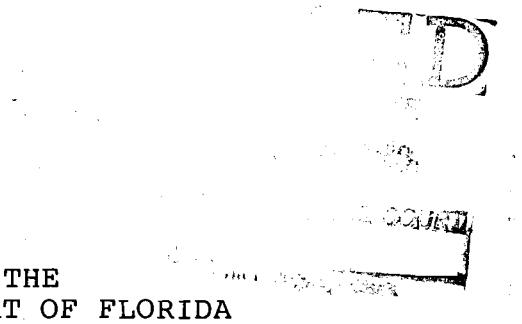

IN THE
SUPREME COURT OF FLORIDA

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

Reply Brief of Palm Beach Newspapers, Inc.

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INTRODUCTION

Both respondents, the State and Hagler, concede the public's fundamental interest in reporting on the criminal justice system. While acknowledging a presumptive right of public access to trials and pre-trial hearings, respondent Hagler argues the public's First Amendment interest should yield to a per se closure rule where criminal depositions are concerned because of the danger to defendants' fair trial rights. The State, relying on Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199 (1984), argues there is no First Amendment right of access to depositions, that the public's interest is overriden by the fair trial rights of the accused and by the privacy interests of litigants and witnesses, and suggests the public's interest can be accommodated by recognizing a post-trial right of access to unfiled deposition transcripts, perhaps through an amendment to the rules of procedure.

Palm Beach Newspapers refers this Court to its brief in Palm Beach Newspapers, Inc., et al. v. Burk, Case No. 67-352, Florida Supreme Court, in support of its position that the First Amendment right of access to information needed to monitor the judicial process and Florida's historic common law commitment to open government establish a qualified right of access to criminal depositions. In response to the State's misplaced reliance on Rhinehart, Palm Beach Newspapers commends

to the Court the Miami Herald's Initial Brief in this case which contains a thorough and scholarly discussion explaining why that decision, if relevant to the disposition of this case, supports petitioners' arguments.

Palm Beach Newspapers will use this reply to argue that the per se deposition closure rules advocated by the respondents are unworkable, inconsistent and inadequate to protect the fundamental interests of all parties. Second, this brief will show that the concerns about deposition access raised by respondents are either unfounded or can be addressed by the court in the context of protective order hearings as contemplated by Rule 1.280(c), Fla. R. Civ. P. Finally, this brief notes that the pending deposition access controversy cannot be resolved through the Court's rule adoption procedure, but must be instead faced squarely on the merits.

STATEMENT OF THE CASE AND THE FACTS

Although accepting Palm Beach Newspaper's Statement of the Case and the Facts in all material respects (State's Brief, p. 3), the State of Florida has nonetheless submitted its own statement which is inaccurate and misleading.

The State incorrectly asserts that "petitioners never sought to attend the deposition of State Attorney David Bludworth in this case (State's Brief, p. 1)." In fact, Miami Herald reporter Mike Boehm telephoned the assistant state attorney and defense counsel on several occasions before the deposition, asking when and where the deposition would take place and requesting that he be allowed to attend. [A-13]. Petitioners moved to obtain a transcript of the State Attorney's deposition after learning it was taken in secret, the parties having agreed not to file with the court the notice required by Rule 3.030(c), Fla. R. Crim. P.

The State inaccurately implies that petitioners' original access motion sought to require the parties to notify the media of the taking of all future depositions in the case (State's Brief, p.2). In fact, petitioners' motion merely sought an order requiring that future depositions be noticed according to Rule 3.030(c) and that no depositions be

closed except by court order afer a duly noticed closure hearing. [A-12].[1]

The State describes as "contemptible," "scurrilous," and without Record support Palm Beach Newspapers' suggestion, in argument, that the State Attorney's extraordinary efforts to conceal his testimony left the public to wonder whether he had

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[1] The State's error in stating the facts and in stating the issue to be decided in this case may arise from the discussion on p.3 of the trial court's order [A-17], which also incorrectly implies that petitioners sought to require the parties to serve deposition notices on the media.

