controlled access to discovery depositions. The Gainesville Sun does not assert any right to attend the depositions. If transcripts are filed, however, the Gainesville Sun asserts that the right of access attaches. Id. at 384.

The primary issues asserted by Tiner involve the issuance of a gag order prohibiting the State Attorney's Office and law enforcement from discussing this case, and the issuance of an order sealing all discovery documents. Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988), controls the resolution of these issues. Based on McCrary, the Court

denies Tiner's requests. Many of the statements contained in the news articles about which Tiner complains were made by non-law enforcement witnesses. Any gag order on the State Attorney's Office and law enforcement would do nothing to control statements made by such witnesses. Tiner does not request, nor will this Court enter a gag order restraining non-law enforcement witnesses from discussing the facts of this case. McCrary, 520 So.2d at 33.

Tiner next complains about the blood alcohol information released by the Florida Game and Fresh Water Fish Commission because that release technically violates Rule 4-3.6(b)(3) of the Florida Rules of Professional Conduct. The public is not unmindful that a person who is arrested for impairment in the operation of motor vehicles or boats are administered tests. Nor is the public unaware of the problem of the intoxicated operators of vehicles. The public understands that there are certain permissible alcohol levels under Florida law and is so informed regularly by public information announcements on television. Moreover, the mere fact that an individual is arrested and charged with an offense involving impairment permits the public to draw a logical inference that the State has some evidence to support a charge that the individual was intoxicated while driving a boat. Consequently, the Florida Game and Fresh Water Fish Commission's release of Tiner's alleged blood alcohol level did not add much new information to the public's awareness of the

State's position that Tiner was above the legal blood alcohol level.

Finally, the information concerning the blood alcohol test has already been released to the public. This Court cannot prohibit the public or the media from publishing that information. See Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). The Court, however, admonishes the State and law enforcement to abide by the Florida Rules of Professional Conduct.

Tiner next complains that all discovery information should be inspected by the defense before being released to the public under the Florida Public Records Act, Chapter 119, Florida Statutes (1991). See §119.011(3)(c)5., Fla. Stat. (1991). Tiner also anticipates the future release of expert witness reports, mainly concerning reconstruction of the boating accident. Tiner urges this Court to fashion a remedy prohibiting the release of any reports reconstructing the accident. Information about how the vehicles were operated and their locations, however, is already in the public domain. Witnesses have already made statements about the particular positions of the vehicles. The bulk of any information that will be contained in such a report is, therefore, already in the public domain. Accordingly, the Court refuses to prohibit disclosure of reports provided or exchanged between the parties.

This Court recently entered orders in State v. Rolling and State v. Davis, controlling the discovery process. In Rolling,

which involved thousands of documents in the intensely publicized Gainesville co-ed killings prosecution, the Court permitted the defense to review pretrial discovery in order to file motions for closure related to any particularly sensitive information. Davis warranted this Court's supervision of discovery because of the extensive publicity attendant to that prosecution which involved two homicides following on the heels of the Gainesville homicides. Tiner urges this Court to accord him the same treatment as Rolling and Davis. This case, however, is not of the magnitude of those cases. It has not garnered the attention of either of those cases. This matter does not warrant deviation from the general disclosure requirements of the Public Records Act. The test is not simply whether anything "prejudicial" is contained in the State's files; there is always prejudicial information about the defendant in the prosecution's files. In short, no extraordinary procedures are warranted here.

The tacit assumption underlying all cases like this one where gag orders and discovery closure orders are requested is that the potential juror who has learned of the case via the media cannot be a fair juror. In the twelve years the Court has been empaneling juries, the Court has yet been unable to pick a fair jury because of pretrial publicity.

This is the branch of government the public does not experience as closely as the legislative and executive branches. But this branch is the third branch of government equally subject to public oversight. The public has a right to be present and

the press often functions as the public's surrogate in exercising this right.

It is the duty of this Court to balance the right of the public to access and government oversight against Tiner's right to a fair trial. If necessary, this Court will resort to alternative methods, short of closure, to ensure a fair, impartial trial. Tiner's motion is denied to the extent he seeks a broad gag order and closure of pretrial discovery.

It is, therefore, ORDERED and ADJUDGED:

1. The Gainesville Sun's motion to intervene is GRANTED.

2. There is no right of access to attend any discovery depositions. If any transcripts are filed, however, the right of access attaches.

3. The State is admonished, and is charged with the responsibility of admonishing law enforcement, to follow the Florida Rules of Professional Conduct, specifically Rule 4-3.6.

4. The State shall disclose any discovery materials as provided in the Public Records Act. The State shall not, however, disclose any records expressly exempted from disclosure under the Public Records Act.

5. Tiner's Motion to Prohibit Public Disclosure of Information and Material is otherwise DENIED.

DONE and ORDERED in chambers at Bronson, Levy County, Florida, this 27 day of June, 1997.

[redacted]

STAN R. MORRIS
Circuit Judge

Copies to:

Robert Moeller, Esq.
Joseph E. Smith, Esq.
Carol Jean LoCicero, Esq.

TPR-57976.2/35071-80

Bloomberg BNA Media Law Reporter®

Source: Media Law Reporter Cases > Florida > Florida v. Bennett, 19 Med.L.Rptr. 1383 (Fla. Cir. Ct. 1991)

19 Med.L.Rptr. 1383

Florida v. Bennett

Florida Circuit Court, Thirteenth Judicial Circuit, Hillsborough County

No. 91-7942

September 26, 1991

THE STATE OF FLORIDA v. ROBERT LEE BENNETT

Headnotes

NEWSGATHERING

Access to records—Judicial—Criminal—Pre-trial/discovery (▸38.1505.04)

Criminal defendant who is charged with attempted murder and arson for alleged burning of individual is not entitled to protective order requiring state to file "Williams Rule" notices and evidence under seal until pre-trial determination of admissibility, in view of defendant's failure to show that such closure is necessary to prevent serious and imminent threat to administration of justice.

Case History and Disposition

Motion by criminal defendant for protective order.

Motion denied without prejudice.

Attorneys

Carol Jean LoCicero, of Holland & Knight, Tampa, Fla., for The Tribune Co.

Dale Sisco, Tampa, for the state.

Rochelle A. Reback, Tampa, for defendant.

Opinion Text

Opinion By:

Mitcham, J.:

Full Text of Opinion

This cause came to be heard on Wednesday, September 11, 1991, on Defendant Robert Lee Bennett, Jr.'s ("Bennett") Motion for Protective Order to Require the State to File all Proposed "Williams Rule" Notices and Evidence *In Camera,* Under Seal Until Pre-trial

Page 1384

Determination of Admissibility Pursuant to Rule 3.220(1) and (m), filed August 14, 1991. That motion is denied.

Bennett is charged with attempted murder and arson for the alleged burning of a man. Area media have covered Bennett's arrest and this prosecution.

Because of concerns about publicity, Bennett moved this Court for a protective order. Bennett sought to require the State to file any "Williams Rule" notices in camera and to have any hearing concerning those notices closed. Bennett is concerned that the material contained in any "Williams Rule" notice

EXHIBIT C

will be prejudicial and might threaten his right to a fair trial.

