IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 67,352

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

Petitioners,

v.

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

Respondents.

On Review From The
Fourth District Court of Appeal

REPLY BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

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SUMMARY OF ARGUMENT

Only a court, upon proper showing, may lawfully restrict the public's qualified right of access to depositions taken in criminal cases. The arbitrary unilateral action of a prosecutor or a public defender sanctioned by the Fourth District here is not a proper basis for denying the public's right to monitor the criminal justice system.

The text of Rule 1.280(c)(5), and all other Florida appellate cases construing that language, explicitly provide that attendance at a deposition may be restricted only by order of the court for "good cause shown". The decision of the Fourth District is contrary to the Rule. The State and Aurilio assert this argument was waived. They are wrong. With respect to the merits, the State concedes Rule 1.280(c) would otherwise apply, and Aurilio offers nothing more than a half-hearted quotation from the Burk majority.

The First Amendment affords the public a qualified right of access to criminal proceedings (i) relevant to informed discussion of the legal system or (ii) which have been historically open to the public. The Fourth District should have recognized the qualified First Amendment right here. Florida's criminal justice system is a "pretrial system" in which more than 97% of the cases are resolved without any trial. Access to depositions is thus critical to public understanding of the criminal justice system. The State and Aurilio fail to address this argument. Aurilio

also erroneously contends there has been no historical presumption of access to criminal depositions, and both Respondents misread the relevant First Amendment precedents.

Finally, the State and Aurilio argue this Court's fundamental commitment to an open criminal justice system should not extend to depositions because (i) they are not judicial proceedings and (ii) it would be impractical to apply the three-part closure test to deposition access cases. But the public interest in monitoring the criminal justice system is not limited to the activities of judges; it extends to reviewing the conduct of other participants in the system. And given the extensive discovery rights provided defendants by Rule 3.220, and the array of less restrictive alternatives to closure available to trial courts, there is no convincing argument that access to criminal depositions is "impractical."

The trial court, not the lawyers, should decide whether the public's qualified right of access must give way to the Sixth Amendment rights of the defendant.

ARGUMENT

I. FLORIDA COURT RULES GRANT THE PUBLIC A PRESUMPTIVE RIGHT OF ACCESS TO DEPOSITIONS TAKEN IN CRIMINAL CASES

A. The Rule 1.280(c)(5) Argument Was Not "Waived"

The State asserts "Petitioners never argued the applicability of Rule 1.280(c)(5) in the Circuit Court. . . .

As a result, the right to argue this issue is waived." (S.B. 5) What the State fails to acknowledge is that the issue was argued extensively by the State itself in the trial court:

> But those Rules of Civil Procedure provide upon motion of a party, and for good cause shown, the Court in which the action is pending may make any order. . . . that discovery be conducted with no one present except persons designated by the Court. . . .

(App. 1-2, 100-04).[1/]

Consequently, Aurilio does not contend waiver occurred, but does incorrectly assert that The Miami Herald did not argue in the Fourth District that Rule 1.280(c)(5) provides the press a presumptive right of access to depositions. Apparently, Aurilio simply overlooked pp. 19-22 of the Herald Reply Memorandum filed in the Fourth District which argued that criminal depositions are presumptively open to the public and relied specifically on Ocala Star-Banner Corp. v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980) ("press does not have the absolute right to attend the taking of a deposition, that its presence may be regulated by Rule 1.280(c)"). (A. App. 20). And, of course, both the Burk majority and dissenters thoroughly address the issue. See 471 So.2d at 577-80 n.4; id. at 583-85. Since the issue was argued and ruled on in the Circuit Court and

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1/ In fact, the access proceedings here began with the State seeking to exclude the press from the depositions by filing a Motion for protective order pursuant to Rule 1.280 (c)(5). (App. 1-2). The trial court initially denied this motion. (App. 58).

the Fourth District, there was no waiver.[2/] In any event, the issues in this case are before this Court as certified questions of great public importance, and it is axiomatic that such matters "substantially affecting the public interest" are not waived even where they are not considered below.[3/]

