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IN THE SUPREME COURT OF FLORIDA

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

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

# BRIEF OF RESPONDENT JOHN W. HAGLER

NELSON E. BAILEY, LAWYER
Commerce Center, Suite 303
324 Datura Street
West Palm Beach, Florida 33401
Telephone (305) 832-7941

COUNSEL FOR RESPONDENT
JOHN W. HAGLER

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## STATEMENT OF THE CASE AND FACTS

The history of this case's journey to the Florida Supreme Court is as outlined in the Petitioners' briefs.

That procedural history boils down to this: The Florida Supreme Court has for review a ruling, by a Circuit Court Judge sitting on trial of a felony criminal case, that holds the press has no right to prior notice of, and to attend, pre-trial depositions while they are being taken by a criminal defense lawyer, and holds the press has no right to obtain before trial a transcript of those depositions, unless and until they are filed of record or otherwise brought before the trial court itself in the course of the judicial decision-making process. The ruling is that the defendant's own right of fair trial prevails over free press, meaning the criminal defense lawyer must remain free to investigate and prepare a client's case without unnecessary, unreasonable intrusion and interference by the public and press.

The facts are as outlined in Petitioners' briefs, and in the Order of the trial court below. See: **Order of September 12, 1983**, Appendix to Initial Brief of Palm Beach Newspapers, Inc., at Tab No. 17, Order at pages 1-2.

## SUMMARY OF ARGUMENT

There is no right of press access to a criminal defense lawyer's depositions at the time those depositions are taken in preparation for trial of a client's case.

Respondent Hagler relies on the trial judge's extensive written order for the law supporting his position, and elects to address the question here in broader terms of Constitutional policy. His perspective is one not shared with any other party to this case — that of the criminally accused citizen.

In deciding how crime can be reported to the public without prejudicing jurors, or those who will become jurors, it is not possible to achieve a balance that gives full and equal value to both free press and fair trial -- but neither is all the weight on the free-press side side of the issue. Secrecy and concealment of truth are dangerous to a democratic society; nevertheless, the administration of justice must be kept as uncontaminated as possible by outside influences.

A defense **subpoena for deposition** is different than one requiring a witness appear before the court to provide imput directly bearing on the administration of justice: it is merely an order requiring the person to answer under oath a defense lawyer's inquiries in the course of preparing for trial of a client's case. So long as the public's and press's right of full access to all matters actually brought before the court to bear on the administration of justice is fully preserved, the Consti-

tutional reasons for a free press are not furthered by making a criminal defense lawyer's pre-trial preparations manditorily and contemporaneously open to public scrutiny. It is the administration of justice that is required to be "public" by the right of free press, and by the right of impartial "and public" trial -- not the lawyers' preparations for trial.

If the press had such a right it would endanger fair trial. Press access to all depositions would put defendants in the position of sometimes having to forgo taking depositions for fear of generating the very pre-trial publicity that would prejudice their ability to get a fair trial -- would risk turning defense counsel's very preparations for trial into a sordid trial by newspaper and television. Also it would risk turning the process prior to trial into a cat-and-mouse game between the defense lawyer in his efforts to complete discovery and the press in their efforts to get a story -- and what happened in this case may be an example.

What the Constitution demands be public is the proving of guilt beyond a reasonable doubt, at courtroom proceedings held in full public view. This clearly includes the right to a full view of defense evidence and arguments tendered in those proceedings. There are no compelling reasons for also giving the public and press the right to a contemporaneous view of the defendant's and his lawyer's preparations for court.

## ARGUMENT

The Petitioners and Amici Curiae review thoroughly, in their briefs to this Court, all existing appellate decisions bearing on the question of there being a right of press and public access to depositions taken during preparations for trial of a criminal case. It may even be suggested they have provided this Court with a supply of case law on the subject sufficient to assure against a shortage in that commodity for several years.

