IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 67,352

PALM BEACH NEWSPAPERS, INC.,
and MIAMI HERALD PUBLISHING COMPANY, et al.,

Petitioners,

v.

THE HONORABLE RICHARD BRYAN BURK,
LINDA AURILIO and STATE OF FLORIDA,

Respondents.

On Review From The
Fourth District Court of Appeal

AMICUS CURIAE BRIEF OF THE TIMES PUBLISHING COMPANY

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, The Times Publishing Company, is the publisher of The St. Petersburg Times and Evening Independent, both newspapers of daily circulation throughout the west coast of Florida. Acordingly, Amicus and its readers have an interest in the free and open dissemination of information about the judicial system.

STATEMENT OF THE CASE AND THE FACTS

Amicus accepts and adopts the Petitioners' statement of the case and the facts.

SUMMARY OF ARGUMENT

All judicial proceedings are presumed open to the press and public absent a judicial ruling to the contrary. Discovery depositions are judicial proceedings which the public and the press have a qualified right to attend. Florida criminal procedure uniquely permits wide-ranging criminal discovery, including deposition discovery.

Depositions and pre-trial hearings are the usual substitute for trials in today's legal system, where only a small minority of cases actually go to trial. If the public is to remain informed about its judicial system, it is essential that the press and public are accorded access to pretrial proceedings including discovery proceedings. Discovery has become the predicate for disposition of over 95% of all criminal cases without trial. Thus, absent access to these pretrial procedings, the practical effect of the opinion below is to shroud the lion's share of the criminal justice system in secrecy, contrary to First Amendment principles and the established judicial policy of this state.

Before the taking of depositions can be closed, notice and a hearing are required together with application

of the three-prong constitutional balancing test outlined by this Court. The party seeking closure must show compelling constitutional reasons for closure. The Respondents in the instant case have failed to meet these requirements.

By contrast, it is ironic to hold that depositions are secret until filed, but the mere discretionary act of filing a transcript blesses the deposition with First Amendment values where none existed previously.

Depositions are judicial proceedings, governed by court rules, under the direct control of the courts, secured by subpoena, conducted by official court reporters and prosecutors acting in their official capacity, secured by compulsory process and enforced by contempt and perjury. Accordingly, the appellate court's decision should be reversed and deposition and related proceedings opened.

Furthermore, press attendance at the taking of a discovery deposition is analogous to, and potentially less disruptive than the presence of cameras in the courtroom and should therefore be allowed under similar standards.

ARGUMENT

I. THE PUBLIC AND THE PRESS HAVE A GENERAL RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS AND COURT RECORDS UNDER THE FIRST AMENDMENT

Contemporary judicial interpretations of the First Amendment hold that it guarantees free and open access by

the public to news and particularly to information concerning fundamental governmental processes. The First Amendment mandates that judicial proceedings are contemporaneously open to the public and the media, to the end of preventing injustice and promoting a self-governing society.

> 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. What ever 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.

State ex rel. Miami Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976). Members of the news media are important agents of the public interest and are accorded particular constitutional protection as the most efficient and practical gatherers and dispensers of public information. Id. at 908.

The question of whether the public and the press have a constitutional right to attend criminal trials was answered in the affirmative by the United States Supreme Court in Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). The Court emphasized the long-established link between the openness of the judicial system and the fair administration of that system. Id. at 571-72. To reach its

decision to allow a right of public access to criminal trials, the court noted that the First Amendment does not speak equivocally, "[i]t must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow." Id. at 576 (quoting Bridges v. California, 314 U.S. 252, 263 (1941)). In keeping with this notion, the Supreme Court expanded public and press access in pretrial stages of judicial proceedings, first to the jury selection process, Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984), then to pretrial suppression hearings. Waller v. Georgia, ___ U.S. ___, 104 S.Ct. 2210 (1984).

Beyond the holdings of both the United States Supreme Court and the Florida Supreme Court that there is a right of access to both the actual trial and pretrial proceedings, what is instructive to this Court's decision is the rationale employed in these cases. For instance, in Globe Newspaper Co. v. Superior Court for Norfolk, 457 U.S. 596 (1982), the Supreme Court asserted that a "'major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'" Id. at 604 (quoting Mills v. Alabama, 384 U.S. 214 (1966)). The protection is afforded "to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." Id. at 605.

Equally significant, the Court spoke in broad terms reaching far beyond the actual trial. The Court noted:

> 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 to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.

Globe, 457 U.S. at 608.

This analysis is completely applicable to the present case. These strong policy concerns mandate that pretrial depositions be open to the press and public. Openness should be held the general rule because pretrial depositions, no less than trials, generate information which is vital to self governance. The arbitrary, blanket closure order effectuated by the Burk court's plurality opinion violates these cherished and longstanding principles of judicial administration.

To insure fairness, the requirement of openness is not restricted to the actual trial, but logically extends to all facets of the criminal trial process. The United States Supreme Court has recognized that the "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions" are legitimate matters of public concern. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 493 (1975). Furthermore, "publicity surrounding a judicial proceeding guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Sheppard v. Maxwell, 384 U.S. 333, 349 (1966). Where the

defendant in a criminal prosecution is a murder suspect, it is particularly important that the judicial process be open to public scrutiny. As is noted in Richmond Newspapers, supra, when a shocking crime occurs, such as the one in the instant case, the public is outraged and demands that justice be done. It is erroneous to assume that the result of the trial alone is enough to meet the public's concern -- the process itself must also satisfy the public's perception of justice.

A. There Is A Presumption of Openness For All Judicial Proceedings.

In a recent series of decisions, both the United States Supreme Court and Florida courts at all levels have consistently ruled in favor of granting public access to all stages of judicial proceedings. In short, the courts unanimously require that a stringent constitutional balancing test be met before a court will accede to a party's request to close a judicial proceeding.

