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

Reply Brief of
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INTRODUCTION

This brief is filed by Palm Beach Newspapers, Inc. in reply to the answer briefs filed by the Attorney General for the trial judge and the Public Defender for Linda Aurilio.[1]

STATEMENT OF THE CASE AND THE FACTS

Both the Attorney General and the Public Defender misstate the record with respect to the Public Records Law arguments advanced in the trial court.

Respondent Aurilio contends the record does not reflect that the media made demands on the court reporter for the deposition transcripts at issue. (Aurilio's Brief at 2). The Attorney General more broadly states petitioner's assertions that reporters made any public records requests for deposition transcripts "is not supported by the record" and that "no mention of Chapter 119 seems to have been made by anyone in the case prior to the reference to the chapter in a dissenting opinion in the Fourth District. Neither the trial court nor the District Court received argument or ruled upon the applicability of Chapter 119." (AG's Brief at 2). Both representations are inaccurate.

The demands made on the court reporter and the presentation of the Public Records Law argument issue to the trial court are plainly reflected in the record. On page 118 of the Appendix (page 2 of the News and Sun Sentinel's "Motion to

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1. Although the State of Florida also is a party to this appeal, it has not filed a brief. The Attorney General's brief states that it is filed only on behalf of the trial judge below.

Open Access to Pretrial Depositions and Obtain Access to Public Records"), the News and Sun Sentinel alleged "PRESS INTERVENOR has now made formal written requests on counsel for Defendant and that STATE OF FLORIDA, as well as the Court Reporter, for access to the transcript of the depositions pursuant to Chapter 119, Florida Statutes." The next paragraph of the motion articulated the legal theory upon which the petitioners sought the records as follows: "These transcripts of depositions taken by the parties, who intentionally prevented the press from learning of the dates and locations of their taking, despite the Court's Order denying the parties Motion for Protective Order, are public records under Chapter 119, Florida Statutes. See, e.g., Satz v. Blankenship, 7 Med.L.Rptr. 2576, (Fla. 4th DCA 1981), on rehearing, 7 Med.L.Rptr. 2576, 2579 (1981)."

At the hearing on this motion conducted February 10, 1983 (appendix pages 121-225), counsel for the media presented the trial court with extensive arguments regarding the applicability of the Public Records Law to deposition transcripts.

The emergency petition filed on the day after Judge Burk rendered the order which is the subject of this appeal asked the Fourth District Court of Appeal, among other things, to "direct the trial court to require the release or filing of any existing deposition transcripts or any deposition transcripts ordered in the future by the parties or the petitioner unless a motion to seal the transcripts is filed, and evidence produced at a hearing showing a compelling need to seal." Several days later, the News & Sun-Sentinel Company

filed an appendix including transcripts from the proceedings below in which all of its Public Records Law arguments were recorded. The appendix made clear to the Fourth District that the Public Records Law provided a basis for petitioners' claims.

SUMMARY OF ARGUMENT

Point I - Access to Deposition Transcripts. Application of the Public Records Law's disclosure requirements to the deposition materials at issue would not violate the separation of powers requirement of the Florida Constitution. The deposition materials are not exempt from disclosure. And, review of this issue has been properly preserved.

Point II - Attendance at Depositions. Respondents rely on authority which has been reversed or superceded, belittle this Court's commitment to open government, and ask the Court to ignore the rules of procedure.

ARGUMENT

I.

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

Neither of the respondents argues that the Public Records Law is not applicable to deposition transcripts and court reporters' notes. Rather, they agree with the petitioner that the law is applicable to these records,[2] but they argue

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2. All of the individuals in possession of the transcripts -- the state attorney, the public defender, and the court reporter -- are state agencies.

the Court should not require disclosure of the deposition materials for several reasons. Each argument is without merit.

A. Application of the Public Records Law to Deposition Materials Does not Violate the Separation of Powers Requirement

The separation of powers requirement of article II, section 3 of the Florida Constitution poses no impediment to the application of the Public Records Law to deposition transcripts or court reporters untranscribed notes.

