IN THE
SUPREME COURT OF FLORIDA

Case No. 67,352

PALM BEACH NEWSPAPERS, INC., et al.,
Petitioners

vs.

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

On Petition for Discretionary Review of
a Decision of the District Court
of Appeal of Florida, Fourth District

Initial Brief of
Palm Beach Newspapers, Inc.

Donald M. Middlebrooks
L. Martin Reeder, Jr.
Thomas R. Julin
Norman Davis

STEEL HECTOR & DAVIS
Attorneys for Palm Beach Newspapers, Inc.
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

TABLE OF CONTENTS

Page

TABLE OF CITATIONS iv

INTRODUCTION 1

STATEMENT OF THE FACTS AND CASE 1

Linda Aurilio Testifies Against her Husband and Others in a Major Palm Beach County Bookmaking Prosecution 2

Linda Aurilio is Charged with Attempting to Murder her Husband 3

The State Seeks a Blanket Closure and Sealing of Depositions 4

Judge Rogers Refuses to Close and Seal All Depositions 5

The State and the Defense Take Depositions Without Filing Notices 6

Linda Aurilio Requests a Declaratory Judgment Regarding Access to Depositions 6

Judge Rodgers Permits Press Exclusion from Depositions if Judicial Process is not Invoked 7

Judge Burk Refuses to Allow Press Attendance at Depositions, but Orders Court Review of Transcripts which the Parties Want to Seal 7

Judge Burk Reconsiders his Order 9

The Fourth District's Plurality Opinion 9

Judge Letts' Special Concurrence 10

Four Judges Dissent 10

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. The Public Records Law Requires Immediate Release of All Deposition Transcripts and Court Reporters' Untranscribed Notes 12

A. Court Reporters' Unfiled Notes and Deposition Transcripts are Public Records 12

B. The Deposition Transcripts Sought by the Petitioners are Not Exempt from the Disclosure Requirements of Chapter 119 14

II. Reporters Cannot be Arbitrarily Excluded from Pretrial Depositions in Criminal Cases 17

A. The First Amendment Prohibits State Action Which Restrains Access to Information Which is Not Warranted by Compelling Interests and Narrowly Tailored to Serve Those Interests 17

1. This Court has Held that Restraints on Access to Information About the Criminal Justice System Abridge the First Amendment Unless Supported by Compelling Interests 18

2. The Decisions from Gannett to Press-Enterprise Establish that this Court Correctly Interpreted the First Amendment in Proposed Local Rule 17 20

a. Gannett Does Not Address the First Amendment Issue 21

b. In Three Decisions After Gannett, the Supreme Court Established the First Amendment Limits Trial Courts' Power to Restrict Access to Information 23

(1) Richmond Newspapers, Inc. v. Virginia 24

(2) Globe Newspapers, Inc. v. Superior Court 25

(3) Press-Enterprise, Inc. v. Superior Court 25

c. Lower Courts Have Interpreted First Amendment Protection of News Gathering as Extending to Depositions and Beyond 26

3. First Amendment Protection of Information Regarding Depositions in Criminal Cases is Essential in a Self-Governing Society .. 27

a. Information Regarding Depositions in Criminal Cases is Essential to Preserve Public Understanding of and Confidence in the Criminal Justice System 27

b. Public Access to Information About Criminal Depositions Prevents the State from Abusing its Investigatory and Accusatory Powers .. 29

c. Deposition Access Helps Ensure that Defense Counsel Will Not Abuse the Discovery Process 31

d. Information Concerning Depositions in Criminal Cases Historically has ... 32 been Freely Available to the Public

4. Neither the State nor the Defense Attempted to Demonstrate that Any Interests Justified Denying Public Access to the Depositions 39

a. Press and Public Attendance of Depositions Will Not Cause Substantial Inconvenience to Lawyers or Litigants 40

b. Closure of All Depositions will not Solve the Problems Which the Fourth District Finds Deposition Access Creates 42

c. The Minor Inconveniences Caused by Access to Some Depositions Does not Warrant Closure of All Depositions ... 44

B. The Fourth District's Opinion is Contrary to this Court's Commitment to Open Government 44

C. The Florida Rules of Procedure Require that Any Party Seeking to Limit Access to Depositions Show Good Cause 48

CONCLUSION 50

TABLE OF CITATIONS

Cases — Page(s)

American Telephone and Telegraph Co. v. Grady, 594 F.2d 594 (7th Cir. 1979) cert. denied, 99 S. Ct. 1533 (1979) 39

Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983) 14

Belcher v. Mansi, 569 F. Supp. 379 (D. R.I. 1983) 26

Bludworth v. Palm Beach Newspapers, Inc., Case No. 84-2112 (Fla. 4th DCA Oct. 11, 1984) 16

Board of Public Instruction v. Doran, 224 So.2d 693 (Fla. 1969) 19

Bundy v. State, 455 So.2d 330 (Fla. 1984) 34

Cable News Network, Inc. v. American Broadcasting Companies, Inc., 518 F. Supp. 1238 (N.D. Ga. 1981) 26

Cazarez v. Church of Scientology, 6 Media L. Rep. (BNA) 2109 (13th Cir. 1980) 39

Cleary Bros. Construction Co. v. Phelps, 24 So.2d 51 (Fla. 1945) 14

Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979) 20-23

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 25, 30, 32

Gordon v. Gerstein, 189 So.2d 873 (Fla. 1966) 33

In re Adoption of Proposed Local Rule 17, 339 So.2d 181 (Fla. 1976) 18-20

In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) 39

In re Express News Corp., 695 F.2d 807 (5th Cir. 1982) 26

Cases

In re Florida Rules of Civil Procedure,
403 So.2d 926 (Fla. 1981) 37

In re Florida Rules of Criminal Procedure,
196 So.2d 125 (Fla. 1967) 30, 36

In re Halkin,
598 F.2d 176 (D.C. Cir. 1979) 39

In re Petition of Post-Newsweek Stations, Florida, Inc.,
370 So.2d 764 (Fla. 1979) 47

In re San Juan Star Co.,
662 F.2d 108 (1st Cir. 1981) 39

International Shoe Co. v. Carmichael,
105 So.2d 389 (Fla. 1st DCA 1958) 14

Jamason v. Palm Beach Newspapers, Inc.,
9 Media L. Rep. (BNA) 1965 (Fla. 15th Cir. 1983),
aff'd, 450 So.2d 1130 (Fla. 4th DCA 1984),
pet. for rev. denied, 461 So.2d 115 (Fla. 1984) 2, 46

Johnson v. Broward County,
7 Media L. Rep. (BNA) 2125 (Fla. 17th Cir. 1981) 39

Kelley v. Kelley,
75 So.2d 191 (Fla. 1954) 2

Lee v. Beach Publishing Co.,
127 Fla. 600, 173 So. 440 (1937) 15

Legi-Tech, Inc. v. Keiper,
766 F.2d 728 (2d. Cir. 1985) 26

Miami Herald Publishing Co. v. Chappell,
403 So.2d 1342 (Fla. 3d DCA 1981) 33

Miami Herald Publishing Co. v. Lewis,
426 So.2d 1 (Fla. 1982) 10, 32, 45, 50

Miami Herald Publishing Co. v. Marko,
352 So.2d 518 (Fla. 1977) 32

Miami Herald Publishing Co. v. Morphonios,
467 So.2d 1026 (Fla. 3d DCA 1985) 33

Miami Herald Publishing Co. v. State,
363 So.2d 603 (Fla. 4th DCA 1978) 33

Cases

Newman v. Graddick,
696 F.2d 796 (11th Cir. 1983) 14

News-Press Publishing Co. v. D'Alessandro,
7 Media L. Rep. (BNA) 2599 (20th Cir.),
aff'd, 421 So.2d 74 (Fla. 2d DCA 1982) 13, 16

News-Press Press Publishing Co. v. State,
345 So.2d 865 (Fla. 2d DCA 1977) 38

Nixon v. Warner Communications, Inc.,
435 U.S. 589 (1978) 14

Ocala Star Banner Corp. v. Sturgis,
388 So.2d 1367 (Fla. 5th DCA 1980) 14, 37, 46

Palm Beach Newspapers, Inc. v. Bludworth,
Case No. 85-2662 CA (L) H 16

Palm Beach Newspapers, Inc. v. Terlizzese,
Case No. 84-2406 CA (L) K, appeal pending,
Fourth District Case Nos. 84-2112 & 94-2367 16

Post-Newsweek Stations, Florida, Inc. v. State,
___ So.2d ___, 10 Fla. L. W. 1879 (3d DCA 1985) 31

Prescott Publishing Co. v. Norfolk County,
395 Mass. 274 (1985) 15

Press-Enterprise, Inc. v. Superior Court,
___ U.S. ___, 78 L.Ed.2d 629 (1984) 25-26

Rose v. D'Alessandro,
380 So.2d 420 (Fla. 1979) 13

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 24, 28, 45

Satz v. Blankenship,
407 So.2d 396 (Fla. 4th DCA 1981),
pet. for rev. denied, 413 So.2d 877 (Fla. 1982) 13-16, 33

Seattle Times Co. v. Rhinehart,
___ U.S. ___, 81 L.Ed.2d 17 (1984) 23, 43

Sentinel Star Co. v. Booth,
372 So.2d 100 (Fla. 2d DCA 1979) 15, 38

Short v. Gaylord Broadcasting Co.,
462 So.2d 591 (Fla. 2d DCA 1985) 10, 35, 49

Cases

State v. Alford,
5 Media L. Rep. (BNA) 2054 (Fla. 15th Cir. 1979) 34

State v. Aurilio,
Circuit Court Case No. 82-5858-CF-T 1

State v. Bundy,
4 Media L. Rep. (BNA) 2629 (Fla. 11th Cir. 1979) 33

State v. Bundy,
Case No. 78-169-CJ (Feb. 27, 1979) 33

State v. Diggs,
5 Media L. Rep. (BNA) 2597 (Fla. 11th Cir. 1980) 34

State v. Freund,
___ So.2d ___, 10 Fla. L. W. 1851 (4th DCA
July 31, 1985), pet. for rev. pending,
Sup. Ct. Case No. 67,482 ..... 22, 35

State v. Fuster-Escalona,
Case No. 84-19728, Eleventh Circuit, aff'd sub. nom,
Post-Newsweek Stations, Florida, Inc. v. State,
___ So.2d ___, 10 Fla. L. W. 1879 (3d DCA 1985) 31

