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IN THE SUPREME COURT OF FLORIDA

PALM BEACH NEWSPAPERS, INC., et al.,

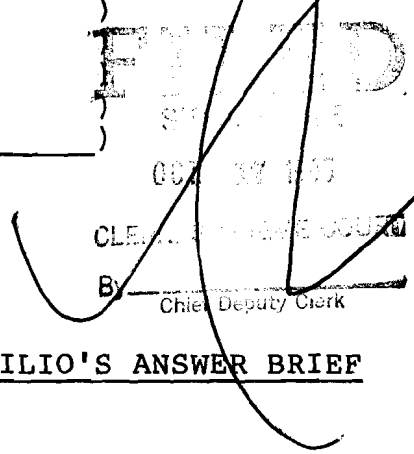
Petitioners,

vs.

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

Respondents.

CASE NO. 67,352



RESPONDENT AURILIO'S ANSWER BRIEF

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PRELIMINARY STATEMENT

References to the various initial briefs of petitioners will be designated by a shortened version of the name of each petitioner: The Herald Publishing Company = Herald; Palm Beach Newspapers, Inc. = Palm Beach Newspapers or P.B.; News and Sun Sentinel Co. = S.S. Page references to the initial brief of the Herald are to their typewritten brief received by respondent Aurilio on September 20, 1985. (The printed brief which contains different page numbers arrived too late to be incorporated in Aurilio's Answer Brief.)

References to the petitioner's appendix filed by the Sun Sentinel will be designated by use of the symbol "P.A." The Herald's appendix is designated by name. The petitioner's appendix omits other essential pleadings filed in the district court, the Herald's reply memo served March 10, 1983, and Aurilio's response thereto filed upon order of the district court. They are included in respondent Aurilio's appendix which is designated by the symbol "RA".

STATEMENT OF THE CASE AND FACTS

Respondent Aurilio accepts the statement of facts and case from the brief by Palm Beach Newspapers, referred to herein as "PB-SFC", with the following additions and corrections:

The record does not show that Sun Sentinel reporters "submitted requests to the state attorney, defense counsel, and the court reporter under the Florida Public Records Law, chapter 119, Florida Statutes, for transcripts (A-59)," as petitioner states (PB-SFC-6). Petitioner's appendix at page 59 is Aurilio's Motion to determine Sixth Amendment rights, etc. In the motion Aurilio alleged that the press was harassing the attorneys for the state and the defendant by repeated calls demanding copies of depositions (PA-59). The record contains no representations that demands for copies of depositions were made to the official court reporter. Respondent Aurilio's Motion to determine Sixth Amendment rights specifically averred that the depositions contained "much opinion evidence, hearsay, reputation and character evidence concerning the defendant, alleged prior criminal activity of the defendant as well as other inadmissible, prejudicial material. See, for example, Kaminski v. State, 63 So.2d 339 (Fla. 1952)." (PA-59).

At the hearing before Judge Burk on February 10, 1983 (PB-SFC-8), counsel for the media also argued that the attorneys' actions in setting depositions without notice to the court file constituted "prior restraint." (PA-154). There is only passing

reference to the Public Record Act in counsel for media's argument to Judge Burk on that day (PA-152,160).

At the February 25 hearing (PB-SFC-9), Judge Burk commented to the attorney for the media that the use of the word "tattles" in its article "Liar's Poker Gives Court Perjury Scare" (PA-362) did not signify "report." Judge Burk then observed that the meanings of the two words were vastly different and made certain remarks on responsible journalism (PA-231-236). These statements by the judge appear at page 7-11 of the February 3 transcript and most certainly DID NOT come after argument, but before ruling, as petitioners state (PB-SFC-9, at footnote 4). (See PA at 227, Index to February 3 hearing: media attorney argues at 16-27, media attorney's rebuttal at 42, order of court at page 49.)

Petitioners' assumption that it was information "presumably gained through the deposition" regarding Carl Aurilio and his business associates which the defendant Aurilio wished to utilize in cross-examining the state's witnesses (PB-SFC-9, footnote 5), is incorrect. Linda Aurilio was the police informant. She knew all about the gambling activity of her former husband and his associates due to her relationship with Carl Aurilio, not from the depositions where Carl Aurilio took the Fifth Amendment on those questions (PA-433,444,446-447).

Petitioners' facts totally omit to note what was argued to the District Court of Appeal, Fourth District. Palm Beach Newspapers filed its petition (PA-Tab 19). Linda Aurilio filed her response (PA-Tab 21). In addition to Palm Beach Newspapers'

reply (PA-Tab 21), the Herald filed a second reply memorandum (RA-1-25). On April 7, 1983, the district court ordered Aurilio to respond to the Herald's memo. Aurilio filed her reply to the Herald memo on April 12, 1983 (RA-27-34). Neither the Herald's memo nor Aurilio's response were included in petitioners' appendix. They are therefore filed as respondent's appendix.

Petitioners' did not argue any authority under the Public Records Law nor cite Florida Rule of Civil Procedure 1.280(c)(5) in any pleading to the district court.

Judge Letts' concurring opinion begins, "I agree with the majority." (PA-535). He then added additional reasons to concur. He most assuredly did not later "confess error" (Herald at 37) or in any way recede from his vote as a member of the majority. In State v. Palm Beach Newspapers, 10 F.L.W. 1851 (Fla. 4th DCA July 31, 1985), (referred to as State v. Freund by petitioners), Judge Letts did modify some of the language of his special concurrence. His agreement with the majority stands. The decision of the en banc district court in Palm Beach Newspapers v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985), is a majority, not a plurality opinion.

The press did not petition for rehearing to attempt to change the decision of Judge Letts or any other judge on the District Court of Appeal, Fourth District.

SUMMARY OF ARGUMENT

Point I: There is no constitutional basis for any public right of access to attend discovery depositions in criminal cases. Any common law right of access to judicial proceedings and court records extends only to matters which have been filed with the court and on which a judicial decision is made.

Depositions are not judicial proceedings and therefore no public right of access pertains. Constitutional analyses utilized by the United States Supreme Court to find a right of access to attend criminal trials, jury selection proceedings and a defendant's motion to suppress hearing where the defendant wanted the press present, are not applicable to discovery proceedings where no judge is present and no legal claims are made nor adjudicated. There is no history of open public access to attend discovery depositions in criminal cases and petitioners' claimed history of such is inaccurate and unreliable. The United States Supreme Court has made it plain that depositions and discovery are not public components of a trial and that depositions are not public sources of information. Nor do any governmental operations or functions take place in discovery proceedings.