The contours of the separation of powers doctrine as applied to Public Records Law questions is described in this Court's advisory opinion in The Florida Bar, 398 So.2d 446 (Fla. 1981). In that case the Board of Governors asked the Court to determine whether its investigative files were public records subject to the disclosure requirements of the Public Records Law. The Court held the Public Records Law could not be applied to these files, but only because Article V, section 15 of the Florida Constitution gives the Supreme Court "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

Unlike the Florida Bar, state attorneys, public defenders, and court reporters, are creatures of statute over which this Court does not have exclusive jurisdiction. Although the Court may discipline attorneys, non-disciplinary matters relating to state attorneys and public defenders -- such as regulation of access to their files -- are within the clear

dominion and control of the legislature. Indeed, in Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980), this Court expressly approved application of the Public Records Law to the files of the state attorney. In State ex rel. Smith v. Brummer, 443 So.2d 957, 959 (Fla. 1984), this Court noted that public defenders are "regulated by statute . . . and by court rule," recognizing that both the legislature and the judiciary can exercise control over these public officers. The Court has promulgated various "procedural" rules regarding court reporters, see, e.g., In Re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972)(setting compensation), but the Court has left substantive regulation of court reporters to the legislature. See section 29.02, Florida Statutes (1983) (setting forth official duties of court reporters).

All three state agencies involved may be regulated by the legislature. Thus, there is no separation of powers problem created by application of the Public Records Law to them.[3]

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3. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), underscores the insubstantial nature of Aurilio's separation of powers claim. In that case the Court held the media was entitled to copy confidential presidential tape recordings which had been subpoenaed in the criminal prosecution of former United States Attorney General John Mitchell under the Presidential Recordings and Materials Preservation Act, 44 U.S.C. §2107. The Court did not find the Act's disclosure requirements to be any infringement on judicial power notwithstanding that the records at issue had been produced by President Nixon in accordance with a subpoena and court order enforcing the subpoena and those records had been filed with the court. The Public Records Law, like the Presidential Recordings Act, also does not infringe on the power of the judiciary.

It cannot be overemphasized that the records here at issue are records which are not a part of a court file. Nevertheless, defendant Aurilio contends that the power of the judiciary to control access to its records is somehow invaded by a statute requiring these materials to be released to the public. The error of this argument is demonstrated by several decisions of this Court which describe the limits on the legislature's power to regulate access to court files.[4] None of those decisions even suggests that the legislature could not mandate public access to records which are in the hands of three separate state agencies.

Indeed, the Attorney General -- although he neglects to mention it in his brief -- previously has concluded in Opinion 84-81 that the Public Records Law is applicable even to "judicial records or records contained in court files (not specifically closed by court order)." The opinion appears to be based on the conclusion that in the absence of a protective order sealing court files, there is no conflict between the courts and the Public Records Law. If a protective order is entered, section 119.07(4), Florida Statutes, provides an exemption (for court-sealed records), which avoids the separation of powers problem.

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4. In Johnson v. State, 336 So.2d 93, 95 (Fla. 1976), this Court held the legislature violated the separation of powers requirement when it enacted a statute which required courts to order the destruction of arrest records in a court's files under certain circumstances. In Petition of Kilgore, 65 So.2d 30 (Fla. 1953), this Court declined a request to treat gubernatorial requests for advisory opinions and opinions which would be rendered in response to such requests as public records. No state agencies were in possession of the records in Kilgore.

In the instant case, no protective order was entered and the records were not sought from court files. Therefore application of the Public Records Law does not abridge the separation of powers requirement.[5]

B. The Exemption for Criminal Investigative and Intelligence Information is not Applicable to Deposition Materials

The Attorney General chooses to ignore the petitioner's argument that deposition transcripts cannot fall within any of the statutory exemptions to the Public Records Law's disclosure requirements because the information they contain already is known to the criminal defendant.[6] Respondent Aurilio, on the other hand, attacks the decision from the Fourth District Appeal upon which the petitioner's argument is built, Satz v.