Respondent Hagler's position on the law applicable is fully stated, and expressed exceedingly well, in the extensive order entered by the trial judge below, the Honorable Carl H. Harper, Circuit Court Judge. Hagler will adopt by reference, without repeating here, the law and reasoning of the trial judge's order.

Respondent Hagler, through his trial lawyer in the criminal case that brought all this on, elects instead to address this Court in broad terms of constitutional policy. Respondent Hagler, even though he has not been an active participant in this review process to date, feels compelled to speak now, for no other party to this case is in a position to speak to the issue from the point of view of the criminally accused citizen facing trial.

Much of what Respondent Hagler has to say here is taken from concepts and arguments from the book **Communication is Power.** Full credit is hereby given. Herbert Brucker, **Communication is**

**Power, Unchanging Values in a Changing Journalism,** New York Oxford University Press, 1973.

This case is an example of a difficulty that plagues both justice and journalism. How can crime be reported to the public without at the same time prejudicing jurors, or those who will become jurors. Two basic rights are involved, and each, considered by itself, is of overriding importance. Neither should be allowed to triumph over the other. Both are written into our Constitution, as part of the Bill of Rights, because both are of paramount importance to maintaining a civilized, free, and democratic society.

The First Amendment says, "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." It sounds simple enough, but it truly is of stupendous importance, to us all. A basic lesson taught by all human history is that eternal vigilance against all censorship is essential if the people are to know enough to keep control of their own affairs and destiny.

Respondent Hagler acknowledges that the Petitioners and Amici Curiae are appropriate and representative spokespersons for the American free press -- especially the large, corporate American free press. Of course, the right of a free press was not written into the Constitution for the benefit of multi-million-circulation newspaper corporations, still less for broadcasting empires that can make the whole nation look at and listen

to the same thing at the same time. The free press was established to preserve a freedom of the individual, a freedom to communicate with fellow citizens through a hand-operated press. The press was once regarded as the decisive instrument for the liberation of the individual from oppressive government. Today citizens are more inclined to ask how they can liberate the individual from the intellectual despotism of the mass communications media, because both big government and big press seem beyond the individual's control anymore. It is fair to suggest that today's citizens no longer see either the daily newspaper or television as a private civil liberty.

In spite of all that, however, Respondent Hagler concedes that the Petitioners and Amici Curiae do speak for the American free press -- as we know it today.

The reporter practices a calling second to none in importance. If he has editors who realize journalism is something more than a business, he has it in his power to make the fresh winds of truth sway the minds of whole human populations. He has the power, and a sacred duty, to infuse the blood of democracy with the corpuscles of fact that sustain its life. But, as Respondent Hagler will seek to show, this does not include the right to invade a criminal defense lawyer's preparations for trial of a client's case.

Respondent Hagler can see where the Petitioners and Amici Curiae, in their arguments to this Court, refer often to maintaining a balance; more than once they make passing reference to the need for balance between the public's right of free press and the accused's right of fair trial. But Respondent Hagler fails to see where Petitioners and Amici Curiae ever really advocate any true balancing. He sees instead that all "balance" advocated by them is on the side of the free press and the peoples' right to know, with no weight at all being accorded to the accused person's right of fair trial.

Any true balancing of these sometimes conflicting constitutional rights involves something more than merely acknowledging there is a "fair trial" side to the issue.

Judges, lawyers, and criminally accused persons sometimes do have legitimate reasons to ask for silence, for they are concerned with keeping trials fair. As is so often true in human affairs, this free-press/fair-trial conflict is a clash not between right and wrong but between two rights.

The fair-trial/free-press conflict leaves us on a seesaw destined always to be in motion. Secrecy and concealment of the whole truth are dangerous to a democratic society. But the fact remains that the administration of justice must be kept as uncontaminated by outside influences as possible. Not all citizens can be judges, but they all can be jurors, and citizens sensitive to the delicate balance of justice are required to make it work.

