IN THE SUPREME COURT OF FLORIDA

MIAMI HERALD PUBLISHING COMPANY and PALM BEACH NEWSPAPERS, INC.,	)	
Petitioners,	)	
v.	)	CASE NO. 67,479
JOHN W. HAGLER and the STATE OF FLORIDA,	)	
Respondents,	)	

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

Interest and Identity of Amici

The amici submitting this brief have a direct interest in the outcome of this appeal because it will establish the standard in Florida for public access to depositions in criminal proceedings. The resolution of this question will determine whether the press will be able to obtain the information necessary to report fairly and accurately the overwhelming majority of criminal cases which never go to trial. Without access to such information, the public's knowledge of, and confidence in, Florida's criminal justice system will surely suffer.

The amici are The New York Times' Florida newspapers: The New York Times Company, publisher of the Sarasota Herald-Tribune; Gainesville Sun Publishing Company, publisher of the Gainesville Sun; Lake City Reporter, Inc., publisher of the Lake City Reporter; Lakeland Ledger Publishing Corporation, publisher of the Lakeland Ledger; Leesburg Daily Commercial, Inc., publisher

of the Leesburg Daily Commercial; Ocala Star-Banner Corporation, publisher of the Ocala Star-Banner; The Palatka Daily News, Inc., publisher of the Palatka Daily News, the Marco Island Eagle and Golden Gate Eagle; Fernandina Beach News-Leader, Inc., publisher of the Fernandina Beach News-Leader; Sebring News-Sun, Inc., publisher of the Sebring News-Sun and the Avon Park Sun.

Statement Of The Facts And Case

The amici adopt the Statement of the Facts and Case set forth by the Petitioners.

Summary Of The Argument

In recent years, the United States Supreme Court has recognized that the First Amendment affords the public a fundamental right to monitor the criminal justice system. In a line of cases commencing in 1979 and continuing to the present, the Court has begun the process of explicating and drawing the contours of this qualified right of access. To date, the right has been found to encompass criminal trials, voir dire proceedings, and pre-trial suppression hearings. This term the Court has taken for review a decision of the California Supreme Court which mistakenly held the First Amendment right of access does not extend generally to pre-trial proceedings in criminal prosecutions.

This Court anticipated by several years these rulings of the United States Supreme Court when it held in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 908 (Fla. 1976), that "the public and the press have a fundamental right of access to all judicial proceedings." This Court reaffirmed that holding four years ago in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982).

Two years ago, in Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the United States Supreme Court held that a narrowly drawn protective order based on a showing of "good cause" did not violate the First Amendment where it had been entered in a civil libel suit to prevent the media defendant from gratuitously publishing the membership and contributor lists it had obtained through compelled discovery from the plaintiff, a highly controversial religious group.

The question presented in this case is whether the Fourth District Court of Appeal was correct in departing from the teachings of prior decisions of this Court and the United States Supreme Court -- and in ignoring the "good cause" requirement of Seattle Times Co. v. Rhinehart and Rule 1.280(c)(5), Florida Rules of Civil Procedure -- to hold the public has absolutely no right to monitor depositions taken in criminal cases.

The holding of the Fourth District is aberrant. A review of Florida cases prior to the decision in Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985), and very recent cases from other jurisdictions, demonstrates that the public may

be excluded from criminal depositions only upon a showing of "good cause", where "good cause" is defined in terms approximating the standard for closure established by this Court in Miami Herald Publishing Co. v. Lewis, supra.

ARGUMENT

Since 1979, the United States Supreme Court has recognized the qualified First Amendment right of the public to monitor the criminal justice system. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett v. Depasquale, 443 U.S. 368 (1979); see Waller v. Georgia, 467 U.S. 39 (1984). While this First Amendment right of access to criminal proceedings is not absolute, it is "of constitutional stature." Globe Newspaper Co. v. Superior Court, supra, at 606. Indeed, access is crucial; the constitutional right to receive information and ideas "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.... [T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." Board of Education v. Pico, 457 U.S. 853, 869 (1982). As Justice Stevens writing separately in Press-Enterprise Co. v. Superior Court, supra, recognized, the central meaning of the First Amendment is to guarantee free and open discussions of government operations, including the workings of the legal system:

> The focus commanded by the First Amendment makes it appropriate to emphasize the fact that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader. The "common core purpose of assuring freedom of communication on matters relating to the functioning of government," that underlies the decision of cases of this kind provides protection to all members of the public "from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch."

Id. at 517 (Stevens, J., concurring) (citations omitted).

In Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the United States Supreme Court recognized that absent a showing of "good cause" under Rule 26(c), there is a public right of access to information obtained in the discovery process in a civil proceeding. Seattle Times, however, did not address public access to criminal discovery material. The issue in Seattle Times was the standard under which a party to civil litigation, who has learned information through compelled discovery, may disseminate that information. The appropriate First Amendment standard for public access to criminal discovery information has not yet been directly addressed by the United States Supreme Court. Nonetheless, it is unlikely that the Court would endorse the Burk decision inasmuch as Burk rejects not only the constitutional standards developed in the criminal access cases but the Rhinehart "good cause" standard as well. This Court should therefore reverse Burk and look to the overwhelming weight of Florida

precedent to determine the precise character of the public right of access to criminal depositions.