The Tribune Company (the "Tribune"), publisher of *The Tampa Tribune* intervened to oppose Bennett's motion based on the First Amendment to the United States Constitution; Article I, Section 4 of the Florida Constitution, the Florida Public Records Act and the common law right of access. The Court finds the Tribune has standing because Bennett's motion impacts on the public right of access to judicial proceedings and the Tribune's newsgathering abilities. *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982).

The Court also finds that the notice at issue constitutes a public judicial record subject to the public's rights of access. Before the requested closures can occur, Bennett must demonstrate that:

1. closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. no alternatives are available, other than change of venue, which would protect Bennett's right to a fair trial; and

3. closure would be effective in protecting Bennett's rights, without being broader than necessary to accomplish this purpose.

Lewis, 426 So.2d at 3. *See also Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988).

The Court first finds that this case does not involve the kind of extensive and prejudicial pre-trial publicity which justifies the sealing of judicial records and closure of judicial proceedings. For example, the Tribune has written only seven articles. The last article prior to this hearing was written over five weeks ago, on August 5, 1991.

The Court has tried controversial cases before. The Court was involved in the trial of a Hillsborough County Circuit Judge which received extensive publicity. In that case, the Court had no trouble seating a fair and impartial jury. In addition, this last year the Court tried four high profile first-degree murder cases. There were three acquittals out of those four cases. In none of those instances did this Court have any problem seating a jury.

A significant number of the public does not retain what is disseminated by the media or, simply, does not read newspapers or watch television. As a result, the feared impact on the fair trial rights of criminal defendants often does not occur — even in matters that have received extensive media coverage.

The Court finds that Bennett has simply failed to establish a factual basis to support the present motion. Closure is not necessary to prevent a serious and imminent threat to the administration of justice. Closure is not necessary to achieve the Court's purpose of guaranteeing the defendant a fair and impartial trial. Because the Court is not ordering closure, it need not consider the alternative measure prong of *Lewis* here.

If there is a wave of publicity and an absolute media assault upon the community including very damaging stories, Bennett may renew this motion.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Bennett's motion for protective order is DENIED without prejudice.

- End of Case -

Bloomberg BNA Media Law Reporter®

Source: Media Law Reporter Cases > Florida > State v. McTear, 37 Med.L.Rptr. 2209 (Fla. Cir. Ct. 2009)

37 Med.L.Rptr. 2209
State v. McTear
Florida Circuit Court
Thirteenth Circuit
Hillsborough County

No. 09-CF-007933

June 17, 2009

STATE OF FLORIDA v. RICHARD ANTHONY MCTEAR

Headnotes

REGULATION OF MEDIA CONTENT

[1] Prior restraints — Fair trial restraints — In general (►5.1001)

Fair trial, free press — Restrictive orders in criminal proceedings — Pre-trial (►8.0501)

NEWSGATHERING

Access to records — Judicial — Criminal — Pre-trial/discovery (►38.1503.04)

Restraints on access to information — Fair trial (►50.17)

Defendant's motion, in murder, kidnapping, aggravated child abuse, burglary, battery, and false imprisonment case, for temporary protective order with respect to release of discovery material, to prohibit discovery from becoming subject to Public Records Act until either it has been reviewed in camera and found non-prejudicial to defendant's constitutional rights, criminal charges are adjudicated or dismissed, or jury has been selected and sequestered, and defendant's request for gag order prohibiting law enforcement and other state and local government employees from making extrajudicial comments, are denied, despite extensive electronic and print media coverage of events surrounding criminal allegations, since discovery materials in possession of state become available to media and public under Public Records Act when they are furnished to defendant, since requested protective order would constitute prior restraint on speech, since, at this point in proceedings, it is premature to characterize current adverse publicity as serious and imminent threat to administration of justice, since it has not been shown that defendant's right to fair trial is in any reasonable way threatened by reports surrounding trial and parties, since argument that members of public will lack impartiality due to existence of adverse reports in news is not compelling, since court has responsibility to ensure fundamental fairness of proceedings, and possesses inherent authority to take any means necessary to ensure such fairness, since testing impartiality of potential jurors is best left to voir dire process, since in camera review of discovery is not required to ensure fair trial before impartial jury, and since gag order is not necessary, in that officers of court are expected to meet professional obligations.

Case History and Disposition

Criminal prosecution, in which defendant moves for temporary protective order with respect to release of discovery material and to prohibit law enforcement and other state and local government employees from making extrajudicial comments.

Denied.

Attorneys

EXHIBIT D

Jalal A. Harb, State Attorney's Office, Tampa, Fla., for State of Florida.

Theda R. James and Mike Peacock, Tampa, for defendant.

Gregg D. Thomas and Rachel E. Fugate, of Thomas & LoCicero, Tampa, Fla., for Tampa Tribune, WFLA-TV, and WTVT-TV.

Alison M. Steele and Layla K. McDonald, of Rahdert Steele Bole & Reynolds, St. Petersburg, Fla., for Times Publishing Co.

Opinion Text

Opinion By:

Holder, J.:

THIS MATTER comes before the Court on this 17th day of June, 2009, on the Defendant's Verified Motion for Temporary Protective Order with Respect to Discovery Material Becoming Subject to Chapter 119 and to Prohibit Agents and Employees of the Hillsborough County State Attorney's Office, the Hillsborough

Page 2210

County Sheriff's Office, the Hillsborough County Clerk's Office, the Public Defender's Office, the Hillsborough County Medical Examiner's Office and the Florida Department of Law Enforcement from Making Extrajudicial Comments and Motions for Evidentiary Hearing, Request for Judicial *in camera* Review and Memorandum of Law in Support Thereof (the "Defendant's Motion"), filed pursuant to Florida Rule of Criminal Procedure 3.220, on June 11, 2009.

In his motion, the Defendant requests that this Court enter a protective order limiting the availability of discovery under the Public Records Act, Chapter 119, Florida Statutes (the Public Records Act). Defendant requests that no discovery be permitted to become subject to the Public Records Act either:

1. Until it has been reviewed *in camera* and found by the Court to be non-prejudicial to Defendant's constitutional rights;
2. Until such time as the criminal charges against Defendant are finally determined by adjudication, dismissal, or other final disposition; OR,
3. Until such time as a jury has been selected and sequestered.

The Defendant also requests that the Court issue a gag order. More specifically, Defendant requests the Court order the agents and employees of the Hillsborough County State Attorney's Office, the Hillsborough County Sheriff's Office, the Hillsborough County Clerk of Court's Office, the Public Defender's Office, the Hillsborough County Medical Examiner's Office and the Florida Department of Law Enforcement to refrain from making any extrajudicial comment concerning this cause, the parties, or any issue related to these matters during the pendency of this matter and until such time as the case is finally determined by adjudication, dismissal, or other final disposition. The Court having considered the motion and attachments, the court file and record, as well as the argument of counsel for the State of Florida, this Defendant as well as the various local media, finds as follows:

The Defendant in this cause was arrested on May 5, 2009, for Murder in the First Degree, Kidnapping, Aggravated Child Abuse, Burglary of a Dwelling, Felony Battery, False Imprisonment, Burglary of a Dwelling with Assault or Battery, and Battery. The Defendant was indicted in Case No. 09-CF-7933, and arraigned on May 20, 2009, for Murder in the First Degree, Burglary of a Dwelling with Assault or Battery, Aggravated Child Abuse, Kidnapping with Harm or Terrorizing, and Battery Second or Subsequent Offense. By and through Counsel, the Defendant pled not guilty to all charges in 09-CF-7933 and demanded discovery from the Office of the State Attorney pursuant to Rule 3.220, Fla.R.Cr.P.