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5. If, however, the Court were to conclude that the records here at issue are of such vital importance to the judiciary that any legislative control over them is impermissible, the records must be deemed to be "judicial records" to which the petitioners have a presumptive right of access under Nixon v. Warner Communications Corp., supra.

6. Apparently overlooking the petitioners' assertion that section 119.011(3)(c)5., which refers to documents given to a person arrested as not being active criminal investigative or intelligence information exempted by section 119.07(3)(d), the Attorney General without explanation or argument contends that the depositions do fall within section 119.07(3)(d). He also misrepresents that section 119.07(3)(m) exempts witness lists from the Public Records Law's disclosure requirements, ignoring a 1984 amendment which limited the (m) exemption to confessions, and he then argues that depositions fall within the (m) exemption. Finally, he states, without any sort of explanation, that depositions fall within the disclosure exemptions found in sections 119.07(4) and (5). This statement, perhaps a typographical error, is the most baffling because these subsections merely provide that the exemptions found in section 119.07 are not intended to create exemptions for open judicial records or to the Sunshine Law.

Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), pet. for rev. denied, 413 So.2d 877 (Fla. 1982), as wrongly decided.

Notably, the Fourth District Court of Appeal recently reaffirmed its Satz decision in Bludworth v. Palm Beach Newspapers, Inc., ___ So.2d ___, 10 Fla. L. W. 2360 (Fla. 4th DCA 1985), rejecting the argument now advanced by Aurilio. Aurilio argues Satz erred in concluding a "person arrested" is not the same as a "criminal defendant" and therefore section 119.011(3)(c)5. does not take deposition material out of the definition of active criminal investigative or intelligence information. The Fourth District held in Bludworth: "A ripened apple is still an apple. To us, 'person arrested' describes a broader category of persons than 'criminal defendant,' for it can be applied to both criminal defendants and persons who are arrested and never become criminal defendants." 10 Fla. L. W. at 2361. The petitioner agrees with this recent ruling.[7]

Aurilio also argues alternatively that depositions do not fall within the Satz rule because they are not "given" to the defendant, but rather are "taken" by the defendant. This technical semantic argument ignores the policy basis of both the Satz and Bludworth interpretations of the Public Records Law. The decisions concluded that once information becomes known to a person charged with a crime, the reasons for keeping the

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7. Bludworth also addressed Aurilio's concern that disclosure of unfiled depositions would violate DR 7-107 of the Code of Professional Responsibility, stating DR 7-107 does not prohibit "the mere release, without elaboration, of information contained in a public record." 10 Fla. L. W. at 2361.

information from the public vanish. Lastly, neither the public defender not the court reporter are "criminal justice agencies" as defined by section 119.011(4), Florida Statutes, and information can be classified as exempt criminal investigative or intelligence information only if it is "collected" or "compiled" by such an agency. See subsections 119.011(3)(a)&(b), Florida Statues. Any information collected by a defense lawyer -- whether by deposition or other means -- cannot be classified as confidential investigative information.

C. The Petitioners Properly Preserved the Public Records Law Issue for Review.

This Court may review the Public Records Law issue raised by the petitioner for the three following reasons.

1. The Petitioners Preserved the Public Records Law Issue by Explicitly Presenting the Issue to the Trial Court.

As demonstrated above, the Public Records Law arguments were fully articulated before the trial court. That presentation protects the record for this Court's review. The state authorities respondents cite regarding waiver, Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Tillman v. State, 471 So.2d 32 (Fla. 1985), hold only that an issue must be presented at trial to preserve it for review. The federal decisions cited by the Attorney General, Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982), hold only that federal habeas corpus will not be issued if the defendant has not complied with a state's contemporaneous objection at trial rule.

In addition, this case is unlike any of the criminal conviction cases cited by the respondents in support of their waiver theory. At issue here is not whether cross-examination was improperly restricted or whether a jury was properly instructed, but the fundamental issue of whether the press is entitled to deposition transcripts. A statute bearing directly on this issue simply cannot be ignored.