Fed.R.Civ.P. 26(c)(5) does not grant the public a right of access to attend discovery depositions. Cases cited by petitioners regarding the public nature of discovery refer to Fed.R.Civ.P. 26(c)(7) and do not discuss a public's right to attend the taking of a deposition; other federal cases on point

have considered this specific question and found no right of the public to attend or a right of access to discovery material not filed with the court or used at trial.

The federal rules are significantly different than the Florida Rules of Civil Procedure so petitioners' "off-point" cases regarding interpretation of the federal rules cannot control in any event. Petitioners' reference to legislative intent of the drafters of the Federal Rules of Civil Procedure is overstated.

The criminal justice system operates under a presumption that the court shall not sanction dissemination of the state witness' statement to the press and public until the case is tried in the courtroom.

Point II: The court rules control what documents may become court records. The amended court rule prohibits filing of depositions unless the contents must be considered by the court on a matter pending before the court. A rule that depositions are not court records until filed is constitutionally sound. The rules of court and common law right of access to judicial records do not give the public a right of access to stenographic tapes of a court reporter, which must be securely kept by the court reporter. A transcript may only be provided to a deponent or a party.

An issue of access under the Public Records Law is not properly preserved for consideration by this Court. In any event, Chapter 119 cannot constitutionally be applied to the

judicial branch of government. Also, depositions in criminal cases contain active criminal investigative information and are therefore exempt from the Public Records Law until the prosecution and/or appeal have terminated.

A court's "commitment to open government" is not a rule of law and does not command press access to attend the taking of discovery deposition or to transcripts of depositions not filed with the court.

ARGUMENT

POINT I

THE PRESS IS NOT ENTITLED TO NOTICE AND THE OPPORTUNITY AND RIGHT TO ATTEND PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE.

Even the issue before this Court is disputed. Petitioners have misstated the certified question and the issue that was decided by the district court. The first certified question asks if the press is entitled to notice and the opportunity and right to attend pretrial discovery depositions in a criminal case (PA-534), Palm Beach Newspapers v. Burk, 471 So.2d 571, 579 (Fla. 4th DCA 1985). The press prefers to restate the question and complain of "arbitrary exclusion" and "closure" without any showing that the taking of a defendant's discovery depositions in a criminal case are public proceedings in Florida. Starting from a "presumption of openness" may ease the burden of the press to demonstrate by competent legal authority that the public should enjoy a right of access to attend the taking of discovery depositions, but it obviously begs the question and is clearly erroneous.

In the district court petitioner sought to establish their "right" of access to the taking of the defendant's discovery depositions on constitutional grounds, the First, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 1, 4, 9 and 21 of the Florida Constitution, by

Florida common law policy of open government or by "broad public policy." (PA-388,398). Nowhere in its Petition for Review in the district court did the Press assert that any access rights were established by Florida Rule of Civil Procedure 1.280(c)(5).[1] Furthermore, the petitioners did not present nor argue to the district court and the circuit court made no ruling on any issue pertaining to the Public Records Act, Chapter 119, Florida Statutes. Plainly, the press should not fault the "Burk majority" for disregarding the "authority" of this civil rule (Herald's Brief at 6) nor claim that the decision "inexplicably makes no reference at all" to the Public Records Law (P.B. Newspaper's Brief at 12), when petitioners completely omitted to mention these authorities to the district court.

There is no constitutional basis for any public right of access to attend discovery depositions in criminal cases and any common law right of access to judicial proceedings and court records extend only to materials which have been filed with the court or on which a judicial decision is based. Not even those judges of the Fourth District Court of Appeal who dissented to

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[1] Although the Herald referred to Fla.R.Civ.P. 1.280(c) at page 15 in its Reply Memorandum served March 10, 1983, the Herald in no way claimed that 1.280(c)(5) established a presumed right of access, that all the public was entitled to attend depositions unless the court issued a protective order under 1.280(c)(5). This is the argument that the Herald presents here at great length (Herald-3-22). The Herald's mention of Rule 1.280(c) was made in its Reply Memorandum to support its argument that "judicial 'presence' at depositions, while not immediate, is pervasive" (Respondent's Appendix-15), i.e. to support the Herald's argument that depositions are "judicial proceedings."

the decision below found any constitutional right of press or public access to attend the taking of a defendant's discovery deposition (PA-17,22,24), Palm Beach Newspapers v. Burk at 581,583,584. Furthermore, Short v. Gaylord, 462 So.2d 591 (Fla. 2d DCA 1985), recognized that the United States Supreme Court held in Seattle Times Co. v. Rhinehart, ___U.S.___, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), that pretrial depositions "are not public components of court proceedings." Accordingly, the Second District found no First Amendment right of the press to attend and report on depositions. 462 So.2d at 592. Also, the Third District adopted the holding of the district court in the instant case in Post-Newsweek Stations et.al. v. Honorable Robert Newman et.al., 10 F.L.W. 1879 (Fla. 3d DCA August 5, 1984).

Clearly, neither the First nor the Sixth Amendment grant the public any right of access to a defense attorney's office to sit in on his pretrial preparations through discovery depositions. The public's common law right of access to attend trials and pretrial hearings before the judge extends only to the adjudicatory stage of litigation where judicial decisions are made, i.e. "judicial proceedings." There is no constitutional right of access to discovery materials not used at trial. Tavoulareas v. Washington Post Co., 724 F.2d 1010 at 1016 (D.C.Cir. 1984), vacated and remanded at 737 F.2d 1170 (D.C.Cir. 1984), for further consideration in light of Seattle Times Co. v. Rhinehart. The common law right of access extends only to materials on which

a judicial decision is based. Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1981) at 1299, footnote 7. See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F.Supp. 866 (E.D. PA 1981), which reviews the common law right of access to "judicial records" and find that the right attaches, presumptively to: (1) material filed with the court, unless filed under seal pursuant to court order, (2) transcripts of open court proceedings and portions of documents read in open court even if filed under seal; (3) material that is the subject of an evidentiary hearing before the court, even if the original is sealed; (4) material referred to at a hearing to the extent that the reference is more specific than general; and (5) material filed under seal that has become the subject of a dispositive ruling and published opinion. 529 F.Supp. at 895-901. The rationale behind this common law right of access to judicial records is that courts have an obligation to explain their decisions and therefore an obligation to allow the public an opportunity to assess the correctness of these rulings. Id. at 901. No such obligation of access pertains to depositions where no judicial decisions are made.

The district court's decision rested in part on the determination that depositions are not "judicial proceedings", Burk at 575. The court below discussed the controlling authority which distinguishes judicial proceedings in open court from discovery proceedings and noted authority from the United States Supreme Court that depositions and interrogatories are not traditionally

public sources of information and are not public components of a civil trial. Id. at 574-576, discussing Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979); Tallahassee Democrat v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979); United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977); Seattle Times Co. v. Rhinehart,supra; Ft. Myers Broadcasting Co. v. Nelson, 460 So.2d 420 (Fla. 2d DCA 1984) .