Interestingly, the Fourth District Court of Appeal also seems to have misunderstood the notice issue in its opinion in Palm Beach Newspapers, Inc., et al. v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985), review pending, Case No. 67,352, Florida Supreme Court, wherein it certified the following issue as being of great public importance:

> Is the press entitled to notice and the opportunity and right to attend pretrial discovery depositions in a criminal case?
>
> (emphasis added)

Neither in this case nor in Burk did the media contend the parties were obliged to serve them with deposition notices. In both cases, the media asked the court to require the filing of deposition notices with the court clerk, as required by the rules of procedure, in order to counter the parties' subterfuge of concealing the time and place of the depositions, thereby denying the media an opportunity to adjudicate their access claims. More accurately put, the issue in this case is whether the parties may deny the public access to depositions and deposition transcripts without first seeking and obtaining a closure order at a duly noticed hearing at which the court is required to make findings of fact supporting the compelling need for closure, the lack of less restrictive alternatives, and the effectiveness of closure for serving the compelling need.

promised Hagler favorable treatment in exchange for his cooperation in hiding the deposition from the public (State's Brief, p.4). Palm Beach Newspapers was careful not to represent the public's likely speculations as fact, including them in its argument merely to illustrate the harmful appearance of impropriety caused by the conduct of the State Attorney (Initial Brief of Palm Beach Newspapers, p.16). The argument of Palm Beach Newspapers was entirely proper.

SUMMARY OF ARGUMENT

This brief advances three points:

POINT I: Respondents recognize the public's fundamental interest in access to information about the criminal justice process, yet they refuse to acknowledge even a qualified right of access where criminal depositions are concerned. The State, while professing concern for the fair trial right of the accused and the supposed privacy right of participants in the judicial process -- rights it has no standing to assert -- has taken the position before this Court that it may unilaterally deny public access to depositions over the objection of a defendant and in the absence of any good cause. Respondent Hagler would vest similar absolute and arbitrary authority to control deposition access in the defendant on Sixth Amendment grounds. Neither of these per se approaches to deposition access is satisfactory because they ignore the existence of competing fundamental rights. Such rights can only be resolved by the court through some type of balancing process similar to the access test established in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982). Rule 1.280(c) provides an appropriate procedural vehicle for applying the access test.

POINT II: Respondents' fears about the consequences of recognizing a public right of access to depositions are unfounded. Except in the most sensational of cases, depositions are unlikely to attract public attention. If space

becomes a problem, access can be controlled as in courtrooms and other public facilities, perhaps with the aid of television monitors outside the deposition room. In the many reported cases where access has been permitted, logistics have not been a problem. Recognizing a right of access to depositions requires no dangerous leap from existing precedents. Every stage of a criminal prosecution from the return of an indictment to trial -- with the sole exception of depositions -- is already open. Burk and its progeny, including this case, are aberrational. Recognizing a qualified public right of access will not impair other fundamental interests such as the fair trial right. Courts have developed well known methods of protecting the Sixth Amendment right through careful jury selection and trial management. Those methods will work equally well where depositions are open. Deposition access has not caused Sixth Amendment problems where it has been allowed and indeed it helps protect the rights of the accused. If a legitimate danger to opposing fundamental rights exists, access can be denied after a closure hearing pursuant to Rule 1.280(c) at which appropriate findings are made by the trial judge. This makes more sense than abdicating control of access to the parties.

POINT III: The deposition access issue is a matter of substantive rights of constitutional magnitude and cannot be resolved by mere rule making according to this Court's authority under Art. V, Section 2(a), Fla. Const.

ARGUMENT

I.

Courts Must Recognize And Weigh Each Of The Competing Interests Involved In Deposition Access If Individual Rights Are To Be Preserved

"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.

***

There are many interests to be considered here, some obviously conflicting ..."

(State's Brief, p.12, 13)

"Two basic rights are involved, [1st Amendment right of access to information vs. 6th Amendment right to fair trial], 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."

(Hagler's Brief, p.5)

"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."
>
> (Palm Beach Newspaper's Initial Brief, p.19)

Judging by the above-referenced quotes from the parties' briefs, all agree that the issue of public access to discovery depositions in criminal cases involves competing individual rights of a fundamental nature.

Indeed, as was pointed out by the Amici, this Court has previously identified those competing interests in addressing the issue of pre-trial access.

> [W]e must delicately balance the competing yet fundamental rights of an accused to a fair trial by an impartial jury, and of the free press guaranteed by the first amendment. The inherent conflict of these two rights is a difficult one to resolve, and in so doing, we seek a solution that gives maximum importance to both interests.
>
> An additional factor that must be considered is the inherent power and interest of the court in guaranteeing to the litigants the fundamental right to a fair trial. The question then, is three dimensional, dealing with the power and authority of the court, the rights of the defendant, and the rights and interests of the public and the press.
>
> Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 3 (Fla. 1982).

The same interests are at stake here.

Respondents do not offer this Court a way of reconciling these competing interests. Instead, they advocate per se rules which necessarily ignore opposing fundamental rights.

