(Not printed Rec. Br. 9-19-85)

29

IN THE
SUPREME COURT OF THE STATE
OF FLORIDA

FILED
SID J. WHITE
OCT 8 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

Case No. 67,352

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

vs.

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

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

RICHARD J. OVELMEN
General Counsel
The Miami Herald
Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

THOMSON ZEDER BOHRER
WERTH ADORNO & RAZOOK
PARKER D. THOMSON
SANFORD L. BOHRER
JEROLD I. BUDNEY
4900 Southeast Financial
Center
200 South Biscayne
Boulevard
Miami, Florida 33131-2363
(305) 350-7200

SHARPSTEIN & SHARPSTEIN,
P.A.
JANICE BURTON SHARPSTEIN
LAURA BESVINICK
3043 Grand Avenue
Penthouse One
Coconut Grove, Florida 33133
(305) 442-8100

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

United States Constitution

Federal Rules of Civil Procedure

Congressional Hearings

Florida Statutes

Florida Rules of Civil Procedure

Florida Rules of Criminal Procedure

Florida Rules of Judicial Administration

Other Authorities

STATEMENT OF CERTIFIED ISSUES

I. IS THE PRESS ENTITLED TO NOTICE AND THE OPPORTUNITY AND RIGHT TO ATTEND PRE-TRIAL DISCOVERY DEPOSITIONS IN A CRIMINAL CASE?

II. 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 COURT OR THE JUDGE?

STATEMENT OF THE FACTS AND THE CASE

Petitioner The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., adopts the Statement of the Facts and Case submitted by Petitioner Palm Beach Newspapers, Inc. in its Initial Brief.

SUMMARY OF ARGUMENT

In the *en banc* decision of the Fourth District Court of Appeal, a bare majority of five judges ("the *Burk* majority") held that the parties to a criminal prosecution wield absolute power to exclude the public from criminal depositions. The *Burk* majority further held that either the state or the defense may arbitrarily withhold from the public all transcripts of depositions unless they are filed with the court. In so holding, the *Burk* majority disregarded the explicit language of Rule 1.280(c) which provides that attendance at depositions may be limited only by order of a court and that such limitations must be for a "good cause shown."

The *Burk* majority was without authority to ignore the Rule. Moreover, this holding is contrary to all prior Florida appellate precedent and virtually all federal cases construing the identical language. The *Burk* majority abandoned the clear intent of the drafters of the Rules, as evidenced by the proceedings of the committee which actually wrote the discovery rules.

Because the *Burk* majority failed to apply the "good cause" standard, it must be reversed. In so doing, this Court should advise the bench and bar as to the criteria necessary for making a showing of "good cause" to close a criminal deposition. Those criteria should be consistent

with (i) the general requirements for closing criminal proceedings under the First Amendment and (ii) Florida's fundamental commitment to an open judicial system.

The United States Supreme Court has now recognized that the First Amendment affords the public a qualified right of access to criminal proceedings. This qualified right of access applies to Florida's criminal depositions because testimony in criminal cases historically has been taken only in public, and because access to criminal depositions provides the public with information relevant to informed discussion of the criminal justice system. Public access to criminal depositions is particularly important to Floridians since 97% of all criminal proceedings never reach trial. The criminal deposition is often the predicate for plea bargains, *nolle prosequi,* dismissals, and other pretrial dispositions. It is usually the only sworn testimony taken by adversary proceeding in the case. Under these circumstances the same considerations which support open trials apply to criminal depositions.

To be consistent with the First Amendment, a protective order excluding the public from a criminal deposition can be issued only after notice and hearing, and must be based on a "compelling" or "overriding" interest, narrowly drawn, and its need must be articulated in findings by the trial court.

Even were the First Amendment not to apply to closures of criminal depositions, Florida's commitment to an open judicial process would require that the public be excluded only where the party seeking closure has met the three part test adopted by this Court in *Miami Herald Publishing Company v. Lewis,* 426 So.2d 1 (1982).

ARGUMENT

I. THE FOURTH DISTRICT'S HOLDING THAT THE PUBLIC MAY BE EXCLUDED ARBITRARILY FROM ALL CRIMINAL DEPOSITIONS VIOLATES RULE 3.220 AND RULE 1.280(c) WHICH AFFORD THE PUBLIC A PRESUMPTIVE RIGHT OF ACCESS WHICH MAY BE OVERCOME ONLY BY A SHOWING OF "GOOD CAUSE"

The *Burk* majority held that each party to a criminal case has the absolute power to arbitrarily exclude the public from any deposition taken in a criminal case, irrespective of the reason for the closure. Thus, our system of pretrial discovery, created for the express purpose of freeing the legal process of harmful secrecy, has become an instrument for cloaking the criminal justice process from public scrutiny. *Palm Beach Newspapers v. Burk,* 471 So.2d 571 (Fla. 4th DCA 1985).

The *Burk* majority responded to the arguments raised in the dissents by stating that, although it had "searched the Rules," it had found no right of the public to attend criminal depositions. *Id.* at 579-80 n.4. The *Burk* majority acknowledged that Rule 1.280(c)(5), Florida Rules of Civil Procedure, *requires* a showing of "good cause" before a court can order "that discovery be conducted with no one present except persons designated by the court," but it decided without reference to any authority that this rule should "be limited to instances where the parties do not agree and there is controversy between them as to whom may be present." *Id.* The majority explicitly refused to give the Rule its clear meaning, that "everybody, public and press, are entitled *ipso facto* to attend unless the

court orders otherwise." *Id.* at 579-80 n.4. While commenting that the Rule "must be amended" to authorize public access to depositions, the *Burk* majority itself actually amended the Rules to prohibit public access by eliminating the "good cause" requirement.

The *Burk* court's construction of the Rules is incorrect on three fundamental grounds. It is contrary to the explicit language of the Rules, it ignores both Florida and federal precedent construing this language, and it is contrary to the intent of the draftsmen of the Rules. There is no legal authority for the assertion that pretrial discovery can be closed to public scrutiny upon the mere whim of any party. Because the Fourth District so held, it must be reversed.

A. By Their Express Language The Rules Of Procedure Preclude Exclusion Of The Public From Criminal Depositions Absent A Showing Of "Good Cause"

Rule 3.220(d), Florida Rules of Criminal Procedure, unequivocally states that the procedure for taking depositions in criminal cases "including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure."

Protective orders in criminal cases are thus controlled by Rule 1.280(c), Florida Rules of Civil Procedure, which provides:

> Protective Orders. *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 or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: . . . (5) *that discovery be conducted with no one present except persons designated by the court;* (emphasis added).

The plain language of Rule 1.280(c) makes it abundantly clear that *only* a court may limit attendance at a deposition and that such a limitation may be imposed *only* upon a showing of "good cause." As all Florida courts are bound to follow the explicit language of the Rules, *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867, 870 (Fla. 1st DCA 1979), the *Burk* majority erred when it failed to do so. The Rule recognizes, unlike the *Burk* majority, that the public's legitimate interest in monitoring a criminal deposition may not be shared by all of the parties to the prosecution.

B. Both Florida And Federal Cases Construing The Rules Recognize The Presumption Of Access

Prior to the *Burk* decision, Florida and federal courts interpreting the discovery rules almost without exception held that the rules create a presumption of openness, mandating that absent entry of a protective order restricting access for "good cause shown," discovery is and ought to be public. The *Burk* majority disregarded this authority.

1. Until *Burk*, Florida Cases Uniformly Recognized The Public Could Be Excluded From Criminal Depositions Only For "Good Cause" Shown

The most recent Florida appellate court to address the issue prior to the *Burk* court squarely held that depositions in criminal cases could be closed to the public only for "good cause" shown. *Short v. Gaylord Broad-*

casting Co., 462 So.2d 591 (Fla. 2d DCA 1985). In *Short*, the defendant sought to restrict attendance at depositions in his case on the grounds that the potential publicity caused would deprive him of his fair trial right. In affirming the trial court's decision not to exclude the public, the Second District wrote:

> [Rule 1.280(c)] gives the trial court control over who may or may not attend depositions; the court's discretion is limited only by the standard "for good cause shown." The rule places the burden of obtaining a protective order on the person or party seeking to limit attendance at a deposition.