2. The Fourth District Court of Appeal Passed Upon the Public Records Law Issue Presented by the Petitioner

Petitioners filed with the Fourth District transcripts of all of the proceedings in the trial court setting forth the Public Records Law claims. The emergency briefs filed in the district court of appeal did not reargue the Public Records Law points advanced below -- instead placing primary emphasis on common law and constitutional principles -- but the District Court of Appeal plainly was asked to direct the trial court to order the transcripts and court reporters' notes released. The court therefore had an opportunity to pass on the Public Records Law issue and did so when it wrote: "We found not a single case, statute or rule that we think precedentially commands the result contended for by the Press." 471 So.2d at 574. Chief Judge Anstead's dissent then criticized the plurality for reaching a result contrary to Public Records Law decisions. 471 So.2d at 581.

3. Resolution of the Public Records Law Issue is Essential to Address the Second Certified Question

The Fourth District certified that the following issue is raised by this case and it is of great public importance: "Is

the press entitled to access to pretrial discovery depositions in a criminal case which may or may not have been transcribed but which have not been filed with the clerk of the court or the judge?" Under the petitioner's Public Records Law argument, this question must be answered in the affirmative because the law mandates access to such records. Yet, the respondents ask the Court to disregard the statute. This suggestion, if followed, might leave the certified question unanswered and lead to relitigation of the identical issue in another case. In Nixon v. Warner Communications, Inc., supra, none of the parties raised the Presidential Materials and Recordings Preservation Act as dispositive. The media argued that the first amendment and the common law controlled access to the court exhibits at issue, disclaiming reliance on the Act. Yet, the Court itself determined that it need not address the issues raised by the parties because the Act was dispositive.

II.

Reporters Cannot be Arbitrarily Excluded from Pretrial Depositions in Criminal Cases

The nature of the replies to the petitioners' arguments regarding arbitrary exclusion of reporters from depositions reveals that the petitioners' arguments should prevail.

A. The Respondents Ignore Controlling First Amendment Authority and Rely on Decisions Which Have been Reversed or Superceded

Neither of the respondents discusses or cites In re Adoption of Proposed Local Rule 17, 339 So.2d 181 (Fla. 1976), the primary decision of this Court relied on by the petitioner

for the argument that orders limiting newsgathering outside of judicial proceedings abridge the first and fourteenth amendments unless they are justified by compelling governmental interests and narrowly tailored to serve those interests. No attempt is made to distinguish this recent and controlling precedent from this Court. Rather, both respondents argue sub silento that this case should be overruled.

In disregard of Proposed Local Rule 17, respondents argue the first amendment assures the press a qualified right of access to judicial proceedings only and that depositions do not qualify as such proceedings because no judicial decision is involved. Even assuming such an argument could be made in the face of Proposed Local Rule 17, it must fail because many of the federal authorities relied upon by the respondents have been either reversed or superceded[8] and the state court precedents

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8. At page 19 of her brief, Aurilio cites "United States v. Cianfrain, 445 F. Supp. 1102, 1107-1108 (E.D. Pa. 1978)," for the proposition that federal courts have "concluded there is no independent right of access by non-parties to materials produced in discovery and not made part of the public record by filing with the court." The correct citation to that case is United States v. Cianfrani, 448 F. Supp. 1102 (E.D. Pa. 1977), and the respondent has failed to point out that that case was reversed by the Third Circuit at 573 F.2d 835 (3rd Cir. 1978). Aurilio also cites "Cianci v. New York Times Publishing Co., 88 F.R.D. 562 (S.D.N.Y. 1980)" for the same proposition. The correct citation to that case is Cianci v. New Times Pub. Co., 486 F. Supp. 368 (S.D.N.Y. 1980). That case also has been reversed at 639 F.2d 54 (2d Cir. 1980). Neither case -- either the trial or appellate decisions -- stands for the proposition for which it is cited. Two other federal decisions relied on by Aurilio, Times Newspapers Ltd. v. McDonnell Douglas Corp., 387 F. Supp. 189 (C.D. Cal. 1974) and United States v. United Shoe Machinery Co., 198 F. 870 (D. Mass. 1912), were decided before the United States Supreme Court determined that the first amendment protects news gathering in or outside of judicial proceedings and therefore have no continuing vitality.

relied on for this argument hold that the press does have a qualified right of access to depositions and support the arguments of the petitioners.[9] Although some of the opinions agree with the respondents that depositions should not be characterized as "judicial proceedings," that is the only point on which the cases support the respondents. The state cases all conclude there is a qualified right of access to gather news -- even outside of a judicial proceeding.

