IN THE
SUPREME COURT OF FLORIDA

CASE NO. 67,479

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

Petitioners,

vs.

JOHN W. HAGLER and
the STATE OF FLORIDA,

Respondents.

On Order Accepting Jurisdiction to
Review a Decision of the District Court
of Appeal of Florida, Fourth District

ANSWER BRIEF OF THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Introduction

Three cases raising issues similar to those presented in this appeal are pending before the Court.[1] The brief of the Miami Herald filed in this appeal merely attempts to summarize what The Herald has previously argued in those cases. The brief of Palm Beach Newspapers confines its argument to discussion of a few public policy considerations. Their brevity is appreciated, but one is left to wonder why the Court has been pressed to take this case. In any event, a few distinctions are in order.

First, this appeal does not involve any consideration of Chapter 119, Florida Statutes, the Public Records Law. (Neither does Post-Newsweek, supra, note 1) The respondents in Burk, supra, note 1, contend that the Chapter 119 issue is not properly before the Court in that appeal, but the point will not be re-argued here. Chapter 119 was clearly not raised in the proceedings below.

Second, petitioners never sought to attend the deposition of State Attorney David Bludworth in this case. Here, the press sought access to an untranscribed deposition of the State

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[1] The three other appeals now before the Court are Post-Newsweek Stations, Florida, Inc. v. State, 474 So.2d 344 (Fla. 3d DCA 1985); State v. Freund, 473 So.2d 274 (Fla. 4th DCA 1985); Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985).

Attorney and written notice of the taking of all future depositions in the case. (See Motion, Pet. Appendix, Tab 12)[2]

The Trial Court's Ruling

Petitioners' joint motion in the trial court was based on the First Amendment, "Florida common law" and unspecified provisions of the Florida Rules of Criminal Procedure. (Pet. Appendix Tab 12) In denying the motion, the trial court held that Rule 3.220(d), Fla.R.Cr.P., providing for the filing of written notices of the taking of depositions, conferred no rights on the press or public and could properly be waived by counsel for the parties. (Tab 17) It also held that petitioners' reliance on Rule 1.080(d), Fla.R.Civ.P., was misplaced in that the rule did not require the filing of an original subpoena where a witness agreed to appear voluntarily and no subpoena was served. The Court correctly observed that no case brought to its attention held that criminal discovery depositions were "judicial proceedings" open to public attendance or that there was a public right of access to untranscribed or unfiled depositions. Finally, the trial court held that Rule 1.310(f)(2), Fla.R.Civ.P., entitled only a party or a deponent to depositions copies, not the press or public.

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[2] As petitioners' appendix reflects, they did obtain a copy of the deposition of the State Attorney. (Appendix, Tab 3) The court reporter's certification appended thereto is dated December 12, 1983. The petitioners' motion (Tab 12) bears a service date of September 1, 1983.

The District Court of Appeal, Fourth District, affirmed the trial court on authority of Palm Beach Newspapers, Inc., et al. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985). The Burk decision, as stated, is now before this Court for review. (Case No. 67,352)

The Facts

Respondent State of Florida does not take issue with Palm Beach's Statement of the Case and Facts (adopted by the Herald's brief) except for its unsubstantiated assertion that the State Attorney had knowledge that the press was seeking to litigate any closure of the depositions. (Palm Beach Brief, p. 8) The point is not material to any issue on appeal.

The facts established in this case are few, and far from extraordinary. The criminal defendant, John W. Hagler, was arrested and charged with the sale of cocaine to an undercover agent. He pleaded guilty to the charge. (Pet. Appendix, Tab 19) Before producing the cocaine, he offered to sell to the agent purportedly "compromising" photographs of State Attorney Bludworth. The agent viewed the photographs, which merely depicted Bludworth at a party on a boat. (Deposition of Richard Stoutenburgh, Pet. Appendix, Tab 2, p. 26) Neither those photographs nor any others that Palm Beach's brief suggests may exist were ever produced by Hagler in the course of the prosecution, or any time thereafter.

The State strongly takes issue with Palm Beach's scurrilous speculation about the state's participation in a conspiracy to suppress information, their wholly unfounded suggestion that State Attorney Bludworth promised Hagler some benefit in exchange for keeping the deposition secret, and their contemptible query as to whether some "unsuspected, nefarious enterprise" is yet afoot. (Palm Beach Brief, p. 16) If such innuendo has any place in a Supreme Court brief, there ought to be some record support for it. Here, the record, including Bludworth's deposition, is devoid of supporting evidence. It is no surprise that having suggested the possibility of such facts, Palm Beach immediately beats a hasty retreat in the assertion that they seem "unlikely." In fact, so unlikely that Palm Beach declines to "vouch" for them. (Palm Beach Brief, p. 16).

