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IN THE SUPREME COURT,
IN AND FOR THE STATE OF FLORIDA

CASE NO. 67,452
Fourth District Court of Appeal, Case No. 83-422

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

Petitioners,

vs.

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

Respondents.

INITIAL BRIEF OF PETITIONER, NEWS AND SUN-SENTINEL COMPANY, ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Appellant/Petitioner, NEWS AND SUN-SENTINEL COMPANY, is before this Honorable Court for review of an Opinion filed on June 11, 1985, by the Fourth District Court of Appeal (A.521), on Emergency Petition to Review Order Limiting Media Access filed by PALM BEACH NEWSPAPERS, INC. (hereinafter "PBN"), NEWS AND SUN-SENTINEL COMPANY (hereinafter "NSS") and MIAMI HERALD PUBLISHING COMPANY (hereinafter "MHPC") (hereinafer collectively "Appellants" or "Petitioners"). (A.383). The Emergency Petition for Review sought review of an Order rendered on February 28, 1983, by the Appellee/ Respondent, HONORABLE RICHARD BRYAN BURK (hereinafer "JUDGE BURK") (A.380), which prohibited the press and public from attending depositions or gaining access to transcripts of pretrial depositions in the case of State of Florida v. Linda J. Aurilio, Case No. 82-5858 CF T, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.[1]/

1/ Pertinent portions of the record before the Fourth District Court of Appeal have been included in an Appendix to this Brief. Also included in the Appendix are the appellate briefs filed in the direct appeal from the criminal case, Aurilio v. State, Fourth District Court of Appeal, Case No. 83-1823. This Court may take judicial notice of those briefs, Section 90.202(6), Florida Statutes (1983); Kelley v. Kelley, 75 So.2d 191 (Fla. 1954); and the Petitioner respectfully requests that this Court do so. References to the Appendix will be made by the notation "A" preceeding the respective page number.

The instant appeal arises from the prosecution of LINDA J. AURILIO (hereinafter "Defendant AURILIO"), who was charged with attempted murder of her husband, CARL AURILIO. (A.137). The Defendant was the key police informant (A.317) whose information led to the arrest and conviction of eight (8) members of an organized crime connected bookmaking ring operating in Palm Beach County. The Defendant's husband was a principal figure in the bookmaking operation and was one (1) of the eight (8) individuals arrested and convicted. (A.279).

On December 1, 1982, the State of Florida filed a Motion for Protective Order to close the depositions scheduled in the Aurilio matter. (A.1). On December 2, 1982, NSS filed a Motion for Limited Intervention to Opposure Closure (A.3) and Response of Press Intervenor's Motion for Protective Order. (A.5). A hearing was held on December 2, 1982, in front of the Honorable Edward Rogers, in the Circuit Court for Palm Beach County, Florida. (A.24). At the December 2, 1982, hearing, counsel for Defendant AURILIO stated that they did not have any objection to the State's Motion for Protective Order but were not joining in the State's Motion to Exclude the press from the scheduled depositions. (A.45).

Judge Rogers, in an Order entered on December 8, 1982 (A.58), denied the State's Motion to Exclude the media from scheduled depoositions.

On January 14, 1983, Defendant AURILIO moved to determine her Sixth Amendment rights and for determination of status of the transcripts of depositions. (A.59). A hearing was held in front of Judge Rogers on January 17, 1983 (A.63), and the Order of January 18, 1983 (A.113), held that:

> [O]f couse, the media must be allowed to attend, the Court-ordered depositions or depositions held in the public facilities of the Palm Beach County courthouse. In order to further protect the record however, the court is going to prohibit the destruction or editing of any depositions taken, without order of the court. It is thereupon Ordered:
>
> 1. The defendant and the State Attorney's Office will not be required to notify the News Media of its intent to take statements, either under oath or not under oath, where Judicial process is not involved, other than issuing a subpoena.
>
> 2. IT IS FURTHER ORDER: that the State and Defense is prohibited from destroying depositions taken and typed up in this case without further order of this Court.
>
> 3. IT IS FURTHER ORDERED: that where notice of depositions are required to be filed and are filed, they must be taken in a place which will admit access to the public and the press.

