IN THE
SUPREME COURT OF FLORIDA

CASE NO. 67,479

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

Petitioners,

v.

JOHN W. HAGLER
and the STATE OF FLORIDA

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND THE FACTS

The first section of this statement describes the decision of the Fourth District.[1] That decision on its face vests this Court with jurisdiction. Because some authority suggests this Court may look to the record to determine whether express and direct conflict jurisdiction exists when the per curiam opinion cites a decision which is pending before this Court, the petitioners, in the second part of this statement, have provided a description of the facts of this case[2] which confirm that the decision in this case expressly and directly conflicts with a decision of another district court of appeal.[3]

The Per Curiam Affirmance

A panel of the Fourth District Court of Appeal filed a per curiam opinion on June 26, 1985, which read in its entirety:

> The order of September 12, 1983, is affirmed on the authority of Palm Beach

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1. A notice invoking the Court's jurisdiction to review a similar decision of the Fourth District Court of Appeal, State v. Freund, Case No. 85-687, was filed simultaneously with the notice filed in this case. That case has been assigned Case No. 67,482 in this Court and a jurisdictional brief in that case is being filed simultaneously with this brief.

2. The district court's opinion and portions of the record have been included in the appendix to this brief. References to the appendix will be made by the notation "(A.)".

3. Consideration of the record is not essential to jurisdiction because, as will be shown in Points I and II below, conflict jurisdiction can be found from the face of the Fourth District's decision. The alternative argument for exercising jurisdiction advanced in Point III of the argument permits the Court to consider the record.

Newspapers, Inc. v. Burk, Case No. 83-422 (Fla 4th DCA June 11, 1985).

(A. 1).

The petitioners filed a motion for rehearing (A. 3) on July 8, 1985, pointing out that less than one month earlier, the en banc Fourth District had filed its opinion in Palm Beach Newspapers, Inc. v. Burk, ___ So.2d ____, 10 Fla. L. W. 1435 (4th DCA June 11, 1985), holding there are no constitutional, common law, or procedural limitations on a trial judge's authority to exclude non-parties from pretrial depositions in a criminal case.[4] The motion emphasized that the Burk decision certified two questions to this Court as being of great public importance[5]

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4. The Fourth District, sitting en banc in Burk, split 4-1-4. Judges Downey, Hersey, Dell, and Walden concurred in the plurality opinion, 10 Fla. L. W. at 1436, while Judge Letts concurred specially, 10 Fla. L. W. at 1439. Chief Judge Anstead authored a dissenting opinion in which Judges Hurley and Barkett concurred, 10 Fla. L. W. at 1439. Judge Hurley authored a dissenting opinion in which Judges Glickstein and Barkett concurred, 10 Fla. L. W. at 1440. Judge Glickstein authored a dissenting opinion in which Judge Hurley concurred. 10 Fla. L. W. at 1440, 10 Fla. L. W. at 1439.

5. The certified questions are similar to the questions the petitioners asked the Fourth District to certify in Hagler. The Burk questions are as follows:

> 1. Is the press entitled to notice and the opportunity and right to attend pre-trial discovery depositions in a criminal case?
>
> 2. Is the press entitled to access to pre-trial discovery depositions in a criminal case which may or may not have been filed with the clerk of the court or the judge?
>
> 10 Fla. L. W. at 1439.

and asked that the Fourth District certify the instant case so that this Court could be presented with a record containing the "full range of factual circumstances occurring where deposition access is at issue." (A. 4).

On July 10, 1985, before the Fourth District had ruled on the motion for rehearing, the petitioners in Burk filed a notice invoking the discretionary jurisdiction of this Court to review the Burk case. This Court issued an order on July 17, 1985, asking the parties to submit briefs on the merits.

The Fourth District denied the petitioner's motion for rehearing "as moot" on July 24, 1985. (A. 6).

The Underlying Facts of the Case

Petitioners intervened in the criminal case from which this appeal arises when their reporters discovered that the defense counsel had deposed the state attorney for the Fifteenth Judicial Circuit, pursuant to an agreement that no notice of taking the deposition would be filed with the clerk of the court. The agreement to conduct the "secret" deposition precluded reporters from learning the state attorney's testimony.[6]

This particular deposition was of substantial public importance because a police informant previously had testified publicly that John Hagler, the defendant, offered to sell the informant photographs which supposedly would be damaging to the

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6. After the deposition was taken, the petitioners' reporters asked the court reporter to transcribe the deposition and supply them with a copy. At the instruction of the parties, the court reporter refused to comply with this request.

the state attorney's reputation. (A. 17). The petitioners believed the deposition might provide the public with the state attorney's response to this charge.