A. Florida Courts Have Traditionally Afforded the Public Access to Depositions.

Florida trial courts have traditionally allowed the public access to depositions, whether under the common law, the rules of procedure, or the First Amendment. Withlacoochee v. Seminole Electric, 8 Med.L.Rptr. 1281 (Fla. 13th Cir. Ct. 1982); Florida v. Sanchez, 7 Med.L.Rptr. 2338 (Fla. 15th Cir. Ct. 1981); Florida v. Hodges, 7 Med.L.Rptr. 2424 (Fla. 20th Cir. 1981); Cazarez v. Church of Scientology, 6 Med.L.Rptr. 2190 (Fla. 6th Cir. Ct. 1980); Florida v. Diggs, 5 Med.L.Rptr. 2597 (Fla. 11th Cir. Ct. 1980); Florida v. Alford, 5 Med.L.Rptr. 2054 (Fla. 15th Cir. Ct. 1979); Florida v. Bundy, 4 Med.L.Rptr. 2629 (Fla. 2d Cir. Ct. 1979). Aside from Burk and its progeny,[1/] Florida appellate courts have also regularly permitted access to depositions. Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985); Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979).

1/ Post-Newsweek Stations, Florida, Inc. v. Fuster, 474 So.2d 344 (Fla. 3d DCA 1985). The Fourth District also has followed Burk in Florida Freedom Newspapers, Inc. v. Karliss, 471 So.2d 571 (Fla. 4th DCA 1985); Miami Herald Publishing Co. v. Hagler, 471 So.2d 1344 (Fla. 4th DCA 1985); and State v. Freund, 473 So.2d 273 (Fla. 4th DCA 1985).

There is no mystery as to why Florida courts have routinely afforded the public access to criminal depositions. This Court has noted that "whatever happens in any courtroom, directly or indirectly, affects all the public. To prevent star-chamber injustice, the public should generally have unrestricted access to all proceedings." State ex rel Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976); In re Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979) ("It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance"). These principals are especially important in criminal prosecutions, where the power of the state can be employed irresponsibly or corruptly to abridge such fundamental rights as life, liberty, and property. The First Amendment interests in access to criminal proceedings are, therefore, even greater than those at stake in civil proceedings. As one court has explained:

> We do not see present in the case of civil discovery those interests that make publicity in a criminal trial an important "safeguard against any attempt to employ our courts as instruments of persecution".

In re San Juan Star Co., 662 F.2d 108, 115 (1st Cir. 1981) (citations omitted).

The overwhelming majority of all Florida criminal proceedings are terminated before trial. In 1979, 1980 and 1981, Florida's circuit courts disposed of a total of 326,433 criminal

matters; and 313,598, or 96.1%, were terminated before trial.[2/] Thus, public access to pre-trial depositions is of particular and fundamental importance. As one Florida commentator has observed:

> Myriad factors that develop through discovery contribute heavily to early dispositions, but the process of discovery, and particularly the taking of depositions, occurs in a twilight zone where neither the judge nor the public sees all. In the name of justice, the State strikes quiet deals of infinite variety -- some proper, some not. The State makes these deals outside the formal arena where the public could judge for itself whether justice has been done.

Note, Nonparty Access to Depositions in Florida, 39 U. Miami L. Rev. 157 (1984). In this case, the lawyers "agreed to take the deposition [of the State Attorney] 'in secret' and not to order or file the transcript." Miami Herald Publishing Co. v. Hagler, 471 So.2d 1344 (Fla. 4th DCA 1985) (Barkett, J., concurring specially). No trial ever occurred and so the denial of access was complete. Depositions play too essential a role in the criminal justice process simply to leave the question of access to them to the "unbridled discretion of the lawyers." Burk, supra (Anstead, J., dissenting).

As Judge Barkett noted in her special concurrence in this case,

> [A] major policy reason for open proceedings in the courts is "the public's right to monitor the functioning of our courts, thereby ensuring quality, honesty, and respect for our

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2/ OFFICE OF THE STATE COURTS ADMINISTRATOR, FLORIDA JUDICIAL SYSTEM STATISTICAL AND PROGRAM ACTIVITY REPORTS (1979-81).

> legal system." In the Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984). Agreements to bypass the rules, and to take secret depositions of the State Attorney in a pending criminal case prosecuted by the same State Attorney's office, are much more prone to ensure speculation and distrust rather than to ensure confidence in our legal system.

Hagler, supra, at 1344. While the First Amendment interests in access to civil discovery recognized in Seattle Times are important, there are even more important interests involved in claims of access to the criminal justice system. This Court should therefore afford the public access to criminal depositions.

B. The "Good Cause" Requirement Should Be Construed In Accord With The Lewis Standard For Closure.

Under the Rules, when a party or deponent seeks to limit access to a criminal deposition, he must seek a protective order from the court and show "good cause" why such an order is necessary. In these circumstances, the "good cause" requirement of the Rules should be construed in accordance with the three-part common law standard for closure of pre-trial hearings adopted by this Court in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982). In Lewis, the Court held that a litigant seeking closure must 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.