State v. Green,
395 So.2d 532 (Fla. 1981) 24

State v. Hagler,
Case No. 82-3750-CF-A02 (Fla. 15th Cir.),
aff'd sub. nom, The Miami Herald Publishing
Co. v. Hagler, ___ So.2d ___, 10 Fla. L. W.
1581 (4th DCA 1985), pet. for rev. pending,
Case No. 67,479 28-29

State v. Hodges,
7 Media L. Rep. (BNA) 2424 (Fla. 20th Cir. 1981) 36

State v. Newman,
405 So.2d 971, 973 (Fla. 1981) 38

State v. O'Dowd,
9 Media L. Rep. (BNA) 2455 (Fla. 13th Cir. 1984) 36

State v. Sanchez,
7 Media L. Rep. (BNA) 2338 (Fla. 15th Cir. 1981) 35

State v. Tobin,
10 Media L. Rep. (BNA) 2364 (Fla. 17th Cir. 1984) 16

Cases

State v. Tolmie,
9 Media L. Rep. (BNA) 1407 (Fla. 15th Cir. 1983) 39

State v. Trent,
Case No. 84-4974 CF A & BO2 35

State ex rel. Miami Herald Publishing
Co. v. McIntosh,
340 So.2d 904 (Fla. 1977) 20, 32, 45

State ex rel. Times Publishing Co. v. Patterson,
451 So.2d 888 (Fla. 2d DCA 1984) 26

Sussman v. Damian,
355 So.2d 809 (Fla. 3d DCA 1977) 46

Tallahassee Democrat, Inc. v. Willis,
370 So.2d 867 (Fla. 1st DCA 1979) 14, 37, 46

Tavoulareas v. Washington Post Co.,
737 F.2d 1170 (D.C. Cir. 1984) 39

Tribune Co. v. Cannella,
458 So.2d 1075 (Fla. 1984) 13

United States v. Edwards,
672 F.2d 1289 (7th Cir. 1982) 14

United States v. Gurney,
558 F.2d 1202 (5th Cir. 1977), reh. denied,
562 F.2d 1257 (5th Cir. 1977), cert. denied,
435 U.S. 968 (1978) 15

United States v. Rosenthal,
___ F.2d ___, 11 Media L. Rep. (BNA) 2237
(11th Cir. 1985) 14

United States v. Salerno,
___ F. Supp. ___, 11 Media L. Rep. (BNA) 2248
(S.D.N.Y. June 24, 1985) 26

Waller v. Georgia,
___ U.S. __ 81 L.Ed.2d 31 (1984) 21-22

Westinghouse Broadcasting Company, Inc.
v. National Transportation Safety Board,
8 Media L. Rep. (BNA) 1177 (D. Mass. 1982) 26

Wills v. American Medical Association,
635 F.2d 1295 (7th Cir. 1981) 39

Cases

Wilson v. American Motors Corp.,
___ F.2d ___, 11 Media L. Rep. (BNA) 2008
(11th Cir. 1985) 14

Withlacoochee v. Seminole Electric,
8 Media L. Rep. (BNA) 1281 (Fla. 13th Cir. 1982) 39

Constitutional Provisions

U.S. Const., amend. I ..... passim

Fla. Const., art. V, sec. 12(d) 45

Statutes & Rules of Procedure

Section 29.01, Florida Statutes (1983) 13

Section 29.02, Florida Statutes (1983) 13

Section 29.03, Florida Statutes (1983) 13

Section 29.04, Florida Statutes (1983) 13

Section 90.202(6), Florida Statutes (1983) 2

Section 112.061, Florida Statutes (1983) 13

Section 119.011, Florida Statutes (1983) 12

Subsection 119.011(2), Florida Statutes (1983) 12

Subsection 119.011(3)(c), Florida Statutes (1983) 15

Section 119.07, Florida Statutes (1983) 13

Florida Rule of Civil Procedure 1.280(c)(5) & (6) 5, 49

Florida Rule of Civil Procedure 1.310(f) 36

Florida Rule of Judicial Administration 2.070(f) 13, 45-46

Florida Rule of Judicial Administration 2.070(h) 13

Florida Rule of Criminal Procedure 3.030(c) 49

Florida Rule of Criminal Procedure 3.220(d) 5, 36, 49

Other Authorities

V. Blasi, The Checking Value in First Amendment Theory, 1977 Am. Bar Found. Res. J. 523 30

A. Datz, Discovery in Criminal Procedure, 16 U. Fla. L. Rev. 163 (1963) 30

A. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149, 1192-99 (1960) 30

Office of the State Courts Administrator, Florida Judicial System Statistical and Program Activity Reports (1979-81) .. 27

INTRODUCTION

The Fourth District Court of Appeal, in a 5-4 en banc decision, certified this case raises two issues of great public importance:

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 pre-trial discovery depositions in a criminal case which may or may not have been transcribed but which have not been filed with the clerk of the court or the judge?

The Fourth District's opinion, answering both questions negatively, should be quashed because (1) the Public Records Law requires that transcripts of pretrial criminal depositions and court reporters' notes be made available for inspection and copying, and (2) the first and fourteenth amendments of the United States Constitution, this Court's commitment to open government, and the rules of procedure prohibit arbitrary governmental restrictions on access to information.

STATEMENT OF THE FACTS AND THE CASE

This appeal arises from the criminal prosecution of Linda Aurilio for the attempted murder of her former husband, Carl Aurilio, State of Florida v. Linda J. Aurilio, Circuit Court Case No. 82-5858-CF-T. The 25 pages of the various opinions of the Fourth District Court of Appeal's en banc decision provide no description of the nature of the underlying criminal case or the circumstances under which the press sought to attend depositions in the case. These facts are essential to an

understanding of this case.[1]

Linda Aurilio Testifies Against
her Husband and Others in a Major
Palm Beach County Bookmaking Prosecution

Prior to the commencement of the criminal case from which this appeal arises, Linda Aurilio, on October 23, 1981, provided a sworn statement to the state attorney of Palm Beach County implicating her former husband, Carl Aurilio, nine other persons, and various government officials in a multi-million dollar bookmaking operation.[2] (A. 279).

---

1. Pertinent portions of the record before the Fourth District Court of Appeal have been included in an appendix filed jointly by Palm Beach Newspapers, Inc. and the News & Sun Sentinel Co. Also included in the appendix are the appellate briefs filed in the direct appeal from the criminal case, Aurilio v. State, Fourth DCA Case No. 83-1823. This Court may take judicial notice of those briefs. See Section 90.202(6), Florida Statutes (1983); Kelley v. Kelley, 75 So.2d 191 (Fla. 1954). Petitioner requests that the Court do so. References to the appendix will be made by the notation "(A.)."

2. The press reported the nature of Linda'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 press did not attend this deposition, a transcript was filed with the court and a copy provided to the press 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 for Palm Beach Newspapers, Inc., Jamason v. Palm Beach Newspapers, Inc., 9 Media L. Rep. (BNA) 1965 (Fla. 15th Cir. 1983), and the Fourth District Court of Appeal affirmed the summary judgment holding that a "report of a judicial proceeding" is absolutely privileged unless "the press strays or deliberately bolts outside the hound's tooth requirement of accuracy." 450 So.2d 1130, 1133 (Fla. 4th DCA 1984), pet. for rev. denied, 461 So.2d 115 (Fla. 1984).

The state attorney used Linda's sworn statement to secure wiretaps and search warrants which led to the prosecution of various members of the alleged bookmaking ring in February, 1982. (A. 279-331). After Linda's identity as an informant was inadvertantly released by the state to defense counsel for Carl, state investigators attempted to persuade Linda to enter the federal witness protection program. (A. 38). She accepted the offer, but remained on her own recognizance. (A. 38).

Linda Aurilio is Charged with
Attempting to Murder her Husband

In a startling turn of events on July 14, 1982, Carl was hospitalized with injuries to his forehead, nose, and eye, a lacerated liver and a collapsed left lung caused by a knife wound.

Immediately following the stabbing, Linda, who had been present at the house when her husband received his injuries, told a police investigator that a man named Felix -- one of the individuals indicted for bookmaking -- knocked on the door on the morning of the stabbing. She said she peeked through a small window in the door, recognized him, became frightened, and ran into the bedroom. (A. 438). She said she heard the sound of breaking glass and then her husband saying "Why me? Why me?" (A. 438). According to her statement, she heard the door slam and when she went into the living room she found her husband with a knife in his stomach. (A. 438). She said she removed the knife and called an ambulance. (A. 438).

Carl claimed, however, that it was his wife Linda who had assaulted him. (A. 435). He told prosecutors that he was

sleeping on a couch in his home and that when he awoke, he saw his wife holding a cement block over his head. (A. 435). He said he was able to knock the block away with both of his arms and that he ran out of the room. (A. 435). He said he went into a bathroom, noticed blood streaming down his face, walked out of the bathroom into the living room, looked down and only then realized he had a knife in his rib cage. He stated he pulled the knife out and telephoned an ambulance. (A. 435). On the basis of Carl's statement, Linda was charged by information with attempted first degree murder on September 20, 1982. (A. 433).

The State Seeks a Blanket Closure and Sealing of Depositions

Several months after being charged, Linda's defense counsel filed notices with the clerk of the court that he intended to depose the state's witnesses during a three day period commencing December 1, 1982. (A. 32).

When the state attorney and public defender arrived at the first deposition, they found a reporter for the Fort Lauderdale News & Sun-Sentinel present and the reporter insisted on attending. The state and the defense agreed to adjourn the depositions to seek a court order banning the press and public from all depositions. (A. 32).

Shortly thereafter, the state filed a "motion for a protective order" excluding the press and public from attending the depositions and sealing the transcripts of all depositions. The state's motion cited Florida Rule of Criminal Procedure 3.220(d) and Florida Rule of Civil Procedure 1.280(c)(5) & (6)

as authorizing the requested relief,[3] and alleged "Media coverage of pretrial depositions will necessarily broaden the already extensive publicity and consequently impair the Defendant's and State's rights to a fair and impartial jury trial." (A. 2) The motion did not, however, set forth any facts in support of these allegations. The motion also noted that counsel for the defendant had been consulted and that "he has no objection to this Motion for Protective Order." (A. 2). The defendant did not file a motion.