Leading among these decisions are two cases recently handed down by the United States Supreme Court. The first, Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S.Ct. 819 (1984), involved a challenge to a trial judge's closure of a jury-empanelling in a rape and murder trial. In reversing this closure, the Court delineated a qualified right enjoyed by the public to attend this judicial proceeding:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

104 S.Ct. at 824.

Significantly, in Press-Enterprise, Chief Justice Burger relied on English common law as the basis for American First Amendment principles to reach his conclusion that the First Amendment requires access to judicial proceedings, including suppression hearings. Drawing from a case decided in 1565, he quoted:

> All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so many as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide.

Id. at 822-23 (emphasis added by the Court). Speaking of openness in a broader sense, the Court announced that the "sure knowledge that anyone is free to attend gives assurance that established procedures are being allowed and that deviation will become known." Id. at 823. Indeed, similar concerns in pretrial depositions necessitate a requirement of openness absent rare and compelling circumstances.

B. An Evidentiary Hearing And Application Of The Three-part Constitutional Balancing Test Is Required Prior To Closure Of Any Judicial Proceedings, Including The Taking Of Discovery Depositions In Criminal Cases.

The presumption of openness of judicial procedures may be overcome only upon a strong showing that an open proceeding will result in the denial of a competing constitutional right. This Court has endorsed a three-part test to determine the constitutional validity of closure of judicial proceedings, a refinement of a test applied by other courts for many years. Under that test, a court proceeding may not be made secret unless all three parts are met:

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 a 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.

Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 3 (Fla. 1982). In addition, "those seeking closure have the burden of producing evidence and proving by a greater weight of the evidence that closure is necessary, the presumption being that a pretrial hearing should be an open one." Id. at 8.

Both before and after Lewis was announced, many Florida trial courts applied the substance of this three-part test and burden of proof to requested closure of deposition proceedings. For post-Lewis decisions, see Florida v. O'Dowd, 9 Med.L.Rptr. 2455, 2456 (Fla. Cir. Ct. Seminole Cty. 1983) ("The procedural and substantive requirements of Miami Herald v. Lewis, supra, apply to the closure of depositions"); and Florida v. Tolmie, 9 Med.L.Rptr. 1407, 1408 (Fla. Cir. Ct. Palm Beach Cty. 1983) (citing Lewis, the court held: "[A]ll pretrial depositions are presumptively open to the press and public and shall not be closed to the press and public until such time as any party seeking such closure has sought and obtained an Order from this Court upon an appropriate evidentiary showing."). Earlier application of a three-part test to deposition closings can be seen in Florida v. Sanchez, 7 Med.L.Rptr. 2338 (Fla. Cir. Ct. Palm Beach Cty. 1981); Florida v. Hodges, 7 Med.L.Rptr. 2424 (Fla. Cir. Ct. Lee Cty. 1981); Florida ex rel. Scott v. City Clerk, 8 Med.L.Rptr. 1164, 1165 (Fla. Cir. Ct. Palm Beach Cty. 1982); Withlacoochee v. Seminole Electric, 1 Fla. Supp. 2d 1377, 8 Med.L.Rptr. 1281, 1282 (Fla. Cir. Ct. Hillsborough Cty. 1982); Cazarez v. Church of Scientology, 6 Med.L.Rptr. 2109 (Fla. Cir. Ct. Pinellas Cty. 1980); Florida v. Bundy, 4 Med.L.Rptr. 2629, 2630 (Fla. Cir. Ct. Leon Cty. 1979); Florida v. Alford, 5 Med.L.Rptr. 2054, 2055 (Fla. Cir. Ct. Palm Beach Cty. 1979) and Florida v. Diggs, 5 Med.L.Rptr. 2597 (Fla. Cir. Ct. Dade Cty. 1980).

It is well established that the First Amendment right of access to judicial proceedings extends to depositions once transcribed and filed in criminal cases. Sentinel Star Company v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979); News-Press Publishing Co. v. State, 345 So.2d 865 (Fla. 2nd DCA 1977). Recent cases, particularly those decided by the circuit courts of Florida, hold that this right of access extends to the actual taking of discovery depositions in criminal cases. In either situation, it is clear that prior to the denial of access to any such judicial proceeding or documents resulting therefrom, the court must hold an evidentiary hearing and may only close such proceedings or further deny access upon finding that closure is necessary to prevent a serious and imminent threat to the administration of justice, that no less restrictive alternative measures are available, and that closure will, in fact, achieve the court's purpose.

Prior to holding the requisite evidentiary hearing relating to closure, all interested parties, including the press, must receive notice. In State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d at 910, this Court recognized that the special concerns of those members of the press who gather and distribute the news require prior notice and an opportunity to be heard when an impairment to the newsgathering process is contemplated. It was held that the news media is entitled to "notice and hearing before any

trial court enjoins or limits publication of court proceedings."[1/] The court continued: "the circumstances may require a summary hearing but reasonable notice under prevailing conditions and a hearing must be had in each instance." Id. See also Times Publishing Co. v. Hall; 357 So.2d 736 (Fla. 2d DCA 1978); Sentinel Star Company v. Booth, supra.

II. FLORIDA CRIMINAL PROCEDURE UNIQUELY ALLOWS CRIMINAL DISCOVERY, INCLUDING DEPOSITION DISCOVERY. THIS PRACTICE PROMOTES PLEA NEGOTIATIONS OF CRIMINAL CASES, WHICH RESULTS IN SECRECY IN THE JUDICIAL PROCESS IF DEPOSITIONS ARE NOT OPEN TO THE PRESS AND PUBLIC

Florida has adopted an extensive compilation of rules of criminal procedure affecting the conduct of criminal cases from arrest through post-conviction relief. One such procedure, the criminal deposition, has become the predicate for disposition of the vast majority of criminal cases, as anticipated by the authors of the pertinent rules.

