

**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

STATE OF FLORIDA

Plaintiff,

v.

NIKOLAS JACOB CRUZ,

Defendant.

CASE NO.: 18001958CF10A

JUDGE: SCHERER

**NEWS MEDIA MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF
OPPOSING REQUESTS TO LIMIT PUBLIC ACCESS**

The Associated Press; Cable News Network, Inc.; Dow Jones & Company; the First Amendment Foundation; the Florida Press Association; Gannett Co., Inc.; GateHouse Media, LLC; Los Angeles Times Communications LLC; The McClatchy Company; Nexstar Broadcasting, Inc.; The New York Times Company; Orlando Sentinel Communications Company, LLC; Reporters Committee for Freedom of the Press; Sun-Sentinel Company, LLC; Sunbeam Television Corporation; and TEGNA (collectively, the “News Media Parties”) hereby move to intervene for the limited purpose of opposing requests to limit access to these proceedings and associated records, including but not limited to, any motions or requests seeking to close hearings, seal judicial or public records (including discovery materials), impose any prohibition on extra-judicial comments, and/or restrict coverage by electronic media. In this regard, should any party or non-party seek to limit public access, the News Media Parties request, pursuant to well-established law, sufficient notice in advance of any closure or restriction and the opportunity to respond and be heard. In support of this motion, the News Media Parties state as follows:

1. On the afternoon of February 14, 2018 at Marjory Stoneman Douglas High School in Parkland, Defendant Nikolas Cruz shot and killed 17 people, including students and teachers, and wounded many others. Since that time, the News Media Parties have covered the shooting and its aftermath as a surrogate for the public (locally, nationally and around the world), who continue to struggle with the events of that tragic day. In so doing and as part of the public's constitutionally-guaranteed rights, the News Media Parties rely on access to the proceedings and records in the prosecution of the Defendant.

2. Specifically, the News Media Parties are local and national newspapers, television networks and stations, and non-profit organizations that support free press and open government interests, including:

- The Associated Press;
- Cable News Network, Inc. ("CNN");
- Dow Jones & Company (publisher of The Wall Street Journal);
- the First Amendment Foundation;
- the Florida Press Association;
- Gannett Co., Inc. (publisher of Florida Today (Brevard County), Indian River Press Journal (Treasure Coast Newspapers-Vero Beach), Naples Daily News, The News-Press (Fort Myers), PNJ.com (Pensacola), The Stuart News (Treasure Coast Newspapers), the St. Lucie News-Tribune (Treasure Coast Newspapers, Fort Pierce), Tallahassee Democrat, and USA TODAY);
- GateHouse Media, LLC (publisher of The Daytona Beach News Journal, The Gainesville Sun, The (Lakeland) Ledger, the Ocala StarBanner, and the (Sarasota) Herald-Tribune);
- Los Angeles Times Communications LLC (publisher of the Los Angeles Times);
- The McClatchy Company (publisher of The Miami Herald and The Bradenton Herald);
- Nexstar Broadcasting, Inc. (owner of WFLA/WTSA (Tampa) and WMBB (Panama City));

- The New York Times Company (publisher of The New York Times);
- Orlando Sentinel Communications Company, LLC (publisher of the Orlando Sentinel);
- Reporters Committee for Freedom of the Press;
- Sun-Sentinel Company, LLC (publisher of the South Florida Sun-Sentinel);
- Sunbeam Television Corporation (owner of WSVN-Ch. 7); and
- TEGNA (owner of WTSP-TV and WTLV/WJXX (“First Coast News”)).

3. In only the first few days of the criminal case, counsel for Defendant has filed a sealed *ex parte* motion, obtained a confidential order and requested broad closure of the proceedings. Defendant’s motion (and subsequent order) was not shared with the prosecution or made publically available as part of the court file or otherwise. After a hearing on Monday, February 19, 2018, the Court ruled that the motion and order, which reportedly were limited to counsel’s access to Defendant, would remain sealed. Going forward, however, the Court advised that all future motions seeking access restrictions or confidentiality related to these proceedings should be heard and filed publicly -- as required by the First Amendment, the Florida Constitution, Florida common law and applicable rules of judicial administration.

4. At the hearing concerning the sealed motion and order, the News Media Parties were not permitted to oppose the closure. Florida law, however, is clear that limiting access to judicial proceedings and documents directly impairs the public’s right to monitor this criminal proceeding, which is of immense public interest. Accordingly, the News Media Parties have standing to intervene and oppose closure at all stages of the proceedings. See Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988); Miami Herald Publ’g Co. v. McIntosh, 340 So. 2d 904, 908 (Fla. 1976).

5. As detailed below, these rights are substantive and constitutionally required. The

News Media Parties therefore request that the Court enter an order granting them leave to intervene in this proceeding for limited, access-related purposes.

MEMORANDUM OF LAW

On countless occasions and routinely in high-profile cases, Florida courts have been asked to consider limiting access to criminal proceedings and information which may be released to the public. When such requests are made, trial courts must adhere to strict procedures that ensure the public's constitutional right of access to criminal prosecutions is protected. Criminal records and proceedings are presumptively open. See generally Sarasota Herald-Tribune v. State, 924 So. 2d 8 (Fla. 2d DCA 2005). Any closure of court records or proceedings therefore should be exceedingly rare. See Morris Publ'g Group, LLC v. State, 136 So. 3d 770, 778 (Fla. 1st DCA 2014) (citation omitted).