Here is how two authors, one a newspaperman and the other a lawyer, sum up the bar-press conflict.

> We do not want a press that is free, more or less, just as we should not tolerate trials that are almost fair * * *. The paradox is that neither value can be absolute, yet we cannot accept the diminution of either one.
>
> Alfred Friendly & Ronald L. Goldfarb, **Crime and Publicity**, New York: Twentieth Century Fund, 1967, p 346

Presumedly this conflict will last as long as humans with free and democratic societies do. It is not possible to achieve a balance that gives full and equal value to both rights; but there are ways of living with it. In the end, it is for the courts to find those ways.

The right to a fair trial is safeguarded by the Sixth and Fourteenth Amendments. These Amendments, like the First, seem simple enough. The Sixth Amendment begins, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." And the Fourteenth says, "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

These rights take meaning when translated into experience. So much of humankind's history is a history of injustice: of people unjustly condemned to disgrace, suffering, or even death, all done outside the view of public scrutiny, and far too often

done on the basis of insufficient evidence, and sometimes on just plain false evidence.

Respondent Hagler, as the only criminal defendant who is a party to this case, would emphasize that the right of fair trial necessarily includes things such as the right to effective assistance of counsel at trial — which includes the right to effective assistance of counsel in preparing for trial.

For the criminal defense lawyer who practices in Florida state courts, effective preparations for trial, or for any judicial proceedings leading up to trial, almost always includes that lawyer's taking statements (and recording of them in one form or another) from witnesses and potential witnesses -- as well as from persons who obviously have no potential of becoming witnesses but who may prove to be sources of information leading to other facts and other persons who perhaps will become witnesses. The lawyer obtains facts from people in two basic ways.

First, the criminal defense lawyer's interview process in preparation for trial may, and usually does, involve statements informally taken from people willing voluntarily to talk with the defense lawyer or his staff. The press has no right to attend those interviews, or to access to the records of them. A right of access comes into existence only when the fruits of the interviews later become a part of the courtroom process itself.

Second, the defense lawyer's pre-trial interview process also usually involves the taking of statements from people who, for a variety of reasons, are unwilling or not allowed to talk with defense counsel voluntarily, and who therefore must be placed under subpoena. Defense counsel can interview them only by force of a subpoena for deposition, being nothing more than a court order compelling someone to submit to inquiries of a lawyer in the course of that attorney preparing for trial of a client's case.

Bear in mind, a **subpoena for deposition** is different than a subpoena for trial; it is not an order to appear before the court itself; it is not an order requiring a person to take part by providing information and input directly into the judicial decision-making process. Since a subpoena for deposition is merely an order requiring the person to answer defense counsel's inquiries in his efforts to discover facts possibly useful in preparing for trial of his client's case, logically it would seem to follow that the press has no greater right to attend those interviews, or to obtain copies of them, than it does in the case of other person's statements voluntarily given in private to that same lawyer.

What is involved here is the defendant's and the criminal defense lawyer's pre-trial preparations, not their conduct of the trial itself, or any pre-trial proceeding -- not their conduct of their case in the courtroom. If and when the statements or

depositions that a criminal defense lawyer does take when preparing for trial, do become a part of the judicial proceedings, be it at trial or in any pre-trial matter brought before the court, by testimony, in documents, or otherwise, then the public's right to know what is occurring in the criminal court process does come into play. The public's right to access to anything brought before the court any time in the course of the criminal court proceedings is clear. When those things become part of the process by which justice is administered, by being brought before the court, but not before then, the public clearly does have a right to know, and a right of access.

In this case, as in most involving the controversy over justice and news of crime, the controversy swirls not about secrecy during trial itself, but about pre-trial events.