Id. at 6.

In Miami Herald Publishing Co. v. Chappell, 403 So.2d 1342 (Fla. 3d DCA 1981), the Third District Court of Appeal explained the three-part Lewis test as follows: "The first prong of the test protects a defendant's right to a fair trial; the second prong employs traditional First Amendment techniques, and the third prong employs practical considerations." Id. at 1345.

The interests at stake here and in Lewis are identical. Thus the Court's words in Lewis are equally applicable to depositions:

> [W]e must delicately balance the competing yet fundamental rights of an accused to a fair trial by an impartial jury, and of the free press guaranteed by the first amendment. The inherent conflict between these two rights is a difficult one to resolve, and in so doing, we seek a solution that gives maximum importance to both interests.
>
> An additional factor that must be considered is the inherent power and interest of the court in guaranteeing to the litigants the fundamental right to a fair trial. The question then, is three dimensional, dealing with the power and authority of the court, the rights of the defendant, and the rights and interests of the public and the press."

Id. at 3. Access to criminal discovery presents the same "three dimensional" question and it therefore requires the same delicate balancing of competing interests.

The question of public access to information contained in civil depositions was considered in In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981). Like the more recent Rhinehart case, San Juan addressed the access issue in terms of the "good cause" requirement.

Noting that the case concerned "one of the most controversial and well-publicized events in recent Puerto Rican history", the San Juan court characterized media coverage of the litigation, particularly of defendants' depositions, as "intense." Id. at 111. The court therefore entered a protective order, finding "good cause" to do so in the "'reasonable likelihood' that the wide dissemination of prejudicial publicity would otherwise deny the defendants a fair trial." Id.

In reaching its decision, the San Juan court first noted that the dissemination of information obtained through depositions "qualifies for protection under the First Amendment". Id. at 114. The court then articulated considerations remarkably similar to those embodied in Lewis:

> We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary.
>
> * * *
>
> In general, then, we find the appropriate measure of such limitations in a standard of "good cause" that incorporates a "heightened sensitivity" to the First Amendment concerns at stake.

Id. at 116.[3] The San Juan court ultimately sustained the entry of the protective order because (i) "'other measures would...fail to correct the threat', [(ii)] 'without this prior restraint a fair trial [would] be denied'", (iii) the order was "narrowly drawn", and (iv) less restrictive means were not available. Id. at 117.

Four other recent decisions provide useful guidance with respect to construction of the "good cause" standard where closure of the discovery process in a criminal case is sought. In State v. Cianci, 496 A.2d 139 (R.I. 1985), the Supreme Court of Rhode Island established a four-part test to determine when a protective order limiting access is permissible:

> [A] four-part inquiry... should be made by the trial court before closure is justified. A protective order (1) must be narrowly tailored to serve the interests sought to be protected, (2) must be the only reasonable alternative, (3) must permit access to those parts of the record not deemed sensitive, and (4) must be accompanied by the trial justice's specific findings explaining the necessity for the order.

In George W. Prescott Publishing Co. v. Register, 479 N.E.2d 658 (Mass. 1985), the Massachusetts Supreme Court found the "good cause" standard in a civil case must encompass the public's interest in examining the information at issue, and explained that

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[3] The San Juan court focussed solely on whether "good cause" had been shown pursuant to Federal Rule of Civil Procedure 26(c), concluding that where good cause was not established, the First Amendment was violated, and where good cause was established, no First Amendment violation could exist.

in Seattle Times, "the Court did not sanction an automatic impoundment of materials uncovered during pretrial civil discovery." A careful reading of Seattle Times, the Massachusetts court stated, indicated that "impoundment of such materials was permissible, under the First Amendment, only if based 'on a showing of good cause'".

Similarly, in Ramada Inns, Inc. v. Drinkell, 490 A.2d 593 (Sup.Ct.Del. 1985), the Superior Court of Delaware interpreting "good cause" in a civil case found that:

> Denial of access to litigation material must be approached from the premise that court restraint should not be imposed unless strong justification exists for such action. Thus, the party seeking the restraint must carry a substantial burden.
>
> * * *
>
> The Court should apply a 'balancing test' giving consideration to the magnitude and imminence of harm to the litigants supporting secrecy against the interests of the government and public in disclosure of matters relevant to matters before the courts.

Id. at 598-99.

Finally, in Plaquemines Parish Commission Council v. Delta Development Co., Inc., 472 So.2d 560 (La. 1985), the Louisiana Supreme Court held that, in balance, the public's right to know and the press' right to publish are superior to the privacy interests of public official defendants in civil pretrial discovery materials. Thus, in the absence of a showing of good cause, the Louisiana court held, no protective order would issue.

This Court should therefore follow its own precedent, as well as the example of other state and federal courts, and require any party seeking to restrict access to a criminal deposition to make a showing of "good cause" defined in accord with the three-part Lewis test.

CONCLUSION

For the foregoing reasons, the amici urge this Court to adopt the three-part Lewis closure test for determining the existence of "good cause" to restrict public access to depositions in criminal cases.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by mail this 24th day of February, 1986 upon:

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