Id. at 592.

The *Burk* majority was aware of the *Short* decision, but made no attempt to distinguish it. The *Burk* court simply "decline[d] to accept or follow the precedent," 471 So.2d at 574 n.2, claiming instead to rely on *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979) ("*Willis*"), and *Ocala Star Banner Corp. v. Sturgis*, 388 So.2d 1367 (Fla. 5th DCA 1980) ("*Sturgis*"). 471 So.2d at 574, n.2. This is error. Both *Willis* and *Sturgis* explicitly acknowledge the presumption of access under the Rules and endorse the "good cause" requirement. Both cases hold that, although the right of the press to attend pretrial discovery depositions is not absolute, it may properly be regulated only by the court pursuant to a "good cause" showing under Rule 1.280(c). Thus the bare majority of the Fourth District is alone in allowing the arbitrary and blanket exclusion of the public and press from criminal depositions. *Willis* and *Sturgis* are authority *contrary* to its position.

While quoting extensively from *dicta* in *Willis* opining that a deposition is not a "judicial proceeding," the *Burk* court ignored the actual holding of *Willis*. The *Willis* court set aside an administrative order sealing all depositions in civil and criminal cases. Holding itself constrained to do so by Rule 1.280(c), *Willis* held:

> [I]n the absence of a court order sealing the deposition, or some provision of law requiring the same to remain confidential, the press may not be excluded from reading, copying, and reporting the contents of a deposition.

Willis, 370 So.2d at 870-71. The *Willis* language cited by the *Burk* majority distinguishing between depositions and "judicial proceedings" is irrelevant. The *Willis* court explicitly held that Rule 1.280(c) is the mandatory procedure to be followed before the public may be excluded from attending any particular deposition:

> Counsel for petitioners have furnished us no authority that would preclude a trial court from exercising the power to seal a deposition under Rule 1.280(c), nor, for that matter, in a proper case order that the deposition be taken with no one present except persons designated by the court, as well as to enter any other protective order permitted by the rules.

Willis, 370 So.2d at 872. Contrary to the *Willis* opinion, the *Burk* majority would allow the parties to usurp the judicial function and arbitrarily decide which depositions should be open.

Sturgis, cited by the *Burk* majority in its discussion of *Willis*, makes the same point: access to depositions is properly regulated through the case-by-case adjudication of the Rule 1.280(c) "good cause" standard. In *Sturgis*, the court quashed an order sealing all discovery in a criminal prosecution on the grounds that the order was overbroad.

The court squarely held that the public's right to attend depositions could only be restricted by the court if the requirements of the Rule have been satisfied:

> We therefore conclude that the press does not have the *absolute* right to attend the taking of a deposition, that its presence may be regulated by the court under Rule 1.280(c). . . .

Sturgis, 388 So.2d at 1371 (emphasis added).

2. Federal Precedent Construing The Discovery Rules Recognizes They Create A Presumptive Right Of Access

As the Committee Note to Rule 1.280 indicates, "the Rule is derived from FR 26." In fact, the language of Rule 1.280(c) is essentially identical to Rule 26(c), Fed. R.Civ.P., on which the Florida Rule was modeled. Thus, in interpreting the Florida Rule, this Court may rely on cases construing the federal, as well as the Florida rule. *Willis*, 370 So.2d at 869.

Cases interpreting the *federal* protective order provision also recognize that, "[a]s a general rule, pretrial discovery must take place in the public eye unless compelling reasons exist for denying public access." *Broan Mfg. Co., Inc. v. Westinghouse Electric Corp.*, 101 F.R.D. 773, 774 (E. D. Wis. June 1, 1984); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. Dec. 3, 1981). "A statutory presumption of openness for discovery materials, even those not used at trial, derives from the Federal Rules of Civil Procedure." *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1015 (D.C. Cir.), *vacated and remanded on other grounds*, 737 F.2d 1170 (1984) (*en banc*). In fact, federal courts have been "virtually unanimous" in concluding that the rules presume openness independent of any general common law or constitutional access right. 724 F.2d at 1015 n.10; *see, e.g., National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Broan Manufacturing Co., Inc. v. Westinghouse Electric Corp., supra*, 101 F.R.D. 773; *Waelde v. Merck, Sharp & Dohme, supra*, 94 F.R.D. 27; *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. March 13, 1980); *Essex Wire Corp. v. Eastern Electric Sales Corp.*, 48 F.R.D. 308 (E.D. Pa. Nov. 14, 1969).[1]

C. The Unmistakable Intent Of The Drafters Of The Rules Of Procedure Was To Provide The Public With Presumptive Access To Discovery Depositions

On June 19, 1934, Congress enacted the enabling statute authorizing the Supreme Court to prescribe a set of general procedural rules for the district courts of the United States. In drafting the rules, the Advisory Committee appointed by the Court drew from existing procedure in the federal courts, the states, Great Britain and abroad. Yet many of the most far-reaching and important of the advances made by the new rules were unprecedented. *See* Holtzoff, Origin and Sources of the Federal Rules of Civil Procedure, 30 N.Y.U. L. Rev. 1058, 1059-60 (1955). Perhaps the greatest innovation was the creation of a com-

---

1. The *Burk* majority rejects the federal rule because "it cites no authority." 471 So.2d at 579 n.4. But this is incorrect; the federal cases rely on the explicit language of Rule 26(c), Federal Rules of Civil Procedure. It is, ironically, the *Burk* majority which can cite no authority.

prehensive system of pretrial discovery rules.[2] And "probably the biggest single advance" was the new deposition procedure. *Id.* at 1072.

The Advisory Committee clearly intended to eliminate secrecy and trial by ambush and to create a "complete and untrammeled right of discovery."[3] The drafters' own comments indicate a desire to move the focus of the judicial process forward—into the newly-created discovery phase—and away from trial. But the drafters did not intend that public access to the judicial process be diminished. The minutes of the Committee's meetings reveal that the drafters explicitly considered the question of public access in light of the new provisions for expansive pretrial discovery. They show that the drafters presumed that public access to the judicial process would continue and extend to the pretrial discovery phase as it always had to the trial itself.

To prevent abuses of the discovery process by lawyers, including the artifice of taking discovery depositions calculated only to embarrass the deponent or a party through re-publication by the press of the testimony adduced at

2. Florida first provided for the taking of depositions for discovery purposes in 1947. New Statute, Section 91.30, Florida Statutes, provided:

> (1) Depositions in chancery and civil cases in the courts of this state may be taken and used under the same circumstances and conditions and for the same purposes and according to the same procedure that depositions are permitted to be taken and used in the district court of the United States under and pursuant to the federal rules of civil procedure.

Prior to the passage of that Statute, there was *no* discovery provided in the Florida rules. As the Statute makes clear, its purpose was to extend discovery in Florida to the limits of the federal rules. The history of the federal rules recounted here is thus equally applicable to the Florida Rules.

3. All relevant draft rules and Committee meeting minutes are included in the Appendix to this Brief. Reference will be made to pages in the Appendix as "(A. #)."

deposition, the Committee developed a procedural mechanism enabling courts to limit attendance where "good cause" for such restriction was shown. It was to this end that the provision here at issue—the "protective order"—was created. The Committee thus created a presumptively open pretrial system, which could nevertheless be closed on a showing of abuse.

1. The Purpose Of The New Discovery Rules Was To Facilitate Preparation For Trial By Providing Pretrial Access To The Information Formally Adduced At A Public Trial

With the new discovery rules, the Advisory Committee intended to reshape the judicial process. Prior to development of the rules, the pleadings of the parties constituted the sole foundation for trial. Whatever the parties asserted or denied in their pleadings was taken at face value. Whether these assertions or denials had any basis in fact could not be determined before trial. Only at trial did the facts of the case surface. Moreover, once at trial, a party could take any position among the broad range he may have claimed in his pleadings. In short, the trial was everything, but the parties were virtually powerless to prepare for it. *See* Sunderland, Discovery Before Trial Under The New Federal Rules, 15 Tenn. L. Rev. 737, 737-39 (1939).