The distinction between discovery proceedings and "judicial proceedings" is important, for in State ex.rel Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), this Court recognized that "the public and press have a right to know what goes on in the courtroom." Accordingly, the press has a right of access to "judicial proceedings" which cannot be denied absent procedural and substantive due process. Id. at 908. The district court determined that the three-prong test of Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), was not applicable to discovery proceedings because the taking of a deposition is not a judicial proceeding. Burk at 589. Notice of hearing, with a resulting need to balance the rights of the press and parties to litigation after a hearing, is required only when the court decides to close or deny access to a proceeding at which the press is entitled to be present. Palm Beach Newspapers v. Harper, 417 So.2d 1100 (Fla. 4th DCA 1983). Nor is notice to the court file of the time and place of taking a deposition required. Florida Rule of Civil Procedure 1.300(c).

The petitioners' claim that "excluding the public from criminal depositions" will violate the public's First Amendment right of access to criminal proceedings (Herald-23-40, Palm Beach News-17-44, Sun Sentinel-25, Amicus-passim). The media's interest in the defendant's discovery depositions cannot be bootstrapped into a First Amendment right to attend where historically, the press has not attended depositions in criminal cases. Petitioners forget that it has been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1969). Petitioners' claimed history of open access to attend depositions starts with Judge Cowart's supposedly allowing their presence at pretrial depositions in the prosecution of State v. Bundy from the Second Judicial Circuit, tried upon a change of venue to the Eleventh Judicial Circuit due to extensive, prejudicial, pretrial publicity. State v. Bundy, 4 Media Law Reporter 2629 (Fla. 11th Cir. 1979). Almost simultaneous, in a separate murder prosecution of the same defendant from the Third Judicial Circuit, Judge Jopling ruled that discovery depositions were not judicial proceedings and that the press did not have the right to attend the taking of Mr. Bundy's discovery depositions. (See Respondent's Appendix-35-41). This lack of any uniform history of access to attend depositions has constitutional significance.

In Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Court refused to provide a First Amendment reporter's privilege even though the media insisted that such would undermine the freedom of the press to collect and disseminate news. The Court there observed that impediments to the freedom of the press from a failure to provide such a First Amendment right was "not the lesson history teaches us." Id. at 698. Since no such privilege was recognized at common law and had never even been asserted as a constitutional argument until 1958, the Court found that the long history of the press' operating without such a constitutional privilege undercut any claim that such a constitutional rule was necessary. Likewise, in the present case, since there exists no history of routine media attendance at the taking of a defendant's discovery deposition in criminal cases, the lack of any history to support such a public right of access militates against the establishment of a right of access which has not heretofore existed.

Palm Beach Newspapers insists that the United States Supreme Court has recognized a First Amendment right of access to "information about government" by the decisions in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 103 S.Ct. 2613, 73 L.Ed.2d 248 (1982), and Press-Enterprise, Inc. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (Palm Beach Newspapers-23-26). In a similar argument, the Herald claims these cases establish a First

Amendment right of access to "governmental" or "criminal" proceedings (Herald-24-25). These cases do indeed establish that the press and public have a qualified constitutional right to attend criminal trials and that jury selection is an integral part of the criminal trial, but none of these cases allow for a press right of access to report on the defendant's pretrial preparations in discovery where no governmental or police conduct is challenged nor any judicial decision is made. The two features of the criminal justice system that explained the right of access to criminal trials are first, that the criminal trial including the voir dire has historically been open, both here and in England, for many centuries and that criminal trials play a significant role in the functioning of the judicial process and the government as a whole. Globe Newspaper, supra at 256.

This constitutional analysis employed by the Supreme Court to find a public right of access to attend judicial or adjudicatory proceedings in open court has not and cannot be extended to the discovery process utilized by lawyers to facilitate orderly preparation for trial. The major difference between pretrial discovery, where raw information is gathered, and judicial proceedings, where claims are brought and judicial decisions made, has been examined by the United States Supreme Court in Gannett Co. v. DePasquale, supra and Seattle Times Co. v. Rhinehart, supra. In these cases, the court referred to the history of pretrial depositions and interrogatories and determined that such proceedings were not open to the public at common

law. Gannett v. DePasquale, 443 U.S. at 396, Justice Berger concurring, Seattle Times, 104 S.Ct. at 2207-2209. Seattle Times Co. v. Rhinehart discusses the sole purpose of discovery, to assist in preparation and trial, or settlement of litigated disputes, and concludes that such pretrial discovery is not traditionally a public source of information, Id. at 2207-2209. That case holds that a litigant does not have a First Amendment right to disseminate information gained through liberal discovery as permitted under the federal rules, that any First Amendment interest may be subordinated to other interests; Seattle Times does not specifically address the precise question presented here, whether the public has a right to attend the taking of a discovery deposition. However, the Supreme Court's observations and holdings that pretrial discovery is not a public source of information and that discovery is not a public component of a civil trial is clearly applicable here.

Petitioners attempt to discount what Seattle Times says about the non-public nature of discovery proceedings because, petitioners observe, that case refers only to "civil trials" and does not comment on the conduct of discovery in criminal trials. (Palm Beach Newspapers-23, footnote 16). Although petitioners elsewhere claim that the interpretation and history of the federal civil discovery rules control the interpretation and practice of Florida criminal discovery depositions (even though the federal rules contain no provisions for discovery depositions in criminal cases), petitioners do not wish to recognize the

authority of the United States Supreme Court's pronouncements on this specific issue, that historically, pretrial discovery has not been public information.

The Herald also suggests that a right of access may be found in absence of a history of such attendance at depositions because there was no reference to historical presumptions in Waller v. Georgia, ___U.S.___, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (Herald at 28). However, that case was decided under the Sixth and Fourteenth Amendments and held a motion to suppress hearing may not be closed to the public over defendant's objection. The constitutional analysis employed by the Court compared the features of a suppression hearing to a bench trial. The Court found that the aims and interests behind the requirement of a public trial are equally served at a suppression hearing where evidence is taken and the court makes factual and legal rulings on a defendant's claim of government misconduct.

Depositions do not serve a similar judicial function of revealing misconduct or a lack of credibility of witnesses, as Amicus claims (A-22), for no judge is present at depositions to make such factual or legal rulings. Amicus' claim to the contrary expresses only the media's desire to draw such conclusions and opinions in its reports to the public based on information it learns in discovery. In discovery depositions no claims or motions are made to be resolved by judicial action, so the petitioners' analogy to Waller v. Georgia must fail.