At a hearing on petitioners' motion to intervene, neither the state nor the defense offered any evidence to demonstrate the necessity of withholding testimony from the press. Nevertheless, the trial judge denied the motion (A. 11) and the Fourth District affirmed the order.

Judge Barkett, concurring in the affirmance, wrote that she felt bound by Burk, but that 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." Slip Opinion at 2.

SUMMARY OF ARGUMENT

Petitioners, The Miami Herald Publishing Company and Palm Beach Newspapers, Inc., ask the Court to review a per curiam affirmance of the Fourth District Court of Appeal which cites as authority an earlier decision of the Fourth District, Palm Beach Newspapers, Inc. v. Burk, ____ So.2d ____, 10 Fla. L.W. 1435 (Fla. 4th DCA 1985)(Sup. Ct. Case No. 67,352), which is now pending review before this Court.[1] The Court has jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) for three reasons: (1) the decision, by

relying on a case pending before this Court, is in prima facie express and direct conflict with a decision of this Court, Jollie v. State, 405 So.2d 418 (Fla. 1981), (2) the decision is in express and direct conflict with a decision of another district, and (3) review of the record, as permitted by Jollie, confirms the existence of an express and direct conflict.

ARGUMENT

I.

A Per Curiam Affirmance Citing a Decision Pending Review by This Court is in Prima Facie Conflict with a Decision of This Court

When a district court of appeal declines to write an opinion, but indicates by way of a per curiam affirmance that it is relying on a a final district court of appeal decision which is not pending review in this Court, the decision is not reviewable under the Court's restricted conflict certiorari jurisdiction, Robles Del Mar, Inc. v. Town of Indian River Shores, 385 So.2d 1371 (Fla. 1980). However, this Court held in Jollie v. State, 405 So.2d 418 (1981), that "a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this court to exercise its jurisdiction."[7] Id. at 420.

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7. This Court in Jollie expressed the underlying equal protection rationale for continuing to grant review on the basis

(Footnote continued on next page)

Because the Fourth District's per curiam opinion cites Burk, a case that is pending review by this Court, a prima facie express conflict exists and allows this Court to exercise its jurisdiction to review the decision.[8]

(Footnote continued from previous page)

of prima facie express conflict. A similar problem faces all appellate courts -- that is "how to dispose conveniently of multiple cases involving a single legal issue without disparately affecting the various litigants," Jollie, 405 So.2d at 420. Most district courts resolve the problem and cut down on their workload by writing one extensive opinion and referencing that opinion in all similar cases. However, if the referenced case comes up for review and is reversed, a restrictive reading of the new "express conflict" provision of the Florida Constitution would protect the rights of the litigant in the referenced case, but would leave the rights of the litigant in the per curiam affirmance disadvantaged solely because of the fortuity that the other case came before the district court of appeal first. A conflict would exist between the per curiam affirmance and the decision reversed by the Supreme Court, but the per curiam affirmance would be unreviewable. It was to prevent inequitable results and protect litigants equally that this Court held it would find a prima facie express conflict in cases citing a decision reversed by this Court or pending review (the latter, presumably because of the probability of reversal).

8. In Jollie this Court suggested that district courts could facilitate Supreme Court review of per curiam cases such as this by "stating that the mandate will be withheld pending final disposition of the petition for review, if any, filed in the controlling decision." 405 So.2d at 420. Because issuance of the Fourth District's mandate in this case would not change the status quo, this procedure was not necessary in this case and the Fourth District's failure to follow it poses no impediment to this Court's exercise of jurisdiction. Furthermore, in a subsequent opinion in another case also dealing with deposition access, State v. Freund, et al., ___ So.2d ___, 10 Fla. L. W. at (4th DCA July 31, 1985), Judge Letts explained that he regards the Fourth District's per curiam affirmances as reviewable even when the suggested sentence is not added. In Freund, the court issued a per curiam opinion citing Burk as controlling authority, but did not withhold its mandate. Commenting on the court's refusal to certify the case to this Court, Judge Letts wrote, "I would . . . certify this particular case[, although it is] . . . [t]rue [that] to do so would be an unnecessary exercise because of Jollie v. State, 405 So.2d 418 (Fla. 1981)."

II.