Edson Sunderland, the primary drafter of the discovery rules, wrote in the Forward to George Ragland's seminal book on pretrial discovery:

> False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial. Under such a system the

merits of controversies are imperfectly understood by the parties, inadequately presented to the courts, and too often fail to exert a controlling influence upon the final judgment.

See G. Ragland, Discovery Before Trial, iii (1932).

To meet these problems, the authors drafted the federal rules with the conscious intent to shift the fact-finding aspect of the trial to the earlier, pretrial phase of the judicial process. The federal rules were intended to produce full disclosure of all potentially relevant information, *see Equal Employment Opportunity Commission v. St. Francis Community Hospital,* 70 F.R.D. 592, 594 (D.S.C. March 2, 1976) (citing *Burns v. Thiokol Chemical Corp.,* 483 F.2d 300, 307 (5th Cir. 1973)); *Zucker v. Sable,* 72 F.R.D. 1, 2 (S.D.N.Y. July 11, 1975), and they were intended to create an open forum to provide access to the information, *see Pierson v. United States,* 428 F.Supp. 384 (D. Del. 1977), *Koster v. Chase Manhattan Bank,* 93 F.R.D. 471 (S.D.N.Y. Feb. 1, 1982).

The underlying principle for this pretrial disclosure was two-fold. First, it remedied the existing trial by ambush which was contrary to the aims of justice. *McClain v. Mack Trucks, Inc.,* 85 F.R.D. 53 (E.D. Pa. Dec. 12, 1979). Second, it promoted judicial economy. Informed participants were expected to have a more realistic view of the worth of their claims and judges would be able to make more accurate and expeditious rulings. *Folding Cartons, Inc. v. American Can Co.,* 79 F.R.D. 698 (N.D. Ill. Sept. 20, 1978). As stated in *United States v. Brown,* 349 F.Supp. 420, 429 (N.D. Ill. 1972), *modified on other grounds,* 478 F.2d 1038 (7th Cir. 1973), "the underlying purpose of discovery is to escape from the sporting theory of litigation toward the principle of an open proceeding in which surprise is minimized and the opposing legal and factual positions are fully clarified for the enlightenment of the decision-maker."

The discovery rules were created and consistently interpreted to facilitate the open and informed administration of justice, *not* to move it behind closed doors.

2. The Authors Of The Rules Explicitly Intended The Public To Have Access To Depositions, Absent A Showing Of "Good Cause" For Closure

When first drafted by Sunderland and approved by the Advisory Committee, the discovery rules gave parties an almost unlimited deposition right. They could depose anyone relevant to the cause, including their opponent. *See* Rule 31, Preliminary Draft of the Federal Rules of Civil Procedure (May, 1936). (A. 2).

The only exceptions to this otherwise unrestricted right to take depositions applied when the individual deposed was one of the parties (or an agent of one of the parties). Rule 32(b) allowed the party-deponent, on a showing of "good cause," to request that his deposition be taken before a master. Rule 32(b), Preliminary Draft. (A. 8). And Rule 32(c) allowed the party-deponent, when *not* before a master, to apply to the court for an order halting his deposition on a showing that the deposition was being conducted "in bad faith, or for the purpose of oppressing, annoying or embarrassing" the party-deponent. Rule 32(c), Preliminary Draft. (A. 9).

Both the Committee Note to Rule 32 and the minutes of the Committee's meeting make clear the purpose of the rule. The Note states:

> The provision for reference to a master is for the purpose of protecting parties from oppression in cases where there is reason to believe that the examination is likely to include matters not properly subject to discovery. It is introduced as a safeguard on account of the unlimited right of discovery given by Rule 31.

Rule 32, Note, Preliminary Draft. (A. 9). The Committee thought that the right to depose the adverse party might be abused and so it devised a limited form of protection available only to party-deponents.

The precise nature of the Committee's concern is apparent in the meeting held prior to the publication of the Preliminary Draft. As the minutes of the Committee meeting make clear, certain members feared that suits might be brought purely for the sake of obtaining the right to depose the adverse party and publicly ventilate facts embarrassing to him:

> Mr. Pepper. Mr. Chairman, I am not worried about the fishing-expedition aspect of this thing, but, in the part of the country I come from, I know perfectly well that this sort of power given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever—the president of some important company, the president of a utilities company or a bank or something. You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.

> The Chairman. It is too much like some of these Senate committees you used to sit on. (Laughter)
>
> Mr. Pepper. Exactly; and that is where I got a taste of the kind of lawlessness that ruins people's reputations without the opportunity ever to redress the harm that is done.
>
> I do not think there is anything worse than the use of judicial proceedings for the creation of a forum from which, through the newspapers, to harangue the public. The defendant is perfectly helpless. There is no restraint upon the examination.

Minutes of Advisory Committee Meeting (Feb. 22, 1936). (A. 13-14).

The principal draftsman explicitly expressed his belief that the Constitution would require the taking of sworn testimony prior to trial to be presumptively open to the press. But he also realized that abuses of the discovery process could occur and some procedural mechanism was needed so that the courts could deal with them:

> Mr. Sunderland. The particular difficulty you suggested, Senator, by way of publicity as a result of the discovery examination, is one that does not actually occur very often, but I think it should be provided against by a rule that upon the request of either party the officer taking the deposition should exclude from the room where the deposition is being taken all persons not immediately concerned with the taking of it.
>
> Mr. Pepper. Our judges would never make a rule like that.

Mr. Morgan. Is not the protection the one Judge Olney spoke of? If the questions are impertinent and do not relate to the merits, if it is the adverse party counsel will tell him not to answer, and then the only way you can determine whether or not he has to answer is by an application to the court for an order to compel him to answer. Then the whole thing will be threshed out before the court, and no answer will be given until the court orders him to answer. There the whole thing can be handled that way to protect against abuse. Certainly if I were appearing for an adverse party he would not answer if the questions got out of bounds, until the court told him he had to.

Mr. Pepper. Of course, there is a lot in that. It is all a question of whether the thing is going to work out happily and decently, and in sportsmanlike fashion, the way it evidently does in California, or whether it is going to work out along some such lines as I perhaps mistakenly apprehend.

But if it works out the way I venture to apprehend, the publicity is: "Important Question Asked of President of X.Y.Z. Company. Corporation Attorney Instructs Witness Not to Answer."

Where are the liberties of the citizen, and all that? That is what you get in the newspaper the next day, and it is a lot worse than if you answered, because the question might be susceptible of being answered No.

Mr. Dodge. I am not accustomed to having depositions taken in public.

Mr. Pepper. They always are with us.

The Chairman. Is that not a Constitutional requirement?

Minutes of Advisory Committee Meeting (Feb. 22, 1936). (A. 16-17).

As these excerpts from the Advisory Committee meeting make quite clear, the drafters provided for a virtually unlimited deposition right with full knowledge of the fact that the depositions taken would be open for all to attend and see. The presumption of access that underlies the discovery rules could not be more plainly stated. However, the draftsmen, in their wisdom, recognized that such a system could be abused and determined to provide litigants with a procedural vehicle for limiting access when "good cause" was shown.

3. The Protective Order Provision Was Drafted Specifically To Regulate Public Attendance At Depositions

The Preliminary Draft of the rules was published in May, 1936, and the Advisory Committee solicited comments from lawyers and bar associations across the country. As the Committee had anticipated, the new discovery rules were among the most controversial of the new provisions.