Counsel for the News & Sun Sentinel Company moved to intervene to oppose the state's motion (A. 3) and filed a response to the motion. (A. 5).

Judge Rogers Refuses to Close and Seal All Depositions

At the hearing on the state's motion, the state attorney argued that discussions might take place during the deposition which, if published, would "cause great jeopardy to both the State and the defense." (A. 36). He did not, however, say what those discussions might be. He offered no evidence in support of the motion. Defense counsel refused to join in the state's motion, but indicated that he had "no objection" to it. (A. 47-

---

3. Florida Rule of Criminal Procedure 3.220(d) states, "the procedure for taking . . . deposition[s] . . . shall be the same as that provided in the Florida Rules of Civil Procedure." Civil Rule 1.280(c) states, "Upon 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 . . . including . . . (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court."

48, 51-52). Judge Rodgers denied the State's motion (A. 58) without prejudice, holding:

> Certainly I would be in error to just issue a blanket rule that no depositions in this case are open to the press.
>
> (Dec. 2 Hearing at 30).

Counsel for the defendant proposed that the parties should return to the Court if particular problems arose during the taking of the depositions. (Dec. 2 Hearing at 31).

The State and the Defense Take Depositions Without Filing Notices

The need to return to Judge Rogers never arose, however, because the state and the defense agreed to take depositions without filing notices with the clerk of the court. (A. 70). When reporters for the News and Sun Sentinel learned of the unnoticed depositions, they 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). All of these individuals possessed transcripts of approximately 12 unnoticed depositions. The state attorney and the court reporter refused the requests. (A. 92-93).

Linda Aurilio Requests a Declaratory Judgment Regarding Access to Depositions

Instead of refusing the public records requests, defense counsel filed a "motion to determine defendant's sixth amendment rights, to determine status of transcript of depositions under Florida law and to prevent further harassment

by press." (A. 59). At the hearing on this motion, counsel for the media argued that unless the parties were required to file correct notices of taking deposition with the clerk, the court's previous order, denying a blanket exclusion order, would be effectively eviscerated. (A. 70-74). Both the state and the defense argued that taking depositions without filing notices with the clerk was permissible. (A. 65-69, 74-95).

Judge Rodgers Permits
Press Exclusion from Depositions
if Judicial Process is not Invoked

Subsequent to the hearing, on January 18, 1983, Judge Rodgers entered an order which allowed the parties to exclude the press from depositions providing that the power of the court was not invoked, other than by subpoena, to require the deposition. (A. 113). The order also provided that if notices of taking depositions were required to be filed, the parties must admit the public and the press. Judge Rodgers did not determine whether transcripts were public records.

Judge Burk Refuses to Allow Press Attendance
at Depositions, but Orders Court Review of
Transcripts which the Parties Want to Seal

On February 9, 1983, the News and Sun Sentinel Company filed a "motion for limited intervention to oppose closure and obtain access to public records" (A. 115) and a "motion to open access to pre-trial depositions and to order production of public records" (A. 117). The News and Sun-Sentinel argued "the conduct of the parties in purposefully avoiding the court's prior Order and evading the media and the public has merely emphasized the rationale for open government under Florida law

and the need for the public to learn of the judicial process in this action as well as scrutinize the conduct of the parties involved." (A. 118).

The Honorable Richard Bryan Burk, to whom the Aurilio prosecution had been reassigned, heard these two motions February 10, 1983. (A. 121). Counsel for the defendant argued, "They (the press) have no right to be at our depositions. . . . We have the right not to give them notice of deposition[s], and the right not to give them copies of our depositions." (A. 126).

Defense counsel also indicated that she and the state attorney had "stipulated" that "if these depositions were open to the public and the press published this information, that it would be impossible to have a fair trial in Palm Beach County, which is the venue that the defendant is entitled to under the Florida Constitution." (A. 127). No evidence was offered to support the "stipulation."

Counsel for the media argued that the first amendment and the common law presumption that governmental processes are open prohibit arbitrary governmental restraints on access to information and that the Public Records Law required release of transcripts or court reporters' notes. (A. 148-68).

In an order rendered February 11, 1983, Judge Burk held members of the press would not be permitted to attend depositions, but transcripts of all depositions would have to be released unless a party obtained a court order, based on in camera judicial review of the transcripts, sealing those portions of the depositions deemed "objectionable." (A. 332).

Judge Burk Reconsiders his Order

At this point, Palm Beach Newspapers, Inc., filed a motion to reconsider that part of the order prohibiting reporters from attending depositions. (A. 334). At the hearing on this motion, neither the state not the defense presented evidence.

Judge Burk reserved ruling on the motion for rehearing until a subsequent hearing,[4] at which he not only denied the motion, but also rescinded that part of his earlier order which required the defendant and the State to release transcripts which the Court had not ordered sealed. (A. 380). On March 1, 1983, Palm Beach Newspapers, Inc. filed a petition with the Fourth District seeking review of this order.[5] (A. 383).

The Fourth District's Plurality Opinion

On June 11, 1985, the Fourth District Court of Appeal rendered its en banc decision. 471 So.2d 571 (Fla. 4th DCA

---

4. Judge Burk convened the hearing with a comment about an article (A. 362) which had appeared in that morning's edition of petitioner's newspaper, The Post, had mischaracterized a juror's reporting of possible perjury to the clerk of the court in an unrelated case. After argument but before ruling, Judge Burk stated, "I am struggling to separate that type of unbiased reporting of unemotional reporting to what the possible effect could be with regard to these matters. And I have said to myself, 'Please put those matters aside because our Constitution means a great deal more to us -- you and me and to all of us -- than that which that one little report might do; or what that one little situation might do.'" (A. 236).

5. During the pendency of the petition, Linda Aurilio was tried and convicted. A divided panel of the Fourth District Court of Appeal affirmed the conviction, without opinion, on December 19, 1984, Case No. 83-1823, over Linda's protests that the trial court erroneously had not allowed her to put on evidence -- which she presumably gained through the depositions -- which would tend to prove that Carl lied about the stabbing incident to punish her and to protect his business associates.

1985). Four judges concurred in a per curiam plurality opinion which held the the press and public have no constitutional, statutory, procedural, or common law right to attend depositions or to obtain unfiled deposition transcripts in criminal cases. Id. at 573. The opinion found no previous decisions directly on point,[6] id. at 574, but affirmed the trial court's order.

Judge Letts' Special Concurrence

Judge Letts specially concurred to provide the fifth vote needed to create a majority. 471 So.2d at 580. He wrote that this Court had decided in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), that the press has no constitutional basis to complain about being excluded from pretrial judicial proceedings and reasoned that a fortiori the press would have no constitutional right to attend pre-trial depositions.

Four Judges Dissent

Chief Judge Anstead and Judges Hurley, Barkett, and Glickstein dissented. Anstead, Hurley, and Glickstein authored separate opinions which will be discussed in the argument infra. The dissenters disagreed. Some concluded the trial court erred because his order abridged the first amendment. Others found it failed to require the parties to follow the rules of procedure.

---

6. The plurality acknowledged, however, that subsequent to preparation of its opinion, the Second District Court of Appeal addressed the deposition access issue in Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985). Id. at 574 n.2. Short approved a ruling which refused to prohibit the press from attending pre-trial depositions in a criminal case where none of the parties had demonstrated good cause for such an order.

SUMMARY OF ARGUMENT

This brief advances two arguments. These arguments address the certified questions in reverse order.

Point I: The Public Records Law Requires Release of the Transcripts. Both the state attorney and court reporters are public agencies which must produce records in their possession for public inspection and copying unless the requested records fall within a specific statutory exemption to the disclosure requirements of the Public Records Law. The unfiled deposition transcripts and court reporters' notes at issue in this appeal do not fall within any exemption. Therefore, the records must be made available to the public and press.

Point II: The Reporters Should Have Been Permitted to Attend the Depositions. The Fourth District erred in holding that parties to a criminal prosecution may exclude reporters from pretrial discovery depositions at their whim. The first amendment of the United States Constitution, the Florida common law, and the Florida rules of civil and criminal procedure prohibit such arbitrary denials of access to information about a critical governmental process. A party who seeks to limit the persons who may attend depositions must file a motion for a protective order and demonstrate that good cause exists for limiting who may attend the deposition. A party can demonstrate good cause only by showing that there are compelling interests in exclusion and that the requested exclusion is no broader than necessary to protect those interests.

ARGUMENT

I.

The Public Records Law Requires Immediate Release of All Deposition Transcripts and Court Reporters' Untranscribed Notes

The second of the two issues certified by the Fourth District Court of Appeal -- whether the public and press are entitled to deposition transcripts or untranscribed court reporters' notes which are not filed with the clerk of the court -- can be answered merely by reference to the unambiguous language of the Florida Public Records Law, chapter 119, Florida Statutes (1983),[7] a provision of law to which the plurality opinion of the Fourth District Court of Appeal inexplicably makes no reference at all.

A. Court Reporters' Unfiled Notes and Deposition Transcripts are Public Records

A court reporter's notes or the transcripts prepared from those notes fall within this legislative definition of "public records" for two reasons. First, a state attorney is a

---

7. Section 119.011, Florida Statutes (1983), provides: "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

Section 119.011(2), Florida Statutes (1983), provides: "'Agency' means any state, county, district, authority or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

public agency[8] which has possession and control over the court reporters' notes and transcripts by statute.[9] Second, court reporters themselves are public agencies[10] which have possession and control of these records.

Section 119.07, Florida Statutes, plainly provides that every person who has custody of public records shall make them available for inspection and copying under reasonable

---

8. The position of "state attorney" is created by chapter 27, Florida Statutes and unquestionably falls within the meaning of "agency" provided in the act. See Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984); Rose v. D'Alessandro, 380 So.2d 420 (Fla. 1979); Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), cert. denied, 413 So.2d 877 (Fla. 1982); News-Press Publishing Co. v. D'Alessandro, 7 Media L. Rep. (BNA) 2599 (20th Cir.), aff'd, 421 So.2d 74 (Fla. 2d DCA 1982).

9. Section 29.02, Florida Statutes, specifically provides that state attorneys are entitled to demand a transcript of any deposition taken in a criminal proceeding attended by an official court reporter. Accordingly, state attorneys properly can be deemed to be in "custody" of deposition transcripts and must make them available for inspection and copying as required by section 119.07, Florida Statutes.