Of major significance are the rules providing for discovery in criminal cases which have been described as

> perhaps the most comprehensive attempt in America to consolidate available and new discovery devices in criminal practice utilizing many of the means of the Rules of Civil Procedure, although not as liberally as in civil practice, prior

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1/ Id. The Fifth District subsequently analogized closure to a direct prior restraint, noting that the end result, a restriction of the dissemination of information to the public, is the same. Ocala Star Banner v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980).

> Florida Statutes, former Rules of Criminal Procedure, the Code of Professional Ethics of an Attorney, recent federal and state court decisions dealing with due process of law and equal protection of the law and the A.B.A. Standards for Criminal Justice relating to discovery and Procedure before trial.

Author's Comment, Rule 3.220, Fla.R.Crim.P. (1973).

Perhaps the greatest historical change in criminal procedure was the advent of the discovery deposition in Florida. In 1966, it was noted that:

> Rule 22(f) of the proposed rules [precursor of present rule 3.220(d)] giving the defendant the right to take discovery depositions, offers the accused a means of discovery unknown at common law and almost unique among the American jurisdictions.

Florida's Proposed Rules of Criminal Discovery -- A New Chapter in Criminal Procedure, 19 U. Fla. L. Rev. 68, 98-94 (1966). See also State v. Dolen, 390 So.2d 407 (Fla. 5th DCA 1980) (discovery depositions in criminal cases unknown in Florida before 1967). Fla.R.Crim.P. 3.220 encourages plea negotiations in an attempt to dispose of cases without going to trial. Rule 3.171 provides that:

> [T]he prosecuting attorney, the defense attorney, or the defendant, when representing himself, are encouraged to discuss and agree on pleas which may be entered by a defendant.

Fla.R.Crim.P. 3.171. The result of this procedure, as noted by the committee revising these rules, is that "[m]ost criminal cases are disposed of by pleas of guilty arrived at by negotiations between prosecutor and defense counsel. . . ." Committee Note, Rule 3.171, Fla.R.Crim.P. (1972).

The liberalized use of discovery depositions in both the Florida Rules of Criminal Procedure and Civil Procedure were designed to promote a narrowing of issues, to reduce the likelihood of unfair surprise and generally to encourage settlement or plea bargaining. See, e.g. Zuberbuhler v. Division of Administration, 344 So.2d 1304, 1307 (Fla. 2d DCA 1977), cert. denied, 358 So.2d 135 (Fla. 1978) (construing the civil rules).

III. DISCOVERY DEPOSITIONS AND PLEA BARGAINS HAVE LARGELY REPLACED PUBLIC TRIALS AS THE MEANS OF FINALLY DETERMINING CRIMINAL PROCEEDINGS

Depositions are the most common factfinding proceedings and serve as the functional equivalent of public trials. Once the facts are discovered, the prosecutor, defense and court are better able to evaluate cases and negotiate pretrial dispositions. The end result of the trend toward liberalization of criminal procedure in Florida is an increase in the number of cases determined without benefit of trial. Chief Justice Burger in Gannett Co. v. DePasquale, 443 U.S. 368 (1979) stated:

> In the entire pretrial period, there is no certainty that trial will take place. Something in the neighborhood of 85 percent of all criminal charges are resolved by guilty pleas, frequently after pretrial depositions have been taken or motions to suppress evidence have been ruled upon.

Id. at 396 (concurring opinion). This only serves to reinforce the fact that pretrial depositions are of great significance in our criminal justice system and as such should be open to the press and public.

Indeed, Florida significantly exceeds the national average for pretrial dispositions of criminal cases. Roughly, ninety-five to ninety-eight per cent of all criminal charges brought in Florida in a given year which are resolved in the same year are resolved without a trial. Florida Summary Records Service, 1982-84, County and Circuit Court Criminal Records, State Court Administrative Office.[2/] Although the criminal trial itself is still a significant part of the criminal justice system, it is merely the tip of the iceberg.

2/ Statistics supplied by the Florida Supreme Court Summary Reporting Service, prepared by the State Court Administrative Office, reveal the following information concerning disposition of criminal matters before or without a trial:

DISPOSITION	CIRCUIT COURT STATEWIDE			COUNTY COURT STATEWIDE		
	1982	1983	1984	1982	1983	1984
Total Defendants Accused	157,640	154,750	163,604	346,752	331,611	348,354
Total Cases Disposed	153,333	149,615	151,723	303,009	322,047	310,108
Total Cases Tried	4,817	4,831	3,761	12,533	11,263	9,280
Total Cases Disposed without trial	148,516	144,784	147,962	290,476	310,784	300,828
Percentage of disposed cases without trial	96.86%	96.77%	97.5%	95.86%	96.5%	97%

A. Any Distinction Between Access To Depositions, And To Other Pretrial Proceedings, Is Inconsistent With The First Amendment.

In his concurring opinion in Press-Enterprise, Justice Stevens stated, "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." Press-Enterprise, 104 S.Ct. at 828 (Stevens, J., concurring).

Several months later, the Court adhered to this admonition and extended the Press-Enterprise test in the context of a pretrial suppression hearing. Waller v. Georgia, ___ U.S. at ___, 104 S.Ct. at 2210. In Waller, Justice Powell, writing for the Court, realized that public exposure to the criminal justice system serves not only as a guard against governmental misconduct, but it also has many other important residual effects, including that "a public trial encourages witnesses to come forward and discourages perjury." 104 S.Ct. at 2215.[3/] This logically should extend to all the facets of the system, including the pretrial depositions in this case.