On February 9, 1983, NSS filed its Motion to Oppose Closure and Obtain Access to Public Records (A.115) and Press Intervenor's Motion to Open Access to Pretrial Depositions and to Order Production of Public Records, (A.117) seeking access to all

future depositions as well as the transcripts of all depositions taken up to that time.

JUDGE BURK held a hearing on February 10, 1983, on NSS's Motion for Limited Intervention to Oppose Closure and Obtain Access to public records and Defendant's Motion to Dismiss. (A.121). At the February 10th hearing, the State and Defendant AURILIO argued that limited intervention had been granted by Judge Rogers only for the purpose of the previous Motion to Oppose Closure. Counsel for NSS argued that Judge Rogers had not addressed the Motion that was under consideration, specifically the Motion to Open Access to Pretrial Depositions and to Order Production of Public Records.

At the February 10, 1983, hearing, JUDGE BURK outlined the procedures which he wanted implemented (A.207), specifically, that no press was to be present at the depositions (A.207) and that depositions are not judicial proceedings. (A.216; 238).

However, JUDGE BURK ordered Defendant AURILIO and the State to file all of the depositions taken in the matter up to that time and to designate any portions of those depositions they felt should remain secret. The designated portions of the transcripts were to be reviewed by JUDGE BURK in camera to determine whether they should be released to the public. (A.207-08; 218).

Additionally, JUDGE BURK denied the Defendant AURILIO's and State's Motion to Dismiss. He further ordered that each

scheduled deposition should be transcribed within forty-eight (48) hours and that the State and Defendant AURILIO would then have the opportunity to designate those portions which the court should review in camera to determine whether public release would occur. In the absence of objections from either the State or Defendant AURILIO, the court reporter will be instructed to make the depositions available to the press. The Order further held that the list of those already deposed was to be furnished by the State and Defendant AURILIO to counsel for NSS. (A.219). Notices of all future depositions were to be filed with the court. (A.219-220).

JUDGE BURK ended the hearing with the request that NSS not appeal the ruling:

> [I] made my request that he is not going to appeal, but I cannot hold him to that.
>
> What we are trying to do is resolve this matter as amicably as we can. I recognize that he might want to take that one question on appeal.

(A.222).

Counsel for NSS refused to waive his right to appeal, pursuant to instructions from his client:

> [I] wanted to make sure, I didn't want to mislead the Court. I am not agreeing to anything. I am simply accepting the Court's ruling, trying to work it out, accepting the ruling of the Court, and reserving to myself the option of appeal or not, after consulting with my clients. That is all.

(A.223-224).

On February 15, 1983, PBN filed its Motion to Intervene and Motion to Reconsider JUDGE BURK's ruling of February 10, 1983. (A.334). On February 25, 1983, hearings were held on PBN's Motion to Reconsider before JUDGE BURK. Counsel for NSS attended the hearing and joined in PBN's Motion. (A.226). Counsel for PBN argued the public's interest in the information contained in the depositions; specifically, he argued that:

> [a]s a result of a statement that she made, a libel action had been filed against my client because she made the statement that several law enforcement officials in this country, including the police, were on the take.2/
>
> I do know that that is important information about the citizens' government, and I know that the people have a high interest in it. That is why my client has covered it and that is why it gets prominent treatment in the newspaper everyday.
>
> I think it is important that if important issues about all those issues is coming out in these depositions, that the people of this country know about it. And they may never know about it, as I pointed out in my Memorandum, if they can't get access to these depositions because this case may never go to trial ... .

(A.242-243).

2/ The lawsuit to which counsel for the PBN is referring is Jamason v. Palm Beach Newspapers, discussed infra at 24.

As to those depositions already taken, JUDGE BURK held that he would consider them in camera, "I am still willing to allow those depositions to be filed in the public interest." (A.276).

Finally, JUDGE BURK ruled that:

> [d]epositions are not judicial proceedings and, therefore, it is my determination that inasmuch as they are not judicial proceedings, and ... there is no right of access by either the public in persona, or through the media to be at the taking of those depositions.