10. The position of "official court reporter" is created by statute, section 29.01, Florida Statutes (1983). Section 29.02, Florida Statutes, spells out the specific duties of official court reporters, section 29.03, Florida Statutes, provides the rate of compensation for official court reporters, and section 29.04, Florida Statutes provides for salaries of official court reporters, and reimbursement of their expenses as provided in section 112.061 which provides for payment of state employees' expenses. Florida Rule of Judicial Administration 2.070(h) promulgated by this Court makes the statute applicable to all court reporters generally. It provides, "A court reporter, whether an official court reporter or deputy court reporter, is an officer of the court for all purposes while acting as a reporter in a judicial proceeding. He or she shall comply with all rules and statutes governing the proceeding that are applicable to court reporters." Rule of Judicial Administration 2.070(f) makes clear the depositions are included within this Court's use of the phrase "judicial proceedings" where it states, "Transcripts of all judicial proceedings, including depositions, shall be uniform in and for all courts throughout the state."

conditions. Accordingly, those notes and transcripts are "public records" which, if not exempt from the chapter 119 disclosure requirements by a specific provision of the statute, may not be withheld from the public.[11]

B. The Deposition Transcripts Sought by the Petitioners are Not Exempt from the Disclosure Requirements of Chapter 119

The only statutory exemption into which some deposition transcripts arguably might fall is that provided for criminal

---

11. If not "public records," the Court might conclude that the transcripts and notes are "judicial records." Interpreting the court reporter statute, this Court has held "the person selected and appointed [pursuant to the statute] to take and transcribe the testimony . . . become[s] an 'arm of the court,' . . . directly responsible as such for the proper performance of his duties." Cleary Bros. Construction Co. v. Phelps, 24 So.2d 51, 55 (Fla. 1945). See also International Shoe Co. v. Carmichael, 105 So.2d 389, 390 (Fla. 1st DCA 1958). Under this Court's Cleary case, unfiled deposition transcripts might be considered "judicial records" rather than "public records" of a state agency. If that were the case, then the records unquestionably would be presumptively open and the decision of the District Court of Appeal would have to be quashed. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (public and press have a common law right of access to judicial records); United States v. Rosenthal, ___ F.2d ___, 11 Media L. Rep. (BNA) 2237 (11th Cir. 1985)(reversing order which sealed all wiretaps introduced in evidence); Wilson v. American Motors Corp., ___ F.2d ___, 11 Media L. Rep. (BNA) 2008 (11th Cir. 1985) (applying presumption of openness to judicial records in civil proceedings); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (permitting press access to list of prisoners to be released which was made a part of court file); Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983)(press and public have a first amendment right of access to documents filed in connection with criminal pre-trial proceedings); United States v. Edwards, 672 F.2d 1289, 1290 (7th Cir. 1982) (recognizing a "strong presumption in favor of common law access to judicial records"); Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980)(reversing blanket order sealing depositions); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867

(Footnote continued on next page)

investigatory and intelligence information in section 119.07(d), Florida Statutes.[12] A careful review of that provision shows the exemption was not intended to encompass materials which have been disclosed to a criminal defendant. Therefore depositions, freely available to the criminal defendant under section 29.02, Florida Statutes, are not within that exemption.

When the Legislature codified the common law "police secrets rule" which was first recognized in Lee v. Beach Publishing Co., 127 Fla. 600, 173 So. 440, 442 (1937), it was careful not to enact a law which would be overly broad. It specifically stated in subsection 119.011(3)(c), Florida Statutes, that certain records, including "[d]ocuments given or required by law or agency rule to be given to the person arrested," are not to be considered active crimial investigative or intelligence information. Thus, information already known to the criminal defendant was not removed from the public.

Notwithstanding the clarity of the statute, a state

(Footnote continued from previous page)

(Fla. 1st DCA 1979)(holding administrative rule sealing all deposition transcripts invalid); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979)(judicial records may be sealed only after three-part test is satisfied by party seeking order); Prescott Publishing Co. v. Norfolk County, 395 Mass. 274 (1985) (deposition excerpts filed with the court are presumptively open). The Fourth District's plurality decision did not cite any of these recent cases. It did cite United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), reh. denied, 562 F.2d 1257 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978), a decision which has been effectively superceded on this point by cases such as Newman and Rosenthal.

12. The depositions at issue in this case were noticed by counsel for the defendants. Characterizing these depositions as "criminal investigative information" therefore is inappropriate.

attorney claimed the statute did not obligate him to release to the press all materials produced to a defendant during discovery. In Satz v. Blankenship, 407 So.2d 396 (4th DCA 1981), pet. for rev. denied, 413 So.2d 877 (Fla. 1982), the Fourth District Court of Appeal rejected that argument, holding, "At the point of disclosure, the information became public in a sense and as public information, it lost its efficacy in deterring criminal activity. Accordingly, the trial court acted properly in releasing the tapes to appellee." 407 So.2d at 398.

This Court refused to review Satz and the rule it established has been applied in numerous subsequent cases.[13] Commenting on the apparent inconsistency between Satz and the plurality opinion in this case, Chief Judge Anstead wrote in dissent, "For the life of me I do not see how we can mandate public access to an untranscribed tape recording and yet deny access to an untranscribed deposition." 471 So.2d at 581.

---

13. See Bludworth v. Palm Beach Newspapers, Inc., Case No. 84-2112 (Fla. 4th DCA Oct. 11, 1984)("following . . . Satz v. Blankenship, the trial court was required to disclose these items since the information was disclosed to the defendants"); Palm Beach Newspapers, Inc. v. Terlizzese, Case No. 84-2406 CA (L) K,(witness statements produced in discovery by the state attorney to the person arrested must be released to the press and public), appeal pending, Fourth District Case Nos. 84-2112 & 94-2367; News-Press Publishing Co. v. D'Alessandro, 7 Media L. Rep. (BNA) 2599 (Fla. 20th Cir. 1982)("The Satz case . . . is decisive of the issues in this case"), aff'd, 421 So.2d 74 (Fla. 2d DCA 1982); In Palm Beach Newspapers, Inc. v. Bludworth, Case No. 85-2662 CA (L) H (Wennet, J.)("The definitive statement by which this Court is governed is enunciated in Satz v. Blankenship, . . . and requires disclosure absent the existence of an applicable statutory exception, of all records given or required to be given to the person arrested"); State v. Tobin, 10 Media L. Rep. (BNA) 2364 (Fla. 17th Cir. 1984)("Those documents, tape recordings and other records given or required to be given to the defendants are in fact public records").

II.

Reporters Cannot be Arbitrarily Excluded from Pretrial Depositions in Criminal Cases

The other issue certified as being of great public importance is whether members of the press and public may be prohibited from attending pretrial depositions in criminal cases. Constitutional and common law principles have been firmly established in recent years which control resolution of this issue.

The first and fourteenth amendment of the United States Constitution impose restraints on a state's power to limit news gathering activities -- both inside and outside the courtroom. Those restraints provide criteria which trial judges must use when faced with requests to limit who may attend depositions. In addition, this Court has articulated an extraordinary commitment to open judicial and governmental processes. The decisions articulating this commitment also provide guidelines which trial courts should apply in evaluating exclusion motions. Finally, the rules of civil and criminal procedure provide the framework within which disputes regarding deposition access must be resolved.[14]

A. The First Amendment Prohibits State Action Which Restrains Access to Information Which is Not Warranted by Compelling Interests and Narrowly Tailored to Serve Those Interests

In recent years, the United States Supreme Court has

---

14. These arguments are directed to whether reporters may attend depositions, but the arguments are also applicable to the issue of whether reporters may obtain a deposition transcript.

rendered a number of decisions establishing that governmental restrictions on access to information are almost as offensive to first amendment freedoms as state orders restraining the dissemination of information, commonly called "prior restraints."

Prior to these decisions, this Court already had recognized judicial orders which block news gathering activities, either inside or outside the courtroom, are subject to first amendment scrutiny. The subsequent federal cases merely confirmed this Court's decisions. As will be seen in the discussion below, the initial federal decisions created doubt about the scope of the first amendment protection of news gathering, at least in the pre-trial context. The more recent Supreme Court cases have clarified that issue and it is now clear that this Court's earlier broad interpretations of the first amendment were correct and that under them trial courts cannot exclude reporters or the public from depositions absent compelling interests in doing so.

1. This Court has Held that Restraints on Access to Information About the Criminal Justice System Abridge the First Amendment Unless Supported by Compelling Interests

This Court initially recognized that the first amendment protects public access to information about the criminal justice system in In re Adoption of Proposed Local Rule 17, 339 So.2d 181 (Fla. 1976), a case which dealt with a proposal to prohibit broadcasting, televising, recording or taking photographs of any kind on any floor of the building where criminal proceedings

were taking place in Dade County.[15] The Court refused to approve the proposed ban stating:

> It is fundamental that news gathering qualifies for First Amendment protection, for a ban upon news gathering could effectively destroy freedom of the press . . . Any direct restraint by government upon First Amendment freedoms of expression and speech must be subjected by the courts to the closest scrutiny, and the government carries a heavy burden of showing a justification of its imposition.
>
> 339 So.2d at 183-184 (citations omitted).

This decision is significant with respect to the instant case because the Court applied a first amendment analysis to invalidate the proposed rule which attempted to control access to information outside of judicial proceedings. The Fourth District plurality placed great emphasis on its conclusion that because depositions are not "judicial

---

15. In an even earlier opinion, the Court hinted there may be constitutional limitations on governmental powers generally to exclude the public and press from any governmental proceedings. In that case, Board of Public Instruction v. Doran, 224 So.2d 693 (Fla. 1969), the Court was asked to interpret the Sunshine Law which had been enacted by the Legislature just two years earlier. In examining the case, the Court concluded that the public's right of access to governmental processes was more deeply embedded in our society than a two-year-old statute. Justice Adkins, for the Court, wrote, "The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. . . . Regardless of their good intentions, those specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are made." 224 So.2d at 699 (emphasis added). Doran's reference to the right of access as "inalienable" foreshadowed Proposed Local Rule 17.

proceedings," 471 So.2d at 578, the first amendment had no application to orders denying access to them. The Proposed Local Rule 17 case demonstrates that the first amendment not only prohibits unwarranted orders closing courtroom doors, but also other unjustifiable governmental barriers to information.

