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

Initial Brief of Palm Beach Newspapers, Inc.

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INTRODUCTION

In this case the trial judge and the Court of Appeal held there are no constitutional, statutory, common law or procedural limitations on the authority of a state attorney and a criminal defendant to withhold from the public a transcript of the state attorney's own deposition, taken in the case he is prosecuting against the defendant, so long as neither party files a transcript of the deposition with the court.

Petitioner has already comprehensively briefed this Court on the legal grounds which support recognition of at least a qualified public right of access to depositions and deposition transcripts in criminal proceedings, principles which also require reversal here.[1] Rather than repeat those arguments, petitioner will use this brief merely to set forth the facts of this case and to highlight the policy considerations which make the need for recognizing a right of public access to unfiled deposition transcripts especially compelling on these facts.

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[1] Petitioner refers this Court to its briefs in Palm Beach Newspapers, Inc., et al., v. Burk, Case No. 67,352, and to petitioners' briefs in Post Newsweek Stations, Florida, Inc., and the Miami Herald Publishing Company v. State of Florida, et al., Case No. 67,671, which are pending before this Court.

STATEMENT OF THE CASE AND THE FACTS

The facts included in this statement come primarily from the pleadings and the discovery depositions taken by the defendant in the underlying criminal action which ended in a plea bargain.[2]

Operation 30-30

During four months in 1982, agents of Palm Beach County State Attorney David Bludworth, the Palm Beach County Sheriff and of the West Palm Beach Police Department collaborated on the first major undercover sting project ever attempted by local law enforcement in Palm Beach County. [A-1, pages 7, 8, 12].

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[2] At defendant's request, transcripts of the depositions of Palm Beach County State Attorney's Office investigators Ralph Wiles and Ron Ahrens, of Sheriff's Detective Arthur Newcomb, and of police informant, Richard Stoutenburgh, were placed in the court file by court order dated November 10, 1983, while this case was being prosecuted. State Attorney David Bludworth's deposition was transcribed, but was never filed with the Court. Bludworth's deposition was released to petitioners by the defendant December 13, 1983, after the criminal prosecution was concluded. Copies of these depositions and the other documents referred to in this statement are included in an appendix filed with this brief.

In some instances, the deposition testimony is conflicting and petitioners do not therefore contend the facts are beyond dispute, particularly as regards the details of the police undercover operation and the controversial photographs. There is, however, record support for each assertion within this statement.

Known as "Operation 30-30," the sting was targeted at suspected police corruption and sellers of stolen property within the Town of Riviera Beach. [A-1, page 4].

Investigators secretly videotaped various individuals with police informant Richard Stoutenburgh who posed as a fence for stolen property in a Riviera Beach storefront. [A-1, page 6]. Operation 30-30 led to the filing of 128 felony counts against 68 persons, including the defendant in the prosecution from which this appeal arises, John W. Hagler. Hagler was charged with possession and sale to Stoutenburgh of one-half of a gram of cocaine.

The Bludworth Photographs

Stoutenburgh testified at a deposition on July 27, 1983 -- which was attended by members of the press -- that before selling him the cocaine, Hagler offered to sell him for as much as $70,000 various photographs of Palm Beach County State Attorney David Bludworth with an unidentified woman. [A-1, page 13].

Hagler represented the photographs could be used as "bargaining chips" "to exert leverage" against Bludworth, who was then campaigning for election to the United States Senate. He said the photographs would "bring [Bludworth] to his knees." [A-2, page 26; A-3, pages 8 and 26; and A-4, page 11].

Hagler was particularly interested in using the photographs to help free Mark Herman, whose conviction

in 1978 of murdering Palm Beach businessman, George Kruesler, has been a source of continuing controversy in Palm Beach County.[3] Hagler planned to use the money he received for the photographs to aid Herman's attempt to obtain a new trial and implied the buyer would be able to use the photographs to extort favors from Bludworth.[4] [A-2, pages 24 and 25; A-4, page 10]. According to Bludworth's investigator, Ron Ahrens, Hagler suggested the photographs were the "key" to reopening the Herman case and that they could be used to force Bludworth to "take some kind of activity he normally wouldn't" such as "getting [Bludworth] to go in and change the files and let [Herman] out." [A-4, page 10; A-5, page 33].