In a similar vein, in 1983 the Eleventh Circuit held that the press could not be denied access to pretrial records and proceedings in a class action involving prison overcrowding, until the following test is met:

3/ The same must be said for pretrial hearings and depositions since the overwhelming majority of cases are disposed of without a trial. Recently, the media's account of a secretary who had been murdered and raped caused two eyewitnesses to come forward with information. See St. Petersburg Times, Aug. 12, 1985, at B-1.

> We do not hold that every hearing, deposition, conference or even trial in cases of this kind must be open to the public. We do hold that "where, as in the present case, the [court] attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest."

Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (emphasis supplied) (quoting Globe Newspaper Co. v. Superior Court, ___ U.S. at ___, 102 S.Ct. at 2620); see also U.S. v. Rosenthal, 763 F.2d 1291 (11th Cir. 1985) (citing Newman for the proposition that the public has the right to attend judicial proceedings).

Both this Court and the district courts of appeal foreshadowed the federal courts' decisions in a series of holdings designed to enforce this state's policy of openness and access to all phases of judicial proceedings. See, e.g., Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) (court enunciated three-part test to be applied before suppression hearing could be closed); Times Publishing Company v. Penick, 433 So.2d 1281 (Fla. 2d DCA 1983) (extended three-part test to posttrial inquiry of juror misconduct); Miami Herald v. Chappell, 403 So.2d 1342 (Fla. 3d DCA 1981) (found absence of evidentiary showing to support closure of a pretrial competency hearing in a criminal case); State ex rel. Pensacola News-Journal, Inc. v. Fleet, 388 So.2d 1106 (Fla. 1st DCA 1980) (court applied three-part test to closure of suppression hearing).

It is illogical to expect an informed citizenry by allowing them to observe only the result of the disposition of a criminal matter without allowing them to observe the foundation upon which it was predicated. The practical effect of a per se order closing discovery depositions would be to foreclose public scrutiny of many court cases which never reach the final stages of trial: "open proceedings may be imperative if the public is to learn issues that help shape modern society. Informed public opinion is critical to effective self-governance." Newman v. Graddick, 696 F.2d at 801.

The Third District Court of Appeal recognized this result in the pretrial context. Miami Herald Publishing Company v. Chappell, supra. In deciding that a trial court order closing a pretrial competency hearing and later denying access to tapes of the testimony of doctors involved was erroneous, the Third District court noted:

> [I]n many criminal cases, pretrial proceedings eliminate the need for a trial, either as a result of dismissal of the charges or by rulings made at the hearing which destroy a party's chances of success at trial. Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979). In Westchester, the court noted: "at the present time, in fact in most criminal cases, there are only pretrial proceedings. Thus, if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors." 423 N.Y.S.2d at 636. [Emphasis

Miami Herald Publishing Company v. Chappell, 403 So.2d at 1345 (emphasis supplied).

B. Denying Access To Depositions Causes Rather Than Solves Discovery Abuses.

While noting that pretrial discovery "has a significant potential for abuse" and that the judicial branch of "government clearly has a substantial interest in preventing this sort of abuse of its processes," the court below ironically rejected a widely recognized safeguard -- press and public scrutiny. Palm Beach Newspapers v. Burk, 471 So.2d 571, 576 (Fla. 4th DCA 1985) (citing Seattle Times Co. v. Rhinehart, ___ U.S. ___, 104 S.Ct. 2199, 2207-2208 (1984)). Because privacy interests may be implicated as part of that abuse, the Fourth District apparently chose to treat the symptom -- with blanket secrecy -- rather than cure the disease -- by exposing abuses and initiating public debate.[4/]

However, the treatment prescribed promises only to exacerbate the abuse. Rather than effectively protecting privacy, the ruling as it stands has the pernicious effect of allowing a party to further abuse the judicial process by manipulating the dissemination of such information for the purpose of obtaining leverage. If, for example, a prosecutor took an intrusive deposition and threatened to file it

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4/ As this Court has observed in a related context, "'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light most efficient policeman.'" McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 n. 13 (1977), citing L. Brandeis, Other People's Money at 92 (1914).

unless the affected individuals would cooperate or concede in some manner, clearly the worst harm would not come from a successfully manipulated press reporting such information.

Because the majority of cases are decided by plea negotiations and otherwise with minimal information finding its way into the public record and that discovery depositions, though taken, are often not transcribed and thus not filed, the chances increase that criminal cases may be decided almost entirely behind closed doors. Such procedure thus prevents the press from effectively monitoring the administration of justice and from "guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism . . .." News-Press Publishing Company, Inc. v. State, 345 So.2d 865, 867 (Fla. 2d DCA 1977) (citing Sheppard v. Maxwell, 384 U.S. 333 (1966)).

Respondent claimed that closure was appropriate because, it is asserted, depositions are not court records until such time as they are transcribed and filed with the clerk. Although the Fourth District Court in Burk found merit in this contention, relying on Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979), the "filing" of a deposition is no longer a viable distinction. Willis involved a request to seal a deposition already in the court file. Burk's reliance on Willis was therefore misplaced.