One year later, in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), the Court, examining a trial court's order prohibiting the news media from reporting "any testimony presented and/or evidence exhibited in the absence of the jury," observed, "[T]he public and press have a right to know what goes on in a courtroom whether the proceeding be criminal or civil. A member of the press or newspaper corporation may be properly considered as a representative of the public insofar as enforcement of [a] public right of access to the court is concerned; and the public and press have a fundamental right of access to all judicial proceedings." 340 So.2d at 908.

Together, Proposed Local Rule 17 and McIntosh establish the first amendment imposes restrictions on the power of judges to limit news gathering activities both inside and outside the courtroom -- a holding which anticipated the interpretation the United States Supreme Court would give the first amendment in a series of decisions a half decade later.

2. The Decisions from Gannett to Press-Enterprise Establish that this Court Correctly Interpreted the First Amendment in the Local Rule 17 Case

The first decision in the series of Supreme Court cases, Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979),

created more confusion than it resolved because, as will be discussed, it expressly declined to address the first amendment issue it raised. Nevertheless, a majority of the en banc Fourth District relied on dicta from a concurring opinion in that case to reject the petitioners' first amendment argument. The majority also chose to ignore a trio of subsequent Supreme Court cases which established the principles argued by the petitioners.

a. Gannett Does Not Address the First Amendment Issue

The Gannett decision affirmed, by a 5-4 vote, the closure of a pretrial suppression hearing. A plurality felt the closure should be affirmed, holding alternatively that the sixth amendment public trial guarantee secures rights only to the defendant, not the public, and, even if such a right existed, then "the circumstances of this case" would justify the closure order. Id. at 391. The plurality opinion expressly declined to determine whether the first amendment limited the trial court's power to exclude the press from pretrial proceedings, finding that even if such a right existed, the facts of this case warranted closure. Id. at 392.

Justice Powell, providing the crucial fifth vote for affirmance, recognized a first amendment limitation on the trial court's discretion to close suppression hearings. Id. at 397. He concluded that the trial court had recognized that limitation and stayed within its bounds, weighing the peculiar facts of the case in favor of closure. Id. at 402-03.

In a subsequent case, Waller v. Georgia, ___ U.S. ___, 81 L.Ed.2d 31 (1984), the Supreme Court observed that a majority

of justices in Gannett (Powell and the four dissenters) recognized a constitutional right of access to pretrial hearings which cannot be arbitrarily denied. In Waller the Court held:

> [I]n . . . Gannett Co. v. DePasquale, we considered whether this right [of access] extends to a pretrial suppression hearing. While the Court's opinion did not reach this question, a majority of Justices concluded that the public had a qualified constitutional right to attend such hearings.
>
> 81 L.Ed.2d at 37 (citations omitted).

Focus on the Waller decision led Judge Letts, whose special concurrence was essential to the Fourth District's 5-4 decision, to conclude that he erred in analyzing the deposition access issue. After reconsidering the issue in State v. Freund, ___ So.2d ___, 10 Fla. L. W. 1851 (4th DCA July 31, 1985), pet. for rev. pending, Sup. Ct. Case No. 67,482, he wrote:

> [W]hile considering the particular matter now before us, I realize that the statement by the Florida Supreme Court in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), that "[t]here is no first amendment protection of the press' rights to attend pretrial hearings" is suspect, if it relies, as it appears to, on Gannett Co. v. DePasquale. If the Florida court continues to be of the same mind when it addresses the issue of pretrial deposition, it should not, as I did in Burk when I quoted Lewis, rely on Gannett. The Gannett decision, while admittedly equivocal, is clarified in a later United States Supreme Court case where it is confirmed that the media has in fact a "qualified" first amendment right to attend pretrial suppression hearings. Waller v. Georgia.
>
> Id. (Letts, J., concurring) (citations omitted).

Therefore, Gannett provides no authority for the Fourth District's conclusion that trial judges need not concern themselves with the first amendment when asked to exclude the public from depositions in criminal cases.

b. In Three Decisions After Gannett, the Supreme Court Established the First Amendment Limits Trial Courts' Power to Restrict Access to Information

Subsequent to the Gannett decision, a commanding majority of the United States Supreme Court recognized the first amendment right of access suggested by Justice Powell in Gannett. Three major cases, all decided after Gannett, now establish the limitations which the first amendment imposes on trial judges faced with requests to close certain proceedings. None of these cases were cited or discussed by the Burk plurality.[16] Yet, in each case, the Supreme Court held trial judges are powerless to enter orders which deny public or press access to information unless required by compelling interests in maintaining secrecy and narrowly tailored to serve those

---

16. The Fourth District did cite one recent United States Supreme Court case, Seattle Times Co. v. Rhinehart, ___ U.S. ___, 81 L.Ed.2d 17 (1984), but wholly misinterprets it. In Seattle Times, Chief Justice Burger stated "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." 81 L.Ed.2d at 27 (emphasis added, citations and footnotes omitted). Burger made no comment, however, regarding the conduct of discovery in criminal trials. And, as will be shown in the argument below, discovery in criminal trials in Florida historically has been conducted publicly. Thus, Burger's views regarding the lack of openness in civil cases should not be persuasive in this criminal case. Furthermore, in Florida and elsewhere, civil discovery in fact has been conducted publicly. See footnote 32 infra.

interests. Because of the significance of these particular cases, they are discussed separately below.

(1) Richmond Newspapers, Inc. v. Virginia

In the first of the cases, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Court reversed a trial court order closing a trial. Chief Justice Burger announced the judgment of the Court in an opinion in which Justices White and Stevens joined. "Absent an overriding interest articulated in findings," he concluded, "the trial of a criminal case must be open to the public." Id. at 581.

Justice Stevens, concurring, remarked, "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." Id. at 582. He interpreted the Court's decision as having applicability far beyond the courtroom door, writing, "the Court unequivocally holds that an arbitrary interference with access to information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." Id. at 583. Thus, the United States Supreme Court recognized what this Court had recognized four years earlier: court orders which arbitrarily interfere with news gathering abridge the first amendment.[17]

---

17. In State v. Green, 395 So.2d 532, 539 (Fla. 1981), a case involving the rule permitting electronic media access to courts, this Court embraced the holding of Richmond Newspapers.

(2) Globe Newspapers, Inc. v. Superior Court

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), examined a statute which required closure of all trial proceedings during the testimony of minor rape victims. Such a mandatory closure rule, the Supreme Court held, abridged the first amendment because it wrested all discretion from trial judges to evaluate the facts relating to the closure of a particular minor witness's testimony. The Court stated trial judges cannot order closure without articulating findings that show compelling interests justify closure, and without concluding closure is no broader in scope or longer in duration than necessary to protect the compelling interests.

The Globe decision is significant because it placed great emphasis on the fact that "public access to criminal trials permits the public to participate in and serve as a check upon the judicial process -- an essential component of our structure of self-government." 457 U.S. at 606. It also made clear that any blanket ban on access would be unconstitutional.

(3) Press-Enterprise, Inc. v. Superior Court

In its third major access case, Press-Enterprise, Inc. v. Superior Court, ___ U.S. ___, 78 L.Ed.2d 629 (1984), the Supreme Court reversed an order excluding the public and press from the voir dire proceedings in a death penalty case. As he had in Richmond, Justice Stevens emphasized that the restrictions which the first amendment places on governmental powers do not exist solely in trials. "[T]he distinction

between trials and other official proceedings," he wrote, "is not necessarily dispositive, or even important, in evaluating First Amendment issues." Id. at 642.

c. Lower Courts Have Interpreted First Amendment Protection of News Gathering as Extending to Depositions and Beyond

Lower courts have applied the principles established by the Supreme Court to a wide range of factual situations. One of those decisions United States v. Salerno, ___ F. Supp. ___, 11 Media L. Rep. (BNA) 2248 (S.D.N.Y. June 24, 1985), granted a motion by the press to be present during a deposition in a criminal case. Because of the witness's health problems, the court directed the media to observe the deposition on a television monitor outside the deposition room "to enable the press to contemporaneously cover the deposition under those conditions governing it were it in a courtroom reporting on a trial." Id.

Although other cases have not addressed the deposition issue directly, they all have held arbitrary denials of access to information found outside of judicial proceedings are prohbited by the first amendment.[18]

---

18. See, e.g., Legi-Tech, Inc. v. Keiper, 766 F.2d 728 (2d. Cir. 1985)(state-owned computerized database); In re Express News Corp., 695 F.2d 807 (5th Cir. 1982)(press interviews of juror after trial); Belcher v. Mansi, 569 F. Supp. 379 (D. R.I. 1983)(school board policy prohibiting tape recording of school board meetings); Cable News Network, Inc. v. American Broadcasting Companies, Inc., 518 F. Supp. 1238, 1244-45 (N.D. Ga. 1981)(presidential press conferences); Westinghouse Broadcasting Company, Inc. v. National Transportation Safety Board, 8 Media L. Rep. (BNA) 1177 (D. Mass. 1982)(air crash site); State ex rel. Times Publishing Co. v. Patterson, 451 So.2d 888 (Fla. 2d DCA 1984)(public records which were exempt from statutory disclosure requirements).

3. First Amendment Protection of Information Regarding Depositions in Criminal Cases is Essential in a Self-Governing Society

The first amendment principles established by the United States Supreme Court are equally applicable in securing access to depositions. The Supreme Court decisions all concluded: (a) information concerning criminal proceedings preserves public understanding and confidence in the criminal justice system, (b) public observation of criminal proceedings ensures that the state cannot abuse its accusatory and investigatory powers, (c) access to criminal proceedings helps ensure the propriety of attorneys' conduct, and (d) criminal proceedings historically have been open. Each of these statements is true with respect to pretrial criminal depositions.

a. Information Regarding Depositions in Criminal Cases is Essential to Preserve Public Understanding of and Confidence in the Criminal Justice System

In our modern criminal justice system, trials are the exception, not the rule.[19] If a trial does take place, it may be months or even years after the charge is filed. Depositions often are the only meaningful opportunity the public has to learn about a case. Without news reports about these proceedings, potential witnesses remain ignorant and uninvolved; victims are bewildered and frustrated; critics are blinded.