Ralph Wiles, Bludworth's chief investigator, wanted to try and develop a case of extortion against Hagler and met with Bludworth and Assistant State Attorney Ken Selvig to advise them about the photographs. [A-1, pages 36, 37 and 42]. Bludworth ordered Wiles not to pursue the photographs, saying the Florida

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[3] Several years ago the Herman case was the subject of a documentary on the ABC news program "20-20," which reported that several of the witnesses whose testimony helped convict Herman had confessed to perjury. In 1985, hearings were begun on a motion for a new trial based on the theory that Herman was not adequately represented at trial. The motion is pending.

[4] An excerpt of the Operation 30-30 videotape, recorded in the Riviera Beach storefront April 21, 1982, is filed with petitioners' Appendix, and includes a discussion between Hagler and the informant in which Hagler explains the significance of the photographs and their potential uses. [A-6].

Department of Law Enforcement would be notified and called in to investigate if anyone tried to use the photographs to extort favors.[5] [A-3, pages 13 and 14]. Following orders, Wiles instructed Stoutenburgh to "get away" from the photographs. [A-1, page 18].

Contrary to Wiles' instructions, Stoutenburgh agreed to meet Hagler shortly thereafter to review some of the photographs at "George's Subs", a West Palm Beach restaurant. Sheriff's Detective Arthur Newcomb telephoned Wiles in advance to advise him of the planned meeting. [A-5, page 38]. Such a meeting was a departure from the investigators' normal policy, which was intended to ensure that all contacts with suspects were observed and recorded at the sting storefront. [A-5, pages 21 and 22]. Although Stoutenburgh was supposed to wear a body bug on those rare occasions when transactions were made away from the storefront, and even though there was sufficient time for him to be equipped with a bug to record his meeting with Hagler, investigators did not require Stoutenburgh to wear a bug. [A-5, pages 22, 40 and 41]. Newcomb followed Stoutenburgh to the sub shop and watched the meeting through binoculars from across the street, but was unable to see what was depicted in the photographs. [A-5, page 43].

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[5] Petitioners served a public records request on FDLE to determine whether it investigated the subject of the photographs. [A-7]. FDLE's atgtorney, John Booth, has orally replied that FDLE has no record of such an investigation. Petitioner will move to supplement the appendix with his written response when it is received.

Stoutenburgh testified the 12 to 20 photographs Hagler showed him at the sub shop were not incriminating and only showed the State Attorney "obviously having a good time" with an unidentified woman at a party and on a boat.[6] [A-1, page 26].

After discussing the meeting and the photographs with investigators, Stoutenburgh was instructed not to purchase the photographs, though he and Hagler continued to discuss a possible deal during the remainder of Operation 30-30. [A-1, pages 30-32]. So far as the record indicates, none of the Bludworth photographs has ever been recovered by authorities.

The Entrapment Defense

Fundamental to Hagler's defense of the drug charges was his assertion that he acceded to the informant's repeated demands to purchase cocaine only so he could continue the negotiations to sell the photographs. He maintained he was entrapped by the state because he had photographs embarrassing to the State Attorney.

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[6] During his prosecution, Hagler claimed to have other photographs, not yet seen by authorities, which would be even more useful to a potential blackmailer.

On June 16, 1983, Hagler's counsel wrote the assistant state attorney in charge of the prosecution, voicing his concern about the State Attorney's apparent conflict of interest.

> At this time I have no intentions of introducing the actual photographs in evidence at trial, since it is only the pending negotiations for sale of them to Stoutenburgh -- not the content of the photographs themselves -- that are directly related to the entrapment defense, and, aside from that, I fear introduction of the photographs themselves into evidence potentially would sidetrack the jury and the whole trial itself to my client's detriment. But the evidence reflecting those negotiations will deal extensively, as I understand it, with the subject matter of the various photographs. If you are unaware of the subject matter of them, I suggest you consult rather quickly with one of your investigators or law officers handling the case. I am rather concerned that in prosecuting this case your office may have a conflict of interest.
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> [A-8]

Despite the controversy surrounding the photographs and the suggestion by Hagler's counsel that the State Attorney had a conflict of interest, Bludworth remained responsible for prosecuting the case.