Moreover, subsequent to Willis an amendment to Rule 1.130(f), Fla.R.Civ.P., eliminated the filing requirement for written depositions, thus rendering the act of filing insignificant. The absence of a filing requirement makes it all the more imperative that the taking of depositions be open to the press and public if there is to be meaningful access to the judicial system. This is particularly so with respect to the instant case where the proceedings involve allegations of prosecutorial misconduct and the criminal prosecution of a person suspected of murder. Because the charges involve a heinous crime inciting public outrage, and questions raised about the government's motives, this matter is even more deserving of public scrutiny than most civil disputes or other criminal prosecutions. Indeed, the fact that depositions can escape both public and judicial scrutiny solely upon the discretion of the attorneys makes access to pretrial depositions all the more compelling. As Judge Hurley aptly asserted in his dissent in the lower court, "[l]itigation is not the parties' private preserve; it is conducted in a public forum subject to rules which embody public policy choices." Burk, 471 So.2d at 584 (footnote omitted).

IV. A DISCOVERY DEPOSITION IS A JUDICIAL PROCEEDING IN FLORIDA FOR PURPOSES OF DETERMINING THE FIRST AMENDMENT RIGHTS OF THE PRESS AND PUBLIC TO ATTEND.

In denying the press access to pretrial depositions, the Fourth District Court of Appeal rested its decision on the notion that because judges are not normally present, depositions are not considered judicial proceedings. This presumption ignores the fact that whether or not judges are present at depositions, they are still conducted as judicial proceedings. As one court noted, "[d]epositions are proceedings governed by the court rules. . . . Testimony given at depositions is under oath and is binding. Lawyers present at depositions are acting as officers of the court. The prosecutor is of course acting in his official capacity. A court reporter transcribes the testimony." Florida v. Sanchez, 7 Med.L.Rptr. at 2340.

A. Florida Courts Have Interpreted Depositions As Judicial Proceedings.

Closely analogous to the right of access at pretrial depositions is the United States Supreme Court's analysis in Waller v. Georgia, ___ U.S. at ___. at 104 S.Ct. 2210. In the context of pretrial suppression hearings, the Court recognized "[s]trong pressures are naturally at work on the prosecution's witnesses to justify the propriety of their conduct in obtaining the evidence." Id. at 2216. Important to the present case, the Supreme Court opined that

the general public "has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." Id. Depositions, like suppression hearings, also serves the function of revealing misconduct or lack of credibility of witnesses. Facts and circumstances that bear significantly on governmental decisions to prosecute are elicited from depositions as well as pretrial hearings. Therefore, public scrutiny should not be foreclosed.

It is illogical to base the constitutional right of access to important governmental functions on the absence or presence of a judge.[5/] To do so would imply that judicial misconduct is the only potential abuse which access serves to prevent. Clearly, this is incorrect. To the contrary, proceeding from the obvious proposition that judges themselves safeguard court functions by their presence, it is even more compelling that the press be allowed to cover and observe important governmental procedures such as pretrial depositions in a criminal case held in the absence of a judge. Since the parties are acting without the immediate supervision of the judge, it is public scrutiny that will insure proper conduct.

Moreover, judges more commonly preside over the deposition process indirectly, by later ruling on evidentiary objections and like matters just as they would do

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5/ Of course, judges do have the power to preside over depositions while they are taken which is done from time to time.

contemporaneously if present while the deposition is taken. Functionally, then, a judge's control over a deposition is identical to his or her control of any other judicial proceeding, including testimony at trial.

As the Second District Court of Appeal indicated in News-Press Publishing Company v. State, 345 So.2d at 867, depositions are, simply stated, "records of a court proceeding. . . ." In that case, and in Sentinel Star v. Booth, 372 So.2d at 100, the Second District placed strictures on the sealing of typed and filed depositions as records of court proceedings. The same standards should apply in the instant case before the proceeding itself may be closed. See Sussman v. Damian, 355 So.2d 809, 811 (Fla. 3d DCA 1977) ("It is established law of this state that defamatory words published by lawyers during the due course of a judicial procedure are absolutely privileged . . .. This privilege extends to the taking of a deposition.") See also Jamason v. Palm Beach Newspapers, Inc., 450 So.2d 1130 (Fla. 4th DCA 1984), rev. denied, 461 So.2d 115 (Fla. 1985).

Many trial court decisions have held that discovery depositions are judicial proceedings in civil cases. See, e.g., Withlacoochee v. Seminole Electric, 1 Fla.Supp. 2d at 137, 8 Med.L.Rptr. at 1281; Florida ex rel. Scott v. City Clerk, 8 Med.L.Rptr. at 1164; Johnson v. Broward County, 7 Med.L.Rptr. at 2125; Cazarez v. Church of Scientology, 6 Med.L.Rptr. at 2109. In the criminal context, see, Florida v. Tolmie, 9 Med.L.Rptr. at 1407; Florida v. O'Dowd,

9 Med.L.Rptr. at 2455; Florida v. Hodges, 7 Med.L.Rptr. at 2424; Florida v. Sanchez, 7 Med.L.Rptr. at 2338; Florida v. Diggs, 5 Med.L.Rptr. at 2597; Florida v. Bundy, 4 Med.L.Rptr. at 2629; Florida v. Alford, 5 Med.L.Rptr. at 2054.

B. The Florida Rules Of Criminal Procedure And Of Judicial Administration Characterize Pretrial Depositions As Judicial Proceedings.

The Florida Rules of Judicial Administration characterize discovery depositions as judicial proceedings:

> Transcripts of all judicial proceedings, including depositions, shall be uniform in and for all courts throughout the state.

Rule 2.070(f), Fla.R.Jud.Admin. (emphasis supplied). Even more illustrative of the court's ultimate power over depositions is the rule governing electronic reporting, which mandates:

> (1) When the chief judge deems it appropriate or necessary, he may by administrative order authorize the use of electronic reporting for any judicial proceedings, including depositions, required to be reported.

Rule 2.0701(c)(1), Fla. R. Jud. Admin. (emphasis supplied). These rules make it quite clear that the deposition, like other judicial proceedings, is controlled by the court and is a significant judicial function.