(A.276).

On June 11, 1985, the Fourth District Court of Appeal rendered its Opinion en banc affirming the lower court's Order of February 28, 1985. (A.380). In its decision, the Fourth District Court of Appeal did not discuss or provide a description of the underlying criminal action which prompted the media's desire to attend the depositions in State of Florida v. Linda J. Aurilio. The circumstances surrounding the media's desire to attend these depositions was purely in the public's interest. Defendant AURILIO had, in sworn statements to the State Attorney of Palm Beach County (A.296), provided information about gambling, organized crime and, most important to the public's interest, police corruption in Palm Beach County, Florida.

The State Attorney used Defendant AURILIO's sworn statement to secure wiretaps and search warrants (A.296), which led to the indictments of ten (10) members of an alleged bookmaking

operation. It is in this context that the decision of the Fourth District Court of Appeal, which denied the media's access to the deposition testimony, must be viewed.

However, the Fourth District Court of Appeal specifically acknowledged the right of the media to have access to: (a) filed depositions because they then become part of the official court records; and (b) the trial, plus pretrial and post trial proceedings, conducted by or before a judge.

On its own Motion, the Fourth District Court of Appeal also certified to the Florida Supreme Court, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(v), the following as questions of great public importance:

> 1. Is the Press entitled to notice and the opportunity and the right to attend pre-trial 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 which have not been filed with the clerk of court or the judge?

There were five (5) separate Opinions filed by the Fourth District Court of Appeal: the majority Opinion with three (3) concurrences; one (1) special concurring Opinion; two (2) dissenting Opinions with two (2) concurrences each; and one (1) dissenting Opinion with one (1) concurrence.

On July 10, 1985, Petitioners filed their Notice to Invoke Discretionary Jurisdiction to the Supreme Court of Florida,

pursuant to Florida Rules of Appellate Procedure 9.030(a)(2), as the Fourth District Court of Appeal's Opinion in Burk:

> (a) expressly and directly conflicts with a decision of the Second District Court of Appeals on the same question of law; and
>
> (b) it expressly construes the First Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's Opinion in Burk should be overruled based upon the following arguments.

First, in the legal system of the United States, the public interest is served by the role of government prosecutor. The public has a right of access to the pretrial proceedings, including depositions, as an overwhelming majority of criminal prosecutions are resolved during the pretrial stage.

Second, Criminal proceedings in the United States, both under the Florida Rules of Criminal Procedure and the Federal Rules of Criminal Procedure, have a presumption of openness. This presumption is rebuttable only upon the requisites of the accepted three (3) part test for closure being fully met. This three (3) part test has been used in a variety of pretrial, trial and post trial proceedings.

Third, depositions, in civil and criminal cases, have been held by the Second and Fourth District Courts of Appeal to have the status of judicial proceedings.

Finally, the basic aim of the First Amendment is free and open discussion of matters of public interest. Every judicial opinion which construes the First Amendment must use - free and open discussion - as its polestar. This is especially true in the criminal case setting, for criminal actions

are overwhelmingly decided not by public trials, but during the pretrial stage. Public knowledge therefore becomes absolutely necessary for a meaningful understanding of the criminal justice system.

ARGUMENT

THE PRESS HAS A RIGHT OF ACCESS TO PRETRIAL DEPOSITIONS IN A CRIMINAL CASE.

Criminal matters are presumed open until the requirements for closure have been met. This basic tenet is bottomed upon the recognition that "a crime is a wrong which the government deems injurious to the public at large and punishes through a judicial proceeding in its own name." 14 Fla. Jur.2d 67, Section 5. The public nature of criminal matters is paramount.

This distinction is crucial for the resolution of the case before this Court, for the press, as a surrogate for the public interest, cannot be barred from those pretrial proceedings which, in an overwhelming percentage of criminal matters, through plea bargaining, provide the basis for disposition of a case before trial.