One comment which apparently carried great weight with the Committee concerned the "master" provision in Rule 32. The comment is reflected in the handwritten annotations of two of the primary drafters of the discovery rules: Edson Sunderland of Michigan and Edmond Morgan of Harvard. Morgan's copy of the Preliminary Draft possesses the following marginalia opposite Rule 32(b):

> Sterry: At any rate ct should have power to order dep to be taken privately and to be sealed to avoid dep for publicity only.

Notes of Edmond Morgan. (A. 20). Sunderland's copy likewise reflects a comment from Norman Sterry of Los Angeles. Sunderland, however, noted the comment in terms of a draft rule authorizing the court to order:

> in proper cases, that the examination be held behind closed doors with no one present except counsel and parties to the record and that after being sealed the deposition shall be opened only by order of the court.

Notes of Edson Sunderland. (A. 8).

When the Advisory Committee returned to its work, Rule 32 was modified to reflect the Sterry suggestion. By February, 1937, subdivision (c) of the rule, which had allowed parties to object to their questioning during deposition and to have it stopped, was extended to all deponents and moved to Rule 34. *See* Rule 34(f)(2), Preliminary Draft (Feb. 1937). (A. 25). Subdivision (b), the "master provision," was eliminated entirely. In its stead, the Committee substituted the newly-created protective order, Rule 34(f)(1):

> (f) *Orders for the Protection of Parties and Deponents.*
>
> (1) After notice is served for taking a deposition by oral examination, the court in which the action is pending, on motion of any party or of any person to be examined, seasonably made and upon notice and good cause shown, may make an order that such deposition shall not be taken, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, *or that the examination shall be held with no one present, except the parties to the record or their officers or counsel and that after being sealed the deposition shall be opened only by order of the court,* or that secret processes, developments, or research need not be disclosed or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court, or may make any other order which justice may require to protect the party or witness from annoyance, embarrassment or oppression.

Rule 34(f)(1), Preliminary Draft (Feb. 1937) (emphasis added). (A. 24-25).[4]

The evolution of the protective order provision demonstrates that the presumption of access underlying the rules is real. The drafters created a system of wide open pretrial discovery to allow for a fairer and more efficient resolution of cases. The establishment of a pretrial fact finding phase was never intended to alter or abridge the openness of the judicial process. Concerns about how pretrial discovery and access might negatively affect the process led first to the master provision and later to the protective order provision. The history recounted here plainly shows that neither of those provisions would ever have been written had the drafters not proceeded from a presumption of public access.

D. The "Good Cause Shown" Requirement Of Rule 1.280(c) Must Be Construed Consistently With The First Amendment And Florida's Commitment To A Legal System Open To Public Scrutiny

Protective orders under Rule 1.280(c) may be entered for a wide variety of purposes so long as "good

4. The protective order provision as first presented to the Advisory Committee in the preliminary draft dated May, 1936, is also included in the Appendix. *See* A. 9. Although somewhat abbreviated, it is substantially similar to the version adopted by the Committee which is quoted here.

cause" is "shown". But where they are sought to limit the public's access to criminal depositions, the criteria for establishing "good cause" must be consistent with both the requirements of the First Amendment and Florida's fundamental commitment to an open system of justice. These requirements are discussed in parts II and III, *infra*. This discussion demonstrates that where a movant is seeking to close a criminal deposition, "good cause" must be construed to embody the elements of the public's qualified First Amendment right to attend criminal proceedings and the three-part Florida closure test established by this Court in *Miami Herald v. Lewis, supra.*

II. THE ARBITRARY EXCLUSION OF THE PUBLIC FROM CRIMINAL DEPOSITIONS, IN THE ABSENCE OF ANY REQUIREMENT OF SHOWING "GOOD CAUSE," VIOLATES THE PUBLIC'S QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS TO CRIMINAL PROCEEDINGS

The *Burk* majority's holding that any party to a criminal prosecution may arbitrarily, without any showing of "good cause," or any cause, exclude the public from any criminal deposition propounds an absolutist rule which affords no weight whatsoever to the interests of anyone other than the parties to criminal prosecutions. The parties may exercise this absolute power of exclusion because, according to the *Burk* majority, the First Amendment affords the public no right at all to monitor criminal depositions.

In contrast, the press here asserts only that the public enjoys a *qualified* First Amendment right of access to criminal depositions. The role of the courts is to balance the interest of the public in monitoring the criminal justice system against those interests supporting closure. In

short, depositions may be closed to the public and press upon a "good cause" showing, where "good cause" is interpreted consistently with the qualified First Amendment right of access to criminal proceedings. Depositions may be closed and transcripts withheld where (i) the movant has shown there are "compelling reasons" for the closure, (ii) the protective order excluding the public is "narrowly drawn" so that it is no broader in scope or longer in duration than is necessary to protect the "overriding interest" of the State or a defendant supporting the closure, (iii) the protective order is based on articulated findings by the trial court, and (iv) is entered only after notice and hearing.

A. The First Amendment Affords The Public A Qualified Right Of Access To Criminal Proceedings

The First Amendment does not *literally* provide for any right of access to criminal trials or any other criminal proceedings. The right of access "is not explicitly mentioned in terms in the First Amendment." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613, 2618-19 (1982) (footnote omitted). But the United States Supreme Court has "long eschewed any 'narrow, literal conception' of the Amendment's terms, for the Framers were concerned with broad principles, and wrote against a background of shared values and practices." *Id.* at 2619 (citation omitted). It is for this reason that "[n]otwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of

proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or the Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share Constitutional protection in common with explicit guarantees." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 581 (1980) (footnote omitted). The Court has specifically held that "the First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe*, 102 S.Ct. at 2619.

One of the rights implied by the language of the First Amendment is the public's right of access to governmental proceedings which provide information relevant to informed discussions of governmental affairs. In a series of recent decisions the U.S. Supreme Court has recognized that, without a right of access to criminal proceedings, free speech about the criminal justice system would be eviscerated. The Court has specifically held that, "[u]nderlying the First Amendment right of access to criminal trials is the common understanding that a 'major purpose of that Amendment was to protect the free discussion of governmental affairs.' By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe*, 102 S.Ct. at 2619 (citations omitted). Thus, "the First Amendment embraces a right of access to trials . . . to ensure that this constitutionally protected discussion of governmental affairs is an informed one. . . ." *Id.*, and it is by now settled that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-govern-

ment. Implicit in this structural role is . . . the antecedent assumption that valuable public debate . . . must be informed." *Richmond Newspapers*, 448 U.S. at 587 (footnote and citations omitted). It is in just this way that "[t]he structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication." *Id.* at 588 (footnote omitted).

B. The Qualified First Amendment Right Of Access Applies To Depositions In Criminal Cases

The Supreme Court has itself determined that the United States Constitution affords the public a qualified right of access to: criminal trials, *Globe, supra; Richmond Newspapers, supra;* voir dire proceedings, *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984); and pretrial suppression hearings, *Waller v. Georgia*, ... U.S. ....., 104 S.Ct. 2210 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *see also infra* at 26-28. The precise issue here on appeal is whether this qualified right of access encompasses criminal depositions. The following analysis demonstrates that the public does indeed enjoy a qualified First Amendment right of access to such proceedings: "The distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." *Press-Enterprise, supra*, 104 S.Ct. at 828 (Stevens, J., concurring). The focus is whether access to criminal depositions contributes to informed discussion of the criminal justice system.

In determining whether the public should be afforded access to a particular type of criminal proceeding, the

Supreme Court has looked to two considerations: whether (i) there has been an historical presumption of the access to the proceedings at issue; and (ii) whether access would provide the public with information relevant to informed discussion of public affairs. *Press-Enterprise, supra,* 104 S.Ct. at 822-24; *Globe, supra,* 102 S.Ct. at 2619-20; *Richmond Newspapers, supra,* 448 U.S. at 564-574.