Rule 3.220(d) of the Florida Rules of Criminal Procedure endows the discovery deposition with the characteristics of all courts proceedings: (1) The deposition must be taken in a building where the trial may be held

unless the court orders otherwise; (2) written notice of the taking of the deposition must be given to all parties; (3) the deposition may be used in the trial to contradict or impeach testimony of the deponent; (4) provision is made for compulsory process; and (5) a witness who refuses to obey a subpoena may be held in contempt of court. Additionally, Rule 3.220(d) provides that "the procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure," which provide for examination and cross-examination of witnesses as permitted at trial, sworn testimony before a court reporter, intervention by the court upon a showing of bad faith in conducting the deposition, and judicial determination as to questions objected to by the deponent. See, e.g., Fla.R.Civ.P. 1.310.

V. UNDER THE FLORIDA RULES OF CIVIL PROCEDURE A PRETRIAL DEPOSITION MAY NOT BE CLOSED ABSENT A SHOWING OF GOOD CAUSE.

As noted above, the Florida Rules of Civil Procedure are applicable to the depositions in the criminal context. Instructive to the case at bar, the Rules of Civil Procedure detail the use of depositions in other court proceedings "as though the witness were present and testifying" in person. Fla.R.Civ.P. 1.330(a). See also Fla.R.Civ.P. 1.280, 1.290, 1.300, 1.320, 1.380, 1.390, 1.400 and 1.410, for the detailed provisions governing the conduct and effect of depositions. Specifically, Fla.R.Civ.P. 1.280 provides,

> [u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following. . . . (5) that discovery be conducted with no one present except persons designated by the court.

(Emphasis supplied).

From the inescapable conclusion of § 1.280, that a pretrial deposition in a criminal case is a judicial proceeding and therefore open to the press and public, it necessarily follows that a showing of "good cause" must meet the standard set out in Press-Enterprise Co. to pass constitutional muster:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

104 S.Ct. at 824. The Press-Enterprise court determined that the trial court's order (similar to the order in the instant case) was "broad and general" and therefore did not justify closure. Id. Likewise, in Globe Newspaper Co. the Supreme Court established the rare circumstance in which closure can be justified. The Court asserted that the State must show that denial of such right of access "is necessitated by a compelling government interest, and is narrowly

tailored to serve that interest." 457 U.S. at 608. Significantly, the Court held that the protection of victims of sexual crimes is not compelling enough to justify mandatory closure.

In the case of Bundy v. State, 455 So.2d 330 (Fla. 1984), this Court recently recognized that:

> The appellate courts of Florida, in grappling with the problem of prejudicial pretrial publicity, have widely taken the view that closure of judicial proceedings must meet the same strict judicial scrutiny as orders of prior restraint since the effect on the ability of the press to disseminate information about court proceedings is roughly the same.

Id. at 337. Noting the important First Amendment interest and policy of openness in court proceedings, this Court enumerated a three-prong formula to be applied by the trial court before access to a criminal proceeding could be denied. A court must find:

> (1) the measure limiting or denying access (closure or sealing of records or both) is necessary to prevent a serious and imminent threat to the administration of justice; (2) no less restrictive alternative measures are available which would mitigate the danger; and (3) the measure being considered will in fact achieve the courts protective purpose.

Id. In refusing to close certain pretrial hearings, the trial court in Bundy used an unmodified version of the three-prong test,[6/] which was propounded in Nebraska Press

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6/ The three factors the trial court considered were: (1) the nature and extent of the damaging publicity, (2) whether alternative measures could be used to mitigate the harmful effects, and (3) whether the restraint would be effective to prevent prejudice. 455 So.2d at 337 n.1. The Florida Supreme Court adopted the modified version of this test in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982).

Association v. Stuart, 427 U.S. 539 (1976) and a case decided by this court, State ex rel. Miami Herald v. McIntosh, 340 So.2d 904 (Fla. 1977). The appellate court decision upholding Bundy's conviction fell in line with many appellate court decisions requiring the three-prong test be met before closing pre-trial proceedings. See, e.g., Miami Herald Publishing Co. v. Chappell, 403 So.2d 1342 (Fla. 3d DCA 1981); Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 3d DCA 1980); Sentinel Star Co. v. Edwards, 387 So.2d 367 (Fla. 5th DCA 1980), pet. denied, 399 So.2d 1145 (Fla. 1981); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979); Miami Herald Publishing Co. v. State, 363 So.2d 603 (Fla. 4th DCA 1978); News-Press Publishing Co. v. State, 345 So.2d 865 (Fla. 2d DCA 1977); Miami Herald Publishing Co. v. Collazo, 329 So.2d 333 (Fla. 3d DCA 1976); State ex rel. Gore Newspapers Co. v. Tyson, 313 So.2d 777 (Fla. 4th DCA 1975). In Bundy's final appeal, this Court concluded that even under the modified three-prong test set out above, the trial court did not abuse its discretion by its refusal to close the pre-trial hearings.

Similarly, the Second District Court of Appeal in Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985), recognized that closure only "for good cause shown," necessarily placed a heavy burden on those seeking a protective order or seeking to limit deposition attendance. The court determined that the petitioner's assertion of adverse trial publicity was insufficient to reverse the

trial judge's denial of a protective order at a pretrial deposition. Id. at 592. In the face of the United States Supreme Court's decision in Press-Enterprise, supra, this Court's decision in Bundy, and the Second District Court of Appeal's decision in Short, the trial court in the present case erroneously failed to follow an ascertainable test to determine whether there was sufficient "good cause" to allow closure of the pretrial deposition. See, Burk, 471 So.2d at 583 (Hurley, J., dissenting).