B. Florida Court Rules Afford the Public A Presumptive Right of Access to Criminal Depositions

Rule 1.280(c)(5) clearly states that upon motion and "for good cause shown" the court may order "that discovery be conducted with no one present except persons designated by the court." The Fourth District improperly "amended" the rule to apply only to "instances where the parties do not agree and there is controversy between them as to whom may be present." 471 So.2d at 580 n.4. The Rule simply contains no such limitation, and no Florida case (other than Burk) has so construed the Rule. In fact, all Florida appellate cases are contrary, including those relied upon by the Burk majority. Ocala Star-Banner Corp. v. Sturgis, supra; Tallahassee Democrat, Inc. v. Willis, 370

2/ Where an issue is brought to the lower court's attention by a party's pleading or motion -- even "in its broadest sense" -- then "a review of the lower court's ruling on those points is not raising the question here for the first time." Love v. Hannah, 72 So.2d 39, 43 (Fla. 1954).

3/ Northwest Florida Home Health Agency v. Merrill, 469 So.2d 893, 900 (Fla. 1st DCA 1985); Ross v. Florida Sun Life Insurance Co., 124 So.2d 892, 898 (Fla. 2d DCA 1960); Ewing v. Dupee, 104 So.2d 672, 673 (Fla. 2d DCA 1958).

So.2d 867 (Fla. 1st DCA 1979). Accord Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985). The Burk majority version of the rule fundamentally shifts from the courts to the parties the authority to decide who may monitor a criminal deposition. Such an abdication of judicial authority to the parties is not warranted. See Orliac v. Berthe, 765 F.2d 30 (2d Cir. 1983). The State concedes that absent the waiver argument, Rule 1.280(c) regulates press access to depositions. (S.B. 5) Aurilio does not respond to these arguments on the language of the Rule, but relies solely on the language of the Burk majority. (A.B. 28).

Aurilio attacks the argument of The Miami Herald on three other grounds:[4/] (1) federal law is inapplicable in this Florida proceeding, (2) civil law is inapplicable in this criminal proceeding and (3) The Miami Herald fails to

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4/ Aurilio also argues that the legislative history provided in the Appendix of The Miami Herald's Brief should not be considered by this Court. (A.B. 28-29). Both cases relied on by Respondent are inapposite. State v. Kaufman, 430 So.2d 904 (Fla. 1983), concerns a challenge to the constitutionality of a state statute based upon tape recordings of certain legislative proceedings. The Court held that only the legislative journals could be so used to impeach an otherwise valid statute. The Miami Herald is not here attacking the validity of Florida's procedural rules. The legislative history presented is meant solely to cast light on the legislative intent underlying the rules. Hillsborough County Board of County Commissioners v. Public Employees Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982), is likewise inapposite. In Hillsborough, the court refused to consider material included in the factual record of another case then on appeal in another court. The court held that the facts upon which a case is based must be brought up in the case actually before the court. Again, The Miami Herald does not seek to have this Court consider the record in some other case. The legislative history presented is offered solely to inform this Court's interpretation of the procedural rules on which this case is based.

distinguish Seattle Times Co. v. Rhinehart. Respondent's arguments are without merit.

Florida cases clearly hold that where Florida law is modeled on federal law, federal cases are of precedential value. 49 Fla.Jur.2d., Statutes § 170 (1984). Here, Florida Rule 1.280(c) and Federal Rule 26(c) are identical. Both provide for the issuance of protective orders by trial courts, based on "good cause shown", to limit attendance at depositions. Both the Florida and federal rules likewise have provisions regarding the filing of depositions. And, in recent years, both systems have, in recognition of the tremendous administrative burden of storing voluminous depositions, restricted their respective filing requirements.[5/] Compare Rule 5(d), Federal Rules of Civil Procedure, Notes of Advisory Committee, 1980 Amendment ("large volume of discovery filings presents serious problems of storage . . . but such materials are sometimes of interest to those who may have no access to them except by a requirement of filing")

5/ The Committee Note accompanying the 1978 proposed federal rules revision (eventually adopted in 1980) explicitly stated that the filing charge was not intended to alter the access right:

> [A]ny party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c).