Respondent Hagler maintains that the public and its press simply have no right to search, willy-nilly, through everything the private criminal defense lawyer finds in his efforts to effectively prepare for trial of a client's case. Nor does the public have a right to stand at that attorney's side, watching, and listening, while he prepares for trial by interviewing people. That non-existent right should not be confused with the public's right to scrutinize anything and everything the lawyer later uses in the courtroom, at any stage of the proceedings, in the course of actually representing his client before the court.

The policy reasons behind the constitutional right of a free press are not served by making a criminal defense lawyer's pretrial preparations manditorily open to public scrutiny.

As documented by authorities cited in the other parties' briefs, and in the trial court's order under attack, the courts seem ready enough to hold that neither the press nor the public has a right to be contemporaneously informed by the state -- that is, by the police and prosecuting authorities — of the details of the evidence being accumulated against a criminal defendant. The courts so hold because the courtroom, not the newspapers or television, is the appropriate forum in our system for the trial of a person accused of a crime.

Determining where the balance lies raises this question: In a democratic society where public scrutiny of public officials is so vitally important -- where public access to information in hands of public officials is so central to maintaining democracy itself -- is it not evident that the public and its press would have a greater claim of right to evidence accumulated by state officials, than it does to evidence gathered by private defense counsel on behalf of a citizen client accused of a crime? Or, to ask the same question differently: Is it not evident that a stronger case can be made for denying a right of press access to a private defense lawyer's pretrial preparations -- including his taking of depositions -- than can be made for denying a right of press access to information about the state's investigative ef-

forts and results prior to the time when one or the other of the parties brings that information before the court?

At trial it is necessary to make compromises between these sometimes conflicting rights of free press and fair trial. Before trial, at least as it relates to the preparations of a private criminal defense lawyer to prepare for trial of a private citizen accused of a crime, there are none of the same compelling reasons for making the same compromises.

In terms of balancing free press and fair trial, perhaps this consideration also should be put onto the scales. Modern communications make the conflict more difficult than it ever has been, because news of a spectacular crime now travels fast and far. Thoughtful individuals may sometimes question whether a trial unsullied by prejudice is possible. All the standard protections of fairness -- silenced lawyers, prosecutors and police; moving trial to another area; delay until furor subsides; the careful selection and sequestration of jurors during trial -- may no longer be enough. In bygone days when the weekly newspaper was printed by people one knew, and was delivered on horseback, potential for prejudice was a bit limited. It is quite another potential when the whole world, or simply the whole state, knows at once all about the crime and the accused -- or is lead to believe it knows all about them.

It is perhaps ironic that what generated this litigation was a story about some purported photographs of the State Attorney, assumed but never actually said to be embarrassing to him. What is involved here is an infinitesimal bit of flotsam on the massive tide of news about crime. All the same, the principle involved is significant.

And the issue remains two-sided. It is a constant struggle to keep justice from being contaminated by prejudice; it is equally a constant struggle to keep justice in full view of the public.

The person being deposed here was the State Attorney. If, instead of the State Attorney, the person being deposed were the victim of a rape, would the Petitioners maintain the same position? If a very young child, the alleged victim of child molesting, the same? If a juvenile in a delinquency proceeding, the same?

The person being deposed was the State Attorney. If any case at all can be made for the Petitioners' position here (and Respondent Hagler does not concede that such a case can be made), it would seem to center on the fact that the person being deposed in this specific case is a government official. Perhaps it also might center on the question of whether the law suit in which the deposition is being taken is in any manner related to his role as a government official. If the fact of his being a government official, or the subject matter of the suit, should strengthen

the Petitioners' position, then care should be taken by this Court that it not confuse the broader issue of whether there is an across-the-board right of public access to all pre-trial depositions taken by defense or prosecution counsel.