Before any closure can occur, courts must specifically identify the factors that threaten the administration of justice and weigh all reasonable alternatives to mitigate the perceived threats short of closure. Only then, after development of a full record on these issues (and allowing the media an opportunity to participate), may a court narrowly fashion a remedy that accommodates the public's interest in open proceedings, alongside that of any compelling interest asserted for closure. See Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6-8 (Fla. 1982). Importantly, because the media is a "public surrogate," it "must be given an opportunity to be heard on the question of closure prior to the court's decision." Id. at 7; see also WESH Television, Inc. v. Freeman, 691 So. 2d 532, 534 (Fla. 5th DCA 1997) (requests for closure require evidentiary hearing with notice to the media and an opportunity to be heard); Times Publ'g Co. v. Pennick, 433 So. 2d 1281, 1283 (Fla. 2d DCA 1983) (same).

A. Constitutional Presumption of Access to Judicial Proceedings

It is well-established that the public and press have a First Amendment right of access to criminal proceedings, including pretrial proceedings. See Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (trials); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (trials); Press-Enterprise Co. v. Riverside County Superior Court, 464 U.S. 501 (1984) (jury selection); Press-Enterprise Co. v. Riverside County Superior Court, 478 U.S. 1 (1986) (pretrial hearings); El Vocero De Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) (pretrial hearings).

In Globe Newspaper Co., for example, the United States Supreme Court struck down a state law which automatically excluded the press and public from a criminal trial during the testimony of a juvenile sex offense victim. The Supreme Court held the law was unconstitutional, citing the presumption of public access under the First Amendment. In so holding, the Court relied on the longstanding tradition of open proceedings, and the particularly significant role that access to criminal trials plays in the proper functioning of the judicial process and the government as a whole. Id. at 605-06. As the Court explained:

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Id. at 606.

B. Florida Law Mandates Open Proceedings and Records

Florida law is in accord with the holding in Globe Newspaper. The Florida Supreme Court has repeatedly held that the “public and press have a fundamental right of access to *all judicial proceedings*.” See Miami Herald Publ’g Co. v. McIntosh, 340 So. 2d 904, 908, 908 (Fla. 1976)

(emphasis added); Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 7 (Fla. 1982) (recognizing that “[w]hat transpires in the courtroom is public property”); Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988) (mandating that “a strong presumption of openness exists for all court proceedings” and that the “filed records of court proceedings are public records available for inspection”); *see also* Rule 2.420 of the Florida Rules of Judicial Administration (incorporating Lewis test). Moreover, the right of access to judicial and public records in Florida is of constitutional magnitude. See Art. I, § 24, Fla. Const.

A party seeking to close hearings or seal records bears the *heavy burden* of establishing through evidence that:

- (a) closure is necessary to prevent a serious and imminent threat to the administration of justice,
- (b) no less restrictive alternative measure other than closure is available, *and*
- (c) closure must be effective in protecting against the perceived harm.

Lewis, 426 So. 2d at 6-8.

Further, consideration of whether to conceal judicial records “must begin with the proposition that all civil and criminal court proceedings are public events, records of court proceedings are public records and there is a strong presumption in favor of public access to such matters.” Sentinel Commc’n Co. v. Watson, 615 So. 2d 768, 770 (Fla. 5th DCA 1993) (citation omitted). That presumption is codified in Fla. R. Jud. Admin. 2.420. Before a court or public record may be properly sealed, a trial court must specifically identify the factors that threaten the administration of justice and weigh all reasonable alternatives. Id.

Florida courts at all levels have reinforced this strong presumption in favor of open court proceedings and records, even in highly-publicized cases. As eloquently stated by the Florida Supreme Court:

Freedom of the press is not, and has never been a private property right granted to those who own the news media. It is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself, other people, and the Nation. News delayed is news denied. To be useful to the public, news events must be reported when they occur. Whatever happens in any courtroom directly or indirectly affects all the public. To prevent star-chamber injustice the public should generally have unrestricted access to all proceedings.

Miami Herald Publ'g Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976).

The Cruz prosecution is a matter of significant importance to a stunned and grieving public seeking to understand the sudden and violent loss of children, teachers, mentors, and parents. Florida's once safest city, Parkland, now is a place of a deadly tragedy. Under such circumstances, public access to these proceedings takes on an even greater importance, reinforcing decades-long legal precedent mandating open courts and records as a hallmark of our judicial system.

CONCLUSION

Closure of criminal proceedings and sealing records are extreme remedies that should be ordered only when there is a manifestly overwhelming threat to a defendant's right to receive a fair trial. And even then, alternatives must be considered and restrictions must be narrow. Because the News Media Parties act as surrogates for the public, they should be notified prior to any closure or sealing, and be afforded an opportunity to respond. The News Media Parties therefore request an order permitting them to intervene in these proceedings for the limited purpose of addressing any motions or requests to restrict public access.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **20th** day of **February, 2018**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and parties identified on the Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

By: /s/ Dana J. McElroy
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