Proposed Rule 5(d), Advisory Committee Note, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978).

with In re Florida Rules of Civil Procedure, 403 So.2d 926 (Fla. 1981) (Court concerned to "relieve the document storage burden"). Neither court system abandoned compulsory filing in order to hide the judicial process from public scrutiny. Contrary to the contention of the Respondents and the Burk majority, both the Florida and federal rules recognize the presumptive public right of access.[6/]

Respondents are likewise mistaken in their contention that the case law and legislative history interpreting the civil rules are inapposite because this is a criminal case. Rule 3.220(d), Fla.R.Crim.P., unequivocally states that the scope of criminal depositions "shall be the same as that provided in the Florida Rules of Civil Procedure."

The Sixth Amendment rights of defendants in criminal cases are amply protected by the three-part test, which

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6/ Respondent Aurilio cites three cases for the proposition that there is "no independent right of access" to discovery materials. Two -- In re Agent Orange Product Liability Litigation, 96 F.R.D. 582 (E.D.N.Y. 1983), and United States v. Cianfrani, 448 F.Supp. 1102 (E.D. Pa. 1978) -- are no longer good law. See In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 567 (E.D.N.Y. 1985) ("The Rule's requirement that the proponent of non-disclosure prove that good cause exists to limit public access to discovery material demonstrates that, in the absence of such proof, the discovery is open to the public. In Rhinehart, 104 S.Ct. at 2209, the Supreme Court tacitly affirmed the validity of the statutory presumption."); United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978) (reversing closure of pretrial criminal hearing). The third case -- Cianci v. New Times Publishing Co., 88 F.R.D. 562 (S.D.N.Y. 1980) -- held only that there was no First Amendment right of access to pretrial materials, and this was before the trio of United States Supreme Court cases establishing the constitutional access right were decided. Further, Cianci was silent on the issue of access under the rules and granted access under the common law.

after all, was adopted by this Court in a criminal case involving access to a pretrial suppression hearing. Moreover, a rule which presumes a qualified right of access allows courts to protect fully defendants' Sixth Amendment rights by limiting access where "good cause" is shown.7/

Finally, Aurilio asserts the recent Supreme Court decision in Seattle Times Co. v. Rhinehart "['supercedes'(sic)] whatever lower federal courts have said about presumed openness of discovery," (A.B. 27) although she recognizes that Rhinehart "does not specifically address the precise question presented here." (A.B. 16). However, Aurilio neglects to note, as Judge Anstead observed, that Rhinehart itself required a "good cause" showing. 104 S.Ct. at 2209; 471 So.2d at 581 n.6.

II. THE FIRST AMENDMENT AFFORDS THE PUBLIC A QUALIFIED RIGHT OF ACCESS TO CRIMINAL DEPOSITIONS

A. Access to Criminal Depositions Is Necessary To Informed Discussion of the Criminal Justice System

Over 97% of all Florida criminal cases reach disposition without trial; consequently, public access to criminal depositions is crucial to "informed discussion" of

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7/ Aurilio argues that "an opposite presumption" with regard to access applies in criminal cases and cites DR 7-107(B), Code of Professional Responsibility. This argument fails on two grounds. First, Aurilio fails to note that the same limitation on "extrajudicial statements" applies in the civil context as in the criminal. Second, DR 7-107 does not bar dissemmination of pretrial proceedings, what the rule precludes is comment on those proceedings that present a "serious and imminent threat" to the administration of justice.

the criminal justice system. Respondents never address this point, nor the fact that Florida has a pretrial criminal justice system. In fact, both repeatedly argue as if criminal cases typically or invariably proceed to trial.[8/] (S.B. 12; A.B. 25, 37).

Aurilio, but not the State, argues that access to depositions is not necessary for informed discussion of the criminal justice system. She argues (i) since no acts of "adjudication" occur at depositions, there is no public interest in attending them (A.B. 10,11), (ii) depositions do not serve the function of revealing a witness's bias or misconduct because no judge is present to make such rulings (A.B. 17), and (iii) access to criminal depositions is not necessary for the public to understand a plea because the basis of the plea is explained at the plea colloquy in open court. (A.B. 24-25).