[1] The Court notes the extensive electronic and print media coverage of the events surrounding these criminal allegations against this Defendant.

The Public Records Act was enacted by the legislative and executive branches of this state government to ensure that the public receives virtual total access to matters which are part of the public record. Discovery materials in the possession of the State become available to the media and the public under the Public Records Act when they are furnished to a defendant. *See Satz v.*

Blankenship, 407 So. 2d 396 [7 Med.L.Rptr. 2576] (Fla. 4th DCA 1981).

The Defendant's requested protective order would constitute a prior restraint on speech which bears the presumption of constitutional invalidity. *See, State ex. rel. Miami Herald Pub. Co. v. McIntosh,* 340 So. 2d 904, 908 [2 Med.L.Rptr. 1328] (Fla. 1977). A member of the press, under certain circumstances, may be properly considered a representative of the public and both the public and the press have both a constitutional and statutory right to see and know what occurs within their courtrooms. *See McIntosh, id.* This Court has long noted the absolute responsibility of the Judiciary as the third "separate but equal" branch of our state government to ensure the rights of all citizens of this great State. As such, the Court must consider the rights of the public to full knowledge of the activities involved within these proceedings. It is only through such public scrutiny and supervision that any branch of government can effectively and honestly function consistent with our obligation and oath to perform our duties as a government of, by, and for the people. It is this transparency with respect to all judicial activities and action that leads to public trust and

Page 2211

confidence in these pre-trial and trial proceedings. It is ultimately this public trust and confidence which ensures fundamental fairness for this Defendant. Against these concerns, a court must balance the rights of a criminal defendant to a fair trial, which include a fair and impartial jury.

The Defendant argues that the publicity in this case has been pervasive and prejudicial to his constitutional rights. He argues that the potential jury pool might become tainted with additional adverse publicity. He states that his ability to receive a fair trial in this county stands in danger of being prejudiced without the requested protective order and a gag order.

In reviewing the motion, this Court has carefully considered and balanced the factors set forth in *Miami Herald Pub. Co. v. Lewis,* 426 So. 2d 1 [8 Med.L.Rptr. 2281] (Fla. 1983). These factors require that this Court consider the following: 1) whether the restriction is necessary to prevent a serious and imminent threat to the administration of justice; 2) whether there are other alternatives available, apart from a change of venue, which would protect a defendant's right to a fair trial; and, 3) whether the restrictions would be effective in protecting the rights of the accused.

At this point in these proceedings, it is premature to characterize the current adverse publicity as a serious and imminent threat to the administration of justice. It has not been shown that Defendant's right to a fair trial is in any reasonable way threatened by the reports surrounding the trial and the parties. The argument that members of the public will lack impartiality due to the existence of adverse reports in the news is not compelling. Moreover, this Court has the responsibility to ensure the fundamental fairness of these proceedings and possesses the inherent authority to take any means necessary to ensure such fairness.

For some members of the public, these matters are an important event and are worthy of public discussion. This does not imply the partiality of these individuals; merely their interest and their absolute right to be informed of these proceedings and this process. For others in the community, the events giving rise to this case may have been noted and dismissed. And yet, for some members of the community, even these reports noted by the Defendant, have drawn no interest or attention. Ignorance of such publicity may yet ensure their impartiality. Testing the impartiality of potential jurors in this case is ultimately best left to the process of voir dire. The fact that new evidence or opinions can be expected to arise during the discovery process does not militate against this conclusion. Further, it is axiomatic that this case will not reach trial in the near future due to the protracted nature of discovery and pretrial matters in cases carrying even the potential of the ultimate penalty.

The Court finds that *in camera* review of discovery is not required to ensure that this Defendant receives a fair trial before an impartial jury. The Court likewise finds that a protective order prohibiting discovery from becoming subject to the Public Records Act is not necessary to ensure that Defendant receives a fair trial before an impartial jury. As for the gag order, the Court notes that Rule 4-3.6 of the Rules Regulating the Florida Bar specifically prohibits an attorney and an attorney's agents or employees from making any prejudicial extrajudicial statements. A gag order is, quite simply, unnecessary at this time as this Court fully expects and hereby Orders all Officers of this Court to meet their professional obligations consistent with their Oath to God, when sworn as members of The Florida Bar.

For the foregoing reasons, it is ORDERED AND ADJUDGED that Defendant's Motion is hereby DENIED.

- End of Case -

Contact us at http://www.bna.com/contact/index.html or call 1-800-372-1033

ISSN 1944-0359

Bloomberg BNA Media Law Reporter™

Source: Media Law Reporter Cases > Florida > Florida v. Rolling, 20 Med.L.Rptr. 1127 (Fla. Cir. Ct. 1992)

20 Med.L.Rptr. 1127

Florida v. Rolling

Florida Circuit Court, Eighth Judicial Circuit, Alachua County

No. 91-3832 CF A

March 10, 1992

STATE OF FLORIDA v. DANNY HAROLD ROLLING a/k/a MICHAEL J. KENNEDY, a/k/a MIKE KENNEDY

Headnotes

REGULATION OF MEDIA CONTENT

[1] Fair trial, free press—Restrictive orders in criminal proceedings—Pre-trial (▸8.0501)

Florida trial court denies criminal defendant's motion to prohibit public disclosure of any information related to case by counsel, law enforcement officials, or potential witnesses, although attorneys are directed to comply with Florida bar rule governing public comments.

NEWSGATHERING

[2] Access to records—Judicial—Criminal—Pre-trial/discovery (▸38.1503.04)

Criminal defendant's request for blanket prohibition against public disclosure of all materials received in discovery is denied as overbroad and premature; instead, discovery information will be closed for 90 days from receipt of information, with either party being permitting to seek in camera inspection and order prohibiting disclosure of specific information until trial or resolution of case.

Case History and Disposition

Prosecution of defendant charged in murders of students at the University of Florida. On defendant's motion for orders to prohibit disclosure of information and material.

Denied in part, granted in part with modifications.

Attorneys

C. Richard Parker, public defender, Gainesville, Fla., for defendant.

Lennard B. Register, III, state attorney, Gainesville, for the state.

George D. Gabel, Jr., and Charles D. Tobin, of Gabel, Taylor & Dees, Jacksonville, Fla., for the Florida Times-Union.

Gregg D. Thomas and David S. Braylow, of Holland & Knight, Tampa, Fla.; Deborah R. Linfield, The New York Times Co., New York, N.Y.; and Jerold I. Budney, The Miami Herald Publishing Co., Miami, Fla., for The

Gainesville Sun, The Tampa Tribune, The Miami Herald, Fernandina Beach News Leader, Lake City Reporter, The Ledger, Leesburg Daily Commercial, Ocala Star-Banner, Palatka Daily News, Marco Island Eagle, Sarasota Herald-Tribune, Charlotte AM, and the News-Sun.