The State Attorney's Secret Deposition

On August 1, 1983, Hagler's attorney, Nelson Bailey, noticed the deposition of the State Attorney for August 16. [A-9]. On August 4, a corresponding subpoena was served on Bludworth commanding him to appear for his deposition. [A-10]. Reporters for both Palm Beach Newspapers and The Miami Herald planned to attend the Bludworth deposition and to report his testimony to the public in line with the news interest which had

motivated attendance at the informant, Stoutenburgh's, deposition.[7]

On August 15, the reporters learned from Bailey that Bludworth's deposition had been cancelled and would be rescheduled for a later date. Bailey advised the reporters he would not, however, reveal when or where the deposition would take place, stating he had agreed with the State Attorney not to notify the media. [A-12; A-13].

During the next few days, Miami Herald reporter Mike Boehm telephoned Bailey several times to ask when and where the deposition would be taken and to urge Bailey to allow him to attend. Bailey told Boehm he would not disclose the information unless the State Attorney released him from their agreement. Boehm also asked Assistant State Attorney Sandra Kabboush for notice of the time and place of the Bludworth deposition, but his request was denied. [A-13].

Despite the fact that both the State Attorney and defense counsel had actual knowledge that the press was seeking an opportunity to litigate any closure of the depositions and that no motion for a protective order had been filed, the

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[7] Reporters for both The Miami Herald and Palm Beach Newspapers had been freely admitted to the earlier deposition of the informant, Richard Stoutenburgh, and both news organizations had published comprehensive news articles reporting on that proceeding. [A-11].

deposition of David Bludworth was taken August 29, 1983, in secret. No amended notice of deposition was filed with the Court and petitioners' reporters, who had specifically requested notice, were not advised. Petitioners attempted to purchase a transcript of the deposition from the court reporter, but their requests were denied because the State Attorney and defense counsel objected. Thus, public access to the information contained in the deposition was deliberately withheld without cause and without any opportunity for a hearing, solely to prevent the public from knowing the facts concerning the State Attorney's conduct in this matter.

The Access Motions

On September 1, 1983, petitioners filed a motion and a supporting affidavit seeking an order permitting them to purchase the Bludworth transcript from the court reporter, and requiring future depositions to be open unless ordered closed by the Court after proper notice and hearing. [A-12; A-13]. Judge Harper orally denied the motion at a hearing on September 6. [A-14]. Judge Harper stated he would issue a written order within the next few days. No evidence was presented at the hearing to prove that withholding Bludworth's testimony from the public was necessary or justified, although Judge Harper declined an offer by the Assistant State Attorney to present testimony because he determined the threshold question was whether the public has a right to attend or obtain a transcript of any unfiled deposition taken in a criminal case.

On September 8, 1983, petitioners filed a motion for reconsideration and a motion for an order requiring the court reporter to prepare a transcript of the Bludworth deposition for the purpose of appellate review in the event the motion for reconsideration was denied. [A-15]. A hearing was scheduled on the latter motion for September 13, at which time Judge Harper announced he had signed an Order the previous day denying petitioners' original motion, their motion for reconsideration, and their motion to have a transcript prepared and submitted to the appellate court.[8] [A-16; A-17].

Press Appeals - Court Stays Secret Depositions

On September 27, 1983, Petitioners filed an Emergency Petition seeking review of the September 12 Order by the Court of Appeal, Fourth District.

On October 24, the State Attorney and defense counsel executed a stipulation to continue Hagler's trial from October 31 on the ground that new potential witnesses had been discovered who needed to be deposed. [A-18]. An Order was entered that same day rescheduling the trial for the week of January 9, 1984. [A-18].

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[8] The Order did, however, direct the court reporter to preserve his notes pending the outcome of the appeal. Florida Rule of Judicial Administration 2.075(e)(3) requires the court reporter to keep untranscribed notes of discovery proceedings for five years in a "secure" place and provides for indefinite storage where "any other person" has agreed to pay for storage.

Petitioners moved on November 10 for the appeals court to stay the taking of any more secret depositions in the underlying prosecution pending resolution of the appeal. That motion was granted by Order of December 5, 1983.

The Plea Bargain

On the same day as the stay was issued, and without prior notice in the court file, Hagler appeared at a remote courthouse annex before a substitute judge who approved a plea bargain, accepted Hagler's guilty plea, and entered a judgment convicting him of the charge of selling cocaine. [A-19]. Sentence was withheld pending Hagler's successful completion of three years of probation.[9] [A-19].

Bludworth's Deposition Released

Evidently no longer bound by his agreement to keep the State Attorney's deposition secret, Hagler released a copy to petitioners on December 13, 1983. [A-3].