In light of Judge (now Justice) Barkett's observation in her concurring opinion below, in the instant case, perhaps it is particularly important that this factor not have a thumb-on-the-scales influence on all situations involving an issue of public access to pre-trial depositions in criminal cases. Judge Barkett, with clear reluctance, concurred in the decision below, obviously doing so only out of respect for **stare decisis**, but in doing so she noted the "agreement to bypass the rules, and to take secret depositions of the State Attorney" in this case, then observed that such agreements and conduct "are much more prone to ensure speculation and distrust rather than to ensure confidence in our legal system." **Miami Herald Publishing Co. v. Hagler**, 471 So.2d 1344 (Fla. 4th DCA 1985) (Barkett, J., concurring specially) at 1344.

Commons sense confirms what Judge Barkett says there -- and in reading the content of the deposition actually taken of the State Attorney, which is now a part of the record before this Court, one might wonder why the State Attorney did not similarly view it when the press sought his permission for release of a

transcript of his deposition. But that is not a question before the Court.

Viewing the entire record here, it is evident what the objectives of the parties were when the State Attorney's deposition was taken, in private, without affording the press any opportunity to attend.

For the defendant, the record reflects his motive was nothing more than to get a full and straightforward deposition from the State Attorney, and to get it without the State Attorney, as any human in similar circumstances may be expected to do, from guarding his answers for fear of how the press might report it or how the public might view it. The defendant's motive was nothing more than to prepare for trial: to find out what, if anything, the State Attorney may have to say that the defense might make use of at trial, without the influence of the press and public breathing down the witness's neck as the deposition was being taken.

If it had turned out that there was something in the State Attorney's deposition that the defendant could make use of before the trial court, then when it was made use of, at any stage of the courtroom process, it would have become immediately available by right to the public. It simply is not in dispute that whatever becomes a part of matters brought before the court -- at the same instant and to the same extent -- becomes available to the public.

Viewed in its full context the record also reflects the defendant's motive of seeking to avoid unnecessary publicity prior to his trial, which clearly would have been the product of the State Attorney's deposition if it had turned out that the State Attorney did have something dramatic to say, and if the press had been there when he said it.

It is for this Court to decide whether the public had a right to be there, at the State Attorney's deposition by the criminal defense lawyer in this case, breathing down the State Attorney's neck. It is for this Court to decide whether there is anything to place in the balance on the other side, the side that relates not to the State Attorney's right to protect himself from political or personal embarrassment, but to the defendant's right to prepare for trial outside the public limelight.

It is for this Court to place in the balance, and decide, whether a criminal defendant must, in the very process of preparing for trial of a case in which the press is interested, forgo taking some depositions for fear of generating the very pre-trial publicity that will prejudice his ability to procure a fair trial. Does the defendant not have a legitimate constitutional right to prepare for trial, and to use compulsory process to compel potential witnesses to talk with counsel in the preparation process, outside the public view? Is that not a legitimate part of his right of fair trial? Respondent Hagler and his trial attorney suggest that clearly it is.

In terms of balancing conflicting constitutional rights here, it is appropriate that the public's right to know only comes into play when counsel brings that information before the court to bear upon the judicial decision-making process itself. That is consistent with the fundamental policy reasons for the constitutional free-press provision in the first place.

It is also consistent with the right of fair and public trial. The Sixth Amendment stipulates a public trial as well as an impartial one. It is based on a principle whose roots go back to Magna Carta -- that justice is most likely to be done when the proceedings held in its name are conducted in full view of the public. The parties' "preparations for" that public trial, however, are not required by those provisions to be done in full public view. Those preparations are to be tested at trial, in full view of the court and public, not in the public forum of the press before trial begins.

If the Petitioner's position were to prevail here, then in trial of criminal cases the public would have a greater right, to more access to information, than the trial court itself would even have to information bearing on the judicial decision-making process.

There is much emphasis in the briefs of the Petitioners and Amici Curiae on the public's right to know everything there is to know about the administration of justice. But in truth the

Petitioners are seeking to establish a right to a whole lot more than that: they seek to establish that the public also has a right to know all that counsel for the defendant learned when he interviewed people while preparing his case, both the relevant and irrelevant. That is a position that goes well beyond the right to know all things that come before the court itself in the course of its administration of justice. It goes beyond the fundamental reasons for the right to a free press as it relates to the administration of justice. And it is a position that directly invades, and compromises, the criminal accused's right to prepare for trial, and his right to a trial free of prejudice by pre-trial publicity.

