IN THE SUPREME COURT
IN AN FOR THE STATE OF FLORIDA

FILED
SID J. WHITE
OCT 9 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

PALM BEACH NEWSPAPERS, INC.; THE MIAMI HERALD PUBLISHING COMPANY; and NEWS AND SUN-SENTINEL COMPANY,

Petitioners,

vs.

CASE NO. 67,352

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

Respondents.

BRIEF OF RESPONDENT THE HONORABLE RICHARD BRYAN BURK, ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE AND FACTS	2
ISSUE I: IT IS SUBMITTED THAT THE CERTIFIED QUESTIONS SHOULD BE ANSWERED IN THE NEGATIVE	3
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF CITATIONS

CASES	Page
Branzburg v. Hayes 408 U.S. 665 (1972)	4
Bundy v. State 455 So.2d 330 (Fla. 1984)	4
Engle v. Isaac 456 U.S. 107 (1982); U.S. 72 (1977)	5
Estes v. Texas 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed2d 543 (1965), reh.den. 382 U.S. 875, 86 S.Ct. 1628, 14 L.Ed.2d 118	4
Gannett Co. v. Pasquale 443 U.S. 368 (1979)	9
Gordon v. Gerstein 189 So.2d 873 (Fla. 1976)	8, 11
Hillsborough County Aviation Authority v. Azarelli Construction Co., Inc., 436 So.2d 153 (Fla. 2d DCA 1983)	6
Miami Herald Publishing Co. v. McIntosh 340 So.2d 904 (1976)	4
New York Times v. United States 403 U.S. 713 (1971)	4
Ocala Star Banner v. Sturgis 388 So.2d 1367 (Fla. 5th DCA 1980)	5
Penekamp v. Florida 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946)	4
Post Newsweek Stations Inc. v. State _____So.2d____(Fla. 3d DCA 1985), 10 F.L.W. (1879)	9
Richmond Newspaper, Inc. v. Virginia 448 U.S. 555 (1980)	4, 8
Seattle Times Co. v. Rhinehart ______U.S. _____104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)	7

TABLE OF CITATIONS AND OTHER AUTHORITIES (continued)

	Page
Sheppard v. Maxwell 384 U.S. 333 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)	4
Short v. Gaylord Broadcastin Co. 462 So.2d 591 (Fla. 2d. DCA 1985)	7
Steinhorst v. State 412 So.2d 332 (Fla. 1982)	5
United States v. Tijerina 412 F.2d 661 (10th Cir. 1969)	4
Wainright v. Sykes 433 U.S. 72 (1977)	5
Zemel v. Rusk 381 U.S. 1 (1965)	4

Other Authorities

Florida Rule of Civil Procedures, 1280 (c)(5)	5
Florida Rule of Civil Procedures 1300	6
§ 27.04	8
§ 119.07(3) (d) and (m), (4) and (5)	6
§ 119.07(3) (d) and (m), (4) or (5)	6
§ 119.011 (3) (b) (c) and (d) Fla. Stat.	6

SUMMARY OF ARGUMENT

The Petitioner's claims of some right of access to unrecorded pretrial discovery depositions are unsupported by the law and, even if arguable, fail to survive Sixth Amendment scrutiny.

Pretrial discovery depositions are not judicial proceedings. No judicial officer is present and no rulings on evidence are made. They are recognized by the United States Supreme Court as private proceedings, neither central to nor part of the "judicial process". As such, no right of access exists under the First Amendment.

Arugments raised pursuant to Florida Statues and Rules of Procedure are improper de novo arguments which, in any event, are meritless. Florida's statutes clearly give privileged (nondisclosure) status to pretrial criminal discovery depositions (or transcripts thereof).

Both certified questions, therefore, should be answered "no". Lawyers must be permitted to do their jobs if our paramount concern -- a fair trial -- is to be served.

STATEMENT OF THE CASE AND FACTS

The Respondents accept the statement of the case and facts submitted by the Petitioner, **Palm Beach Newspapers, Inc.** with the following additions or corrections noted.