H. Scott Bates and James R. Lussier, of Mateer, Harbert & Bates, Orlando, Fla., for The Orlando Sentinal and WESH-TV.

EXHIBIT E

Opinion Text

Opinion By:

Morris, J.:

Full Text of Opinion

THIS CAUSE came on to be heard upon the Motion of the Defendant to Prohibit Public Disclosure of Information and Material. It seeks to prohibit the public disclosure of any information relating to investigation, prosecution or defense of this action by any employee of the Public Defender, State Attorney, Eighth Judicial Circuit Court, Alachua County Clerk of the Court, any law enforcement agency involved in the investigation and all potential witnesses. The only exceptions to disclosure would be those allowed under Rule 4.3-6(o) of the Rules Regulating the Florida Bar. The Defendant reasons the case has been and will continue to be the subject of reports in the public media. He further alleges he will be precluded from his ability to receive a fair trial in Alachua County if disclosure of facts, opinions and circumstances continue to pervade the community. Finally, his fundamental rights will be prejudiced if material disclosed to him in the discovery process becomes subject to public scrutiny.

The State does not object to the entry of such order. However, the State asserted that those who would be subject to the restriction of the Rule Regulating the Florida Bar do not include all those whom the Public Defender would place within its scope.

The Media (both print and electronic) sought and was granted leave to intervene. Various newspapers, and radio and television stations appeared through counsel. The Media objected to any order of closure on the ground that the Defendant's motion was vague, premature, violated the Public Record laws and fails to meet the appropriate legal test to be applied in such matters (the test of *Florida Freedom Newspaper, Inc. vs. McCray*, 520 So2nd 32 [14 Med.L.Rptr. 2374] (Fla. 1988). The Media further objected to any prohibition of statements as too broad and protested any order entered without findings of fact on necessity and the absence of less restrictive alternatives to outright prohibition.

This Court is aware that the Public Defender did not present evidence of the nature and extent of prior media coverage of this case. However, this Court was presented such evidence prior to the empaneling of the Grand Jury in support of an extraordinary Motion to Voir Dire that jury pool. No jurist with any experience in the local criminal justice system can be unaware of the extraordinary nature of this case. No such jurist could be unaware of the intensity of the Media's coverage of this case. The adoption of a local rule creating a Media Committee to facilitate the Media's access to the Courthouse while insuring the orderly and dignified operation of the daily business of the court system is a direct product of this case. No case known to this jurist has ever so captured the attention of the citizens of this Circuit or generated the volume of media coverage experienced with these five homicides. The return of the indictments in this case was broadcast live by television stations throughout the State. As this case approaches trial there is little doubt that media coverage will once again, intensify.

The duty of the Public Defender is to zealously represent his client within the bounds of law and ethics. He has filed this motion as a prophylactic measure to insure his client's right to a fair trial by an unbiased jury in Alachua County. He has stated that he does not wish to move the case away from Gainesville and is attempting to avoid any problem which could force such a request. The State Attorney is mindful of his obligations as an officer of the Court, to insure a fair trial occurs. He also seeks to avoid collateral problems that would impede the prosecution or create grounds for appellate intervention or reversal. He had therefore made the decision not to object to the entry of the requested order.

The Court's obligation is to insure a fair trial can occur under the State and Federal Constitutions with due consideration to the public's right to access to

Page 1129

court proceedings. The right to a fair trial is preeminent when it conflicts with that right to access or the right of free speech and press. *Estes v. Texas* 381 US 532, 85 S.Ct. 1628, 146 L.Ed2nd 543 [1 Med.L.Rptr. 1187] (1965). Additionally, that right of fair trial is specific to the county wherein the crime occurred. Article I Section 16 Florida Constitution (1968), *Miami Herald Publishing Company v. Lewis* 426 So2nd 1 [8 Med.L.Rptr. 2281] (Fla. 1982).

This access, which has been described as a "privilege of the press" (*Miami Herald Publishing Company v. Lewis*, supra at page 6) is not to be disregarded lightly. Prior court decisions make clear that public access is a judicial policy in support of open government and in recognition of the many benefits that

flow from the policy.

> Public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed2nd 484 [1 Med.L.Rptr. 1334] (1966). Such access gives the assurance that the proceedings were conducted fairly to all concerned. *Richmond Newspapers*. Aside from any beneficial consequences which flow from having open courts, the people have a right to know what occurs in the courts. The Supreme Court of the United States has noted repeatedly that a trial is a public event. What transpires in the courtroom is public property. [*Craig v. Harney*, 331 U.S. 367, 373-74, 67 S.Ct. 1249, 1253-54, 91 L.Ed. 1546 [1 Med.L.Rptr. 1310] (1947). Public access also serves as a check on corrupt practices by exposing the judicial process to public scrutiny, *Nebraska Press Ass'n v. Stuart*. 427 U.S. 539, 559-560, 96 S.Ct. 2791, 2802-2803, 49 L.Ed.2nd 683 [1 Med.L.Rptr. 1964] (1976), and protects the rights of the accused to a fair trial. *Richmond Newspapers*, 448 U.S. at 564, 100 S.Ct. at 2821 [6 Med.L.Rptr. 1833] et seq. Finally, because participating lawyers, witnesses and judges know their conduct will be subject to public scrutiny, it is fair to conclude that they will be more conscientious in the performance of their roles.

Miami Herald Publishing Company v. Lewis, supra, at page 6 and 7.

[1] Accordingly, this Court has grappled with a blanket prohibition against public disclosure and public statement. The request of the Public Defender for the latter is satisfied by adherence to Rule 4.3-6 of the Rules Regulating the Florida Bar. The attorneys and staff of the Public Defender and State Attorney are admonished to follow that Rule. The State Attorney is directed to explain these registrations to the law enforcement agencies involved in this matter. Public statement by law enforcement that creates unfair prejudice to the Defendant must be suffered by the prosecutor. At this time, the Court will go no further than such admonition. Hopefully, it will not be necessary to revisit this ruling but the Court will not hesitate to do so if the record demands.

[2] The request for blanket prohibition of all materials the Public Defender will receive in discovery is too broad and premature. The controlling precedent is set forth in *Florida Freedom Newspaper Inc. v. McCray* 520 So2nd 32 [14 Med.L.Rptr. 2374] (Fla. 1988) and Chapter 119, Public Records; Florida Statutes (1985). Disclosure to the press and public of these materials by virtue of Chapter 119 Florida Statutes is subject to judicial measures to insure the right of a fair trial.

> ... under the separation of powers doctrine, it is the responsibility of the judicial branch to ensure that parties receive a fair trial. In the case of a criminal defendant, the right to a fair trial includes the right to an impartial jury in the county where the crime was allegedly committed. The United States Supreme Court has characterized the right to a fair trial as the most fundamental of all freedoms and one which must be preserved at all costs. *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed2nd 543, [1 Med.L.Rptr. 1187] (1965). Moreover,
>
> > [t]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Sheppard v. Maxwell*, [384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2nd 600 [1 Med.L.Rptr. 1220] (1966)] *supra*. And because of the Constitution's pervasive concern
>
> **Page 1130**
>
> > of these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.
>
> *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2nd 608 [5 Med.L.Rptr. 1337] (1979). *Accord Palm Beach Newspapers, Inc. v. Burk*, 504 So.2nd 378, 380 [13 Med.L.Rptr. 2087] (Fla. 1987) ("where a

> defendant's right to a fair trial conflicts with the public's right to access, it is the right of access which must yield"); *Bundy v. State*, 455 So2nd 338 (Fla. 1984) (a balancing test between the right of public access and a defendant's right to a fair trial must be applied so as to recognize the weightier considerations of the defendant). If, as the press urges, Chapter 119 was read and applied so as to violate the constitutional separation of powers doctrine or the right to a fair trial, we should be obliged to declare the statute unconstitutional. Instead, we hold that when correctly interpreted and applied there is no conflict between the statute and the constitutional authority of the judicial branch to take such measures as are necessary to obtain orderly proceedings and a fair trial. *Florida Freedom Newspapers v. McCray,supra*, at page 34 and 35.