1. There Has Been An Historical Presumption Of Public Access To Criminal Depositions

With respect to the first factor, the Court has carefully reviewed the historical record as it relates to access to the type of the governmental proceeding from which the public would be excluded. For example, in considering whether the First Amendment affords the public a qualified right of access to criminal trials, the Supreme Court has weighed heavily the fact "that throughout its evolution, the trial has been open to all who care to observe." *Richmond Newspapers, supra,* 448 U.S. at 564. And the reason the Court accords importance to an historical tradition of access has been clearly stated: "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'." *Globe, supra,* 102 S.Ct. at 2619 (quoting *Richmond Newspapers, supra,* 448 U.S. at 589 (Brennan, J., concurring)). Similarly, in considering whether the public could be excluded from voir dire proceedings, the Court emphasized that "[p]ublic jury selection thus was the common practice in America when the Constitution was adopted." *Press-Enterprise, supra,* 104 S.Ct. at 823.

As has been already demonstrated (*supra* at 13-17), there has been an historical presumption of access to the taking of testimony in criminal cases. Prior to the adoption of the discovery provisions of the federal rules of procedure, testimony in criminal cases was given only at public trials. The federal rules preserved the presumption of openness for pretrial depositions, and allowed for protective orders closing them only upon a showing of "good cause." Thus, sworn testimony in criminal cases has always been presumptively open to the public.

2. Public Access To Criminal Depositions Is Essential To Informed Discussion Of The Criminal Justice System

While the historical record is important, in adjudicating First Amendment claims the Supreme Court has looked primarily to the second consideration, the "structural role" which access to criminal proceedings plays in the informed discussion of public affairs. *See, e.g., Waller v. Georgia, supra,* 104 S.Ct. 210 (1984).[5] The structural considerations which support open criminal trials, voir dire proceedings, and pretrial suppression hearings have been set forth by the Court in great detail.

Open trials give "assurance the proceedings were conducted fairly to all concerned," and deter "the misconduct of participants and decision based on secret bias or partiality." *Richmond Newspapers v. Virginia, supra,* 448 U.S. at 569. In short "[o]penness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise, supra,* 104 S.Ct. at 823. In addition to the fairness interest, open trials serve a "significant community therapeutic value." *Richmond Newspapers, supra,* 448 U.S. at 570. The commission of particularly shocking crimes engenders public outrage, and "without an aware-

5. The Supreme Court held in *Waller* that pretrial suppression hearings must be open without any reference to historical presumptions

ness 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-fury' . . . ." *Id.* at 571. Even "civilized societies . . . cannot erase from people's consciousness the fundamental, natural yearning to see justice done. . . ." *Richmond Newspapers, supra,* 448 U.S. at 571. It cannot be disputed that the "crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner." *Id.* Moreover, open trials provide the public "an opportunity both for understanding the system in general and its workings in a particular case." *Richmond Newspapers, supra,* 448 U.S. at 572. Thus, public access also serves an "educative" function. But "in the broadest terms, public 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." *Id.*

In *Waller v. Georgia, supra,* and *Press-Enterprise, supra,* the Supreme Court found these same structural considerations support open pretrial suppression hearings and public voir dire proceedings. In *Press-Enterprise,* the Court recognized that public access to the process utilized for choosing the trier of fact in a criminal case is necessary to satisfy all of the same values served by open trials. In *Waller,* the Court held that fairness, the appearance of fairness, and the deterrence of misconduct by participants "are no less pressing in a hearing to suppress wrongfully seized evidence. As several of the individual opinions in *Gannett* recognized, suppression hearings are often as important as the trial itself." *Waller, supra,* 104 S.Ct. at 2215-16. In fact, the Court acknowledged that in "*Gannett,* as in many cases, the suppression hearing was the *only* trial, because the defendants there-

after pleaded guilty pursuant to a *plea bargain.*" *Id.* at 2216 (emphasis in original).

All of the structural considerations which form the predicate of the First Amendment right of access apply with peculiar force to criminal depositions in Florida. The beginning of wisdom in understanding Florida's system of criminal justice is to grasp the simple fact that it is a *pretrial system.* The statistical records of this Court show that 97% of the criminal cases disposed of last year were by pretrial proceedings, and trials have accounted for less than 5% of criminal dispositions for many years.[6] As in *Waller,* the only sworn testimony taken in the overwhelming majority of criminal cases is at deposition, simply because the cases terminate prior to trial. Thus, each of the interests served by access to trials - fairness, appear-

---

6. According to figures provided by the Florida Supreme Court Summary Reporting Service and compiled by the State Court Administrative Office, for the past three years, more than 95% of criminal dispositions occurred without trial:

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

ance of fairness, understanding the system and the case at hand, the therapeutic value of observing the process, the deterrance of wrongdoing, and the communication of information relevant to informed discussion of the system—are served by access to criminal depositions. The Supreme Court in *Waller* observed that the need for open suppression hearings "may be particularly strong" because "[a] challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor." 104 S.Ct. at 2216. Many defense depositions do the same thing. When they lead to a plea bargain, dismissal, or *nolle prosequi,* the public must have access to the deposition to be able to understand, monitor, watchdog, and discuss in an informed manner the judicial process in general, as well as in the particular case. The First Amendment access decisions of the United States Supreme Court preclude a rule allowing parties to a criminal case to arbitrarily exclude the public from depositions.

The lower federal courts already have enforced the right in a wide variety of contexts sweeping far beyond the parameters of a criminal trial. The qualified First Amendment right of access was applied by the United States Court of Appeals for the Eleventh Circuit to civil pretrial and post-trial hearings on prison conditions and the release of prisoners, as well as to pretrial records and trial exhibits;[7] by the Second and Third Circuits to pretrial motions to suppress;[8] by the Third Circuit to a civil pretrial motion for preliminary injunction;[9] by the Fifth Circuit to a pretrial bond reduction hearing and post-trial interviews

7. *Newman v. Graddick,* 696 F.2d 796, 802 (11th Cir. 1983); *Wilson v. American Motors Corp.,* 759 F.2d 1568, 1571 (11th Cir 1985).

8. *Application of the Herald Co.,* 734 F.2d 93, 98 (2d Cir. 1984); *United States v. Criden,* 675 F.2d 550, 556-57 (3d Cir. 1982).

9. *Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059, 1071 (3d Cir. 1984).

of jurors;[10] by the Sixth Circuit to documents filed in a civil pretrial hearing on a temporary restraining order;[11] and by the Ninth Circuit to pretrial documents and proceedings.[12]

Other federal courts have applied the qualified First Amendment right of access even in non-judicial contexts, including Presidential news conferences[13] and air crash sites under the control of the National Air Transportation Safety Board.[14] The most recent federal decision to directly address the access to depositions issue held that the public and press had a "right to be present at and report on [a deposition] as to which they have expressed considerable interest," and rejected the defendant's attempt to exclude the press and public from the deposition.[15]

The qualified First Amendment right of access is not merely a qualified right to attend "trials," but rather is the public's primary means of obtaining information, and thus reassurance, about the operations of the branches of government which have been entrusted with the protection of the public welfare. A qualified right of public access to criminal depositions is the only means by which the public may monitor and understand Florida's pretrial system of criminal justice.

10. *United States v. Chagra,* 701 F.2d 354, 363 (5th Cir. 1983); *In Re Express-News Corp.,* 695 F.2d 807, 808 (5th Cir. 1982).

11. *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1177 (6th Cir. 1983).

12. *C.B.S., Inc. v. U.S. District Court,* 765 F.2d 823, 825 (9th Cir. 1985); *Associated Press v. U.S. Dist. Ct. for C.D. of Cal.,* 705 F.2d 1143, 1145 (9th Cir. 1983).

13. *Cable News Network, Inc. v. American Broadcasting Companies, Inc.,* 318 F.Supp. 1238, 1244-45 (M.D. Ga. 1981).

14. *Westinghouse Broadcasting Company, Inc. v. National Transportation Safety Board,* 8 Media L. Rep. 1177, 1184-1185 (BNA) (D.Mass. Jan. 29, 1982).

15. *United States v. Salerno,* 11 Media L. Rep. 2248 (BNA) (S.D.N.Y. June 24, 1985).