On page 6 of its brief, the Petitioner asserts that reporters of the **News and Sun Sentinel** submitted requests for deposition transcripts pursuant to Chapter 119, Florida Statutes (the "Public Records Law") and that these requests were denied. This assertion is not supported by the record references (A. 59, 92-93) provided. Indeed, no mention of Chapter 119 seems to have been made by anyone in the case prior to the reference to the chapter in a dissenting opinion in the Fourth District. Neither the trial court nor the District Court received argument or ruled upon the applicability of Chapter 119. (A. 383-399, 402-413, 414-425).

The absence of any argument probably explains the District Court's "inexplicable" failure to address the statute. (See Brief of Palm Beach Post, p.12).

The Respondents would question the characterization of the Fourth District's 5-4 decision as a mere "plurality" opinion, given that Judge Letts' concurring opinion begins with: "I agree with the majority."

IT IS SUBMITTED THAT THE CERTIFIED QUESTIONS SHOULD BE ANSWERED IN THE NEGATIVE.

The District court has certified the following questions:

> 1. Is the press entitled to notice and the opportunity and right to attend pretrial discovery depositions in a criminal case?
>
> 2. Is the press entitled to access to pretrial discovery depositions in a criminal case which may or may not have been transcribed but have not been filed with the clerk of the court or the judge?

The Petitioners contend that there is no difference between a judicial proceeding and a private discovery deposition. They attach no significance to the differences in kind and content of testimony adduced at hearings as opposed to depositions. They attach no significance to the Sixth Amendment right of an accused to prepare his case for trial. They attach no significance to the Hobson's choice of "generating adverse publicity" as opposed to going without discovery. They attach no significance to the fact that a deposition may be conducted on private property (a home or office) on which the public has no "easement". They attach no significance to the concept of "work product".

The Petitioners do, however, allege:

> "There are no discernable public policy reasons to allow the public access to pretrial criminal proceedings and then limit that access to only certain proceedings." (Brief of **News and Sun Sentinel Co.**, pg.14).

The Respondents respectfully disagree. The Court is not presented with esoteric or philosophical arguments here. We are dealing with the reality of criminal practice -- and in doing so we remind this Honorable Court of its admonition in **Miami Herald Publishing Co. v. McIntosh**, 340 So.2d 904 (1976) that a defendant's right to a fair trial is the most fundamental of all rights, and is a consideration which outweighs any "First Amendment" claim. See **Estes v. Texas**, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), **reh. den.** 382 U.S. 875, 86 S.Ct. 18, 15 L.Ed.2d 118; **Pennekamp v. Florida**, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); **United States v. Tijerina**, 412 F.2d 661 (10th Cir. 1969); **Bundy v. State**, 455 So.2d 330 (Fla. 1984).

While the Petitioners do not discern any reason to close pretrial discovery depositions, they do concede certain issues, obviating any need for extensive restatement. Suffice it to say:

> (1) The parties hereto agree that the press has no greater right of access to news than the public in general. **Branzburg v. Hayes**, 408 U.S. 665 (1972); **Zemel v. Rusk**, 381 U.S. 1 (1965); **New York Times v. United States,** 403 U.S. 713 (1971).
>
> (2) The public has a right to access to criminal trials and some pretrial hearings under **Richmond Newspapers, Inc. v. Virginia**, 448 U.S. 555 (1980). That access may be limited if justice demands it.

(3) If necessary, courts can exclude the media from depositions per Fla. R. Civ. P. 1.280 (1) (5). **Ocala Star Banner v. Sturgis**, 388 So.2d 1367 (Fla. 5th DCA 1980).

Where the parties hereto part ways is in the defining of a pretrial discovery deposition. [NOTE: Not to be confused with depositions in perpetuation of testimony.] The three petitioners contend, as does the amicus, that private, pretrial discovery depositions are also "judicial" proceedings, thus giving them a right of access unless the parties can justify closure.

The Miami Herald Publishing Co. bases its argument largely upon a lengthy history of the concept of discovery and the perceived evolution of Fla. R. Civ. P. 1.280 (c) (5). The other members of the press join in, but do not argue the proposition as thoroughly as the Herald.