Each of these arguments is fallacious. Access to depositions should not depend on whether adjudicatory acts are performed during the deposition. The public is justifiably interested in the conduct of the prosecutor, the public defender, and law enforcement agencies, as well as the judge. Moreover, a deposition transcript may be the un-

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8/ The State asserts:

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

(S.B. 12). If this were so, appellate courts would have nothing to do, and in 97% of criminal cases the public would be unable to assess the State's case.

revealed predicate for an adjudication, or show the adjudication would have been quite different had the lawyers properly used the deposition testimony.

With respect to the claim that depositions do not reveal misconduct by witnesses, or their lack of credibility -- because no judge is there to rule on such matters -- it should be noted that Aurilio herself does not believe this argument. In fact, she disposes of her own contention:

> Furthermore, police reports do not document matters of bias, motive, or prejudice of the witness against the criminally accused and such are the matters a defense attorney would wish to delve into on deposition, to explore the credibility of the state's witness, . . .

(A.B. 35). Misconduct and bias are frequently apparent to the general public from deposition testimony without the aid of judicial guidance.

Finally, the fact that there must be a plea colloquy in open court does not mean the assertions made during such a proceeding should not be subject to public verification. Access to depositions often provides the only vehicle for such a review. The Miami Herald also respectfully suggests that a plea colloquy is typically highly abbreviated and often sheds little light on the reasons a specific plea is offered and accepted.

B. Criminal Depositions Have Been Presumptively Open to the Public Since Adoption of the Modern Court Rules

Aurilio claims there is no historical presumption of access to criminal depositions, and therefore contends

the First Amendment affords no right of access to them. (A.B. 17). Aurilio is simply mistaken as a matter of law. A strong structural interest is sufficient to support the qualified First Amendment access right even in the absence of any historical presumption of access. In re Application of The Herald Co., 734 F.2d 93, 98 (2d Cir. 1984); United States v. Chagra, 701 F.2d 354, 362 (5th Cir. 1983); United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982); United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982).

Aurilio is also mistaken in her premise that there is no historical presumption of access to criminal depositions. The Federal Rules of Civil Procedure, adopted in 1938, created a presumptive right of public access to depositions and this presumption has existed for almost half of a century. (Br. 9-19). Aurilio's "contrary authorities" were either decided prior to the effective date of the rules or rely on such superseded authority.9/

Aurilio's discussion of the historical development of the Florida deposition access case law is incorrect. The Miami Herald routinely had access to depositions in criminal cases prior to the Burk decision. The Miami Herald's Initial Brief cited numerous trial court opinions affording the

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9/ Aurilio relies on United States v. United Shoe Machinery of New Jersey, 198 F. 870 (Mass. Cir. 1912), decided 26 years prior to adoption of the federal rules and 68 years prior to recognition of the First Amendment right of access. She also relies on an even older case, Beale v. Thompson & Maris, 12 U.S. (8 Cranch) 70 (1814) and Times Newspaper Ltd. v. McDonnell Douglas Corp., 387 F.Supp. 189 (C.D. Cal. 1974), which relies upon both these antiquated authorities.

press access to criminal depositions, and all Florida appellate decisions prior to Burk concurred in that result. According to Aurilio, this does not constitute a history of access in Florida because there are three unreported cases in which trial courts denied the press access to criminal depositions. Her analysis of these cases is flawed,[10/] and, in any event, their citation does not alter the fact that the great weight of authority until Burk has been in favor of access.

The State erroneously claims the press is asserting an "absolute First Amendment right of access," (S.B. 7) but the press is claiming only a qualified right.