C. The Qualified First Amendment Right Of Access To Criminal Depositions May Be Overcome By A Compelling Interest, Narrowly Drawn, Which Has Been Articulated In Findings By The Trial Court

Although the public's First Amendment right of access to criminal proceedings "is of constitutional stature, it is not absolute." *Globe, supra,* 102 S.Ct. at 2620. This "qualified" constitutional right or "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise, supra,* 104 S.Ct. at 824; *Globe, supra,* 102 S.Ct. at 2621-22; *Richmond Newspapers, supra,* 448 U.S. at 580-81; *accord Waller v. Georgia, supra,* 104 S.Ct. at 2215. Thus a closure order violates the qualified First Amendment right of access unless it meets each of three requirements:

(i) The order must serve a "compelling" or "overriding" interest. *Press-Enterprise,* 104 S.Ct. at 824; *Globe,* 102 S.Ct. at 2620; *Richmond Newspapers,* 448 U.S. at 581.

(ii) The order must be narrowly drawn so that it is no broader than protection of that interest requires. *Press-Enterprise,* 104 S.Ct. at 824; *Globe,* 102 S.Ct. at 2620.

(iii) The order must be based on findings articulated by the trial court. *Globe,* 102 S.Ct. at 2621-22; *Richmond Newspapers,* 448 U.S. at 580-81.

The failure of an order to meet any one of these three elements is fatal. In *Press-Enterprise,* for example, the

privacy interests of jurors were held not sufficiently "compelling" to close the voir dire process in a capital case. The closure order was reversed. In *Richmond Newspapers,* the trial court's closure of an entire trial was reversed for failure to make specific findings which showed the need for the closure. And in *Globe* a Massachusetts statute imposing a per se closure of all testimony of minor witnesses in sex crime cases was held invalid because it was not narrowly drawn. The state interests supporting closure could not justify mandatory closure in all such cases. These are the constitutional requirements against which the Fourth District opinion must be tested.

D. The Decision Of The Fourth District Authorizing The Arbitrary Closure Of All Criminal Depositions Violates The Public's Qualified First Amendment Right Of Access

The decision of the Fourth District below obviously violates each element of the public's qualified First Amendment right of access to criminal proceedings. Since the Fourth District held that any criminal deposition could be closed without any showing having been made by any party, criminal depositions in Florida would be closed in the absence of any "compelling" or "overriding" interest supporting closure, no findings supporting closure would be articulated, and the closures would be anything but "narrowly drawn."

E. The Authority Relied Upon By The *Burk* Plurality Is Inapposite, Superseded, Or Misconstrued

In concluding that the public may be arbitrarily excluded from any criminal deposition, the *Burk* majority purported to rely on five cases. *Gannett Co., Inc. v. De-*

Pasquale, supra, 443 U.S. 368; *Tallahassee Democrat, Inc., v. Willis, supra,* 370 So.2d 867; *United States v. Gurney,* 558 F.2d 1202 (5th Cir. 1977), *cert. denied sub nom. Miami Herald Publishing Co. v. Krentzman,* 435 U.S. 968 (1978); *Seattle Times v. Rhinehart,* ..... U.S. ....., 104 S.Ct. 2199 (1984); and *Fort Myers Broadcasting Co. v. Nelson,* 460 So.2d 420 (Fla. 2d DCA 1984). Reliance on these cases is misplaced.[16]

The *Burk* majority cites language from Chief Justice Burger's concurring opinion in *Gannett* (an opinion joined by no other Justice) to the effect that there is no right of the public to attend pretrial proceedings. 471 So.2d at 574. But the *Burk* majority ignored the fact that a majority of Justices in *Gannett* reached just the opposite conclusion. The Supreme Court itself readily made this observation in the *Waller* case:

> [I]n . . . *Gannett Co. v. DePasquale,* 443 U.S. 368, 61 L.Ed.2d 608, 99 S.Ct. 2898 (1979), we considered whether this right [of access] extends to a pretrial suppression hearing. While the Court's opinion did not reach the question, *id.,* at 392, 61 L.Ed.2d 608, 99 S.Ct. 2898, a majority of Justices concluded that the public had a qualified constitutional right to attend such hearings, *id.,* at 397, 61 L.Ed.2d 608, 99 S.Ct. 2898 (Powell, J., concurring) (basing right on First Amendment); *id.,* at 406, 61 L.Ed.2d 608, 99 S.Ct. 2898 (Blackmun, J., joined by Brennan, White, and Marshall, JJ., dissenting in part) (basing right on Sixth Amendment).

104 S.Ct. at 2214-15. Judge Letts, the crucial fifth vote in the *Burk* majority has himself now recognized he was in error on this point. In *State v. Freund,* ..... So.2d .....,

16. Since the *Burk* majority's misplaced reliance on the *Willis* decision has already been addressed, it will not be repeated.

10 F.L.W. 1851 (Fla. 4th DCA July 31, 1985), Judge Letts confessed error acknowledging that "[t]he *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." 10 F.L.W. at 1851. (Letts, J., specially concurring) (citing *Waller*)."

The Fourth District also purported to rely on *United States v. Gurney, supra,* 558 F.2d 1202, even though that case was decided prior to recognition of the First Amendment right of access in *Richmond Newspapers, Globe,* and *Press-Enterprise.* In fact, *Gurney* has been superseded by several subsequent Eleventh and Fifth Circuit decisions which hold there is a qualified First Amendment right of access to pretrial proceedings. Most recently, in *Wilson v. American Motors Corp.,* 759 F.2d 1568 (11th Cir. 1985), the Eleventh Circuit reaffirmed its holding in *Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983) that hearings, depositions and conferences conducted pretrial, post-trial or during trial are subject to the qualified right of access established by the Supreme Court in *Globe*:

> We do not hold that every hearing, deposition, conference or even trial in a case of this kind must be open to the public. We do hold that "where, as in the present case, the [court] attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 at 606-607, 102 S.Ct. 2613 at 2620, 73 L.Ed.2d 248 at 257.

759 F.2d at 1571 (quoting *Newman*). *Accord United States v. Rosenthal,* 763 F.2d 1291 (11th Cir. 1985) (access to

wiretap evidence can only be curtailed if there is a showing it will interfere with the administration of justice); *United States v. Chagra,* 701 F.2d 354, 363-64 (5th Cir. 1983) ("We, therefore, agree with the Third Circuit's conclusion that 'the same societal interests . . . that mandated a first amendment right of access to criminal trials in *Richmond Newspapers* apply' to pretrial criminal proceedings, . . . and we extend this to bail reduction hearing") (citations omitted). Indeed, in *Haeberle v. Texas-International Airlines,* 739 F.2d 1019, 1021 (5th Cir. 1984) and *In Re Express-News Corp.,* 695 F.2d 807, 809-10 (5th Cir. 1982), the Fifth Circuit interpreted *Gurney* as confirming a qualified First Amendment right of access which had been overcome by a showing of threatened infringement of Sixth Amendment fair trial rights under the facts of those cases. The Fifth Circuit further held in *Express-News* that a per se blanket rule denying the public post-trial access to interview jurors violates that same qualified First Amendment right of access. 695 F.2d at 809-10.

The remaining authorities the Fourth District found "inferentially significant" included the United States Supreme Court's decision in *Seattle Times Co. v. Rhinehart, supra,* 104 S.Ct. 2199, and the Second District Court of Appeal's citation to *Rhinehart* in its one-sentence denial of a petition for certiorari in *Fort Myers Broadcasting Co. v. Nelson,* 460 So.2d 420 (Fla. 2d DCA 1984) (*"Nelson"*). Since both cases involved protective orders entered against libel defendants which were based on "good cause shown" under the state law equivalent of Rule 26(c), Federal Rules of Civil Procedure, they provide no support for the *Burk* majority's holding that criminal depositions may be closed at the whim of any party, without a "good cause" showing.