For example, in this case the State argues a qualified First Amendment right of public access to criminal discovery depositions should not be recognized because it would impair defendants' Sixth Amendment right of fair trial[2] and would intrude on the privacy[3] of parties and witnesses "caught ... in the legal machinery (State's Brief, p.9, 12)." Yet for

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[2] While a prosecutor may be obliged not to interfere with the fair trial right of an accused, and while courts are charged with the duty of protecting that right, the Sixth Amendment right itself is personal to the accused and the State therefore lacks standing to rest its opposition to public deposition access on the Sixth Amendment.

[3] There is no constitutionally recognized right of privacy in the context of a judicial proceeding. In Re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 779 (Fla. 1979). The scope of the federally protected right is limited to matters relating to marriage, procreation, contraception, family relationships, childrearing, and education. Id.

This court has held that "the right of privacy does not necessarily protect a person ... in connection with the dissemination of legitimate news items or other matters of public interest." Jacova v. Southern Radio and Television Company, 83 So.2d 34 (Fla. 1955). Nor is a right of disclosural privacy supplied by the Florida Constitution. Forsberg v. Housing Authority of City of Miami Beach, 455 So.2d 373 (Fla. 1984); Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So.2d 633 (Fla. 1980).

Nonetheless, the State may on rare occasions be able to assert a fundamental interest which would support the closing of a deposition, such as to protect a witness from the threat of physical harm or to otherwise safeguard the administration of justice.

all of the State's sanctimonious bluster in aid of the Sixth Amendment, the same state attorney as was involved here showed little regard for that right in the murder prosecution of John Trent and Dr. Freund, now pending before this Court on the issue of deposition access in Palm Beach Newspapers, Inc., et al. v. State, Case No. 67,482, Florida Supreme Court. In that case, the defendants objected to the State's attempt to exclude the media from discovery depositions. The defendants argued they enjoyed a Sixth Amendment right to conduct their discovery in public. See Waller v. Georgia, ___U.S.___, 104 S.Ct. 2210 (1984). The State argued and ultimately convinced the Fourth District Court of Appeal that it may unilaterally bar the public from depositions notwithstanding a defendant's objections and irrespective of the trial court's finding that the State had failed to demonstrate any good cause for closure. State v. Freund, 473 So.2d 274 (Fla. 4th DCA 1985), review pending, Case No. 67,482, Florida Supreme Court.

The true position of the State is that it alone is empowered to control access to depositions without interference from the defendant, the public, or the court. It is the State, not petitioners who disregards defendants' Six Amendment rights.

By contrast, respondent Hagler recognizes the public's strong First Amendment interest in access to depositions, but

concludes that recognition of such a right will interfere with a defendant's Sixth Amendment right and that a per se rule denying public access is therefore required. While not discussing whether a defendant's Sixth Amendment right may ever be overriden by the State's or the Court's need to protect the administration of justice, respondent Hagler argues the right to fair trial is paramount. Like the State, Hagler fails to explain how competing interests in access can be accomodated, advocating a per se rule in favor of his own particular interest.

Only petitioners have provided this Court with a rational means for adjudicating on a case by case basis among the competing fundamental interests of public access, fair trial and fair adminstration of justice. As petitioners have consistently urged in all of the pending deposition access cases, the Court should recognize a qualified right of public access to depositions based on the First Amendment or Florida common law. Access should be preserved absent a showing of a compelling interest justifying closure, a finding that closure will be effective to serve the compelling interest, and a finding that there are no less restrictive alternatives to closure. This test for deposition access is similar to the test for pre-trial access adopted in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), and can be readily

applied to motions for protective orders according to the existing procedure authorized by Rule 1.280(c), Fla. R. Civ. P.

II.

Respondents' Concerns About Deposition Access Are Either Unfounded Or Can Be Addressed In The Context A Closure Hearing

The State argues the public will flock to depositions, overcrowding facilities, that access will impair defendants' right to fair trial and compromise the privacy of witnesses and litigants, that protective orders, authorized by Rule 1.280(c), Fla. R. Civ. P., are ineffective as restraints on publication once the public has been allowed to attend a deposition, and that recognition of a public access right will entitle reporters to demand copies of interrogatories, requests for admissions and documents provided in response to discovery requests. Respondent Hagler argues that public access to depositions will prejudice a defendant's Sixth Amendment right by interfering with his attorney's trial preparations and by subjecting defendants to "trial by the press." Respondents' arguments are either unfounded or the potential harm can be

avoided by using the existing protective order procedure provided by Rule 1.280(c).[4]

A. Press and Public Attendance at Depositions will not Substantially Inconvenience Lawyers and Litigants

Most depositions are routine and will not attract public attention. In newsworthy cases, lawyers, litigants, and witnesses will be centers of press attention throughout the proceedings. Recognizing a public right of access to depositions will not appreciably add to the participants' discomfort.