The argument is not being made that there can be no closure of pretrial proceedings in criminal cases -- but that all pretrial proceedings, including depositions in criminal cases, must follow the three (3) pronged test established for such closure by this Court in Miami Herald v. Lewis:

> 1. Closure is necessary to prevent a serious and iminent 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 acused, without being broader than necessary to accomplish this purpose.

426 So.2d 1 (Fla. 1982).

If, as the United States Supreme Court has stated, eighty-five (85%) percent of all criminal charges are resolved pretrial, Gannett v. de Pasquale, 443 U.S. 368 (1979), then access to pretrial proceedings "promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system." Lewis, supra, quoting from Mills v. Alabama, 384 U.S. 214 (1966):

> [S]uch access gives the assurance that the proceedings were conducted fairly to all concerned ... . Finally, because participating lawyers, witnesses and judges know their conduct will be subject to public scrutiny, it is fair to conclude that they will be more conscientious in the performance of their roles. (citations omitted).

Access to pretrial proceedings in criminal cases have been consistently expanded in recent years and now include voir dire examinations, Press-Enterprises v. Riverside County Superior Court, 104 S.Ct. 819 (1984); pre and post trial hearings, Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); pretrial detention hearings, U.S. v. Edwards, 430 A.2d 1321 (D.C., D.C. 1981); and

pretrial criminal proceedings, Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980).

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. The basis of the decisions which have expanded the public's access, generally in criminal proceedings, have their primary focus on whether public access to the proceedings in questions serves the same purpose as access to trials. U.S. v. Edwards, supra, cert. denied, 102 S.Ct. 1721 (1982). With the overwhelming majority of criminal cases resolved during the pretrial stage, many before formal hearings are instituted, public access to such proceedings as depositions does serve the same purpose as access to the trial itself.

The decision of the Fourth District Court of Appeal in Burk does not articulate a fundamental distinction between pretrial depositions and access to other pretrial, trial and post trial proceedings but focuses instead upon the procedural device of filing a deposition with the court, "we note that the trigger device is the act of filing. Thus, conversely, we hold that no right of access accrues until there is a 'filing.'" (A.521).

This is a distinction without resort to the underlying principles which presume that criminal proceedings are open. As was stated by Judge Anstead in his dissent in Burk:

> [I]t is the public's right of access to the information that is crucial, not the particular form or container in which the information may be found.
>
> Similarly, I cannot accept the totally technical and semantical distinction made by the majority between the right of access to a deposition transcribed and filed, a decision presumably made solely at the discretion of the lawyers involved, and a deposition taken but not transcribed. Again, it is the public's right to access to the information disclosed at the deposition that should be determinative. That determination should not be left to the unbridled discretion of the lawyers, either of whom presumably could order transcription without the permission of the other or court order. Hence, poof!, 'secret' information is transformed into 'public' information. (emphasis supplied).

THE FLORIDA RULES OF CRIMINAL PROCEDURE PRESUME THAT PRETRIAL DISCOVERY BE OPEN.

The Florida Rules of Criminal Procedure give rise to a presumption of openness for pretrial discovery.

Discovery depositions in criminal cases are governed by Rule 3.220(d), Florida Rules of Criminal Procedure, which states that:

> ... the procedure for taking such deposition ... shall be the same as that provided in the Florida Rules of Civil Procedure.

Rule 1.280(c)(5), Florida Rules of Civil Procedure, authorizes a trial court for "good cause shown to order that the

discovery be conducted with no one present except persons designated by the court." (emphasis supplied).

The presumption therefore is that unless good cause is shown for limiting a deposition, the deposition is open.

Aside from the opinion of the Second District Court of Appeal in Short v. Gaylord, 462 So.2d 591 (Fla. 2d DCA 1985), there would seem to be limited authority within Florida jurisprudence to bolster the presumption of an openness argument other than resort to the rules themselves. However, authority for the presumption of openness rules is available a fortiori to federal case law. This approach, by analogy, has been specifically endorsed by this Court.