The Herald's history of the rules of civil procedure fails to include certain factors which are important to any review of this case.

First, the Petitioners never argued the applicability of Rule 1.280 (c) (5) in the Circuit Court. They cannot, on appeal, seek to reverse a lower court order with a claim not presented to the lower court. As a result, the right to argue this issue is waived. **Wainwright v. Sykes**, 433 U.S. 72 (1977); **Engle v. Isaac**, 456 U.S. 107 (1982); **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982).

Second, (presented without agreeing to any right of argument) Fla. R. Civ. P. 1.300 states that depositions can be set, by agreement of the parties, at any time or place, on any notice and before any person without judicial approval. This rule makes clear that discovery depositions are not "public proceedings" bearing a "right" to notice for the general public.

Third, transcripts of pretrial criminal discovery depositions qualified as privileged material, not subject to disclosure, under § 119.011(3)(b), (c) and (d), Fla.Stat. and § 119.07 (3) (d) and (m), (4) and (5), Fla. Stats. (the Public Records Act). The provisions of this Act are substantive rather than procedural, and take precedence over Rule 1.280. **Hillsborough County Aviation Authority v. Azarelli Construction Co., Inc.**, 436 So.2d 153 (Fla. 2d DCA 1983).

The initial brief of Palm Beach Newspapers, Inc., approaches the case (and most particularly the second certified question) by quoting selected passages from Chapter 119, Fla. Stat., while avoiding any mention of § 119.07 (3) (d), (m), (4) or (5). Those sections deal directly with criminal discovery depositions, witness lists and other materials, expressly declaring them <u>privileged</u>. The State respectfully submits, however, that this was not the only oversight.

Just as the **Herald** has waived any right to argue Rule 1.280, so the Post, et al, cannot seek to overturn

the order of the trial court with a de novo claim never argued in either the Circuit Court or the Fourth District. The **Sykes-Engle** doctrine, as well as comity and judicial courtesy, forbids appeal by "ambush" or de novo argument. Therefore argument regarding Chapter 119, should not be considered.

All of the Petitioners argue that pretrial discovery depositions are "judicial proceedings" to which they have an absolute First Amendment right of access no matter where or when they are held. None of the Petitioners' cited cases support this proposition. Virtually every cited First Amendment case deals with court hearings (before a judicial officer), voir dire proceedings or access to filed documents. Only one other Florida case [NOTE: that the State does not accept circuit court orders as binding precedent on this court and excludes them from this argument] seems to address pretrial discovery and the First Amendment, and that case clearly states that there is no First Amendment right of access to depositions (agreeing with **Seattle Times Co. v. Rhinehart**, _____ U.S. _____, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) in that regard) or to report on them. **Short v. Gaylord Broadcasting Co.** , 462 So.2d 591 (Fla. 2d DCA 1985).

No court has characterized pretrial discovery depositions as "public proceedings" for indeed they are not. Discovery depositions are the lawyer's tool for framing,

focusing and clarifying issues to be tried, eliminating the problem of trial by ambush.

The Petitioners contend that this proposition, as well as a right of access, is supported by **Gordon v. Gerstein**, 189 So.2d 873 (fla. 1976). They are in error. **Gordon** does not even remotely discuss, much less determine, the issue of depositions. Rather, it merely addresses the right to have counsel present at §27.04 inquests by state attorneys. The only mention of public access is the Supreme Court's terse disapproval of the Petitioners' claim that state attorney investigations were comparable to "secret" inquisitions or star chamber proceedings.

Let us examine what the courts have said about pretrial depositions:

> "The taking of a deposition itself can hardly be categorized as a judicial proceeding for the simple reason that there is no judge present, and no rulings nor adjudications of any sort are made by any judicial authority. Further, in criminal cases, discovery depositions taken under Rule 3.220(d), Fla. r. Cr. P. may be used only for the purpose of contradicting or impeaching." **Tallahassee Democrat, Inc. v. Willis**, 370 So.2d 867, 71-72 (fla. 1st DCA 1979).