The State's fear that depositions will need to be taken in public auditoriums to meet the public's desire to

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[4] In evaluating repondents' claims that deposition access poses serious problems, it is well to remember that except for Burk and its progeny, Florida trial judges have for years recognized a public right of access to attend criminal discovery depositions. Bundy v. State, 4 Media L. Rep. (BNA) 2629, 2630 (Fla. 11th Cir. 1979); State v. Alford, 5 Media L. Rep. (BNA) 2054 (Fla. 15th Cir. 1979); State v. Diggs, 5 Media L. Rep. (BNA) 2597 (Fla. 11th Cir. 1980); State v. Sanchez, 7 Media L. Rep. (BNA) 2338 (Fla. 15th Cir. 1981); State v. Hodges, 7 Media L. Rep. (BNA) 2424 (Fla. 20th Cir. 1981); State v. Tolmie, 9 Media L. Rept. (BNA) 1407 (Fla. 15th Cir. 1983); State v. O'Dowd, 9 Media L. Rep. (BNA) 2455, 2456 (Fla. 13th Cir. 1984); Florida v. Short, 11 Media L. Rep. 1063 (Fla. 6th Cir. 1984), cert denied, 462 So.2d 591 (Fla. 2d DCA 1985); State v. Freund, Case No. 84-4974, (Fla. 15th Cir., February 22, 1985), writ issued, 473 So.2d 274 (Fla. 4th DCA 1985), pet. for review pending, Case No. 67,482, Florida Supreme Court.

In none of these cases has deposition access caused any discernible harm to the fair trial right of the defendant or posed significant logistical problems.

attend is unreasonable. The courthouse deposition rooms where most criminal depositions are taken are large enough to accomodate press representatives as well as occasional members of the public who may wish to attend. In those rare circumstances where space becomes a problem, access can reasonably be controlled just as it is in courtrooms and other public facilities, perhaps with the aid of television monitors outside the deposition room. Significantly, space was not a problem in the cases cited in the previous footnote where access was allowed.

B. Recognizing a Right of Access to Depositions is Consistent with Existing Access Law

The State's concern that recognizing a public right of access to criminal depositions will encourage the press to seek access to interrogatories, requests for admissions and other discovery documents demonstrates a fundamental ignorance of existing access law. The Rules of Criminal Procedure do not provide for discovery by interrogatories and requests for admissions.[5] Moreover, original requests for admissions and

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[5] Presumably, the State is concerned that a right of access to criminal depositions might be argued to extend to civil depositions. While Florida's circuit courts have ruled that civil depositions are open, that issue is not before the Court and need not be addressed. See Withlacoochee v. Seminole Electric, 8 Media L. Rep. (BNA) 1281 (Fla. 13th Cir. 1982); Johnson v. Broward County, 7 Media L. Rep. (BNA) 2125 (Fla. 17th Cir. 1981); Cazarez v. Church of Scientology, 6 Media L. Rep. (BNA) 2109 (Fla. 13th Cir. 1980).

responses thereto are required to be filed with the court where they are available for public inspection. Interrogatories, like depositions, were required to be filed with the court until Rule 1.340(e) was amended to make attorneys the custodians in order to relieve the document storage burden on court clerks. In re Florida Rules of Civil Procedure, 403 So.2d 926 (Fla. 1981). Inasmuch as interrogatories are the equivalent of written depositions, it is logical to control access to them on the same basis as the court regulates access to civil depositions.

In criminal cases, Florida's Public Records Law already assures public access to Rule 3.220 discovery materials once the State furnishes those materials to the accused. Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775 (Fla. 4th DCA 1985), pet. for review denied, ___So.2d___, March 26, 1986, (Fla. 1986); Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981), pet. for review denied, 413 So.2d 877 (Fla. 1982). These discovery materials, which are usually available to the public before depositions are taken, include the names and addresses of all persons known to the prosecutor to have information relevant to the offense charged or any defense thereto, the written or recorded statements of such persons, statements made by the accused, statements by co-defendants, tangible papers or objects obtained from or which belonged to

the accused, experts' reports or statements, and whether or not the State has any information obtained from a confidential source or through wiretapping or other electronic surveillance. Rule 3.220(l), Fla. Rule Crim. P.