Allowing a right of public access to pre-trial depositions runs real danger, in high publicity cases, of turning the defendant's and his attorney's own pretrial preparations into something that generates even more prejudicial pretrial publicity -- and therefore into something they will chose to forego in order to avoid that danger. It runs the risk, too, of turning the pretrial preparations of the criminal defense lawyer into a sordid trial by newspaper, played out by some defense counsel and some prosecutors, not to mention by some witnesses. It runs the risk in other cases of turning the criminal trial process prior to trial into a cat-and-mouse game between the defense lawyer in his efforts to complete discovery and the press in its effort to get

a story. Indeed, what happened in this case may be an example of precisely that.

Allowing the press access to defense depositions would tend, in high publicity cases, to make the administration of justice seem more a game rather than what it should be: the deadly serious public business of finding the guilty, if they can be found, and of publicly proving them guilty beyond a reasonable doubt.

Perhaps it really is not a question of balancing conflicting rights. What the Constitution demands to be public is the proving of guilt beyond a reasonable doubt, by court proceedings held in full public view. Does that really include a right to full and contemporaneous access to the state's preparations for trial, or the defendant's?

Perhaps the **Amici Curiae** are correct when they point out that the centeral meaning of the First Amendment is to guarantee free and open discussion of government operations, including the court system, and that what underlies decisions applying the First Amendment is the "common core purpose of assuring freedom of communication on matters relating to the functioning of government." Brief of Amici Curiae, at pages 4-5.

Defense depositions are not an operation of government or of the judicial branch, but of the citizen accused in perparation for an operation of the judicial branch.

## CONCLUSION

For the reasons of Constitutional policy set forth hereinabove, and based on the authorities and arguments contained in the trial court's Order, the Florida Supreme Court should affirm the decision of the District Court of Appeal, Fourth District, and should confirm the holdings of the trial judge.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this pleading was served, by mail, upon Attorney General Jim Smith [Attention: **Assistant Attorney General Louis F. Hubener**], The Capital, Suite 1501, Tallahassee, Florida, 32301, and State Attorney David Bludworth [Attention: **Assistant State Attorney Frank Stockton**], Palm Beach County Courthouse, 300 North Dixie Highway, West Palm Beach, Florida, 33401, and the **Honorable Carl H. Harper, Circuit Court Judge**, Palm Beach County Courthouse, 300 North Dixie Highway, West Palm Beach, Florida, 33401, and **E. Martin Reeder, Jr., Lawyer**, Steel Hector Davis Burns & Middleton, 1200 Northbridge Centre, 515 North Flagler Drive, West Palm Beach, Florida, 33401, and **Richard J. Ovelmen, Lawyer**, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida, 33101, and **Janice Burton Sharpstein, Lawyer**, Sharpstein & Sharpstein, P.A., 3043 Grand Avenue, Penthouse One, coconut Grove, Florida, 33133, and **Jerold I. Budney, Lawyer**, Thomson Zeder Bohrer Werth Adorno & Razook, 4900 Southeast Finincial Center, 200 South Biscayne

Boulevard, Miami, Florida, 33131-2363, and **Dan Paul, Lawyer**, Paul & Burt, 13th Floor, 100 South Biscayne Boulevard, Miami, Florida, 33131, on this date, the 11th day of the month of March, A.D. 1986.

Respectfully submitted,

**NELSON E. BAILEY, LAWYER**
Commerce Center, Suite 303
324 Datura Street
West Palm Beach, Florida 33401
Telephone (305) 832-7941

By Nelson E. Bailey
NELSON E. BAILEY, LAWYER
FOR DEFENDANT