In *Rhinehart,* the plaintiff, a highly controversial religious organization, sought a protective order precluding dissemination of its membership and donor lists obtained through judicially compelled discovery, "arguing in particular that compelled production of the identities of the Foundation to donors and members would violate the first amendment rights of members and donors to privacy, freedom of religion, and freedom of association." 104 S.Ct. at 2203. The trial court initially had denied the motion for protective order because the religious organization only alleged conclusory facts in support of these claimed threats to important constitutional rights and had failed to file any supporting affidavits. *Id.* at 2204. Subsequently, the religious organization renewed its motion for protective order by filing several affidavits detailing prior instances in which public identification of some members had caused physical attacks, threats and assaults on those members, and showing it was likely that dissemination of the information at issue would again subject its members and contributors to further harassment and reprisals. *Id.* As a result, the trial court found these affidavits provided a sufficient showing of a compelling interest to support a finding of "good cause" for a protective order. The trial court narrowly tailored the protective order to cover only such information obtained solely through compelled discovery and which was not necessary to the preparation and trial of the case. *Id.* Under those circumstances, the Supreme Court held the protective order did not offend the First Amendment. *Id.* at 2209-10. Clearly, no support may be found in these cases for the absolutist position of the *Burk* majority.

III. THE DECISION BELOW IS CONTRARY TO FLORIDA'S COMMITMENT TO OPEN GOVERNMENT AS ARTICULATED BY THIS COURT IN *MIAMI HERALD* v. *LEWIS*

A. Florida's Fundamental Commitment To Open Judicial Proceedings Mandates That The *Lewis* Test Be Applied To Closures Of Criminal Depositions

This Court's commitment to a legal system open to public scrutiny extends beyond the sweep of the First Amendment and predates the decisions of the United States Supreme Court which have extended the qualified First Amendment right of access to criminal proceedings. *See, e.g., State ex rel. Miami Herald v. McIntosh,* 340 So.2d 904 (Fla. 1977) (*"McIntosh"*) (holding right of access to all judicial proceedings); *In Re Petition of Post-Newsweek Stations, Florida, Inc.,* 370 So.2d 764 (Fla. 1979) (permitting camera access even though no constitutional right to such access); *Miami Herald Publishing Company v. Lewis,* 426 So.2d 1 (Fla. 1982) (*"Lewis"*) (public access to suppression hearings granted despite rejection of constitutional claim). This Court has recognized that "the public and the press have a fundamental right of access to all judicial proceedings." *McIntosh,* 340 So.2d at 908. And in adjudicating any "restriction to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to litigation with those of the public and the press." *Id.*

In striking this balance, this Court adopted a three-part test for closure orders requiring movants seeking closure to show:

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.

Lewis, 426 So.2d at 6.

Nowhere in *Lewis,* which involved closure of a pretrial suppression hearing, did this Court state that this test should be applied only to pretrial suppression hearings, and Florida courts have applied the *Lewis* test to all phases of the legal system, including to the sealing of pretrial discovery depositions,[17] pretrial arraignments,[18] competency proceedings,[19] post-trial sentencing hearings,[20] and suppression hearings, as well as restraints on attendance at pretrial depositions.[21]

---

17. *Sentinel Star Company v. Booth,* 372 So.2d 100, 102 (Fla. 2d DCA 1979).

18. *Palm Beach Newspapers, Inc. v. Nourse,* 413 So.2d 467, 469 (Fla. 4th DCA 1982).

19. *The Miami Herald Publishing Co. v. Chappell,* 403 So.2d 1342, 1345 (Fla. 3rd DCA 1982).

20. *Palm Beach Newspapers v. Cook,* 434 So.2d 355 (Fla. 4th DCA 1983).

21. Numerous trial judges have held that criminal depositions in Florida are open to the public and in accordance with those orders, depositions have been conducted publicly. *See, e.g., Florida v. O'Dowd,* 9 Media L. Rep. 2455 (BNA) (Fla. 18th Cir. Ct. Oct. 13, 1983), (Mize, J.); *Florida v. Tolmie,* 9 Media L. Rep. 1407 (BNA) (Fla. 15th Cir. Ct. March 3, 1983) (Cook, J.); *Florida v. Reid,* 8 Media L. Rep. 1249 (BNA) (Fla. 15th Cir. Ct. March 8, 1982) (Goldman, J.); *Florida v. Sanchez,* 7 Media L. Rep. 2338 (BNA) (Fla. 15th Cir. Ct. Nov. 17, 1981) (Mounts, J.); *Florida v. Hodges,* 7 Media L. Rep. 2424 (BNA) (Fla. 20th Cir. Ct. Dec. 21, 1981) (Pack, J.); *Florida v. Alford,* 5 Media L. Rep. 2054 (BNA) (Fla. 15th Cir. Ct. Oct. 19, 1979) (Mounts, J.); *Florida v. Diggs,* 5 Media L. Rep. 2597 (BNA) (Fla. 11th Cir. Ct. March 4, 1980) (Nesbitt, J.); *Florida v. Bundy,* 48 Fla. Supp. 205 (Fla. 2d Cir. Ct. Apr. 26, 1979) (Cowart, J.). Even

(Continued on following page)

The common thread among these varied applications of the *Lewis* test and its predecessor is that, as a result of this State's traditional commitment to open government, the three-part test is to be applied where there is an attempt to obstruct "public access, through the media, to the *judicial process*. . . ." *Lewis*, 426 So.2d at 7 (emphasis added). This policy requires, absent satisfaction of the three-part test, public access to whatever information is necessary for the public to evaluate the judicial process, regardless of whether that information is revealed in a "judicial proceeding."

B. The *Burk* Majority's Arguments Against Application Of The *Lewis* Test To Closures Of Criminal Depositions Are Unpersuasive

The *Burk* majority claims that the *Lewis* test is not applicable to closure of criminal depositions because a criminal deposition is not a "judicial proceeding" and because application of the *Lewis* test will not work for an array of practical reasons. These claims are without merit.

1. Criminal Depositions Are "Judicial Proceedings"

The *Burk* majority claims that the *Lewis* test should apply only to "judicial proceedings," and depositions are not "judicial proceedings." Even were *Lewis* limited to "judicial proceedings," which it is not (*see infra* at

---

Footnote continued—

civil depositions have been presumed open in Florida. *Withlacoochee v. Seminole Electric*, 1 Fla.Supp.2d 1377, 8 Media L. Rep. 1281 (BNA) (Fla. 13th Cir. Ct. March 11, 1982) (Miller, J.); *Cazarez v. Church of Scientology*, 6 Media L. Rep. 2109 (BNA) (Fla. 6th Cir. Ct. Oct. 31, 1980) (Bryson, J.); *Johnson v. Broward County*, 7 Media L. Rep. 2125 (BNA) (Fla. 17th Cir. Ct. Oct. 22, 1981).

41), the court is wrong. The criminal depositions to which the public was denied access in this case are pretrial "judicial proceedings" subject to the *Lewis* three-part test. Indeed, this Court specifically has denominated and treated pretrial depositions as "judicial proceedings" in Rules 2.070(c) and (f) of the Rules of Judicial Administration.[22] Depositions are "judicial proceedings" under Florida law for at least the following reasons:

* This court's judicial rules of procedure create the right to take and govern the taking of depositions. Rules 1.280 and 1.290 Fla.R.Civ.P.; Rule 3.220(d), Fla.R.Crim.P.

* The trial judge is constructively present through his general supervisory powers over the taking of depositions. Rule 1.280, Fla.R.Civ.P.

* Criminal depositions may be taken only if there is a pending prosecution by the State. Rule 3.220(d), Fla.R.Crim.P.

* The deposition may be used at trial for impeachment purposes. Rule 1.330, Fla.R.Civ.P.; Rule 3.220(d), Fla.R.Crim.P.

* An official court reporter must be present. Rule 1.330, Fla.R.Civ.P.

* The attorneys examining and defending the witness are officers of the court, and at least one and usually both are public officials.