In a similar vein suggestive of some shadowy agreement, the Miami Herald's brief states as a fact that Hagler received "only 3 months probation" for the sale of cocaine. (Herald Brief, p. 6) The record shows he received 3 years. (Palm Beach Appendix, Tab 19)

SUMMARY OF ARGUMENT

There is no right under the First Amendment, common law or the rules of criminal and civil procedure for the public and the press to attend depositions. There is no such right entitling the public or press to copies of depositions or other discovery materials not transcribed and filed in court.

The fact that a trial court is empowered to enter protective orders does not create a right of access. Once information given in the course of a deposition becomes public (immediately if the press or public attends), a court is virtually powerless to prevent its dissemination no matter how prejudicial to a criminal defendant or invasive of the privacy of a civil litigant.

ARGUMENT

WHETHER THE PRESS AND THE PUBLIC HAVE A RIGHT TO RECEIVE NOTICE OF AND ATTEND DISCOVERY DEPOSITIONS; AND WHETHER THEY HAVE A RIGHT OF ACCESS TO UNTRANSCRIBED OR UNFILED DISCOVERY DEPOSITIONS.

The issue in this and the related cases is not whether an "appearance of impropriety" is created by non-public depositions as Palm Beach argues. Nor is it whether a "per se closure rule" is appropriate as the question is framed in The Herald brief. The issue is whether the public and press have a right to attend depositions and publish deposition material. If so, what is the source of that right?

Petitioners generally rely on briefs filed in other cases- Burk, Post-Newsweek Stations, and Freund, supra, note 1. Palm Beach offers only a few digressive thoughts on what it thinks are important policy considerations and the Herald presents a rehash of arguments in the other cases. The State therefore will adopt the reasoning and authority in the trial court's order below and also the authorities contained in the respondents' briefs in Burk and Post-Newsweek Stations

Palm Beach argues that the need for a public right of access to deposition proceedings and transcripts is "especially compelling" on the facts of this case (Pet. Brief, p. 12), which they say reflect the circumstance of

> an elected public official and candidate for high public office [being] implicated in possible wrongdoing and identified as a target for blackmail . . . [and who] conspires with an accused to secret [sic] his deposition testimony from the public.
>
> (Palm Beach Brief, p. 13)

The "facts" that so stir Palm Beach, however, are without question no more than the fabrications of a common criminal against a public official--something that could occur in any criminal prosecution. The argument that State Attorney Bludworth "conspired" to secrete his deposition testimony is especially contrived as there is not the slightest evidence for it. Palm Beach's attorney was given a copy of the deposition following disposition of Hagler's guilty plea. The facts of this case are certainly less than "compelling."

Of course the facts, compelling or not, are not determinative of the right that petitioners seek to establish. The right for which Palm Beach and the Herald contend in Burk, Post-Newsweek, Freund and this case is not a simple public right to attend depositions of public officials accused of wrongdoing, but the right of the press and presumably innumerable members of the public--whoever, in fact, may be interested--to attend any deposition and to publish any material elicited in any deposition in any case, civil or criminal.

As the trial court found, this right has not been conferred by the rules of civil and criminal procedure, nor has any case--

state or federal--held a deposition to be a "judicial proceeding" open to public attendance. Petitioners do not point to any constitutional source of this alleged right. The right is not established simply by suggesting, as the Herald does, that trial courts can control deposition proceedings through issuance of protective orders and that discovery materials have historically been filed with the Court where they are available for public inspection. By this reasoning, any reporter or any member of the public could also demand from an attorney copies of answers to interrogatories and requests for admissions, as well as virtually all papers and documents produced in compliance with discovery requests in any case.[3]

In the sensational case, where literally scores of press reporters, television crews (as in Post-Newsweek Stations), and

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[3] That the Federal and Florida Rules of Civil Procedure may have once provided for filing discovery materials does not establish a constitutional or common law right. Discovery materials are no longer filed as a matter of course. Rule 1.300(f)(3), Florida Rules of Civil Procedure; Local Rule 7, Northern District of Florida; Local Rule 3.03, Middle District of Florida. In any event, under the former rules, parties at least had an opportunity to move for a protective order, if desirable and justifiable, before the filing of discovery material. If the public and press may now attend depositions, that right is largely illusory.

Moreover, it is interesting to note that in all four cases before the court petitioners seek the right to attend a deposition in a criminal proceeding. The federal rules of criminal procedure do not even allow for the taking of discovery depositions. A deposition may be taken only in "exceptional circumstances" for the limited purpose of preserving the testimony of a witness. Rule 15, Fed.R.Cr.P.

hundreds among the general public may wish to pass the day at a deposition, the rules give no guidance on how to choose among groups and individuals. The rights of the press are no greater than those of the public. Nixon v. Warner Communications, 435 U.S. 589 (1978); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct 1029, 43 L.Ed.2d 328 (1975). No one individual's right is superior to another's. In the lurid crime or the sensational divorce, is the trial court left to direct the parties to rent an auditorium and hire monitors to control the crowds in order that the parties may exercise their rights as litigants to conduct discovery?