At the beginning of this brief, the State cited **Richmond Newspapers, Inc. v. Virginia**, for the proposition that the press has a First Amendment right of access to trials and court hearings. The same Supreme Court justices who formed the majority in that case (as well as Justice Powell, who did not vote) wrote nothing about access to

depositions. However, in **Gannett Co. v. De Pasquale**, 443 U.S. 368 (1979), they did discuss depositions and the First Amendment, stating:

> (Berger, C.J. concurring)
> "Similarly, during the last 40 years in which pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or private interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a 'trial' until and unless the contents of the deposition are offered in evidence."

(id 396-398)

the opinion of the court states:

> "It is to be emphasized, however, that not all of the incidents of pretrial and trial are comparable in terms of public interest and importance to a formal hearing. . . In the criminal process there may be numerous arguments, consultations and decisions, as well as depositions and interrogatories, that are not central to the process and that implicate no First Amendment rights." (id)

This was the stated (and repeated) conclusion of Justices Blackmun, Brennan, Marshall, White, Powell, and, of course, Chief Justice Burger. Depositions are not central components of a trial nor are they even comparable to judicial proceedings. Florida's First, Third [**Post Newsweek Stations, Inc. v. State**, ____ So.2d ____, (Fla. 3d DCA 1985), 10 F.L.W. 1879], Fourth and Fifth Districts clearly follow the Supreme Court, while the Second District (supra) has held no "First Amendment" right exists.

As noted in **In Re. San Juan Star Co.**, 662 F.2d 108 (1st Cir. 1981), a deposition is a means of eliciting information, including information that is not admissible as evidence. By declaring them "judicial proceedings" judges will be compelled to monitor depositions just as they do trials, to ensure the publication of only relevant and admissible evidence. Such monitoring will be necessary because newspaper reporters are not trained in the law of evidence, and the revelation of "evidence" will require a guiding judicial hand where one is not required at this time.

As noted in **Estes v. Texas**, 381 U.S. 532, 14 L.Ed.2d 543, 47 (1965):

> "Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt. . . ."

Depositions (as stated before) are a lawyer's tool, just like the client conference, the witness interview, legal research, consultation, and negotiations. If a lawyer must allow the press into every discovery deposition so that the public can see "how" the system works, the same rationale would justify press attendance at witness interviews, plea negotiations or even grand jury proceedings (to show the public the state has a "case" and that the prosecutor is behaving appropriately, as alleged in the brief of the Palm Beach Post)?

This brings us squarely into the proposed public policy arguments.

The Petitioner Miami Herald raises the claim that denial of access to pretrial depositions would place a cloak of secrecy over the system and a shield for nefarious conduct by crooked trial judges and scheming lawyers. This argument demeans the profession as well as the Petitioners and is rejected with the same opinion expressed in **Gordon v. Gerstein**, supra. Lawyers and judges are no less honest than newsmen.

This brings us to the second argument. The Post alleges that access will enable the press to report "the evidence" to the public so it can assess the merits of the case. As noted above, this theory, if correct, will mean a judge must be present at every discovery deposition to decide what is or is not "evidence". **San Juan Star, supra.**

This argument also overlooks the need to get into "irrelevant" or "inadmissible" evidence which might lead to discoverable evidence. A lawyer cannot be "chilled" into avoiding necessary inquiry because incompetent "evidence" might be broadcast to potential jurors. This is especially true when counsel must depose a hostile witness and thus publicize damaging testimony at the expense of his client. Such a deposition would also preclude a "change of venue" since the defense generated the publicity. This court must appreciate the torrent of 3.850 prtitions or habeas actions

which will arise out of "harmful, publicized" depositions or, worse yet, depositions which were not taken out of fear.

This brings us to the *Post's* claim of "policing lawyers", particularly "abusive defense lawyers". The Sixth Amendment right to effective assistance of counsel cannot be chilled by fear that, by doing his job, a lawyer may be criticized in print. Abuse, particularly of a hostile witness, is a subjective assessment. While our code does not condone abuse of a witness, the Bar provides penalties, and remedies, for actual abuse. The Petitioners may freely report those penalties imposed by the Bar.