Respondents are therefore incorrect in suggesting that allowing the public access to criminal discovery depositions is a dangerous leap from existing precedents. In fact, depositions are the only stage of the prosecution to which public access has been denied. The Fourth District's decisions in this case and in Burk are nothing more than aberrational blots on what has otherwise been a consistent State policy of maximizing public access to the judicial system. Miami Herald Publishing Co. v. Lewis, supra; In re Post-Newsweek Stations, Florida, Inc., supra; State ex rel Miami Herald v. McIntosh, 340 So.2d 904, 910 (Fla. 1976); Bludworth v. Palm Beach Newspapers, Inc., supra.

C. Permitting Public Access to Depositions need not Impair other Fundamental Interests

Respondent Hagler's and the State's fears that the right of fair trial will be impaired if a qualified public access right to criminal depositions is recognized and the

State's concern about the privacy rights of litigants are unfounded.[6]

The competing fundamental interest most likely to be asserted in opposition to the public's interest in access is the fair trial right of the accused. Courts are accustomed to protecting this right and have devised well known procedures commonly used during jury selection and trial to assure the defendant's right to an impartial panel of jurors and a fair trial. These methods work well in all but the most sensational cases where changes of venue are sometimes necessary.[7]

There is no reason to suppose public access to depositions poses insurmountable problems for protecting the fair trial right. As Palm Beach Newspapers noted recently in its Initial Brief in Palm Beach Newspapers, Inc. v. State, Case No. 67,482, Florida Supreme Court, press access to the

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[6] As previously explained in footnote 3, privacy claims by participants in judicial proceedings are dubious at best. If any such right exists, the State has no standing to assert it. Any such claim could be adjudicated, however, on a motion for protective order. There is certainly no justification for the per se denial of access the State defends.

Likewise, as to the fair trial right, the State has no standing to assert it (see footnote 2).

[7] This Court has previously decided that public access must yield where the only alternative is a change of venue. Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982).

discovery depositions in the underlying highly publicized murder prosecutions in that case had no apparent effect on jury selection. If a real danger exists in a sensational case of "trial by the press" it will be present irrespective of whether the public is allowed access to depositions or deposition transcripts. The information or indictment, statements by investigating officials, the Rule 3.220 materials, the court file and the pre-trial hearings, all available to the public, already assure that the discovery period in criminal cases is not the private preserve of the litigants.

This is as it should be, particularly in criminal cases, where the public is responsible for monitoring the quality of justice being dispensed by its public servants engaged in law enforcement, prosecution and adjudication. Public knowledge about law enforcement and prosecution practices, the flaws in which are often exposed in criminal discovery depositions, is indeed the ultimate guarantee of the system's fairness to the accused.

If, in a particular case, a defendant believes it probable that public access to a deposition will impair his right to a fair trial, he need only file a motion pursuant to Rule 1.280(c) for a protective order limiting those who may attend. The court should then consider the motion, as was done in Seattle Times v. Rhinehart, supra, to determine whether there is "good cause" to support the motion. Good cause

incorporates constitutional and common law principles of access as established in Miami Herald Publishing Co. v. Lewis, supra; Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Press Enterprises, Inc. v. Superior Court, ___ U.S. ____, 104 S.Ct. 819 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); and In re Adoption of Proposed Local Rule 17, 339 So.2d 181 (Fla. 1976).

By use of this method, courts retain control of the discovery process and are in a position to adjudicate the competing interests of the parties and the public in a rational manner.

III.

The Deposition Access Issue Cannot Be Resolved By Amending the Rules

The State suggests that if this Court is inclined to recognize a qualified right of public access to criminal depositions it should be done through a rule amendment rather than by adjudicating petitioners' First Amendment, common law and statutory (public records law) claims.[8]

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[8] The public records law is not an issue in this case, but the issue is preserved in Beach Newspapers, Inc. v. Burk, Case No. 67,352, pending review. The Burk majority also suggested the possibility of resolving the deposition access issue by an amendment to the rules. 571 So.2d at 579.

This Court's authority to adopt rules of practice and procedure under Art. V, Section 2(a), Fla. Const., entitles it to adopt a rule setting forth a procedure for determining who may attend depositions. Indeed, this Court has such a rule already in place, Rule 1.280(c). However, the rights at issue are plainly substantive -- indeed they are of constitutional magnitude -- and cannot be resolved by mere rule making. Wait v. Florida Power & Light Co., 372 So.2d 420, 423 (Fla. 1979). This Court must decide those rights.

CONCLUSION

The decision of the Fourth District should be reversed.

Respectfully submitted,

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