The use of the three-part test enumerated in Miami Herald Publishing Co. v. Lewis, to establish "good cause" is compelling in that it promotes uniformity in deciding logically identical closure issues. That standard also promotes the formation of a record capable of appellate review. When dealing in areas involving First Amendment interests, conformity and a high level of certainty are imperative goals.

Several Florida circuit courts, cited supra, have adhered to the above-described principles and have held that a discovery deposition is a judicial proceeding to which the press enjoys a First Amendment right of access, which extends to attending the deposition itself. For instance, Bundy, supra, 4 Med.L.Rptr. 2629 involved perhaps the most widely publicized and notorious murder prosecution in Florida's recent history, yet the court refused to close the taking of depositions to the press and public. Citing the applicable law as that stated in McIntosh, 347 So.2d 904, the Bundy trial court held that "closure orders may be

entered only to prevent clear and present danger of the defendant's right to a fair trial." 4 Med.L.Rptr. at 2630. See also Alford, supra.

Additionally, in State v. Diggs, involving the prosecution of white police officers for the murder of black insurance agent Arthur McDuffie, Judge Nesbitt upheld the right of the press and public to attend discovery depositions and stated:

> A pre-trial deposition is a public judicial proceeding . . . closure of depositions or other judicial proceedings may only be ordered after a showing:
>
> 1. That prejudicial publicity resulting from access will create a clear and present danger to the defendant's right to a fair trial;
>
> 2. That there is no available trial management alternative which will avoid jury prejudice by means less chilling of First Amendment interests, and;
>
> 3. That the closure will be effective in achieving trial fairness.

5 Med.L.Rptr. at 2597.

It should be noted that in both Bundy and Diggs there was widespread local, state, and even national media attention centered on the criminal proceedings involved. Despite that fact, neither court found it necessary to prevent the media from attending the taking of discovery depositions. Insofar as the instant case involves an attempted murder prosecution, similar treatment is required. The taking of a deposition is a critical and integral part of the criminal proceeding and as such it should be accessible to the public through the press. The entire process

must be safeguarded by application of the three-part balancing test before closure is warranted.

VI. PRESS ATTENDANCE AT THE TAKING OF A DISCOVERY DEPOSITION IN A CRIMINAL CASE IS ANALOGOUS TO, AND LESS POTENTIALLY DISRUPTIVE THAN THE PRESENCE OF CAMERAS IN THE COURTROOM AND SHOULD THEREFORE BE ALLOWED UNDER SIMILAR STANDARDS

Florida has led the nation in allowing electronic media coverage of judicial proceedings. While noting the previous problems created by such coverage, in 1977 this Court created a one-year pilot program allowing electronic media coverage of judicial proceedings subject to the court's guidelines. See Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 404 (Fla. 1977). At the conclusion of the pilot program this Court conducted several surveys and interviews to determine the impact of electronic media on judicial proceedings and concluded that "there had been absolutely no adverse effect upon the participants' performance or the decorum of the proceedings." Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 769 (Fla. 1979).

In reaching that conclusion, the Court reviewed the many grounds raised by the organized legal bar for banning the electronic media from court proceedings -- grounds which primarily focused on the effect of such media coverage on the demeanor and testimony of witnesses and upon

the jury, and logistical problems associated with the physical presence of cameras in courtrooms. This Court specifically reviewed the issues of physical disruption of the proceedings, the psychological effect of media coverage on courtroom participants, potential exploitation of the courts for commercial purposes, prejudicial publicity and the effect of media presence on witnesses. The Court concluded that the presence of electronic media had no adverse effects and that the fears expressed by members of the bar were unfounded. 370 So.2d at 774-79.

With regard to physical disruption, this Court noted that any "physical disturbance was so minimal as not to be an arguable factor." Id. at 775. Moreover, advanced technology has made it possible to use the cameras unobtrusively. The Court observed that "the standards with respect to pooling and resolution of media disputes appear to have proved workable during the pilot period." Id.

These concerns, although rejected by this Court in Post-Newsweek, were advanced by the Fourth District Court of Appeal in the present case. For example, that court was concerned about limited space, stating "most such places simply will not have sufficient accommodations to allow the presence of media. . . ." Burk, 471 So.2d at 579. This Court has mandated that if alternative measures exist that are less violative of First Amendment rights, they must be employed. Miami Herald Publishing Co. v. Lewis, supra. The alternative measures advanced in Post-Newsweek are equally applicable in this case.

Addressing the issue of exploitation of courtroom and prejudicial publicity, this Court recognized that this was merely speculation without any support. Moreover, the Court believed that other methods of limiting prejudicial publicity existed, such as voir dire examination or a change of venue. Post-Newsweek, 370 So.2d at 777. Once again, this Court's analyses in Post-Newsweek are completely applicable to this case. All these enumerated safeguards are still available.

This Court's finding in Post-Newsweek, that cameras in the courtroom serve several positive functions, is applicable here. The bench and the bar resisted cameras in the courtroom, often for the reason that it was contrary to established procedure. While a similar argument against access to depositions may be especially anticipated, Amicus Curiae urges a principled and reasoned departure from tradition for its own sake, similar to the Post-Newsweek analysis. For instance, this Court found that both jurors and witnesses perceived that the presence of the electronic media made them more responsible for their actions. Id. at 768. Moreover, the presence of the media made all participants more attentive. Id. The same objective of encouraging responsible behavior is met by access to depositions.

Petitioners in this case seek only access, by individual reporters, to the taking of discovery depositions in criminal cases. It is difficult to understand how the presence of one or two additional persons, quietly and

unobtrusively observing or taking notes during a deposition, could be potentially disruptive to fair trial rights, when compared with the Supreme Court's studied finding that the presence of the electronic media in the courtroom does not have this effect.