There is no history of a press right to attend discovery depositions in federal court; rather, such constitutional claim has historically been rejected. In Times Newspaper Limited v. McDonnell-Douglas Corp., 387 F.Supp. 189 (C.D. Calif. 1974), the court rejected a newspaper's claim that the First Amendment granted the press a right to be present at discovery depositions in death actions arising out of a crash of a McDonnell-Douglas airplane. The district court there noted that the press claim that the public nature of trials also allowed the press to be present at depositions had been considered and rejected as early as 1912 in United States v. United Shoe Machinery of New Jersey, 198 F. 870 (1912). The district court also noted that as early as 1814 the United States had made short shift of a claimed right to open a deposition before the trial in Beale v. Thompson, 12 U.S. (8 Cranch) 70, 3 L.Ed. 491 (1814). In United Shoe, the right of the press to attend the taking of a deposition was easily rejected "upon a consideration of the essential difference between a trial or judicial proceeding held by an officer with judicial authority, and the merely preliminary step of taking depositions." Id. at 871.

The district court in Times Newspaper Ltd. then noted that after the decision in United Shoe Machinery, Congress passed 15 U.S.C. Section 30, applicable only to antitrust suits, which specifically provided that deposition proceedings in those cases would be open to the public as freely as are trials in open court. If the First Amendment gave the public the right to

attend depositions, there would be no need for a statute such as 15 U.S.C. Section 30. 387 F.Supp. at 195-196. Other courts considering the question have also concluded that there is no independent right of access by non-parties to materials produced in discovery and not made part of the public record by filing with the court. See In Re Agent Orange Product Liability Litigation-Pretrial Order No. 44, 96 F.R.D. 582 (E.D. NY 1983), In Re Agent Orange Product Liability Litigation-Pretrial Order No. 54, 98 F.R.D. 539 (E.D. NY 1983), Cianci v. New York Times Publishing Co., 88 F.R.D. 562 (S.D. NY 1980) and United States v. Cianfrain, 445 F.Supp. 1102, 1107-1108 (E.D. PA 1978), to the effect that the presumption of openness applies only to proceedings conducted by a judge in his courtroom. The Supreme Court of Oklahoma considered the issue in Graham v. District Court of the Seventh Judicial, District, Oklahoma County, 548 P.2d 1010 (Okla. 1976), and concluded that where a plaintiff sought to take a defendant's deposition and at deposition there were people present who could be classified as "the public," the defendant deponent could properly refuse to give his deposition in the presence of the public.

Petitioner's "history" that discovery depositions have "uniformly" been considered open to the public in Florida is essentially incorrect. This history is based mainly on circuit court orders as selectively reported in Media Law Reporter. Respondent Aurilio contended in both the circuit court and the district court that the Media Law Reporter is an inaccurate and

unreliable reporter for failure to report all circuit court orders on this issue. The Media Law Reporter only catalogues circuit court orders which are favorable to the media. For example, the Media Law Reporter reports Judge Cowart's order in State v. Bundy, from the Second Circuit prosecution but omits to report Judge Jopling's order from the Third Circuit prosecution. This Court is well aware that Judge Cowart's decision could not modify an earlier unreported decision in the same case by Judge Jopling, as petitioner states (Palm Beach Newspapers at 33). See Bundy v. State, 455 So.2d 330 (Fla. 1984), Bundy v. State, 471 So.2d 9 (Fla. 1985).

Respondent also pointed out below that the Media Law Reporter omits to record that in open court on July 9, 1979, Judge Cowart modified his prior order of April 25, 1979, in State v. Bundy and allowed the defendant's attorney to take the deposition of Cheryl Thomas without the presence of the media after Gannett Co. v. DePasquale, supra, was decided on July 2, 1979 (PA-373-379). In this partial transcript the prosecutor, Mr. Simpson, reminds Judge Cowart that Mr. Bundy announced his instructions to his attorneys during a previous court hearing that they were not to take any depositions if news people were present. Mr. Simpson also informed the court that the defendant's attorney previously refused to take Cheryl Thomas' deposition because a news reporter was present. (PA-375). Clearly, neither the press nor the public ever attended the taking of a single deposition in that case.

Respondent Aurilio also pointed out to Judge Burk that Judge Cowart's April order in State v. Bundy preceeded the district court's decision in Tallahassee Democrat v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979), decided May 17, 1979, and Ocala Star Banner Corp.v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980), decided October 15, 1980, wherein the district courts held that depositions are not judicial proceedings.

Respondent showed to the lower courts that there is at least one other order of a circuit court, State v. Dudley and Brown, case nos. 81-2247 and 2248, Circuit Court for Pinellas County, where the Honorable Fred L. Bryson determined that members of the media would not be permitted to attend discovery depositions in a capital case (PA-369-371). Respondent Aurilio also demonstrated that this order had been appealed by the press and that the Second District rendered a per curiam affirmed decision on the basis of Ocala Star Banner, Corp. v. Sturgis, supra. Times Publishing Co. v. The Honorable Fred L. Bryson, 411 So.2d 880 (Fla. 2d DCA 1981). Respondent cited this case from the Second District, not for precedential value, but in order to demonstrate the inaccuracy of the Media Law Reporter. Neither the decision of the circuit court in Pinellas County nor the decision of the Second District Court of Appeal is reported in the Media Law Reporter.

Florida v. Alford, 5 Media Law Reporter 2054 (Fla. 5th Cir.Ct. 1979), can not pertain to pretrial depositions in a criminal case, as the Herald claims (Herald at 43), but must

apply to some other proceedings, perhaps discovery depositions taken on a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850. This is necessarily so because Mr. Alford's conviction for first degree murder had already been affirmed by this Court in 1975. Alford v. State, 307 So.2d 433 (Fla. 1975).

Petitioners' claims that depositions have historically been open in Florida based on "numerous" cases is simply inaccurate. The Herald's citation to the circuit court orders from the Media Law Reporter are not "numerous" as claimed (Herald at 43), but rather reflect isolated occurrences. Most of the other circuit court orders in Media Law Reporter rely on other circuit court orders and ultimately on Judge Cowart's order in State v. Bundy. Judge Nesbitt's order in State v. Diggs, 5 Media Law Reporter 2597 (Fla. 11th Cir. 1980), does refer to Gordon v. Gerstein, 189 So.2d 873 (Fla. 1966), but that case plainly does not say that discovery depositions are judicial proceedings. Gordon v. Gerstein stands only for the proposition that a state attorney's investigative interrogation under Section 27.04, Florida Statutes, should be open for the attendance of the witness' attorney.