In Moore v. State, 452 So.2d 559 (Fla. 1984), this Court was called upon to interpret the Florida Evidence Code, Section 90.801(2)(a), Florida Statutes (1981). In its analysis of the intent of Section 90.801(2)(a), this Court noted that it was "inspired in part by Federal Rule of Evidence 801(d)(1)" and:

> [B]ecause section 90.801(2)(a) was patterned after Federal Rule of Evidence 801(d)(1), we should construe the former in accordance with federal court decisions interpreting the latter. See e.g., Hightower v. Bigorney, 156 So.2d 501 (Fla. 1963). (emphasis supplied).

See, also: Crump v. Goldhouse Restaurants, 96 So.2d 215, 218 (Fla. 1957) ("Since Rule 1.35 is almost identical with Rule 41 of the Federal Rules, 28 U.S.C.A., and was patterned thereafter, the

federal court decisions interpreting their rule are persuasive here.")

The Fourth District Court of Appeal's decision in Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607 (Fla. 4th DCA 1975), also strongly supports resort to federal decisions in the absence of Florida authority on point:

> [S]ince our Rules of Civil Procedure are patterned very closely after the Federal rules, and it has been the practice of the Florida courts closely to examine and analyze the Federal decisions and commentaries under the Federal rules in interpreting ours we turn, in the absence of a Federal decision, to Moore's Federal Practice, 2nd Edition ... . (emphasis supplied). (footnote omitted).

Sentinel Star, supra, at 611.

In Sentinel Star, the Fourth District Court of Appeal resorted to the general treatise of Moore's Federal Practice, 2d Ed., for its authority.

However, federal case law, which is closely analagous to the case before this Court, is available for authority.

In Graddick, supra, the press challenged the orders issued by the trial court which denied its petition to copy judicial records and gain access to pre and post trial hearings. The appellate court held that good cause must be shown in order for closure to occur. In so holding, the Eleventh Circuit Court of Appeals specifically included depositions within the scope of those proceedings where good cause must be shown for closure:

> [W]e do not hold that every hearing, deposition, conference or even trial in a case 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.'
>
> Accord, AT&T v. Grady, 594 F.2d 594 (7th Cir. 1978). ('As a general proposition, pretrial discovery must take place in the public [interest] unless compelling reasons exist for denying the public access to the proceedings.') (emphasis supplied).

The Eleventh Circuit's decision rested upon the public policy foundation of open discussion and the public's need for understanding of the legal processes. This is the same foundation upon which federal cases have consistently expanded the public's access to pretrial proceedings in a variety of contexts:

> [I]n addition, open proceedings may be imperative if the public is to learn about the crucial legal issues that help shape modern society. Informed public opinion is critical to effective self-governance. (emphasis supplied). (citations omitted).

Graddick, supra.

The Federal Rules of Civil Procedure also contain specific authority for the presumption of openness.

In Tavoulareas v. Washington Post, 737 F.2d 1170 (1984), the appellate court specifically held that the Federal Rules of Civil

Procedure (after which the Florida Rules of Civil Procedure are patterned) contained a presumption of openness:

> [A] statutory presumption of openness for discovery materials, even those not used at trial, derives from the Federal Rules of Civil Procedure. The Federal Rules do not restrict the use of properly discovered materials. (emphasis supplied).

The approach of the presumption of openness by the Graddick and Tavoulareas courts is the same approach which the Florida Second District Court of Appeal took in Gaylord, supra, where the court held, based upon Rule 1.280(c), Florida Rules of Civil Procedure, protective orders, that:

> [T]his rule gives the trial court control over who may or may not attend depositions; the court's discretion is limited only by the standard 'for good cause shown.' The rule places the burden of obtaining a protective order on the person or party seeking to limit attendance at a deposition. (emphasis supplied).

Gaylord, supra, at 592.

The Fourth District Court of Appeal, in its opinion in Burk, did not specifically discuss the presumption of openness, but held inferently that such a presumption exists when it stated:

> [A]ccording to the view, in the absence of a court order sealing the deposition, or some provision of law requiring the same to remain confidential, the press may not be excluded from reading, copying and reporting the contents of a deposition. [Citation to Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979)]. We agree with this holding. See also Ocala Star Banner Corp. v.

> Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980). We note the trigger device is the act of 'filing'. Thus, conversely, we hold that no right of access accrues until there is a 'filing'. (emphasis supplied).

The Fourt District Court of Appeal rationalized this holding based upon Florida Rules of Judicial Administration 2.075(a)(1) which deals with Retention of Court Records. This section is purely administrative in nature and was implemented to stem the storage problems of voluminous court records.

It is also of interest that, similar to the Florida Rules of Judicial Administration 2.075(a)(1), in 1978, the Advisory Committee to the Proposed Amendments to the Federal Rules of Civil Procedure proposed that because of storage costs, discovery materials did not need to be filed except upon order of the court or for use in proceedings. However, the preliminary draft made provision for access to discovered material by non-parties:

> [I]n 1978 the Advisory Committee proposed, because of storage costs, that discovery materials not be filed except upon order of the court or for use in the proceedings. Even if this amendment had been approved, the accompanying advisory committee note provided for access to discovered material by nonparties.
>
> This amendment and amendments to the discovery rules permit the materials described to be retained by the parties unless and until they are used for some purpose in the action. But any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own

> motion **at the request of a person who is not a party who desires access to public records,** subject to the provisions of Rule 26(c). (emphasis supplied).

Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978); Tavoulareas, supra, at footnote 9.

While the Proposed Federal Amendment was not passed (while it was passed in Florida for storage reasons), Federal Rules of Civil Procedure 5(d) advisory note stated that:

> [T]he Committee requires such a filing [even to documents not used in the proceeding] because these 'materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally ... .
>
> Simply stated, the Federal Rules of Civil Procedure and the advisory committee notes indicate that discovery proceedings are presumptively open unless ordered by the court.[3]/ (emphasis supplied).

3/ [C]ourts have been virtually unanimous in concluding that the Federal rules of Civil Procedure presume open discovery. See, e.g. National Polymer Products v. Borg-Warner Corp., 641 F.2d 418, 423 (6th Cir. 1981) ("[t]he discovery rules themselves place no limits on what a party may do with materials obtained in discovery"); Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980) (quoting American Telephone and Telegraph Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978) ("[a]s a general proposition, pretrial discovery must take place in the [sic] public unless compelling reasons exist for denying the public access to the proceedings"); In Re Halkin. 598 F.2d 176, 188 (D.C. Cir. 1979) ("without a protective order materials obtained in discovery may be used by a party for any purpose, including dissemination to the public").

Footnote 10 by the court in Tavoulareas, supra.

THE PRESUMPTION OF OPENNESS MUST BE REBUTTED FOR CLOSURE OF CRIMINAL PRETRIAL PROCEEDINGS.

The same statutory scheme, both under the Federal and Florida rules, that provides for the presumption of public access to discovery materials, including depositions, acknowledges that a litigant may have good cause to protect those materials from the public. The procedure established is that of the protective order, Florida Rules of Civil Proceudre 1.280(c), where:

> [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 ... . (emphasis supplied).

Following the weight of authority accorded the presumption of openness of other pretrial proceedings, NSS respectfully submits that the three (3) part test for closure adopted by this Court in Lewis, supra, should be adopted for closure in pretrial discovery depositions in criminal proceedings. Several Florida courts have already done so in the context of pretrial depositions in criminal proceedings. An illustration of the requisites determined necessary for closure is found in the holding in Florida v. Diggs, 5 Med.L.Rptr. 2596 (Dade County Circuit Court 1980):

> [A] pre-trial deposition is a public judicial proceeding, Gordon v. Gernstein, 189 So.2d

873 (Fla. 1966); Florida v. Alford, (Palm Beach Circuit Court 1979); State v. Bundy, (Leon Circuit Court 1979). 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 defendants' right to a fair trial;

2. That there is no available trial management alternative which will avoid jury prejudice by a means less chilling of First Amendment interests, and;

3. That the closure will be effective in achieving trial fairness.

State ex rel, Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. S.Ct. 1977); Sentinel Star Company v. Booth, 372 So.2d 100, 102 (Fla. 2d DCA 1979); Miami Herald Publishing Company v. State, 363 So.2d 603, 606 (Fla. 4th DCA 1978); Florida v. Bundy, supra. Factual findings concerning the presence of these criteria based upon clear and cogent evidence is required. See, Nebraska Press Assoc. v. Stewart, 242 U.S. 539 (1976); Palm Beach Newspapers, Inc. v. State, 378 S.2d 862 (Fla. 4th DCA 1980); Florida v. Bundy. No requisite showing has been made. (emphasis supplied).