When the respondents turn to the controlling United States Supreme Court precedents, they rely upon misrepresentation to advance their arguments. For example, the Attorney General misstates the holding of Gannett Co. v. DePasquale, 443 U.S. 368 (1979), in two ways. His brief at page 9 quotes from Chief Justice Burger's concurring opinion and erroneously states that seven justices joined in the opinion. In fact, none of the justices joined the concurrence. Next, on page 9 the brief quotes a footnote in Justice Powell's concurrence, 443 U.S. at 397 n.1, as "the opinion of the court." In fact, none of the other justices concurred in Justice Powell's concurrence.

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9. The principal authorities cited are Ocala Star-Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980), and Tallahassee Democrat v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979). Aurilio also cites Downer v. State, 375 So.2d 840 (Fla. 1979), as rejecting "a claimed First Amendment right to gather and publish information about health care practices." That case only rejects a claim that a hospital maternity facility's restrictions on public access were unreasonable. The case in fact assumes that news gathering in a public hospital is protected by the first amendment.

Respondent Aurilio incorrectly represents the holding in Seattle Times v. Rhinehart, ____ U.S. ____, 81 L.Ed.2d 17 (1984), to constitute a complete denial of access to depositions. Instead, the Court merely upheld a trial court's finding of good cause to support a protective order where the court had found a compelling interest at stake.[10] Neither respondent acknowledges that Seattle Times is factually distinguishable in that it examined only a party's right to disseminate information it had obtained in a civil libel case. The decision does not discuss non-party access to criminal cases.[11]

B. This Court's Commitment to Open Government is More than a "Vague and Amorphous Doctrine"

Respondents ridicule this Court's commitment to open government as "a vague and amorphous doctrine" which should not

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10. Plaintiff Rhinehart and the Aquarius Foundation sought protection in a defamation action against the dissemination by a newspaper defendant of membership and contributor lists which had emerged during discovery, insisting that rights of religious practice, association and privacy supported by the first amendment would be abused. Rhinehart's motion was granted based on evidence of prior physical threats and attacks on members of the controversial organization. A protective order therefore was essential to protect the plaintiff's constitutional rights and that need outweighed the defendant's first amendment interests. Justice Brennan, concurring, interpreted the Court's majority opinion as recognizing "that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment." 81 L.Ed.2d at 30 (citations omitted).

11. Aurilio also erroneously cites Branzburg v. Hayes, 408 U.S. 665 (1972), for the proposition that reporters have no first amendment privilege to collect and disseminate news, ignoring this Court's extensive analysis of Branzburg in Morgan v. State, 337 So.2d 951 (Fla. 1976), and its conclusion that a majority of the justices in that case recognized a qualified reportorial privilege under the first amendment.

be given substance in this case. This doctrine has been utilized by the Court in such important decisions as In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979)(cameras in the courtroom), and Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982)(access to pretrial hearings). To suggest the doctrine has no role in this case is incorrect.

C. The Court Should Not Disregard the Rules of Civil and Criminal Procedure

The Fourth District's plurality opinion itself recognizes that it conflicts with the holding of Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985), which recognizes that under the rules of procedure attendance of depositions may be limited by court order only if the moving party shows good cause. Thus, the issue regarding applicability of the rules to this case cannot be deemed to have been waived as the respondents argue.

CONCLUSION

The questions certified by the Fourth District Court of Appeal should be answered in the affirmative.

Respectfully submitted,

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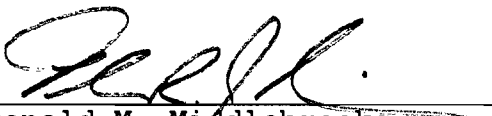
By 

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