Historically, public attendance at criminal discovery depositions has been rare. Nor are depositions public, judicial proceedings, thus petitioners' First Amendment and common law right of access arguments under the analysis utilized by the Supreme Court in Richmond Newspapers v. Virginia, Globe Newspapers v. Superior Court and Press Enterprises Inc. v. Superior Court, must fail, because historically there has not

been open right of access for the public to attend depositions in criminal and civil cases. As pointed out in the lower court's opinion, the access rights of the press are no greater than that of the public generally. The petitioners' long list of attended evils that will occur and secrecy which will forbear if they are not now granted a right to hear discovery depositions before trial and report on them, is unfounded. As in Branzanberg v. Hayes, the existing constitutional rules and denial of right of access to attend discovery depositions have not been a serious obstacle to the ability to the press to report on the criminal justice system.

Next, petitioners have not demonstrated that a defendant's pretrial discovery in criminal cases plays a significant role in the functioning of the judicial process and government as a whole. A defense attorney's preparations, as the adversary of the state, in order to meet the state's accusations of crime, cannot be characterized as the "operation of government." In State v. Meyer, 430 So.2d 440 (Fla. 1983), this Court noted the constitutional basis for the adversary function of defense counsel. That decision severely undermines the petitioners' suggestion that a defense attorney's actions in preparing the defendant's case for trial through pretrial discovery can be imputed to the state and thus characterized as the "operation of government."

The petitioner's belief that guilty pleas insulate a prosecution from public scrutiny is obviated by procedural and

constitutional requirements attendant to the entry of a guilty plea. See Boykin v. Alabama, 395 U.S. 238 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In Florida, the procedural requirements include a factual basis for the plea of guilty. Florida Rule of Criminal Procedure 3.170(j) provides:

> Responsibility of Court on pleas. No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.
>
> Complete record of the proceedings at which a defendant pleads shall be kept by the court.

Where an accused pleads guilty through protesting his innocence when he intelligently concludes that course in his best interest, those circumstances will be reflected and explored by the probing plea colloquy in open court. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The petitioners' imagined spector of clandestine and secret guilty pleas is belied by the appropriate guilty plea procedures required by the United States Constitution and the Florida Rules of Criminal Procedure. The Federal Rules of Criminal Procedure do not allow for discovery depositions. Yet, petitioners have cited to not the first case where the plea colloquy in federal, or even state court, was deemed insufficient to adequately

apprise the public of the functioning of the judicial system, the reason for the accusation and plea and the facts and circumstances which may have occasioned the plea.

Petitioners' observation (Amicus at 6, Herald at 29, Palm Beach Newspaper at 28) that when a shocking crime occurs the public is outraged is essentially correct. However, hearing the content of the defendant's discovery depositions, opinions of the witnesses, their reports on the defendant's character and criminal background, that polygraph examinations influenced the police in their disbelief of the defendant's exculpatory statement and the prosecutor's decision to charge the defendant cannot in any way satisfy the public that "justice is being done." Facing the public with details of the crime and reasons for the arrest from deposition statements where no adjudication of the state's accusation occurs only fosters the press' and public's speculation on the defendant's culpability.

Discovery does not contain information on "society's response to criminal conduct" but contains information on the underlying criminal episode. The justice of such a charge has yet to be adjudicated and justice will not be done until the criminal justice system operates to resolve that claim in open court. It is more than a little unfair to allow the press to try the case in the newspaper before it is tried in the courtroom. In United States v. United Shoe Machinery Co., the court observed:

> Due process of law requires that the parties have an opportunity to be heard. For the Court to enforce a rule that the public and the press

> shall have an opportunity to listen before the parties to the case have an opportunity to be heard would be a plain violation of elementary rules of fair play.

198 F. at 873.

Petitioners' claim that Federal Rule of Civil Procedure 26(c)(5) grants a presumed right of access to attend discovery depositions is based on cases construing Rule 26(c)(7) and not on 26(c)(5). (Herald-9-10, Sun Sentinel-17-20, Palm Beach Newspaper-39). Those cases do recite that discovery is generally conducted in public, but do not specifically address the public's right to be physically present in an attorney's office during the taking of a deposition. Furthermore, petitioners' argument ignores major differences between the Federal Rules of Civil Procedure and Florida Rules of Civil Procedure. The Florida Rules of Civil Procedure are significantly different. See Palm Beach Newspapers v. Burk, at 580, and Issue II, infra. The Federal Rules of Civil Procedure do not allow pretrial discovery depositions in criminal cases in any event.[2] Therefore, any committee contemplating how a proposed Federal Rule of Civil Procedure would operate could not and did not presume to discuss the logistical and constitutional impediments to a defendant's right to a fair trial by affording the press a presumed right to report on the substance of the state's case against an accused citizen before the case is tried in the courtroom.

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[2] Significantly, United States v. Salerno, 11 Media Law Reporter 2248 (S.D. NY 1985), cited by petitioners, concerns access to a deposition to perpetrate testimony for trial, not a pretrial discovery deposition.

Federal Rule of Civil Procedure 5(d) requires that all papers served upon a party after a complaint, including depositions, be filed with the court unless the court orders otherwise. Federal Rule of Civil Procedure 30(f)(1) requires depositions to be promptly filed with the court in which the action is pending unless otherwise ordered by the court. It is these rules, in addition to Federal Rule of Civil Procedure 26(c), which led the court in Tavoulareas v. Washington Post, supra, to conclude that discovery was presumed open under the Federal Rules of Civil Procedure. This decision in Tavoulareas has subsequently been vacated in light of Seattle Times Co. v. Rhinehart; in any event, whatever lower federal courts have said about presumed openness of discovery has been superceded by United States Supreme Court, which reached the opposite conclusion, that pretrial depositions are not public components of court proceedings and do not contain public information. Seattle Times Co. v. Rhinehart, supra.

The petitioner's theory that "everyone has always known that Fed.R.Civ.P. 26(c)(5) or Florida Rule of Civil Procedure 1.280 (c)(5) gives the public a right of access to attend a discovery deposition unless the First Amendment standards for closure or exclusion are met" has one glaring flaw. If this meaning of the Rule is so obvious, the press would have urged this interpretation of the Rule to the court below. Petitioners' failure to make the argument in the district court is persuasive authority that such interpretation of an access right from the language of the rule is obscure and not readily apparent. The district court

in Burk did not discover that Fla.R.Civ.P. 1.280(c) was intended to allow the public and press to be present unless excluded by the court:

> Hoping not to be merely argumentative, we have searched the Rules and not found a mention of public and press or that they are entitled to notice and attendance at such depositions. We have dissected Florida Rule of Civil Procedure 1.280 and do not reach a conclusion that it serves that purpose. It is true that section (c) of that Rule provides for protective orders for many purposes, one of which is "(5) that discovery be conducted with no one present except persons designated by the court." We construe its application to be limited to instances where the parties do not agree and there is controversy between them as to whom may be present. For example, this might be applicable where trade secrets or sensitive matters will be pursued or where one of the parties or his or her friends insist on being present and are disruptive. We do not read it that everybody, public and press, are entitled ipso facto to attend unless the court orders otherwise. To repeat, if the Rules are to be the avenue so opening up depositions, then the Rules in our opinion must be amended to specifically so state.