The justification for judicial measures must be based upon a review of evidence and judicial findings. The *McCray* case, quoted from above, dealt with pre-trial discovery materials being subject to a protective order deferring or restricting disclosure until trial. There the Court set out the duty of the Trial Court at page 35:

> ...the material here reached the status of a public record and it is necessary to determine what standard will apply in determining cause to temporarily seal public judicial records. A finding of cause to restrict or defer disclosure of such records cannot rest in air, it must be conclusion reached after considering relevant factors. As the present case illustrates, these factors are essentially the same as those set out in the three-pronged *Lewis* test. This is not surprising since both *Lewis* and the case here address the issue of restricting public access to what would normally be accessible to the public. Accordingly, we hold that the facts set out in *Lewis* are relevant to a finding of cause and should be considered in determining whether public access to a judicial public record should be restricted or deferred.

To enter a protective order in the absence of evidence and judicial fact finding is to deprive interested parties of a right to meaningful appellate review of an abuse of discretion by the Trial Court. This Court must consider relevant factors, including those communicated in *Miami Herald Publishing Company v. Lewis,supra*, before restricting access to records otherwise public.

The probability is that some restrictions may prove appropriate. For instance, the reports and depositions of experts may be the subject of motions and hearings on admissibility. Challenge may be raised on issues of competence, scientific reliability or acceptance, or the specific reliability of testing procedures or principles. To have conclusions published before such issues are heard could result in public knowledge of material seemingly inculpatory later being excluded at a subsequent trial. This problem most often occurs in the context of an accused's statements against interest. Although the Court can conceive of such issues there is no record yet existing to transform speculation to judicial fact finding and thus, an order of restriction upon disclosure until trial is premature.

This Court is not unmindful of the task to be faced. The State Attorney took two full weeks to present these cases to the Grand Jury. He has represented it would take at least two full days to make a summary presentation of his potential evidence to the Court. The Alachua County Commission has made an extraordinary budget allocation to the Public Defender to enhance his computer capabilities to receive and process the discovery material the State will present. Yet, none of these considerations relieve the Court of its duty to review evidence and enter findings of fact to justify any restriction on disclosure.

Two methods are apparent to meet this task. One is to allow the in-camera summary presentation by the State Attorney to the Court of the evidence he intends to disclose. Thereafter, the Court could make a determination of potential harm to the right of fair trial upon pre-trial disclosure. Alternatively, the Court

Page 1131

can order the State to proceed with disclosure to the defense, while ordering a temporary prohibition against public disclosure. This would allow the Public Defender to review materials and file specific request for in-camera inspection of materials that he finds might deprive his client of a fair trial upon early disclosure. The Court prefers the latter method because the initial judgment of harm is made by the attorney for the Defendant. This is in keeping with the adversarial nature of our system and a measured approach to this issue. It should be noted that the State Attorney may likewise seek restriction on disclosure when he feels matters otherwise disclosable under Chapter 119.011(3)(c)(5)a and b, Florida Statute, may prejudice the State's right to a fair trial. Both sides must be given a

reasonable time to review materials and file motions for protective measures.

One other matter must be discussed. All parties were invited to address the impact, if any, of *Locke v. Hawkes* __ So2nd __ [19 Med.L.Rptr. 1522] (Fla. 1991), November 7, 1991. At the time of this hearing, the Supreme Court had agreed to reconsider its opinion. A new opinion was issued February 27, 1992. This Court has carefully considered this new opinion and finds the prior judicial pronouncements interpreting Chapter 119.011(3)(c)(5) (1987) continue to be binding on this Court. The Public Defender is not exempted from compliance with Chapter 119 except in accord with prior case law. Although listed in Article V Section 18 Florida Constitution (1968) his duties are proscribed by the general law. Article I Section V Florida Constitution (1968) does not list the Public Defender as an entity in which is vested the judicial power of the State. This Court does not hold that there is no instance in which the Public Defender may partake of the judicial power of Article I Section V. Rather, on the limited issue of the applicability of Chapter 119 Florida Statute, this Court finds that it is within the power of the legislature to determine when matters contemplated in pre-trial discovery become public records subject to public access, albeit limited by a Trial Court's power to temporarily prohibit disclosure to insure a right of fair trial. Therefore

The motion is denied as to a prohibition on comment and admonishment given to follow the restriction of Rule 4.3-6, Rules Regulating the Florida Bar. If the Public Defender files his Notice of Intent to Participate in Discovery, the State Attorney is directed to file his Answer with the Clerk of the Court who shall immediately seal said Answer. An order of temporary closure to any and all materials shall thereafter be in effect for 90 days from receipt of such discovery by the Public Defender, during which the Public Defender or the State Attorney may move for in-camera inspection by the Court and order prohibiting disclosure of specific matters until trial or resolution of this matter.

- End of Case -

ISSN 1944-0359

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

STATE OF FLORIDA,

Plaintiff,

vs.

CASEY MARIE ANTHONY,

Defendant.
_____/

CASE NO.: 2008-CF-15606-O
DIVISION: 10

ORDER DENYING MOTION TO SEAL PENALTY PHASE DISCOVERY

THIS CAUSE came before this Court for hearing on December 20, 2010, on the Defendant's Motion to Seal Penalty Phase Discovery filed on December 3, 2010, pursuant to Florida Rule of Criminal Procedure 3.220(l). After carefully considering the Motions, arguments of counsel, and the law, the Court finds and determines as follows:

Counsel for the defense petitions this Court to enter a protective order pursuant to Florida Rule of Criminal Procedure 3.220(l), sealing or exempting from public access certain penalty phase discovery. Specifically, counsel for the defense wishes to preclude the release of the penalty phase witness list, which this Court ordered disclosed on November 30, 2010. Counsel for the *Orlando Sentinel* ("Sentinel"), a local daily newspaper granted standing by the Court, has filed a motion in opposition.

The issue thus presented is whether or not the Court must seal this discovery from public access in order to ensure the Defendant's right to a fair trial. For the reasons discussed *infra*, the Court finds that the requested action is not required.

Rule 3.220(1) provides that *upon a showing of good cause*, the Court may "order specified disclosures be restricted, deferred, or exempted from discovery." Fla. R.

COMPOSITE EXHIBIT F

Crim. P. 3.220(1). (Emphasis supplied).

Before court or public records may properly be closed on fair-trial grounds, this Court must specifically identify the factors that threaten the administration of justice and weigh all reasonable alternatives to mitigate the perceived threats. Only then, after development of a full record on these issues, may a court narrowly fashion a remedy that accommodates the public's interest alongside that of the criminal justice system.