Petitioners' arguments are fatally flawed by the curious fact that they advert not once to the fundamental right of an accused to a fair trial-- "the most fundamental of all freedoms" which "must be maintained at all costs." Estes v. Texas, 381 U.S. 532, 540, 14 L.Ed.2d 543, 549, 85 S.Ct. 1628 (1965). Nor do the briefs of the press on file in Burk and Post-Newsweek Stations. The right to a fair trial is superior to the interest of the press in news gathering. Bundy v. State, 455 So.2d 330 (Fla. 1984). It strains credulity to suggest that the trial courts have effective control over what is heard and published if the press has a right to attend depositions. Any experienced attorney knows that answers and information produced at depositions or in discovery responses are far from predictable. And this being so, a prior restraint against publication could

not be imposed before a deposition. See, State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904, 908, 911 (Fla. 1976). Do petitioners suggest that when the prejudicial opinion or answer is given at a deposition that counsel should immediately race to the courthouse to try to obtain a protective order before the reporter can get back to the paper and publish his story? And why should the limited resources of the public defender or state attorney be diverted to legal battles with the media?

Contrary to the Herald's argument, Seattle Times Co. v. Rhinehart, ____ U.S. ____, 104 S.Ct. 2199 (1984), scarcely recognizes either a First Amendment right of access to depositions or a protective order as the universal panacea for public intrusion into discovery. As the Supreme Court said in Rhinehart:

> . . . A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. . . .
>
> Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law.

104 S.Ct. at 2207, 2208.

The Court continued:

> . . . It is clear from experience that pretrial discovery by depositions and

> interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expenses; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
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> There is an opportunity, therefore, for litigants to obtain-incidentially or purposefully-information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes . . . The prevention of the abuse that can attend the coerced production of information under a state's discovery rule is sufficient justification for the authorization of protective orders.[22]

104 S.Ct. at 2208, 2209.

Footnote 22 of the opinion reads as follows:

> The Supreme Court of Washington properly emphasized the importance of ensuring that potential litigants have unimpeded access to the courts: "[A]s the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use

> it, resulting in frustration of a right as valuable as that of speech itself."

104. S.Ct. at 2209, n. 22.

If a litigant has no First Amendment right of access to discovery material, how do the press and public? Petitioners fail to explain. Nor do their arguments give any heed to privacy interests of litigants and witnesses nor to the fundamental right of an accused to a fair trial. Petitioners utterly fail to articulate how a protective order can be effective once a deposition answer is given in the presence of the press.

The State acknowledges that the press certainly has an interest in reporting on the judicial system, on criminal prosecutions, and on public officials who may be engaged in wrongdoing. And the public also has an interest in knowing of these events so that they may, as petitioners argue, cast an informed vote for their elected officials. Nevertheless, this interest does not justify their intrusion into the discovery process to the prejudice of its orderly functioning nor an invasion of the legitimate privacy interests of parties and of witnesses caught, perhaps involuntarily, in the legal machinery. Nor does an arguable interest in attending and publishing depositions justify the potential prejudice, largely uncontrollable, to the right of the accused to a fair trial. For these reasons, the decision below should be affirmed.

It is suggested that should the Court deem it desirable to recognize limited rights of the press and public in discovery depositions, it should do so by appropriate modification of the rules of civil and criminal procedure, rather than by the unprecedented acknowledgment of a right to attend, procure and publish depositions and, presumably, all other discovery materials. Participation in rule revision by those involved in criminal and civil trial practice would be desirable. What petitioners have stressed in this appeal is the right to report on alleged misconduct of public officials. The passage of a few weeks or months does not diminish the significance of misconduct. If depositions are not transcribed and filed, it might well be agreed that a presumptive right of access after trial should be recognized--assuming that would not compromise ongoing criminal investigations or invade private matters of no concern to the public. There are many interests to be considered here, some obviously conflicting, and they are not appropriately resolved by the broad grant of a presumptive right on the part of the public and press to attend and publish depositions.

CONCLUSION

The decision of the Fourth District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RICHARD J. OVELMEN, General Counsel, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; SHARPSTEIN & SHARPSTEIN, P.A., Janice Burton Sharpstein, Laura Besvinick, 3043 Grand Avenue, Penthouse One, Coconut Grove, Florida 33133; 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; and STEEL, HECTOR, DAVIS, BURNS & MIDDLETON, 1200 Northbridge Centre, 515 North Flagler Drive, West Palm Beach, Florida 33401, this 14th day of March, 1986.

LOUIS F. HUBENER