---

22. The Fourth and Third District Courts of Appeal in libel suits also have characterized depositions as "judicial proceedings" for purposes of the privilege to report statements made during the course of judicial proceedings. *Palm Beach Newspapers, Inc. v. Jamason*, 450 So.2d 1130 (Fla. 4th DCA 1984); *Sussman v. Damian*, 355 So.2d 809 (Fla. 3d DCA 1977).

* Testimony is given under oath and a violation of that oath can result in a perjury or contempt of court conviction.

* Attendance at depositions is compelled by either issuance by the court of a subpoena or by judicial rule. Rule 3.220(d), Fla.R.Crim.P.; Rule 1.280, Fla. R.Civ.P.

* The failure to appear is punishable by the court through contempt sanctions. Rule 3.220(j), Fla. R.Crim.P.; Rule 1.380, Fla.R.Civ.P.

* If a witness refuses or is directed not to answer specific questions, those questions may be certified for consideration by the judge and the witness compelled to answer them. Rule 1.310(d), Fla.R.Civ.P.

The decision of the *Burk* majority simply ignores all of of these considerations.

2. Irrespective Of Whether Criminal Depositions Are "Judicial Proceedings", The *Lewis* Test Applies

The *Burk* majority concluded that criminal depositions are not "judicial proceedings" because a judge is normally not physically present during the deposition. It then asserted that the *Lewis* test applies only to "judicial proceedings." The *Burk* majority is wrong. Nowhere in *Lewis* or any other case is the physical presence of the judge stated to be determinative of the public's right of access. In *Lewis* this Court based the access right on Florida's commitment to open government and the public's need to know about the functioning of the judicial process—not on the physical presence of a judge. The public has a right to monitor the conduct of all the public officials involved in the criminal justice system,

not simply the judge. Indeed, it is precisely those proceedings at which a judge is *not* present which the public has the greatest need to monitor. Access to criminal depositions allows the public to scrutinize decisions of law enforcement personnel, prosecutors, and public defenders.

The basic flaw in the Fourth District's focus on the judge's physical presence is that it places form over substance and ignores Florida's fundamental policy of open government which was reaffirmed in the strongest terms by this Court in *Lewis*. The Fourth District's assumption that it is only access to those proceedings at which a judge is physically present which contributes to an informed discussion of the judicial system is patently incorrect. Just as this Court recognized in *Lewis* that vital information about the operation of the judicial process was revealed outside the formal trial, so it should recognize now that equally vital information about the operation of the judicial process is revealed outside the physical presence of the judge.

3. The *Burk* Majority's Claim That The *Lewis* Test Should Not Be Applied To Depositions Because It Is "Impractical" Is Without Merit

The *Burk* majority concluded its Opinion by advancing four practical arguments against public access to criminal depositions. First, it is suggested that the three-part *Lewis* test cannot work because counsel "cannot know in advance what testimony will be adduced at discovery depositions." *Burk*, 471 So.2d at 578. Moreover, the uncertainty of what would be said at a public deposition would "chill" the discovery process. The Court has rather badly overstated the problem. Under the Florida Rules of Criminal Procedure, defense counsel are entitled to discovery from

Since counsel may review the state's witness statements and police reports, a defense lawyer seldom would be faced with the situation suggested by the Court. Moreover, the State is required to provide the defense with exculpatory or *Brady* material. *Brady v. Maryland*, 373 U.S. 83 (1963); *Pitts v. State*, 249 So.2d 47 (Fla. 1st DCA 1971) (applicable to Florida prosecutions), *on remand*, 247 So.2d 53 (Fla. 1972). And of course, both the prosecution and the defense may take *ex parte* witness statements.

The *Burke* majority next contends that criminal discovery depositions, unlike criminal depositions to perpetuate testimony and civil depositions, cannot be introduced directly into evidence when the witness proves unavailable for trial[23] and that certain deposition testimony would be inadmissible at trial. Neither consideration warrants disregard of the three-part test. First, even discovery depositions can be used at trial to contradict or impeach the deponent when he testifies at trial. Rule 3.220(d), Fla. R.Crim.Proc. More importantly, no one, including the Fourth District, contends the public must automatically be evicted from the courtroom whenever the jury is excused. Indeed, the Fourth District concedes the public has a right of access to judicial records regardless of their admissibility or whether they are introduced at trial, including deposition transcripts filed with the court. 471 So.2d 571, 575 (Fla. 4th DCA 1985). Admissibility thus is irrelevant to the access right.

The public's knowledge of a criminal prosecution should not be and is not limited to the evidence actually admitted at trial. The application of the three-part test in *Lewis* to closure of pretrial suppression hearings at which inadmissible evidence is likely to be disclosed belies

23. *But see* § 90.804(2)(a), Fla. Stat., which provides for the introduction of a deposition at trial if the deponent is unavailable for trial.

the Fourth District's contention. *See Bundy v. State*, 455 So.2d 330, 337 (Fla. 1984).

There is no basis for denying access to both the admissible and non-admissible portions of the depositions, rather than informing the public about the non-admissible portions of depositions along with the admissible portions.

Third, the *Burk* majority claimed that it may often be awkward to give the press reasonable notice of depositions arranged orally without formal notice for the convenience of counsel. However, Rule 3.220(d), Fla.R.Crim. Proc., specifies: "The party taking the deposition shall give written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined." Rule 3.030(c), Fla.R.Crim.Proc., requires: "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." Therefore, this Court's Rules of Criminal Procedure require the parties to provide the public with notice of the date, time and place of the depositions by filing such notice with the court. Indeed, when Respondents conspired to evade the trial court's denial of their motion for protective order by orally agreeing without written notice to the schedule of depositions, they were violating this Court's rules of procedure. Thus the Rules already provide the mechanism for notice to the press and public—the filing with the Court of the required written notice of taking deposition.

Finally, the court expressed concern about the lack of sufficient space in a deposition room to accommodate the press and public. However, the rare circumstances in which such logistical problems might arise cannot support a *per se* rule excluding the public from all depositions. Such problems can easily be handled on a case-by-case basis

by the trial court. The court can compel the press to pool its reporters and permit only a limited number to attend, and similarly limit the attendance of the public, much as the court can limit the number of reporters and spectators at trial. There is a fundamental difference between limiting the numbers of the public because of logistical considerations, and the blanket *per se* denial of access ordered by the Fourth District.

CONCLUSION

For the foregoing reasons, the Fourth District's two certified questions should both be answered affirmatively, and Petitioners should be provided immediate access to all transcripts of all depositions taken in this case.

RICHARD J. OVELMEN
General Counsel
The Miami Herald
Publishing Company
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

By: /s/ RICHARD J. OVELMEN

SHARPSTEIN & SHARPSTEIN, P.A.
JANICE BURTON SHARPSTEIN
LAURA BESVINICK
3043 Grand Avenue
Penthouse One
Coconut Grove, Florida
33133
(305) 442-8100

THOMSON ZEDER BOHRER
WERTH ADORNO & RAZOOK
PARKER D. THOMSON
SANFORD L. BOHRER
JEROLD I. BUDNEY
4900 Southeast Financial
Center
200 South Biscayne
Boulevard
Miami, Florida 33131
(305) 350-7200

By: /s/ LAURA G. PULA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner The Miami Herald Publishing Company has been furnished by U.S. Mail this 17th day of September, 1985, to the following:

Margaret Good
Assistant Public Defender
Fifteenth Judicial Circuit
224 Datura Street
West Palm Beach, Florida 33401

Jim Smith
Attorney General
The Capitol
Tallahassee, Florida 32301

Richard L. Jorandby
Public Defender
13th Floor
224 Datura Street
West Palm Beach, Florida 33401

Ray Ferrero
Ferrero Middlebrooks Strickland &
Fischer
707 S.E. Third Avenue
Ft. Lauderdale, Florida 33302

Donald M. Middlebrooks
Steel Hector & Davis
4000 Southeast Financial Center
Miami, Florida 33131-2398

/s/ RICHARD J. OVELMEN