---

19. In the years 1979, 1980, and 1981, Florida's circuit courts disposed of a total of 326,433 criminal matters; 313,598 or 96.1 percent were terminated before trial. Office of the State Courts Administrator, Florida Judicial System Statistical and Program Activity Reports (1979-81).

Thus, a decision to deny the press access to depositions may have serious societal consequences. Chief Justice Burger has emphasized that "When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help,' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers." 448 U.S. at 571. Without access to the discovery phase of a criminal prosecution, the public has no way to know that society's responses to criminal conduct are "underway." "People in an open society do not demand infalibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Id. at 572.

A recent narcotics prosecution provides a good example of the suspicion and distrust of the system which can be created by closed depositions. In State v. Hagler, Case No. 82-3750-CF-A02 (Fla. 15th Cir.), the defendant claimed that he had been entrapped by the state attorney and threatened to make public at his trial photographs that he said would "compromise" the state attorney. The defendant noticed the deposition of the state attorney, but held the deposition at a time and place other than that indicated in the notice. Upon learning of the "secret" deposition, reporters petitioned the trial court to permit them to inspect the transcript. The trial judge denied the reporters' requests. Shortly thereafter, the state attorney accepted the

defendant's plea to a lesser included offense and the defendant was placed on three years probation.

The Fourth District affirmed, but Judge Barkett concurring, wrote, "a major policy reason for open proceedings in the courts is 'the public's right to monitor the functioning of our courts, thereby ensuring quality, honesty, and respect for our legal system.' Agreements to bypass the rules and to take secret depositions of the State Attorney in a pending criminal case prosecuted by the same State Attorney's office, are much more prone to ensure speculation and distrust rather than to ensure confidence in our legal system." The Miami Herald Publishing Co. v. Hagler, ___ So.2d ___, 10 Fla. L. W. 1581 (4th DCA 1985), pet. for rev. pending, Case No. 67,479 (citation omitted).

Even in those cases which are tried, denial of public access to depositions can preclude meaningful evaluation of the system. Here, Linda Aurilio was precluded from offering testimony at trial from witnesses involved with her husband's gambling operations. Public knowledge of the statements in depositions could have helped the public determine whether the criminal justice system worked in her case.

b. Public Access to Information About Criminal Depositions Prevents the State from Abusing its Investigatory and Accusatory Powers

A leading article on constitutional theory concludes that "the most influential free-speech theorists of the eighteenth century -- those who drafted the First Amendment and their mentors -- placed great emphasis on the role free

expression can play in guarding against breaches of trust by public officials." V. Blasi, The Checking Value in First Amendment Theory, 1977 Am. Bar Found. Res. J. 523, 527. Justice Brennan expressly recognized this theory in Globe Newspaper Company observing, "[P]ublic access to criminal trials permits the public to participate in and serve as a check upon the judicial process - an essential component in our structure of self government." 457 U.S at 605.

Public attendance of depositions can check a prosecutor's power. Criminal depositions ordinarily are noticed by the defense for the purpose of discovering the testimony that state witnesses will present at trial.[20] If the depositions reveal the witnesses do not have sufficient evidence to convict the defendant, the public should be entitled to inquire why the state commenced the prosecution in the first instance. Without knowledge of the contents of depositions, that inquiry is foreclosed. Furthermore, the deposition contents might reveal that the prosecution had considerable evidence with which a conviction might be obtained, yet the prosecution later is dismissed or a plea of guilty to a lesser charge accepted.

---

20. Although the state also can take depositions under this rule, it can obtain its discovery ex parte pursuant to section 27.04, Florida Statutes (1983). The Committee Note following the original rules states they were adopted "to afford the defendant relief from situations where witnesses refuse to 'cooperate' by making pretrial disclosures to the defense." In re Florida Rules of Criminal Procedure, 196 So.2d 124, 154 (Fla. 1967). See also A. Datz, Discovery in Criminal Procedure, 16 U. Fla. L. Rev. 163 (1963); A. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149, 1192-99 (1960).

Again the public should be entitled to inquire about the state attorney's decision, but would not have the knowledge necessary to ask the question unless the depositions were open. In short, the only way the public can keep a watchful eye over the prosecutor is by observing the discovery process.

c. Deposition Access Helps Ensure that Defense Counsel Will Not Abuse the Discovery Process

In a case which arose after the Fourth District's Burk decision, State v. Fuster Escalona, Case No. 84-19728, Eleventh Circuit, various reporters asked to be admitted to the deposition of a child who would be one of the state's principal witnesses in a prosecution for sexual assault on a number of children. Defense counsel sought exclusion of the media from the deposition. Although the child's parents voiced no objection to the media's observation of the deposition and the media had agreed not to photograph or identify the child, the trial judge, adhering to the Fourth District's Burk decision, enforced the defense counsel's wish and allowed the deposition to proceed in private.

On appeal, the Third District also followed the Burk case in Post-Newsweek Stations, Florida, Inc. v. State, ___ So.2d ___, 10 Fla. L. W. 1879 (3d DCA 1985). Shortly after that appellate decision, the deposition commenced, but was terminated by the counsel for the child because of alleged abusive tactics being used by the defense counsel to intimidate the child. An appeal to the Third District followed in which counsel for the child argued that both the judge and the media should have been

present at this deposition to check the potential for abuse. Cousino v. Fuster Escalona, 10 Fla. L. W. 2087 (Aug. 7, 1985).

In other cases as well, criminal defense attorneys can abuse the discovery process by attempting to intimidate or badger witnesses if they are permitted to conduct depositions secretly. Although the state can seek protective orders to prevent such abuses, public observation of depositions can make such tactics difficult for attorneys even to attempt without incurring public rebuke -- sometimes a more effective deterrent to improper behavior than an after-the-fact court order.

d. Information Concerning Depositions in Criminal Cases Historically has been Freely Available to the Public

Some of the recent United States Supreme Court decisions interpreting the first amendment have emphasized that trials cannot be closed arbitrarily because historically they have been open to the public and the press.[21] The same is true of pretrial depositions in Florida.[22]

---

21. The Globe decision observed, "[T]he criminal trial historically has been open to the press and general public . . . This uniform rule of openness has been viewed as significant in constitutional terms not only 'because the Constitution carries the gloss of history,' but also because a tradition of accessibility implies the favorable judgment of experience." 457 U.S at 605 (citation omitted). See also Richmond Newspapers, 448 U.S. at 563-75.

22. Indeed, virtually all phases of criminal prosecutions after a formal charge has been rendered are open. See, e.g., Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) (pretrial suppression hearings); Miami Herald Publishing Co. v. Marko, 352 So.2d 518 (Fla. 1977)(grand jury report or presentment); State ex rel. Miami Herald Pub. Co. v. McIntosh, supra,

(Footnote continued on next page)

Prior to Burk, Florida's circuit courts repeatedly held pretrial depositions in criminal cases must be conducted publicly absent a demonstration by the party seeking to close the proceedings that openness seriously jeopardized fair trial rights, that closure would be effective, and no less restrictive alternatives were available. This conclusion was reached in the highly publicized murder trial State v. Bundy, 4 Media L. Rep. (BNA) 2629, 2630 (Fla. 11th Cir. 1979). Judge Cowart held, "Insofar as the motion to conduct in-camera hearings and the taking of depositions, this Court is of the opinion that closure orders may be entered only to prevent clear and present danger of the defendant's right to a fair trial."[23]

On the appeal from his conviction, Bundy argued for reversal on the ground that the trial court erroneously refused

---

(Footnote continued from previous page)

(trials); Satz v. Blankenship, supra (documents given or required by law to be given to the person arrested are required to be made public); Miami Herald Publishing Co. v. Chappell, 403 So.2d 1342 (Fla. 3d DCA 1981)(competency hearings); Miami Herald Publishing Co. v. Morphonios, 467 So.2d 1026 (Fla. 3d DCA 1985)(testimony of a minor victim video-taped prior to trial for use at trial pursuant to section 90.90, Florida Statutes); Miami Herald Publishing Co. v. State, 363 So.2d 603 (Fla. 4th DCA 1978). Cf. Gordon v. Gerstein, 189 So.2d 873, 874-75 (Fla. 1966)(holding witness had a right to have an attorney present during state attorney's questioning because "We know of no provision for secret inquisitional sessions by the State Attorney").

23. Judge Cowart's decision modified an earlier unreported decision in the same case by Judge Wallace Jopling which closed all depositions and sealed all deposition transcripts. State v. Bundy, Case No. 78-169-CJ (Feb, 27, 1979). Counsel for Ms. Aurilio filed a partial transcript from a hearing before Judge Cowart conducted in the Bundy case on July 9, 1979. She represented that the transcript reflected a modification of Judge Cowart's earlier order. It does not.

to close pretrial hearings. This Court, acknowledging "the societal interest in the openness of court proceedings" rejected those arguments in Bundy v. State, 455 So.2d 330, 337-39 (Fla. 1984). Relying on district court of appeal decisions which overturned blanket orders sealing deposition transcripts,[24] this Court noted that "Florida courts have held that denial of access to court proceedings or records for the purpose of protecting the interests of parties to litigation may only be ordered after finding that the . . . three-pronged test has been met." 455 So.2d at 337. The Court's reliance on these deposition access cases to reject Bundy's appeal suggests this Court would have rejected a claim by Bundy that the trial court erred in opening the depositions.[25]

Judge Cowart's Bundy opinion was followed by State v. Alford, 5 Media L. Rep. (BNA) 2054 (Fla. 15th Cir. 1979), another highly-publicized trial in which Judge Mounts held "discovery depositions taken pursuant to subpoena issued by the State shall be open," Id. at 2055, and by State v. Diggs, 5 Media L. Rep. (BNA) 2597 (Fla. 11th Cir. 1980), in which Judge Nesbitt held "a pre-trial deposition is a public judicial proceeding."

---

24. The Court relied on Ocala Star Banner v. Sturgis, 388 So.2d 1367 (Fla. 1st DCA 1980); and Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979); and News-Press Press Publishing Co. v. State, 345 So.2d 865 (Fla. 2d DCA 1977)

25. The petitioner acknowledges that the Court could not have reached this question in Bundy because Bundy, who had argued strenuously for exclusion of the media from the depositions in the trial court, did not even argue on appeal that the media access to the depositions had infringed on his fair trial rights. Appellant's Brief, Bundy.