The Fourth District's Opinion

A panel of the Court of Appeal, Fourth District, having dispensed with oral argument, filed a per curiam opinion June 26, 1985, [A-21 (471 So.2d 1344)], affirming Judge Harper's Order on the basis of the Fourth District's en banc decision in

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[9] Several weeks ago petitioner ordered a transcript of the plea conference from the official court reporter, but has been orally advised the notes are lost. Petitioner will either move to supplement its appendix when the notes are found or will ask the court reporter to file with this Court an affidavit verifying the loss.

Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985), a decision which is now being reviewed by this Court (Sup. Ct. Case No. 67,352). In Burk, the Fourth District held there are no constitutional, common law, statutory, or procedural limitations on the parties' authority to exclude the press from pre-trial depositions in criminal cases.

Judge Barkett's Concurrence

Then Judge Barkett, concurring in the affirmance, wrote that although she felt bound by Burk -- an opinion from which she dissented -- she disagreed with the result because "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." [A-21 (471 So.2d at 1344)].

Jurisdiction

Petitioners timely sought review of the Fourth District's decision on the basis of this Court's conflict jurisdiction. Jurisdiction was accepted on January 21, 1986.

SUMMARY OF ARGUMENT

At the heart of the constitutional, statutory, common law, and procedural arguments petitioners have advanced in support of at least a qualified right of access to criminal discovery depositions is the notion that, in a democracy, citizens must be able to observe the criminal justice process in order to carry out in an informed manner their responsibility to ensure that justice is done. The need for access is especially strong in situatons like the instant case where an elected public official and candidate for high public office is implicated in possible wrongdoing and identified as a target for blackmail, yet conspires with an accused to secret his deposition testimony from the public. In such circumstances, the need for public access is paramount and overrides privacy concerns. Access inspires public confidence in the judicial process by avoiding the appearance of impropriety and makes possible citizens' informed exercise of their right to vote.

ARGUMENT

I.

Allowing A State Attorney And A Criminal Defendant He Is Charged With Prosecuting Arbitrary Discretion To Bar Public Access To The Prosecutor's Own Deposition Creates An Appearance Of Impropriety Which Destroys Public Confidence In The Judicial Process

Then Judge Barkett, though bound to affirm below because of the Fourth District's earlier en banc decision in Burk, voiced in her special concurring opinion her concern that "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."

The facts of this case are indeed a shocking example of how the credibility of the criminal justice process can be damaged by the poor judgment of an elected official who endeavors to hide from public view matters of legitimate public concern. Here a police informant had publicly testified that a state attorney and candidate for high public office was the potential target of an attempt at blackmail by members of the criminal underworld. The photographs were for sale to the highest bidder for up to $70,000 and were supposedly so damaging to the state attorney that he might help free a convicted killer to keep them under wraps.

The defendant's attorney had publicly suggested the state attorney's agents entrapped his client into selling cocaine to the informant when his only real interest was selling the photographs. The attorney claimed this created a "conflict of interest" for the prosecutor and urged him to disqualify his office from conducting the prosecution.

On these facts, the state attorney's deposition -- at which he would have an opportunity to tell the truth about the photographs and any extortion threats he may have received -- was a subject of legitimate public interest.

The state attorney's response to the situation -- conspiring with the defendant to hide his testimony from public view -- illustrates the lunacy of the Fourth District's decision in this case which permits parties to control access to unfiled depositions without court supervision. Under the rule of law established in Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985) pet. for rev. pending, Case No. 67,352, and in this case (471 So.2d 1344), criminal defendants are permitted to use the process of criminal discovery to obtain damaging information about the conduct of law enforcement officers and public officials, but neither they nor the state can be required to share that information with the public unless a transcript of the deposition is filed with the court.

When the state conspires with persons accused of criminal activity to withhold information from the public, the potential for abuse is obvious. Here, for example, the public was left to wonder what Mr. Bludworth had to promise Hagler in exchange for keeping the deposition secret. Was this the reason for the quietly arranged plea bargain heard without the filing of any notice and presided over while Judge Harper was on vacation by a substitute judge in a remote courthouse annex? Does this explain the withholding of sentencing? Is it possible Hagler's scheme was successful and that the photographs played a part in the recent revival of efforts on behalf of Mark Herman to obtain a new trial? Or, have the photographs been exploited to advance some other, as yet unsuspected, nefarious enterprise?