Both the State and Aurilio argue Gannett v. DePasquale, 443 U.S. 368 (1929), and Seattle Times Co. v. Rhinehart, supra, should be read to state that no First Amendment right of access to pretrial discovery proceedings exists in criminal cases. The State completely misrepresents Gannett, asserting six Justices concluded depositions are not "central components of a public trial." (S.B. 9). But the quoted language is not from the opinion of the Court (as

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10/ Aurilio fails to note that Judge Bryson in State v. Dudley, Case No. CRC 81-2247 (Fla. 6th Cir. Ct. Aug. 21, 1981) and State v. Brown, Case No. CRC 81-2248 (Fla. 6th Cir. Ct. Aug. 21, 1981), did not hold depositions are not judicial proceedings, and he did balance the First Amendment right of access against the Defendant's Sixth Amendment interests. The Bundy deposition bench ruling occurred in the middle of the trial. And contrary to Aurilio's absurd assertion, the Media Law Reporter routinely reports adverse trial court decisions. See, e.g., News-Press Publishing Co. v. Sapp, 10 Media L. Rep. (BNA) 1367 (Fla. 12th Cir. Ct. Feb. 24, 1984); Florida ex rel. Harte-Hanks v. Austin, 9 Media L. Rep. (BNA) 1170 (Fla. 4th Cir.Ct. Jan. 18, 1983).

it asserts) but rather from Chief Justice Burger's concurrence (joined by no other Justice) and Justice Powell's concurrence which, read correctly, recognizes a right of access to depositions.

Respondents have cited Rhinehart as if it held there is no qualified First Amendment right of access to criminal depositions. In fact, Rhinehart holds only that the First Amendment is not violated where a narrow protective order based upon "good cause" temporarily restricts a civil litigant's ability to disseminate very specific private information obtained through discovery. The public's presumptive right to attend depositions -- civil or criminal -- was not denied in Rhinehart.

III. THIS COURT'S FUNDAMENTAL COMMITMENT TO OPEN GOVERNMENT MANDATES RECOGNITION OF A QUALIFIED RIGHT OF PUBLIC ACCESS TO DEPOSITIONS TAKEN IN CRIMINAL CASES

Respondents claim that Florida's commitment to open government does not extend to criminal depositions because they are not "judicial proceedings" (since judges typically are not present at them). (S.B. 10, 11; A.B. 17). Respondents have offered no reply to any of the arguments made in The Miami Herald's Initial Brief as to why depositions are judicial proceedings. (Br. 38-40). Those arguments will not be repeated here, other than to observe that a criminal deposition is an adversary proceeding conducted solely under judicial authority and pursuant to judicial

rules. The more fundamental point is that the public's interest in monitoring the criminal justice process is not limited to those proceedings attended by a judge. The public's right to know attaches as the process matures from the investigatory stage to the judicial or adversarial phase. This Court's opinions in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), and State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1976), make clear that the public's interest is in an open legal process, not merely in proceedings over which a judge presides.

Aurilio argues that the Fourth District was correct in asserting that a public defender cannot know in advance how a witness may testify at deposition, and that he therefore is unable to meet the three-part closure test. Aurilio dismisses as "absurd" the argument that the broad right of discovery granted Florida criminal defendants largely obviates this problem. But contrary to Aurilio's assertion, the opportunity for discovery prior to deposition is substantial. (A.B. 35). Even police reports are generally discoverable, pursuant to Rule 3.220(a)(1), Fla.R.Crim.P. To the extent police reports contain "irrelevant, sensitive information," the trial court may prohibit or partially restrict disclosure, after in camera review. Depositions can be similarly monitored by the trial court pursuant to the precise language of Rule 1.280(c). In such cases the public defender knows exactly what to expect from a hostile

witness. But what of the remaining cases? Aurilio ignores the fact there is less than a 3% chance that any criminal case will go to trial, and she fails to explain why voir dire or other curative alternatives to closure less restrictive of First Amendment rights would not eliminate any remaining problems.

CONCLUSION

For the foregoing reasons, Petitioner The Miami Herald Publishing Company respectfully requests that this Court answer the two certified questions affirmatively.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner The Miami Herald Publishing Company has been furnished by U.S. Mail this 27th day of November, 1985, to the following:

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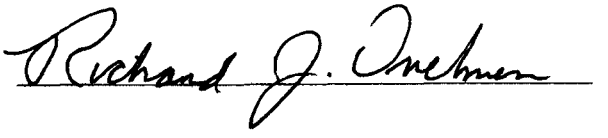

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