In State v. Sanchez, 7 Media L. Rep. (BNA) 2338 (Fla. 15th Cir. 1981), Judge Mounts was faced with motions seeking to exclude the public and press from an estimated 75 to 80 pretrial depositions in a criminal case. In response, Judge Mounts wrote a lengthy opinion tracing the history of Florida access law. He first noted that "Motions to close depositions have been made, and uniformly denied in Florida's most notorious recent criminal prosecutions," and then he proceeded to find that these denials were not inconsistent with the defendants' rights to fair trials. Judge Mounts noted:

> Jurors are not expected to be utterly ignorant or unfamiliar with news reports of crimes in their community. . . . Through appropriate trial management techniques, judges . . . are able to guarantee defendants their right to a fair trial. . . . In fact, press coverage may well aid in securing for a defendant his right to a fair trial in circumstances where much is known about the crime and more is rumored.26
>
> 7 Media L. Rep. (BNA) at 2339.

---

26. In a subsequent decision, State v. Trent, Case No. 84-4974 CF A & B02, Judge Mounts, in part because he was bound by Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985)(discussed in part II.C. infra), changed his analysis of the deposition access problem somewhat, finding that the rules of procedure, rather than the first amendment, provide a presumption of openness which require a party seeking exclusion of the media to demonstrate "good cause." Because the state had not demonstrated good cause in that case and the defendants had opposed exclusion of the press, Judge Mounts refused to enter the requested protective order. Reviewing that decision shortly after it rendered its en banc decision in Burk, the Fourth District quashed Judge Mounts opinion, stating only that Burk "which takes the opposite view from Short . . . must govern the case at bar." State v. Freund, ___ So.2d ___, 10 Fla. L. W. 1851 (4th DCA July 31, 1985), pet. for rev. pending, Fla. S. Ct. Case No. 67,482.

Shortly after the Sanchez decision, Judge Pack of the 20th Judicial Circuit, in State v. Hodges, 7 Media L. Rep. (BNA) (BNA) 2424 (Fla. 20th Cir. 1981), reached many of the same conclusions reached by Judge Mounts. Reviewing all of these decisions, Judge Mize of the Eighteenth Circuit held in State v. O'Dowd, 9 Media L. Rep. (BNA) 2455, 2456 (Fla. 13th Cir. 1984), that "Florida trial courts have consistently applied the three-pronged closure tests in situations involving the proposed closure of depositions."

All of these decisions have been rendered fairly recently -- within the past six years. But when analyzing the history of criminal depositions in Florida, it must be remembered that depositions in criminal cases are a fairly recent innovation in Florida. It was not until March 1, 1967, that this Court enacted a rule permitting such depositions. In re Florida Rules of Criminal Procedure, 196 So.2d 125 (Fla. 1967). Significantly, the question of access to criminal depositions did not arise during the first decade of their existence, there being no apparent conflict between reporters and attorneys regarding whether they could attend.

One of the obvious reasons this access question did not arise earlier is that until January 1, 1982, Florida Rule of Civil Procedure 1.310(f) required all deposition transcripts to be filed.[27] Thus, if a reporter were denied the opportunity

---

27. This rule of civil procedure would be applicable in criminal cases as well by virtue of Florida Rule of Criminal Procedure 3.220(d) which borrows the civil deposition rules.

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.

The filing rule was amended in 1982, however, so as not to require the filing of original transcripts of depositions with the clerk. In re Florida Rules of Civil Procedure, 403 So.2d 926 (Fla. 1981). The Burk decision turned this apparently innocuous housekeeping change[28] into a blanket ban on all deposition access. The Fourth District first acknowledged that decisions such as Tallahassee Democrat v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979) and Ocala Star Banner v. Sturgis, 388 So.2d 1367 (Fla. 1st DCA 1980), both decided prior to the amendment to Rule 1.310, had concluded that blanket bans -- either in the form of administrative rules or protective orders[29] -- on access to deposition transcripts filed with the court were violative of the common law right of access to judicial

---

28. This Court stated the reason it had adopted the new no-filing rule was "to relieve the document storage burden now experienced by all segments of Florida's court system." 403 So.2d at 926.

29. In the Willis case the chief judge of the Second Judicial Circuit had promulgated an administrative order which provided that duly certified transcripts of depositions shall be securely sealed and filed with the court and that they would be subject to unsealing only by order of the court. In the Sturgis case, the defendant requested an order sealing the court file. The trial court, without an evidentiary basis, concluded that continued availability of the court files, including transcripts of discovery depositions, threatened the administration of justice and accordingly, entered an order which in substance closed the entire case and sealed the court file.

records.[30] Agreeing with this, the Fourth District concluded that because depositions are not now required to be filed, transcripts are no longer court records and therefore not available to the public. The Fourth District explained:

> 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.' As all know, our rules of procedure do not blanket mandate the filing of depositions and other discovery documents.
>
> 471 So.2d at 575.

Thus this rule change was given the same effect as the blanket rule sealing all filed deposition transcripts in Willis and the protective order sealing all depositions filed in Sturgis. Chief Judge Anstead, dissenting in Burk, found no logic in the Fourth District's use of the change in the filing rule to justify a ban on access to transcripts, commenting, "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 which should be determinative. That determination should not be left to the

---

30. See also News-Press Publishing Co., Inc. v. State, 345 So.2d 865 (Fla. 2d DCA 1977)(holding there must be compelling reasons demonstrated before depositions filed with the court are sealed); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979)(holding depositions cannot be sealed absent adequate evidentiary showing of compelling reasons for order). This Court cited both the News-Press and Booth decisions with approval in State v. Newman, 405 So.2d 971, 973 (Fla. 1981).

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."[31] 471 So.2d at 582.

The historical availability of transcripts demonstrates there are no reasons for sealing access to this phase of the criminal process and that absent compelling interests to support closure and sealing, access cannot be denied.[32]

4. Neither the State nor the Defense Attempted to Demonstrate that Any Interests Justified Denying Public Access to the Depositions

Although press and public attendance of depositions in

---

31. One trial judge also has found the change in the filing rule as having no impact on the deposition access question. In an opinion rendered before the Fourth District's Burk decision, but after the change in the filing rule, Judge Cook wrote, "depositions are judicial proceedings. . . [and there is] a qualified public privilege to be present during all phases of the judicial process as set forth in Miami Herald v. Lewis." State v. Tolmie, 9 Media L. Rep. (BNA) 1407 (Fla. 15th Cir. 1983).

32. The issue of whether civil depositions also are open to the public and the press is not before the Court in this case. Nevertheless, to the extent that civil and criminal depositions can be compared, it should be considered that Florida's circuit courts have ruled that civil depositions are open. Withlacoochee v. Seminole Electric, 8 Media L. Rep. (BNA) 1281 (Fla. 13th Cir. 1982); Johnson v. Broward County, 7 Media L. Rep. (BNA) 2125 (Fla. 17th Cir. 1981); Cazarez v. Church of Scientology, 6 Media L. Rep. (BNA) 2109 (13th Cir. 1980). The Florida decisions are consistent with various federal decisions which have held "[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying public access to the proceedings." American Telephone and Telegraph Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1979) cert. denied, 99 S. Ct. 1533 (1979) See also Tavoulareas v. Washington Post Co., 737 F.2d 1170, 1171-72 (D.C. Cir. 1984); In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984); In re San Juan Star Co., 662 F.2d 108, 114 (1st Cir. 1981); Wills v. American Medical Association, 635 F.2d 1295 (7th Cir. 1981); In re Halkin, 598 F.2d 176, 191 (D.C. Cir. 1979).

criminal cases has the potential to cause lawyers, parties, witnesses, and judges some inconveniences, the Fourth District's articulated fears regarding the "practical implications" of such attendance are unfounded.[33] Furthermore, closure of all depositions in criminal cases would not even resolve the problems which the Fourth District perceived deposition access would create. And, the problems created by deposition access certainly do not warrant a blanket ban on access to all pretrial criminal depositions.

a. Press and Public Attendance of Depositions Will Not Cause Substantial Inconvenience to Lawyers or Litigants

The plurality argues that "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 . . ." 471 So.2d at 579.

That certainly didn't happen here. At first, the depositions were noticed, the counsel for the parties, the witness and a reporter who had inspected the court file, appeared at the designated time and place. There were no space limitation problems.

---

33. Indeed, the Fourth District's opinion concedes that if access is "constitutionally mandated," 471 So.2d at 578, then the "practical implications" would not prevail. Not only do these considerations not rise to a level to overcome constitutional interests, they offer virtually no obstacle.

The reasonable notice issue is illusory. Most depositions are held at the time and place which is designated in the court file. Holding that the press and public cannot arbitrarily be excluded from depositions would require the parties to provide the press with no more notice than the rules of procedure now require -- the filing of a notice of taking deposition with the court. In the event that a deposition were taken on unusually short notice, as sometimes is necessary, the burden would be on the press to discover this. As long as the parties are not permitted to deliberately conceal the times and places of depositions and are required to comply with the rules of procedure, the press and public cannot complain that notice is unreasonable.

The problem with space limitations similarly is unreal. Most depositions are routine and unlikely to attract press attention. Those few that do are found in newsworthy cases and there will be press attention throughout the proceeding. It is naive to think that attendance at depositions adds appreciably to any discomfort of participants.

Most depositions in cases of this kind are held at the courthouse. In those instances where counsel, for their own convenience, hold a deposition in a private law office, it is not too much to ask that members of the press or public be allowed to attend. Any lawyer who objects to such attendance can utilize space the public has made available at the courthouse.

Space problems and logistics may well be present in connection with the newsworthy case. Those problems could be solved by use of a television monitor outside the deposition room or simply by using a larger room. Such efforts are a small price to pay for public participation in the judicial system. Significantly, logistics were not a problem in the Bundy, Diggs, Sanchez, Hodges, and O'Dowd trials referred to above.

b. Closure of All Depositions will not Solve the Problems Which the Fourth District Finds Deposition Access Creates

The Fourth District plurality argued that its conclusion was essential because counsel cannot know in advance what testimony will be adduced at a deposition and therefore any standard governing attendance of the press or public at a deposition would be unworkable and impossible to apply. The opinion states the press and public always should be excluded because "how can he [defense counsel] 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?"