Now we turn to the issue of telling the public how "good" or "bad" the state's case is (brief of *Post*). Depositions do not answer those questions, only trials can. The contention is meritless.

Finally, the press contends that reports on depositions can be read by potential witneses. That, it is submitted, is a problem -- not a benefit. While stories on crime may give general information, reports on specific testimony permit witnesses to compare said testimony with their own. In some cases, witnesses may become unsure of their own testimony because others differ. Other witnesses may dishonestly alter their stories.

Florida has a sequestration rule designed to keep witnesses from hearing each other's testimony during trial. The effectiveness of that rule would be negated if testimony was published prior to trial.

One final note, if a witness at a deposition names other, possibly unwilling, witnesses, one can only imagine the possible problems, up to and including the loss of said witnesses, if the witnesses became the unwilling object of sudden publicity.

Now let the State mention one additional concern:

Not all deposition are taken in the courthouse. Some, if not most, are taken on private property (a home or private office). Can the press force itself onto private property? Or can it force parties to move their depositions to locations large enough and public enough to accommodate all who might wish to attent?

This brings us to the second question certified, the right of the press to compel production of unfiled transcripts. The problems with this are similar to those surrounding attendance. However, the Petitioners are entitled to any depositions transcribed in preparation for trial after the case is disposed of according to the above-cited provisions of Chapter 119. For the press, this means that it can compare trial and pretrial testimony and, as lawyers do, it can compare the conflicting testimony of witnesses who are not aware of other witnesses' testimony. The Petitioners can also "assess" plea bargained cases and advise the public of their opinion. Again, absent any gag order, untranscribed depositions can simply be replaced by reporter-witness interviews. Thus, the Petitioners' alleged need

to see untranscribed and unused depositions is not a compelling one.

CONCLUSION

The press has not shown any legal, factual or policy basis for permitting attendance at unrecorded pretrial discovery depositions, or for compelling transcripts thereof. Therefore, the decision of the District Court should be affirmed.

Respectfully submitted:

JIM SMITH
Attorney General

MARK MENSER
Assistant Attorney General

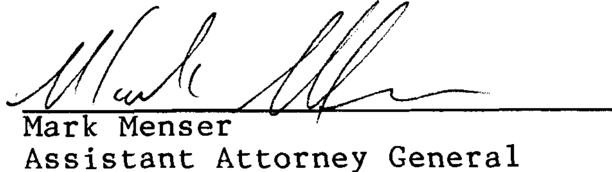
LOUIS HUBENER
Assistant Attorney General

COUNSEL FOR RESPONDENTS

The Capitol
Tallahassee, FL 32301
(904) 488-0600, 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief of Respondents has been furnished the following parties by mailing a copy of the same to the respective addresses by United States Mail this ______ day of October, 1985:



Mark Menser
Assistant Attorney General

RAY FERRERO, JR., Esq.
WILTON L. STRICKLAND, Esq.
RICKI TANNEN, Esq.
of: Ferrero, Middlebrooks, Strickland & Fischer, P.A.
707 S.E. 3 Ave., 6th Floor
Ft. Lauderdale, FL 33316

DONALD M. MIDDLEBROOKS, Esq.
L. MARTIN REEDER, Esq.
THOMAS R. JULIN, Esq.
NORMAN DAVIS, Esq.
at: 400 Southeast Financial Center
Miami, FL 33131-2398

HON. RICHARD B. BURK
at: Palm Beach County Courthouse
300 N. Dixie Highway
W. Palm Beach, FL 33401

CARL WEINBERG, Esq.
Asst. State Attorney
at: Broward County Courthouse
201 S.E. 6th Street, #620
Ft. Lauderdale, FL 33301

MARGARET GOOD, Esq.
of: Public Defender's Office
224 Datura Street, #1300
W. Palm Beach, FL 33401