(PA-535)

Petitioners also claim that the unmistakable intent of the drafters of the federal civil rules was to provide for public access, based on a portion of an unauthenticated transcript, supposedly of the 1936 committee meeting that purports to include a discussion on the meaning of the rule. Petitioners say they obtained this transcript from the Archives Collection of Harvard University (Herald's Appendix, Index, A-13-18) so it is not easily accessible to the Court and respondents. First of all, this is nothing but an attempt to prove legislative history by

certain parole evidence to support the Herald's argument. Such proof of legislative history, by parole evidence, should be made in the trial court. State v. Kaufman, 430 So.2d 904 (Fla. 1983). Since an appeal has never been an evidentiary proceeding, it is inappropriate to include such an unauthenticated transcript in an appendix. See Hillsboro County Board of County Commissioners v. Public Employees Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982).

The portion of the transcript provided does not demonstrate that any independent right of access for the public to attend depositions was discussed at this committee meeting, but rather a hypothetical was advanced that an unethical lawyer could "have" ie. invite the press to attend a deposition of a respectable person and conduct an unfair and slanderous interrogation for the sole purpose of generating adverse publicity. If Congress intended to grant the public a right of access to attend all discovery depositions, they would have employed clear and unequivocal language to that effect, similar to that used in 15 U.S.C. § 30 for depositions in antitrust cases.

The partial transcript ends with Mr. Sunderland commenting that 12 or 14 states allow such a practice (Herald Appendix at 18). If the Herald means to imply by this partial unauthenticated transcript that 12 to 14 states allow for the presence of the press and public at discovery depositions, then the petitioners should cite this Court to competent authority of practices from other states. When the media petitioned this Court to change

the Code of Judicial Conduct, Canon 3(A)(7), Petition of Post-Newsweek Stations, Florida, 370 So.2d 764 (Fla. 1979), for example, they emphasized and cited to the laws of 12 states which allowed cameras in the courtroom. (See Report of Post-Newsweek Stations filed June 15, 1979, at pages 52-82, Supreme Court Case No. 46,835). If in fact there were 12 other states that freely allowed the press access to attend the taking of discovery depositions as Mr. Sunderland stated, petitioners no doubt would have cited such as competent authority to this Court. They have not cited cases that establish such a right is routinely granted in any other state because no such cases exist. This is necessarily so because lawyers and litigants have never considered that there was any presumption of openness or public right to attend discovery proceedings in civil or criminal cases.

In regard to criminal cases, an opposite presumption would appear to pertain in the law,[3] i.e. the court should not

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[3] The presumption that depositions are not conducted in public is implied by DR-7-107, Code of Professional Responsibility, which mandates that officers of the court not participate in pretrial dissemination of information pertaining to the criminal investigation. If attorneys may not make or participate in certain extra-judicial statements, described by DR-7-107)(B), how can they ethically conduct depositions in an open forum? Acceptance of petitioners' position would require modification of DR7-107(B) which provides:

> (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means

sanction dissemination of witness' statements which are not made during judicial proceedings. A trial judge in a criminal case has a duty to make some effort to control the release of leads, and information and gossip to the press by police officers, witnesses and counsel for both sides. Sheppard v. Maxwell, 384 U.S. 333, 359, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Indeed, the Court there observed at footnote 15:

> Such 'premature disclosure and weighing of the evidence' may seriously jeopardize a defendant's right to an impartial jury. '[N]either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against [Sheppard].'

384 U.S. at 361.

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of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

In Sheppard v. Maxwell, the Court further noted, based on cases coming before them, that unfair and prejudicial news comment on pending trials had become increasingly prevalent. The Court said:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measure to ensure that the balance is never weighed against the accused.

384 U.S. at 362.

In Press Enterprise, the Court noted that no right ranked higher than the right of the accused to a fair trial. 104 S.Ct. at 823. The Sixth Amendment would appear to prohibit granting the press a new right of access to attend the taking of a defendant's discovery depositions in a criminal case under the standards proposed by petitioners for such a right of access would completely destroy the defendant's Sixth Amendment rights to a fair trial. A defendant could never be afforded protection from conducting discovery in an open forum where his side of the equation requires a showing before he is ever allowed to use his discovery tools. The district court noted the impracticalities of allowing press access in the discovery process (PA-523-533):

> We hold that the three-pronged test is not applicable to pretrial discovery proceedings such as discovery depositions because, among other things, the taking of such depositions is not a judicial proceeding since the judge is not in attendance and since the deposition cannot be received in evidence.

More importantly, if such test were to be considered as applicable, it would be impossible to apply because of the inherent nature of such depositions. Counsel cannot know in advance what testimony will be adduced at discovery depositions.

Usually and for obvious reasons such discovery depositions are aimed at hostile witnesses, witnesses that refuse to communicate or give statements and witnesses that refuse to cooperate with counsel or his investigator seeking information. The reasons why counsel may seek to depose a witness in a criminal case defy being catalogued. Perhaps based on hunch or hearsay it is thought that the witness may have some knowledge of some kind about some facet of the alleged crime. The witness upon being deposed may reveal that he or she was an eye-witness or a participant or that the witness knows nothing. It may uncover incriminating or exculpatory information of large or small magnitude about all or some of the events. Again, the point is that counsel cannot know in advance, except by way of possible speculation and conjecture, what the witness knows and the scope of the testimony. Under these circumstances counsel cannot apply in advance for protection and, if he did do so, he would have no way of satisfying the three-pronged test. Repetitively, how can he protect his client's right to a fair trial when he does not know if the witness's unrevealed and undiscovered testimony, if released to the media, would prejudice and place the defendant in jeopardy?

All who have taken discovery depositions know that it entails fishing on a dangerous and uncharted sea. However, they are very valuable tools and, in our opinion, a lawyer would be remiss in not making pretrial inquiry of witnesses where he has reason to think they may have knowledge of some kind concerning the alleged crime. It the witness incriminates the defendant when the indicated areas are plumbed, counsel will at least know what he may be faced with at trial and undertake to mount a defense. Counsel can undertake to elicit impeachment testimony and other matters that might impair the credibility of the witness. If the witness

has friendly testimony then, of course, counsel will add the witness to his trial witness list.