Closure of discovery depositions cannot be sustained on unfounded speculation, contrary in premise to this Court's finding, in the context of cameras in the courtroom, that attendance by the press would be potentially disruptive absent some showing of clear and present danger to the defendants' constitutional rights.

VII. THE PER SE CLOSURE ORDER IN THIS CASE IS AN OVERBROAD VIOLATION OF THE FIRST AMENDMENT GUARANTEE OF ACCESS AND IS CONTRARY TO THIS COUNTRY'S POLICY OF OPEN JUDICIAL PROCEEDINGS

Miami Herald Publishing Co. v. Lewis, 426 So.2d at 5 requires that closure orders must not be "broader than necessary" to protect a defendant's Sixth Amendment right to a fair trial. The arbitrary, per se closure order allowed here clearly violates this principle against overbreadth. See also Globe Newspaper Co. v. Superior Court, 457 U.S. at 608; State ex rel. Times Publishing Co. v. Patterson, 451 So.2d 888 (Fla. 2d DCA 1984).

Courts at all levels in the United States have strictly required compelling reasons before a closure order will be entered.

> [T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest . . ..

Globe Newspaper Co., 457 U.S. at 607-08.

Amicus Curiae maintains that the court should determine whether closure of any particular deposition is appropriate during an evidentiary hearing applying the three-part test of Lewis before ordering wholesale closure it depositions. In Lewis, a criminal case, this Court set out the existence of numerous alternatives which must be employed before a closure would be necessary to protect the impartiality of a jury. "The following alternatives should be considered: continuance, severance, change of venire, voir dire, peremptory challenges, sequestration, and admonition of the jury." Lewis, 426 So.2d at 8. Pretrial publicity alone is not sufficient to meet the "good cause" requirement for closure. If publicity is the concern in this case, surely there have been cases involving greater publicity than this one. Indeed, in Bundy, the defendant argued that the trial judge failed to accord sufficient importance to his right to be tried by a jury free from the improper prejudicial effects of persuasive pretrial publicity. 455 So.2d 337. This Court approved the trial court's application of the three part inquiry under either Lewis or

Miami Herald Publishing Co. v. Chappell. Notably, this Court affirmed the trial court's determination that closure was improper. Id. Moreover, this Court condoned the use of alternative measures less intrusive on First Amendment rights. Yet in these cases, including Bundy and State v. Diggs, 5 Med.L.Rptr. at 2596, the courts refused to find a conclusory allegation of taint sufficient to require a change of venue or to impede this nation's long-standing policy of open judicial proceedings. Bundy also involved access to depositions in a murder case, where the court refused to close the taking of depositions to the press despite the defendant's involvement in one of the most notorious murder prosecutions in recent memory. Similarly, Diggs involved the highly publicized prosecutions of white police officers for the murder of black insurance agent Arthur McDuffie, yet the right of the press and public to attend discovery depositions was upheld. In the end, the defendant in Diggs was acquitted.

The United States Supreme Court has recognized that "no right ranks higher than the right of the accused to a fair trial." Press-Enterprise, ___ U.S. at ___, 104 S.Ct. at 823. Florida courts also recognize this right but, significantly, Florida and federal decisions uniformly reject overbroad, per se closure orders, preferring to accommodate First and Sixth Amendment rights by a constitutional balancing process. In Florida v. Sanchez, the court specifically reviewed jury empanelling and came to this conclusion:

> Jurors are not expected to be utterly ignorant or unfamilar with news reports of crimes in their community. Florida judges in small towns such as Chattahoochee and Monticello frequently are faced with trials of defendants with whom literally everyone in town is intimately familiar. Through appropriate trial management techniques, judges in these communities are able to guarantee defendants their right to a fair trial. Since fair trials are routinely held under these conditions, there is no reason to conclude that a fair trial cannot be held in a large metropolitan area such as West Palm Beach merely because the newspapers report facts learned about the case in pretrial depositions.

7 Med.L.Rptr. at 2339.

The clear message from the judiciary is that while it is appropriately sensitive to the Sixth Amendment right to a fair trial, a clear compromise of a First Amendment right, such as closure, cannot be had upon mere speculation of a Sixth Amendment problem. In order to adequately adjust the delicate balance between the public right to be informed and the individual's right to a fair trial, this Court should continue its commitment to open proceedings and mandate that the courts consistently adhere to the Lewis balancing test.

CONCLUSION

Depositions are judicial proceedings. They are governed by rules of court, judicially controlled by a variety of means, obtained by subpoena, enforced by judicial sanctions including contempt, often held in courthouse facilities before official court reporters and conducted by prosecutors acting in their official capacity. Once taken, depositions may be used at trial and pretrial proceedings for a variety of purposes, including use as direct testimony. Perhaps a more subtle but more pervasive use is as a catalyst for plea negotiations, hence as a shadow surrogate of criminal trials.

Courts have recognized the strong First Amendment interest in access to filed depositions. In view of the common practice of either long delay or waiver of transcription and filing of most depositions, logic requires the extension of access principles to the taking of depositions. Either logistical difficulties or Sixth Amendment concerns presented by public access to depositions may be resolved by traditional, constitutional balancing. The arbitrary, blanket rule of secrecy permitted by this case does not pass constitutional muster and is contrary to this Court's stated

commitment to open judicial proceedings. The plurality opinion of the Fourth District should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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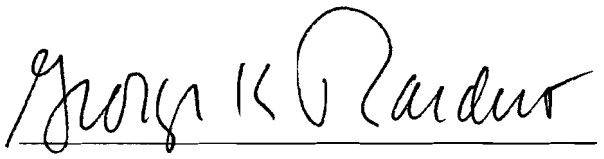

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