The Fourth District's Decision Expressly and Directly Conflicts with a Decision of Another District Court of Appeal

If a referenced case in a district court's per curiam affirmance stands for a single proposition, then the per curiam affirmance, by necessary implication, stands for the same proposition and this Court can exercise jurisdiction to review the case if a decision of another district court of appeal has expressly considered the same point of law and reached a conflicting result.[9] The cited decision in this case, the en banc Fourth District's Burk decision, discussed various legal theories advanced by the petitioners in support of their arguments, but the opinion reached a singular holding: trial courts may arbitrarily deny press and public access to pretrial depositions in criminal cases and to transcripts of those depositions if they are not filed. The Fourth District panel's citation of the Burk opinion in this case therefore could have

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9. This point is not contrary to the Court's holding in Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). In that case, the Court declined to review a district court's per curiam affirmance which cited a decision which itself allegedly was in conflict with another district court's decision. The cited panel decision, unlike the cited en banc decision in the instant case, stood for two alternative propositions. This Court therefore could not determine the proposition which was the basis of the district court's decision and "express and direct" conflict jurisdiction could not be invoked without further indication on the face of the per curiam opinion. Here, there are no similar ambiguities. The cited decision stands for a single proposition and the panel was bound to follow it. Thus, this Court can determine the holding of the Fourth District's opinion and exercise of conflict jurisdiction is permissible.

been solely for that same proposition. Therefore, if that proposition conflicts with another district court of appeal's view of the law, express and direct conflict jurisdiction will exist.

The Burk plurality opinion itself recognizes that its holding is in direct conflict with Short v. Gaylord Broadcasting Company, 462 So.2d 591 (Fla. 2d DCA 1985), which held the press and public may not be excluded from pretrial discovery depositions in a criminal case except upon upon a showing of "good cause." 10 Fla. L. W. at 1441 n.2. Accordingly, the Hagler decision must be in express and direct conflict with the Short decision and this Court may exercise jurisdiction over it.

III.

Exercise of Prima Facie Conflict Jurisdiction Confirms that the Fourth District's Decision Expressly and Directly Conflicts with a Decision of Another District Court of Appeal

Although the Court ordinarily is precluded from looking to the record of a case to find express and direct conflict jurisdiction, this case falls within an exception to that rule. As demonstrated in point I, supra, the Fourth District has created prima facie conflict jurisdiction by citing in its per curiam affirmance a decision which is pending review in this Court. Thus, the Court has jurisdiction to review the case on an independent ground. In reviewing the case on that independent ground, the record of the instant case becomes this Court's own public records and the Court can see from those records that the Fourth District's decision directly conflicts

with a decision of the Second District, accordingly the Court can exercise express and direct conflict jurisdiction over the case even if it ultimately declines to exercise jurisdiction over the case because of the prima facie conflict with a decision of this Court. In the Jollie decision itself, this Court relied on record facts to confirm that jurisdiction over the case properly was being exercised. The Court explained that "Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it." 405 So.2d at 420. The Court may follow the same procedure in the instant case in determining that express and direct conflict exists.

A review of the record in the instant case confirms that the Fourth District's decision in fact conflicts with the Second District's decision in Short. The trial judge excluded the press and the public from a deposition of the state attorney of the Fifteenth Judicial Circuit, at the request of the state attorney, notwithstanding that the state attorney did not offer any evidence to demonstrate that closure would serve any purpose whatsoever. The Fourth District's affirmance of this order is squarely contrary to the Second District's holding in Short that a party cannot exclude non-parties from depositions absent a showing of good cause. Accordingly, jurisdiction may be exercised over this case.

CONCLUSION

This Court has jurisdiction to review this case because the decision is in prima facie conflict with a decision of this Court, the decision expressly and directly conflicts with a decision of another district court of appeal, and the record confirms that express and direct conflict jurisdiction exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was mailed August 14, 1985, and a true and correct copy with corrections was mailed August 21, 1985, to:

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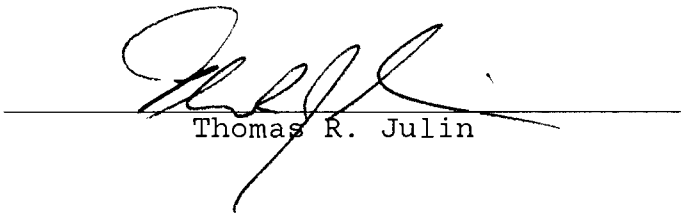

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