Practical considerations militate against press access, although it is agreed that such considerations could not prevail if access was constitutionally mandated. As before mentioned, discovery depositions are not subject to admission into evidence. Jackson v. State, 453 So.2d 456 (Fla. 4th DCA 1984) Terrell v. State, 407 So.2d 1039 (Fla. 1st DCA 1981).[3] Moreover , as a general rule, there are many questions and answers that are proper as a matter of discovery which would not be allowable even if produced live at trial. Thus, if the Press is present at deposition time it is fair to say that such presence would severely chill or inhibit the discovery process. The questioner is not likely to explore or pursue needed subjects and areas as he normally would if he learns that the answers may prejudice or damage his client or others if the answers are published before trial as indicative of the facts of the case.

Such depositions are often arranged orally without formal notice for the convenience of counsel. Sometimes they are arranged on short notice and in such case it could be awkward to be required to give the Press reasonable notice. In addition, depositions are most often scheduled for a lawyer's or court reporter's office where space is limited. Without laboring it, most such places simply will not have sufficient accommodations to allow the presence of the media, especially in cases that the media would deem sensational or specially newsworthy. Moreover, it should be recognized that the right of access for the press is no greater than that of the general public. Pell v. Procunier and Howchins v. KQED, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). In other words, if the press can attend pretrial discovery depositions, so can the general public and this would only exacerbate the mentioned problem.

Finally, if media access should be required, it is reasonably predictable there will be collisions out of the presence of the court between counsel and the media as to access and the terms of it. These collisions will in many instances, we feel, require resolution by the court. This will require

> hearings, notice, counsel, orders, and the whole panoply. This will impose an additional work load on the judges and delay the prosecution.
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> 3. Of course, depositions taken to perpetuate testimony, different from discovery depositions, would be admissible. See Fla.R.Crim.P. 3.190(j).

(PA-531-533).

Petitioners' assertions that press presence at depositions to report on their content would not cause problems described by the district court's decision are absurd (Herald-47-50). The media assumes that defense counsel will have reviewed witness statements and police reports before taking depositions. However, under Florida law police reports are not, per se discoverable. Whiddon v. State, 431 So.2d 290, (Fla. 1st DCA 1983), State v.Love, 393 So.2d (Fla. 3d DCA 1981). Furthermore, police reports do not document matters of bias, motive, or prejudice of the witness against the criminally accused and such are the matters a defense attorney would wish to delve into on deposition, to explore the credibility of the state's witness, but not if probing the witness' bias means that a public attack on the defendant's character will take place in the afternoon press.

Petitioners' suggestions on the salutary benefits of press access to depositions attributes the press with superior powers and functions as a participant and not as an observer. Petitioners claim the press, not the defense or the court, is the entity which can check a prosecutor's power (PB-30) and that the

court needs the help of the press to control the unethical or abusive conduct of counsel at deposition (PB-31). With such powers at petitioners' command, conflict between the media representatives and the attorneys and witnesses are bound to occur with no judge present to control the media, their set up or number of cameras, their interruptions to ask questions and their attempts to interview the attorneys and witnesses. Petitioners' factual recitations of problems with depositions in specific cases (PB-28-29,30-32) that could be cured by the presence of the media, are not supported by this record or the facts recited in the reported appellate cases petitioner seeks to describe.

Respondent disagrees with petitioners' blanket assertion that the "experience prior to Burk" (PB-44) has not created problems of an increase in judicial workload. Suggestions that the media's representatives are never disruptive or ill-behaved themselves are plainly undocumented assertions, not fact. Common sense dictates that attorneys are understandably reluctant to have the press present at depositions when no judge is present to control the reporters' conduct and attempts at participation in discovery proceedings.

That there is no presumed right of the press to the substance of the defendant's discovery deposition is also implied by the opinion in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982). The Court there suggested that in ruling in a defendant's motion to suppress confessions or statements, "a carefully controlled suppression hearing can itself be conducted

in open court without creating any prejudice whatsoever." Id. at 7. The Court thus implies that the substance of a defendant's confession can legitimately be withheld from the media without any type of hearing and that they have no right of access to such information learned by a defendant through his discovery until it is presented in the courtroom. The teachings of Sheppard v. Maxwell, supra, require that a defendant should never be put to the burden of justifying why the court should not grant the media a sneak preview of the prosecution's evidence prior to its presentation during judicial proceedings. When judges and officers of the court place the interest of justice first, the news media will soon learn to be content with the task of reporting the case from the courtroom. Sheppard v. Maxwell, supra, 384 U.S. at 362.

POINT II

IS THE PRESS ENTITLED TO ACCESS TO PRETRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE WHICH MAY OR MAY NOT HAVE BEEN TRANSCRIBED BUT WHICH HAVE NOT BEEN FILED WITH THE COURT?

The petitioners are most disgruntled with the January 1, 1982, amendment to the operation of Florida Rule of Civil Procedure 1.310(f)(3)(A) and (B) which provides:

> (3) A copy of a deposition may be filed only:
> (A) By a party or the witness when the contents of the deposition must be considered by the court on any matter pending before the court. Prompt notice of the filing of the deposition shall be given to all parties unless notice is waived. A party filing the deposition shall furnish a copy of the deposition or the part being filed to other parties unless the party already has a copy.
> (B) If the court determines that a deposition previously taken is necessary for the decision of a matter pending before the court, the court may order that a copy be filed by any party at the initial cost of the party. (Emphasis supplied).

Petitioners note that under the prior rule which required filing of all depositions ordered transcribed, "if a reporter were denied the opportunity to attend a deposition, he or she simply could wait for the filing of the original transcript in the court file to discover what had been said in the deposition." (PB-37). Under operation of the prior rule, if the deposition was filed was also dependent on whether a deponent or a party requested transcription. The complained of arbitrary nature of the rule (PB-38-39) has been in operation without incident for many years. The court below carefully observed that the rules

contain no requirement for counsel to require transcription or file a discovery deposition if it was non-productive, hurtful or of no use to him at trial. Burk at 575. When a deposition was filed under the prior rules was necessarily influenced by when the court reporter could get the job done. Transcription of depositions was never immediate, particularly in indigent criminal cases due to the court reporter's other official duties to record judicial and discovery proceedings and to provide transcripts for appellate purposes. Sections 29.02 and 29.05, Florida Statutes.