Specifically, this Court must apply the three-part test referenced in *Florida Freedom Newspapers v. McCrary*, 520 So. 2d 32 (Fla. 1988), and established in *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982). Such findings can only be made after a careful analysis of the following factors:

a. Restricting public access to discovery material is necessary to prevent a serious and imminent threat to the administration of justice;

b. No alternatives, other than a change of venue, would protect the defendant's right to a fair trial; and

c. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Lewis 426 So. 2d at 6; *McCrary*, 520 So. 2d at 35.

Bearing the preceding principles in mind, the Defendant's claim fails. As a threshold matter, the Court agrees with the Sentinel that the Defense bears the burden of proof in sealing this penalty phase discovery. It is well-settled that the party seeking closure has the burden of proving by the greater weight of the evidence that closure is necessary to prevent a serious and imminent threat to the administration of justice. *WESH Television, Inc. v. Freeman*, 691 So.2d 532, 534 (Fla. 5th DCA 1997).

Although the Defense claims that disclosure of the witness list has a potentially chilling effect, the Court agrees with the Sentinel that this bald assertion is insufficient. A finding of cause to restrict or defer disclosure of such records cannot rest in air. *McCrary*, 520 So. 2d at 35. In order to seal the entire penalty phase witness list, the Defendant must make a much more particularized showing. The Court agrees with the Sentinel that the three-pronged test has not been met in the case *sub judice*.

To the contrary, many potential penalty phase witnesses are presumably already known to the public at large and are already associated with this case. Release of any known individual's name could not possibly deprive the Defendant of her fair trial rights. Moreover, even for witnesses not known, counsel's conclusory assertion that some witnesses may be reluctant to come forward is insufficient to demonstrate a real threat to the Defendant's fair trial rights. Any penalty phase witness will testify in an open courtroom and be publicly identified with this case. If the unknown individuals on the Defendant's witness list are simply reluctant to be associated with this case, the Defendant has not shown how the delayed association of these individuals will protect her fair trial rights. Because the Defense does not satisfy its burden, the Motion to Seal Penalty Phase Discovery is DENIED.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 7th day of January 2011.

[redacted]

BELVIN PERRY, JR.
Chief Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Order Denying Motion to Seal Penalty Phase Discovery has been furnished via U.S. Mail or hand delivery to **Ann E. Finnell, Esq.,** Finnell, McGuiness, Nezami, & Andux P.A., 233 E. Bay Street, Suite 601, Jacksonville, Florida 32202; **Jose A. Baez, Esq.,** The Baez Law Firm, 522 Simpson Road, Kissimmec, Florida 34744; **J. Cheney Mason; Esq.,** 390 N. Orange Ave., Suite 2100, Orlando, Florida 32801; **Linda Drane Burdick, Esq.,** State Attorney's Office, 415 N. Orange Avenue, Orlando, Florida 32801; and **Rachel E. Fugate, Esq.,** 400 N. Ashley Dr., Suite 1100, Tampa, Florida 33602, on the 24 day of Jan, 2011.

[redacted]
Judicial Assistant

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

STATE OF FLORIDA,
Plaintiff,

vs.

CASEY MARIE ANTHONY,
Defendant.
_____/

CASE NO. 48-2008-CF-15606

DIVISION: 99

ORDERS ADDRESSING MOTION TO SEAL RECORDS RELATED TO THE JUSTICE ADMINISTRATIVE COMMISSION/ RETAINMENT AND PAYMENT OF EXPERTS, INVESTIGATORS, MITIGATION SPECIALIST, AND OTHER COSTS/ RECONSIDERATION OF DEFENDANT'S REQUEST TO WAIVE APPEARANCE AT CERTAIN HEARINGS/ PROCEDURES FOR FUTURE MOTIONS

THIS MATTER came before the Court for hearing on May 6, 2010 to address several issues and motions including: The retainment and estimated budget for payment of certain fees and costs for Defendant by the Justice Administrative Commission (hereinafter referred to as "JAC") and the sealing of records relating thereto; reconsideration of Defendant's request to waive her appearance at certain hearings; and certain procedures for future motions. Based upon review of the Motions and hearing arguments of counsel, the Court makes the below findings:

I. Defendant's Motion to seal all JAC documents, including but not limited to, all payment vouchers, financial disclosures of experts and personal information of experts and costs:

After hearing arguments from counsel for Defendant, the State Attorney's Office, JAC, and the Orlando Sentinel[1], and consideration of the applicable law, the Court finds that Defendant has not met her burden to show that a blanket order sealing these records is necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of

[1] The Orlando Sentinel filed a Motion to Intervene for the Limited Purpose of Opposing Defendant's Motion to Seal All Justice Administrative Commission Documents. There being no objections, the Court granted the Motion.

justice in her case.[2] However, the Court does recognize that there may be certain records pertaining to the payment of fees and costs which may require an in camera review to determine if such records should be sealed. Accordingly, Defendant's motion to seal these records is **DENIED, without prejudice** to allow Defendant's counsel the opportunity to request an in camera review by the Court on an as needed basis.

II. Approval for Retainment and Payment of Fees and Costs for Certain Experts, a Mitigation Specialist, Investigators, and Other Costs:

After hearing arguments from counsel for Defendant, the State Attorney's Office, and JAC, and consideration of the applicable law, the Court orders the following as to the retainment and proposed budget for payment of fees and costs for Defendant's experts, mitigation specialist, and investigators:

A. The Court finds that the experts, mitigation specialist, and investigators listed below are relevant and necessary to provide Defendant with adequate representation.[3]

Accordingly, Defendant's request for retainment of these persons and payment of their estimated fees and fess is **GRANTED** within the parameters established in this Order and subsequent Orders, if needed. These persons have agreed and shall comply with the rates, policies and procedures as established by JAC and the Indigent Services Committee. Further, whenever possible, depositions of out of state experts, the mitigation specialist, and the investigators shall be done through the use of video conference equipment available at the Orange County Courthouse. Counsel shall contact the Court Administrator, Matt Benefiel to arrange for the use of the video conference equipment.

---

[2] See Florida Rule of Judicial Administration 2.420(c)(9)(A)(i) requiring a showing that the sealing of records is necessary in order to prevent a serious and imminent threat to the fair, impartial, and orderly administration justice. Also, see *News-Press Pub. Co., Inc. v. State*, 345 So. 2d 865 (Fla. 2d DCA 1977) where the Court found that there must be compelling reasons before some or all of the records of a court proceeding may be sealed, and such reasons should be specifically set forth by the sealing authority in order that the legality thereof can be reviewed.

[3] See *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985) and *Lavender v. State*, 889 So. 2d 882 (Fla. 5th DCA 2004).

1. For the below persons, caps are included as to the number of hours to be incurred:

Dr. Henry Lee – Criminalist Expert: A cap of 8 hours for in court services and a cap of 25 hours for out of court services is approved.

Jeanene Barrett - Mitigation Specialist: A cap of 384 hours for services is approved.

One Investigator (in state): A cap of 300 hours for in state services is approved.

Out Investigator (out of state): A cap of 100 hours for out of state services is approved.

One K-9 Expert (out of state): A cap of 20 hours for services is approved.