Petitioner does not vouch for these speculations, which in fact seem unlikely based on the subsequently released Bludworth transcript. [A-3]. The point, however, is that speculation is inevitable when an elected official schemes with an accused criminal to conceal information from the public. It is inconceivable that the public and the judiciary are powerless to put a stop to such practices where the information in question is a product of the judicial process, albeit contained in an unfiled deposition transcript.

This court must reverse the Fourth District's decision in this case and recognize a qualified right of public access to transcripts of unfiled criminal depositions if public respect for the criminal justice process is to be preserved.

II.

Voters Need To Know What Occurs At Depositions, Especially When The Testimony Pertains To The Fitness For Office Of An Elected Public Official

Virtually every Florida official charged with significant responsibility for the identification, prosecution or adjudication of criminal activity achieves and holds public office directly or indirectly at the will of the electorate.[10] The fitness for office of these various public officials is a subject of legitimate and continuing public interest. If Florida's citizens are to cast informed votes, public access to information about the officials responsible for carrying out the process of criminal justice must be maximized.

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[10] Elected State Attorneys are not only responsible for prosecuting accused criminals, but often decide who will be prosecuted and sometimes, as in this case, participate in the investigation of criminal activity. The state's chief law enforcement officer, the Attorney General, is also an elected official.

In each of Florida's counties, an elected sheriff is the law enforcement official with primary responsibility for identifying criminal activity and apprehending violators. Within cities, police chiefs may be elected or, if appointed, hold office at the pleasure of city commissioners who are themselves directly responsible to the electorate.

The adjudication of criminal cases occurs before elected county and circuit judges in courthouses administered by elected clerks. In the vast majority of cases, the defendant will be represented in court by an elected public defender. If an appeal results, the Court of Appeals judges and Supreme Court justices who will decide the case are subject to merit retention elections.

Because Florida's criminal justice system is in effect a pretrial system,[11] discovery depositions are a crucial stage at which the soundness of the state's evidence against an accused is rigorously tested. Depositions are typically used to explore allegations of police and prosecutorial misconduct, often either providing the basis for accepting a plea bargain or a motion to suppress evidence illegally obtained. In the overwhelming majority of cases, therefore, depositions are a critically important source of information the public requires to properly evaluate the qualificiations of prosecutors and law enforcement officials. It is folly to expect the public to make intelligent use of the ballot box in elections of local law enforcement officials and prosecutors based solely on those proceedings which occur in a courtroom. To attempt to do so is as futile as asking a blind man to describe an elephant after allowing him to feel only its tail.

Here, the state attorney, who was also a candidate for the office of United States Senator, conspired with an accused criminal to conceal his deposition testimony from public view in a case he was responsible for prosecuting. While only he knows his true motives, it appears the state attorney secreted his

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[11] In the years 1979, 1980, and 1981, Florida's circuit courts disposed of a total of 326,433 criminal matters; 313,598 or 96.1 percent were terminated before trial. Office of the State Courts Administrator, Florida Judicial System Statistical and Program Activity Reports (1979-81).

deposition in an attempt to prevent the public from learning the details of the potential extortion attempt against him.[12] Due to their ability to offer a favorable plea bargain or even to dismiss altogether the charges against an accused, prosecutors may often be able to coerce defendants into agreeing to secret potentially embarrassing depositions from the public. By abdicating to the parties discretion to withhold unfiled depositions from the public, the decision of the Fourth District in this case invites public officials to join in such shenanigans.

If citizens are ever to be denied access to the pretrial criminal discovery depositions of elected officials, it should be only after a court has determined there are compelling reasons why the public may not know the information. The order under review gave the parties blanket authority to secret depositions from the public, without the need to appear in court and make any showing whatsoever that secrecy was required in this case to protect an overriding interest.

In sum, the order is abhorrent to Florida's long-standing commitment to open government because it

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[12] More charitably, the state attorney may have simply believed the deposition might prove to be embarrassing. However, embarrassment alone is an insufficient reason to deny the public access to the sworn testimony of a witness called upon to testify in a judicial proceeding. It has long been established that when a person chooses to assume the mantle of public office, he necessarily exposes to public scrutiny aspects of his personal life that bear on his fitness for office.

interferes with the ability of the electorate to fairly assess the qualifications for office of officials charged with administering Florida's criminal justice process.

CONCLUSION

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

Respectfully submitted,

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I hereby certify that a copy of this brief was served by mail February 24, 1986, on:

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