Petitioners' proposed remedy in response to their dissatisfaction to the needed "housekeeping change" to relieve a serious document shortage problem is to require more work on court reporters, to transcribe depositions even if not requested by a party, or require press access to attend depositions and a resulting increased judicial workload due to the conflicts that will occur in those sensational cases, the shocking crimes that the press deems newsworthy (Palm Beach Newspapers at 18, Amicus at 6, Herald at 29). There are no reasons to require the judiciary to keep, store and maintain voluminous documents which are of no concern to the court, not before the court for a decision on any matter and are never used at trial. The judiciary should not be required to structure the functioning of its workload nor forego needed procedural rules to relieve serious document storage problems in order to accommodate the media's desire to report on a case before it comes to court. If the new

rule is invalid, as petitioners contend, then the remedy should be no broader than the status quo under the prior rule.

The rules do not provide that depositions must be transcribed and filed with the court. Only upon filing does a deposition become part of the court file. Tallahassee Democrat v. Willis, supra, Florida Rule of Judicial Administration 2.075(a)(1). As previously discussed under Point I, supra, at page 11, the common law right of access to judicial records extends only to material filed with the court or on which a judicial decision is made. Since there is no common law nor constitutional right of access to discovery material not used at trial, the amended court rule, which requires depositions to be filed only when the contents must be considered by the court on a matter pending before the court, is not constitutionally infirm.

The court's rules determine when discovery documents become "court records." The rules prohibit the filing of all depositions and other discovery documents. See Florida Rule of Civil Procedure 1.310(f)(3), 1.340 and 1.350. "Depositions filed with the clerk" are "court records." Florida Rule of Judicial Administration 2.075(a)(1). Stenographic tapes of depositions are indeed court records which must be retained in a secure place in Florida. Florida Rule of Judicial Administration 2.075(e). This rule requires those stenographic tapes to be securely kept and does not provide for open access to those notes under the

rules. The court reporter is not authorized to provide transcripts thereof to any person who may want one. Florida Rule of Civil Procedure 1.310(f)(2) states: "Upon payment of reasonable charges therefore the officer shall furnish a copy of the deposition to any party or to the deponent." The rules also clearly delineate the difference between discovery depositions and judicial proceedings because they are variously described: "Court reporters or persons acting as court reporters for judicial or discovery proceedings shall retain the original notes. . ." Fla.R.Jud.Admin. 2.075(e).

This Court should not consider petitioners' arguments, newly presented here and not in the lower court, that the Public Records Act provides access to depositions where the court rules do not, when this case was not litigated in the lower courts under the Public Records Law. Tillman v. State, 10 F.L.W. 305 (Fla. June 6, 1985). Although this Court may not be inclined to apply traditional concepts of waiver in this case, failure to do so may have unwarranted and unfair economic consequences to some of the respondents. Section 119.12, Florida Statutes.

In any event, petitioners' reliance on the Public Records Law for access to judicial records must necessarily fail on constitutional grounds. Article II, Section 3, Florida Constitution. Since, as petitioners point out (PB-14), an official court reporter is "an arm of the court," Cleary Bros. Construction Co. v. Phelps, 24 So.2d 51 (Fla. 1945), a court reporter is necessarily subject only to the control and direction of the Court and

not to either of the other branches of government. See The Florida Bar. In Re Advisory Opinion Concerning the Applicability of Ch.119, F.S., 398 So.2d 446 (Fla. 1981), where this Court rejected the idea that Chapter 119 could control the files of an official arm of this Court:

> The definition of "public records" in section 119.011(1), Florida (1979), and the definition of the term "agency" as contained in section 119.011(2) are far reaching, and broad enough to include the records of judicial branch entities. It is fundamental that all the legislative power of the state which is not withheld or vested elsewhere by the constitution resides in the legislature. Where a limitation does exist, however, the legislature may not exceed such limitation. If judicial entities are included within the scope of chapter 119, the legislature has sought to exercise legislative power concerning a matter that is explicitly withheld and vested elsewhere in the constitution, i.e., article V.
>
> Article II, section 3, Florida Constitution, provides no person belonging to one branch of government shall exercise any power appertaining to either of the other branches unless explicitly provided in the constitution. Neither the legislature nor the governor can control what is purely a judicial function.

At page 447.

Petitioners' reliance on Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), is also misplaced (PB-15-16). Petitioners argue that depositions are not exempt from public inspection as "active criminal investigative or intelligence information." The exemption from "criminal intelligence information" in Section 119.011(3)(c), that certain records, including "documents given or required by law or agency ruled to be given to the person

arrested" is interpreted by petitioners to mean "information already known to the criminal defendant" (PB-15). Petitioners' interpretation greatly expands the plain words of the statute. First of all, discovery depositions are not "given" to a defendant. Florida Rule of Criminal Procedure 3.220(d) provides that at any time after the filing of an indictment or information "the defendant may take the deposition" of certain persons. The State Attorney has no responsibility to give depositions to the defendant by producing state witnesses for a defendant's discovery deposition. State ex rel. Gerstein v. Durant, 348 So.2d 405 (Fla. 3d DCA 1977).

A "person arrested" is not entitled to take a discovery deposition. Only defendants, those who have been informed against or indicted, may take discovery depositions, Florida Rule of Criminal Procedure 3.220(d). To the extent Satz v. Blankenship interpreted and explained the phrase "person arrested" to mean "defendant," that decision employs incorrect principles of statutory construction. When a statutory provision is clear and unambiguous, the courts are obliged to give effect to the language of the legislature used. Heredia v. Allstate Ins. Co., 358 So.2d 1353 (Fla. 1978).

Petitioners suggest that the decision below must be reversed, in any event, because it is contrary to this Court's "commitment to open government." (PB-44-48). Such a "perceived commitment" is not a rule of law requiring open and easy access

to any and all information, documents and places when an individual claims he is exercising First Amendment rights in order to inform the public. Application of such a vague and amorphous doctrine would require this Court to allow the press rights to accompany police on their investigations, judges as they conference a case and lawyers to their offices as they prepare or answer interrogatories. Petitioners have not advanced any rule of law that requires this Court to order Florida lawyers to open their private offices or the limited space of deposition rooms in courthouses provided for attorneys' use so the public may have access to the taking of depositions. See Downer v. State, 375 So.2d 840 (Fla. 1979), upholding trespass convictions in a post-partum area of a public hospital against a claimed First Amendment right to gather and publish information about health care practices.

The decision of the district court is comprehensive, well-reasoned and correct. This Court should not create a public right of access to attend the taking of discovery depositions when neither the Constitution, common law, nor rules of procedure require that result. Accordingly, the decision of the district court should be affirmed.

CONCLUSION

Based on the foregoing, this Court should adopt and uphold the decision of the District Court, Fourth District, in the instant case for there is no constitutional, statutory, common law right or procedural rule which allow the press and public to be present at the taking of discovery depositions in Florida.

Respectfully submitted,

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