One Postmortem Hair Banding Expert: A cap of 20 hours is approved.

2. For the below persons, caps as to the number of hours to be incurred has not been determined to date. Thus, these caps shall be approved by subsequent order:

One Forensic Entomologist (out of state)
One Forensic Anthropologist
One Forensic Botanist (out of state)
One Out of State Forensic Pathologist (out of state)
One Digital Computer Forensic Expert (out of state)
One DNA Expert (out of state)
One Forensic Chemist (in state)
One Forensic Chemist (out of state)

B. The Court finds that the experts listed below are not relevant and necessary to provide Defendant with adequate representation and therefore Defendant's request for the retainment of the below listed persons and payment of their fees and costs is DENIED as follows:

Jury Consultant: **DENIED with prejudice.**

One additional DNA Expert: **DENIED with prejudice.**

One additional forensic botanist for consulting only: **DENIED with prejudice.**

One Trace Evidence Expert: **DENIED without prejudice** to provide Defense counsel the opportunity to determine whether Dr. Henry Lee can provide the trace evidence services and if he not able to do so, counsel can then request approval from the Court for an in state DNA expert.

One Taphonomy Expert: **DENIED without prejudice** to allow Defense counsel to request a *Rogers* hearing.[4] Also, the expert may appear at the Rogers hearing via video conferencing.

One Cell Phone Expert: **DENIED without prejudice** to determine after the State's cell phone expert is deposed as to whether this expert is needed.

C. As to the request for approval of other Defense costs, the Court orders as follows:

Costs for Public Record Requests: A cap of $3,500.00 is **GRANTED.**

Travel Costs for Defense counsel: **DENIED.**

Costs to Conduct Tests as to Evidence in Defendant's Automobile: These costs include materials and two Pontiac Sunbirds automobiles, similar to Defendant's automobile: **DENIED without prejudice** to allow Defense counsel to request a *Rogers* hearing.

Transcripts of Depositions: Defense counsel shall continue to request transcripts by motion for each deposition and shall include deponent's name and date of deposition.

III. Reconsideration of Defendant's Request to Waive Appearance at Certain Hearings:

Defendant's has requested that she be allowed to waive appearance at certain hearings such as hearings addressing approval of costs. Defendant's request is **DENIED in part without prejudice** to allow for her request to be reconsidered for certain hearings on an individual basis and **GRANTED in part** to provide that she will not be required to appear at status hearings unless she chooses to do so.

IV. Defense's Witness List:

Defense Counsel shall submit a list of all known witnesses by August 31, 2010. This list may be supplemented at a later date.

---

[4] See *Rogers v. State*, 783 So. 2d 980 (Fla. 2001).

V. Procedures for Future Motions filed after May 6, 2010:

Motions where the movant prefers a response from the opposing party, either prior to or in lieu of a hearing, shall include this request in writing. Also, all motions shall state whether or not an evidentiary hearing is requested or shall state that the motion can be resolved without a hearing through the pleadings submitted by the parties. Further, courtesy copies of all motions shall be provided to the Court.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 12th day of May, 2010, nunc pro tunc to May 6, 2010.

[redacted]

BELVIN PERRY, JR.
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand delivery to:

Jose A. Baez, Esq. and Michele Medina, Esq.; The Baez Law Firm, 522 Simpson Road, Kissimmee, Florida 34744

J. Cheney Mason, Esq., J. Cheney Mason P.A., 390 N. Orange Avenue, Suite 2100, Orlando, Florida 32801

Andrea D. Lyon, Esq., Director, Center for Justice in Capital Cases, DePaul University College of Law, 1 E. Jackson Blvd., Chicago, Illinois 60604

Linda Kenney Baden, Esq., 15 West 53rd Street, Suite 18B, New York, New York 10019

Linda Drane Burdick, Jeffrey L. Ashton, and Frank George, Assistant State Attorneys, Office of the State Attorney, 415 N. Orange Avenue, Orlando, Florida 32801

Brad Bischoff, Attorney for the Justice Administrative Commission, Post Office Box 1654 (32302), 227 North Bronough Street, Suite 2100, Tallahassee, Florida 32301

Rachael E. Fugate, Esq. Thomas & Locicero PL, Attorneys for the Orlando Sentinel, 400 N. Ashley Drive, Suite 1100, Tampa, Florida 33602

[redacted]
Judicial Assistant

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

STATE OF FLORIDA,
Plaintiff,

CASE NO.: 48-2008-CF-15606-O

DIVISION: 99

vs.

CASEY MARIE ANTHONY,
Defendant.
_____/

ORDER DENYING MOTION TO SEAL JAIL VISITATION LOG RECORDS

THIS MATTER came before the Court for hearing on June 1, 2010, on the Defendant's Motion to Seal Jail Visiting Log Records, filed on April 29, 2010. After carefully considering the Motions, arguments of counsel, and the law, the Court finds and determines as follows:

Counsel for the defense petitions the Court to enter an Order directing the Administrator of the Orange County Jail to seal and maintain the confidentiality of all records of visitors to the Defendant, Casey Marie Anthony. Specifically, counsel moves the Court to seal the "jail visitation log," which documents the names of persons who visit the Defendant, an inmate awaiting trial on criminal charges. Of particular concern to the defense is the identification of expert witnesses who will be meeting with the Defendant to assist in the preparation of her case. Counsel for the Defendant argues that the mere identity of these individuals to the news media "will cause unfounded speculation, as well as 'google' inquiries," thus severely hampering her entitlements to due process, equal protection of the law, and effective assistance of counsel.

Counsel for Orange County, on behalf of Orange County Corrections, has filed a Response opposing the Defendant's Motion based upon the Florida Public Records Law as well as Article I, section 24 of the Florida Constitution.

The issue thus presented is whether or not a trial court may rightfully order an administrative agency, in this case the county jail, to seal public records that are within its exclusive possession. For the reasons discussed *infra*, the Court finds that it can not.

First, such an order would amount to a violation of the doctrine of separation of powers set forth in Article II, section 3 of the Florida Constitution, which mandates that no branch of government may encroach upon the powers of another. *Florida Dept. of State, Div. of Elections v. Martin*, 916 So. 2d 763 (Fla. 2005); *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004); *Sloban v. Florida Bd. of Pharmacy*, 982 So. 2d 26 (Fla. 1st DCA 2008). In adherence to this basic principle, the judiciary is precluded from interfering with, much less usurping the proper authority of, the executive. *Sharrard v. State*, 998 So. 2d 1188 (Fla. 4th DCA 2009). Moreover, a trial court is forbidden from entering an injunction that requires an administrative agency to perform its duties in a particular way. *Crowley Museum and Nature Center, Inc. v. Southwest Florida Water Management Dist.*, 993. So. 2d 605 (Fla. 2d DCA 2008).

In addition, it is well-established that a trial court may not interfere with and does not have the authority to enter into the decision-making process which is delegated to an executive agency. *Department of Revenue ex rel. Jackson v. Nesbitt*, 975 So. 2d 549 (Fla. 4th DCA 2008); *Agency for Persons with Disabilities v. J.M.*, 924 So. 2d 1 (Fla. 3d DCA 2005), *review denied*, 932 So. 2d 193 (Fla. 2006) The jail visitation log record is an administrative procedure utilized by the Orange County Jail to ensure the safety and security of inmates, jail employees, and the general public by recording the identity of visitors to its facilities. The agency has determined in its discretion that the visitation log is a vital tool in effecting those means.