DEPOSITIONS ARE JUDICIAL PROCEEDINGS

The Fourth District Court of Appeal has held plainly and squarely in a companion case to State of Florida v. Aurilio that depositions are judicial proceedings.

In Jamason v. Palm Beach Newspapers, 450 So.2d 1130 (Fla. 4th DCA 1984), cert. denied, 461 So.2d 115 (Fla. 1985), the press reported the nature of Linda Aurilio's testimony after an attorney for one of the accused bookmakers took the deposition of Agent James Nazarro of the Palm Beach County Sheriff's Department's Organized Crime Bureau. Nazarro testified that Aurilio had told him there was official corruption among local police departments. Although the media did not attend this deposition, a transcript was filed with the court and a copy provided to the media by an assistant state attorney. Chief Jamason of the West Palm Beach Police Department, one of the police officials identified by Aurilio as being "on the take", brought a libel action against Palm Beach Newspapers, Inc. for reporting the Aurilio allegations. The trial judge in that libel case entered a summary judgment in favor of Palm Beach Newspapers, Inc. [Jamason v. Palm Beach Newspapers, Inc., 9 Med.L.Rptr. 1965 (Fla. 15th Cir. 1983)] and the Fourth District Court of Appeal affirmed the summary judgment holding that a:

> [r]eport of a judicial proceeding [is absolutely privileged unless] the press strays or dseliberately bolts outside the hound's tooth requirement of accuracy.

Palm Beach Newspapers, supra. Accord, Newman v. Florida Freedom Newspapers, 447 So.2d 906 (Fla. 1st DCA 1984); Sussman v. Domian, 355 So.2d 809 (Fla. 3d DCA 1977).

Judge Anstead, in his dissent in Burk articulated the policy reasons why depositions should be considered judicial proceedings:

> [D]epositions are taken by the invocation of all the same judicial authority that is called to bear when a witness is subpoenaed to testify in any official court proceeding. The public prosecution of a criminal defendant is a judicial proceeding and the compelled testimony of a witness taken prior to trial is an integral part of that judicial proceeding. (emphasis supplied).

How can the simple administrative act of filing a deposition "trigger" public access? The same judicial authority and public policy reasons which mandate public access to the pretrial proceedings in criminal cases, generally mandate access to the compelled testimony of those publically prosecuted. To uphold the majority Opinion of the Fourth District Court of Appeal in Burk, is to elevate procedure (and here, one implemented for purely administrative reasons) above substance.

THE FIRST AMENDMENT REQUIRES FREE AND OPEN DEBATE IN CRIMINAL MATTERS.

This case need not reach the constitutional issue of access, pursuant to the First Amendment. The Florida Rules and the cases

in the Federal system, which construe virtually identical provisions, are sufficient authority on the presumption of openness accorded deposition testimony in criminal pretrial proceedings.

However, on public policy grounds, the need for free and open discussion of matters of public concern is especially needed in the criminal pretrial justice system, when the system, in fact, is a pretrial disposition system. The overwhelming majority of criminal cases do not go to trial -- but are largely resolved at the pretrial stage. Public access, and public knowledge, become absolutely necessary in order for the public to have confidence in that system.

CONCLUSION

For the foregoing reasons, the Appellant/Petitioner, NEWS AND SUN SENTINEL COMPANY, respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal in Burk and hold that pretrial depositions in criminal proceedings may be accessed by the public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner, NEWS AND SUN SENTINEL COMPANY, on the Merits has been provided by United States mail to all parties noted on the attached Service List, this 16th day of September, 1985.

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