This contention is illogical for several reasons. First, the witness is free to grant the media an interview and disseminate the identical information outside the deposition. The adverse party can release the information or simply file the transcript in the Court file. The contention also ignores that untranscribed reporters' notes are a public record pursuant to Chap. 119, Florida Statutes. See Point I, supra. It further

ignores the fact that witness statements taken by the prosecution and given the defense in discovery are public under the public records law. These ex parte statements obviously have more potential for creating publicity adverse to the defense than a deposition with the protection afforded by the adversary system.

In addition, evidence gained in discovery -- including the most sensitive information -- routinely becomes the subject of pretrial hearings. These hearings without question cannot be closed unless the party seeking closure meets the constitutional and common law standards.

Perhaps more importantly, the Fourth District's conclusion regarding the "practical implications" of permitting the public and the press to attend depositions, overlooks existing mechanisms whereby a party or deponent's legitimate interests can be protected. These mechanisms offer effective protection to alleviate specific problems, instead of the blunderbuss approach of a closed proceeding.

The adversarial nature of a deposition allows objections to be made and, under supervision of the trial court, protective orders can be granted in appropriate circumstances. This was the procedure which the parties followed in Seattle Times Co. v. Rhinehart, ____ U.S. ____, 81 L.Ed.2d 17 (1984), a decision erroneously cited by the Burk plurality as authority for a blanket ban on access to depositions. The Rhinehart case in fact demonstrates how protective orders may be properly used to balance conflicting constitutional interests.

c. The Minor Inconveniences Caused by Access to Some Depositions Does not Warrant Closure of All Depositions

As a final point, the Fourth District plurality argues that if media access is allowed it is predictable that there will be disagreement between counsel as to the terms of it requiring resolution by the court. "This will require hearing, notice, counsel, orders, and the whole panoply . . . impos[ing] an additional work load on the judges . . ." 471 So.2d at 579.

There may be a slight increase in judicial workload, although the experience prior to Burk belies much of a burden. The Court is urged not to utilize this possibility as a basis for a blanket ban on public access.

B. The Fourth District's Opinion is Contrary to this Court's Commitment to Open Government

Wholly apart from constitutional principles, the Fourth District's opinion can only be viewed as inconsistent with this state's tradition of open government, particularly in the courts.[34] No aspect of Florida public policy is more pervasive than the movement towards open government which has occupied Floridians for over two decades and which is commonly believed to be essential to responsive and democratic government. The Florida Sunshine Law, Public Records Law, Campaign Finance Law, Financial Disclosure Law, each has a foundation in the belief

---

34. This point is discussed more extensively in the briefs filed by the News & Sun Sentinel Company and the Times Publishing Company.

that openness in government increases citizen participation and acts as a check upon abuse of powers.

The openness of Florida government unquestionably extends to all phases of the judicial process. In 1976, the voters adopted a constitutional amendment which opened judicial discipline proceedings, Fla. Const. art. V, sec. 12(d). Long before the United States Supreme Court's decision in Richmond Newspapers, supra, this Court stated in State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1977):

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

In Miami Herald Publishing Co. v. Lewis, supra, although declining to apply first amendment principles, this Court did not hesitate in making the policy choice that "judicial proceedings" would be presumptively open,[35] stating:

> [A] concern for open government is not new to us, nor is the policy of open government to the judicial branch.

---

35. Depositions can and have been characterized as "judicial proceedings." Florida Rule of Judicial Administration

(Footnote continued on next page)

* * *

> Public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. . . . Such access gives the assurance that the proceedings were conducted fairly to all concerned. . . . Aside from any beneficial consequences which flow from having open courts, the people have a right to know what occurs in the courts. The Supreme Court of the United States has noted repeatedly that a trial is a public event. What transpires in the courtroom is public property. . . . Public access also serves as a check on corrupt practices by exposing the judicial process to public scrutiny, and

---

(Footnote continued from previous page)

2.070(f), states, "Transcripts of all judicial proceedings, including depositions, shall be uniform in and for all courts throughout the state." (Emphasis added). In addition, Florida's District Courts of Appeal have held depositions are indeed "judicial proceedings." See, e.g., Jamason v. Palm Beach Newspapers, Inc., 450 So.2d 1130 (Fla. 4th DCA 1984)(affirming a summary judgment for a newspaper in a libel case because all the newspaper had done was quote testimony from a deposition); Sussman v. Damian, 355 So.2d 809 (Fla. 3d DCA 1977)(qualified privilege against defamation applicable in judicial proceedings applies to statements in depositions). But see Tallahassee Democrat, Inc. v. Willis, supra, (stating in dicta "a deposition itself can hardly be categorized as a judicial proceeding"); Ocala Star Banner v. Sturgis, supra, (relying on the Willis dicta). Both the Willis and Sturgis cases invalidated attempts to seal all deposition transcripts filed with the court. Chief Judge Anstead, dissenting from the Burk decision, criticized the majority for coming to the conclusion that depositions are not "judicial proceedings." "Tell that to someone being tried for perjury or to someone seeking a qualified or absolute privilege in a defamation action," he wrote. 471 So.2d at 582. "Depositions 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." Id.

> protects the rights of the accused to a fair trial. . . . 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.
>
> 426 So.2d at 6.

The Lewis Court then proceeded to articulate this three-pronged test for determining the circumstances which would justify an order closing a pretrial hearing:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.
>
> 426 So.2d at 6.

In permitting cameras in Florida courts, the Court stated: "The prime motivating consideration prompting our conclusion is this state's commitment to open government." In re Petition of Post-Newsweek Stations Florida, Inc., 370 So.2d 764, 780 (Fla. 1979). Concerned that "[i]n a democracy, no portion of a government should be a mystery. But what may be called 'courthouse government' still is mysterious to most of the laity," the Court took the bold, at the time, step of

permitting electronic access, stating:

> We have no need to hide our bench and bar under a basket. Ventilating the judicial process, we submit will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system.
>
> 370 So.2d at 781.

As an important part of the criminal process, access to depositions serves these same policy objectives. And unlike the novel experiment of electronic access where the Court was "not unmindful of the perceived risks articulated by the opponents of change," access to depositions has been permitted for years. In light of previous decisions of this Court, and the traditional openness of the Florida justice system, the District Court decision which permits denial of access at the unbridled whim of a party, is thoroughly illogical.

In disregard of the presumption of openness and the three-pronged test this Court established in Lewis for determining whether pretrial proceedings may be closed, the parties below obtained an order banning press access to all of the depositions and unfiled deposition transcripts in this case. The order was not based on any articulated findings that it was necessary to serve any purpose whatsoever. Therefore, it should have been reversed by the Fourth District Court of Appeal.

C. The Florida Rules of Procedure Provide the Mechanism Which Courts Should Use to Balance Conflicting Interests

The Florida Rules of Civil and Criminal Procedure provide the procedural device which trial courts should use to

balance a party's interest in secrecy against the societal benefit of conducting all phases of the judicial process openly.[36]

The rules directing parties to file notices of taking depositions is sufficient to place reporters and the public on notice that a deposition is about to be taken.[37] The rules regarding protective orders properly place the burden on the party seeking to limit deposition attendance to show "good cause" for the order.[38]

In Short v. Gaylord Broadcasting Co.. 462 So.2d 591 (Fla. 2d DCA 1985), the Second District upheld a trial court's order permitting media attendance at a deposition in a criminal case, holding "The rule places the burden of obtaining a protective order on the person or party seeking to limit attendance at a deposition." Id. at 592.

The rules of procedure do not, however, give substance to the "good cause" requirement. The decisions of the United States Supreme Court and this Court provide the substantive

---

36. This point is addressed more extensively in the brief submitted by The Miami Herald Publishing Company.

37. Florida Rule of Criminal Procedure 3.220(d) provides the "party taking the deposition shall give written notice to each other party" stating "the time and place the deposition is to be taken and the name of each person to be examined." Rule 3.030(c) provides that "all original papers, copies of which are required to be served upon parties, must be filed with the court either before service or immediately thereafter."

38. Florida Rule of Civil Procedure 1.280(c) provides when a party seeks to limit the persons who may attend a deposition then that party must obtain a court order and may do so only for "good cause shown."

definition of the scope of the right of access. Thus, consistent with first amendment principles, "good cause" for closure or for an order sealing unfiled transcripts exists only if there are compelling governmental interests supporting the exclusion of the public. Consistent with this Court's decision in Lewis, interests should be deemed sufficiently "compelling" to warrant closure only if the three-pronged Lewis test can be met by the moving party.

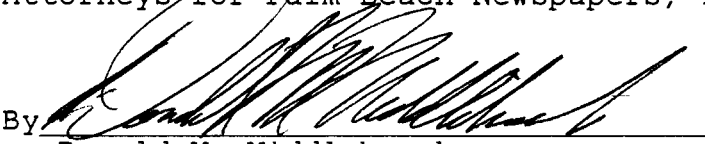
In this case, the trial court erred in not even requiring the state or the defendant to make any evidentiary showing to demonstrate the need for closure before he entered an order which excluded the press and public from all depositions and sealed all unfiled deposition transcripts.

CONCLUSION

The decision of the Fourth District Court of Appeal should be quashed and a judgment should be directed for the petitioners.

Respectfully submitted,

STEEL HECTOR & DAVIS
Attorneys for Palm Beach Newspapers, Inc.

By 

Donald M. Middlebrooks
L. Martin Reeder, Jr.
Thomas R. Julin
Norman Davis
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was mailed September 17, 1985, to:

Ray Ferrero, Jr.
Wilton L. Strickland
Ricki Tannen
707 S.E. 3rd Avenue, 6th Floor
Fort Lauderdale, FL 33316

Richard J. Ovelmen
One Herald Plaza
Miami, Florida 33101

Richard A. Sharpstein
Janice B. Sharpstein
3043 Grand Avenue PH 1
Coconut Grive, FL 33133

George Rahdert
233 3rd Street, N.
St. Petersburg, FL 33701

Jim Smith
The Capitol
Tallahassee, FL 32304

Sarah Mayer
Room 204, Elisha Newton Dimick Building
111 Georgia Avenue
West Palm Beach, Florida 33401

Carl Weinberg
620 Broward County Courthouse
201 Southeast Sixth Street
Fort Lauderdale, Florida 33301

Margaret Good
224 Datura Street
West Palm Beach, Florida 33401

Sanford Bohrer
4900 Southeast Financial Center
Miami, Florida 33131

Thomas R. Julin