As such, to require a judge to second guess administrative decisions would place the judicial branch in a supervisory role over basic executive branch, public protection functions in

violation of the separation of powers doctrine. *Strickland v. Department of Agriculture and Consumer Services*, 922 So. 2d 1022 (Fla. 5th DCA 2006). This the Court may not do absent a violation of constitutional or statutory rights. *Miami-Dade County v. Miller*, 19 So. 3d 1037 (Fla. 3d DCA 2009). While counsel for the defense argues that failure to seal the jail visitation log records would violate the Defendant's entitlements to due process, equal protection, and effective assistance of counsel, the Court remains unpersuaded.

First, the Defendant's claim that failure to seal the jail visitation log is violative of her right to equal protection of the law is without merit. "Equal protection of the laws" means that each person is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed on, others in a similar situation. *McDaniel v. Board of Public Instruction for Escambia County, Fla.*, 39 F. Supp. 638 (N.D. Fla. 1941); *Caldwell v. Mann*, 157 Fla. 633, 26 So. 2d 788 (1946); *Riley v. Lawson*, 106 Fla. 521, 143 So. 619 (1932). All *similarly situated* persons are equal under the law and must be treated alike; the rights of all persons or classes must rest on the same rule under *similar circumstances*. (Emphasis supplied). *Ocala Breeders' Sales Co., Inc. v. Florida Gaming Centers, Inc.*, 793 So. 2d 899 (Fla. 2001).

Thus, equal protection is not violated merely because some persons are treated differently than other persons; it only requires that persons similarly situated be treated similarly, and it demands only reasonable conformity in dealing with persons similarly situated. *Duncan v. Moore*, 754 So. 2d 708 (Fla. 2000); *Fredman v. Fredman*, 960 So. 2d 52 (Fla. 2d DCA 2007), *review denied*, 968 So. 2d 556 (Fla. 2007) *and cert. denied*, 128 S. Ct. 1481, 170 L. Ed. 2d 297 (U.S. 2008).

The jail visitation log records the identification of every person that visits an inmate in the Orange County Jail. Consequently, the Defendant's contention that she is being treated disparately from similarly situated persons, i.e., other inmates, is simply unfounded.

Equally implausible is the argument that if the jail visitation log isn't sealed, the Defendant will not receive effective assistance of counsel. Even if the Court was vested with such authority, it is not convinced that the disclosure of the jail logs would give the prosecution any tactical advantage. The disclosure of jail visitors' names does not hold the potential to reveal privileged communications. In fact, the Defendant ultimately will be required to disclose to the prosecution the names of all testifying experts, along with any other reports or statements of experts made in connection with the case. Fla. R. Crim. P. 3.220(d)(I)(A) and (B)(ii). Furthermore, any "unfounded speculation" on the part of the news media is beyond the ambit of the Court.

Lastly, counsel for the defense claims that failure to seal the jail log would result in impingement to the Defendant's entitlement to due process of law. Although the Defendant's Motion contains very general allegations concerning the nature of this alleged due process violation, it fails to cite any authority that stands for the proposition that jail inmates have a fundamental right to seal visitation log records.[1] Perhaps most telling, the Motion is bereft of any citation to legal authority at all. While it is true that during the hearing on the Motion counsel did offer one case to support its position, it is easily distinguishable.

In *Powell v. Foxman*, 528 So. 2d 91 (Fla. 5th DCA 1988), the defendant sought a writ of mandamus to compel the State to produce *recorded testimony* of the minor victim during a dependency hearing (Emphasis supplied). The District Court of Appeal, in granting the writ, held that the defendant was entitled to the prior recorded testimony based on the Confrontation Clause

[1] The issues presented in this case do not broach procedural due process matters.

of the Sixth Amendment of the Unites States Constitution and Article I, section 16, of the Florida Constitution. Clearly, *Foxman* is not analogous to the instant case.

First, the jail log does not constitute any form of "testimonial evidence" which entitles the Defendant a right to confront and cross-examine it. *See Crawford v. Washington*, 541 U.S. 36 (2004). Furthermore, the defendant in *Foxman* sought to have records produced rather than concealed, as in the case *sub judice*. Finally, and perhaps most germane to the disposition of this claim, *Foxman* involved court records. It did not pertain to public records that were in the exclusive possession of a co-equal branch of government.

To the contrary, the Florida Supreme Court has expressly held that the judiciary only has exclusive power and responsibility over court records, and it has further acknowledged the distinction between court records and records that are not in the exclusive possession of the courts. *Johnson v. State*, 336 So. 2d 93 (Fla. 1976); *State v. D.H.W.*, 686 So. 2d 1331). Indeed, the court explicitly ruled that under the separation of powers doctrine, a court's power to order the sealing of nonjudicial criminal history records not in the custody of the courts derives only from a legislative grant by statute. *D.H.W.* 686 at 1334.

Additionally, as counsel for Orange County aptly points out, the Orange County Jail is an agency subject to the Florida Public Records Law. This statute, along with Article I, section 24 of the Florida Constitution, mandates that all public records of county agencies are open for inspection and copying by any person. § 119.01, and 119.011(1), Fla. Stat. (2010).

A "public record" is defined as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical for, characteristic or means of transmission, made or received pursuant to law or

ordinance or in connection with the transaction of official business by any agency." § 119.011(11), Fla. Stat. (2010).

Clearly, the jail log constitutes a public record that is subject to the statute. As such, Orange County Corrections Department is required to permit inspection of the log upon request by any person, unless it falls into one of the statutory exemptions listed in Section 119.071, Florida Statutes (2010), or is exempt pursuant to any other law.

The Court agrees with the County that a criminal defendant's desire to "maintain the confidentiality of visitors" in a high profile case does not qualify as a lawful exemption. As mentioned *supra*, the Defendant's Motion does not provide any statutory exemption or legal authority for the Court to "seal" documents that constitute public records.

Instead, counsel for the defense entreats the Court to judicially create an exemption in this case. The Court is unable to acquiesce. Any exemption from the Florida Public Records Act must originate in the legislature and not by judicial decision. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

Accordingly, the Defendant's Motion to Seal Jail Visitation Log Records is DENIED.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 7th day of June 2010.

[redacted]

BELVIN PERRY, JR.
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished by U.S. Mail or hand delivery this 7th day of March, 2010 to:

- Linda Drane Burdick, Jeffrey L. Ashton, and Frank George, Assistant State Attorneys, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801;

- Jose Baez, Esquire, The Baez Law Firm, 522 Simpson Road, Kissimmee, Florida 34744;

- J. Cheney Mason, Esquire, J. Cheney Mason, P.A., 390 North Orange Avenue, Suite 2100, Orlando, Florida 32801;

- Andrea Lyon, Esquire, Director, Center for Justice in Capital Cases, DePaul University College of Law, 1 East Jackson Boulevard, Chicago, Illinois 60604;

- Tamara L. Gappen, Assistant County Attorney, Orange County Attorney's Office, Orange County Administration Center, P.O. Box 1392, Orlando, Florida 32802.

[redacted]
Judicial Assistant