IN THE
SUPREME COURT OF FLORIDA
CASE NO. 67,482

PALM BEACH NEWSPAPERS, INC., SCRIPPS-HOWARD BROADCASTING COMPANY, THE MIAMI HERALD PUBLISHING COMPANY, and THE NEWS AND SUN SENTINEL COMPANY,
Petitioners,

v.

JOHN S. FREUND, JOHN TRENT, 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

This statement describes the opinion of the Fourth District.[1] Examination of the opinion alone is sufficient to establish express and direct conflict jurisdiction.[2]

The Court's Per Curiam Opinion

A three-judge panel of the Fourth District Court of Appeal succinctly rendered its per curiam affirmance of the trial court's order excluding the press and public from depositions as follows:

> The trial court permitted media attendance at pretrial depositions in a criminal proceeding pursuant to our sister court's holding in Short v. Gaylord Broadcasting Co., 461 So.2d 591 (Fla. 2d DCA 1981). Since then this court announced its en banc decision in Palm Beach Newspapers, Inc. v. Burk, No. 83-422 (Fla. 4th DCA June 11, 1985), which takes the opposite view from Short and which must govern the case at bar. Accordingly, we grant the writ and quash the trial court's order on the authority of our en banc decision in Burk.
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> (A. 1-2).

The Burk opinion held there are no constitutional, common law, or procedural limitations on a trial judge's

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1. The opinion of the Fourth District Court of Appeal is included in the appendix to this brief. References to the appendix will be made by the notation "(A.)".

2. A notice invoking the Court's jurisdiction to review a similar decision of the Fourth District Court of Appeal, Miami Herald Publishing Co. v. Hagler, Case No. 83-2062, was filed with the notice filed in this case. That case has been assigned Case No. 67,479 in this Court and a jurisdictional brief in that case is being filed simultaneously with this brief.

authority to exclude non-parties from pre-trial depositions in a criminal case.[3] At the conclusion of the Burk plurality opinion, the Fourth District certified the two questions to this Court as being of great public importance.[4] A notice invoking the discretionary jurisdiction of this Court was filed in the Burk case on July 10, 1985, and this Court issued an order on July 18, 1985, asking the parties to submit briefs on the merits.

Judge Letts' Special Concurrence

Judge Letts, whose concurrence in the Burk plurality opinion was essential to create a majority, concurred with the panel opinion in the instant case because he agreed that Burk governed. However, he also stated that he had erred in his

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3. 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.

4. The certified questions, 10 Fla. L.W. at 1439, 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?

reasoning when he concurred in Burk, thus substantially undermining the vitality of the Burk opinion itself. Judge Letts explained:

> I agree that Burk, supra, governs this case. However, while considering the particular matter now before us, I realize that the statement by the Florida Supreme Court in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), that "[t]here is no first amendment protection of the press' rights to attend pretrial hearings" is suspect, if it relies, as it appears to, on Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). If the Florida court continues to be of the same mind when it addresses the issue of pretrial deposition, it should not, as I did in Burk when I quoted Lewis, rely on Gannett. The Gannett decision, while admittedly equivocal, is clarified in a later United States Supreme Court case where it is confirmed that the media has in fact a "qualified" first amendment right to attend pretrial suppression hearings. Waller v. Georgia, ___ U.S. ___, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).
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> (A. 3).

Judge Letts then explained that he would certify this case to the Florida Supreme Court although "to do so should be an unnecessary exercise because of Jollie v. State, 405 So.2d 418 (Fla. 1981)." He noted that "the issue is certainly of great public importance, the certification has been requested, and it makes it that much easier for the litigants if we do so."

SUMMARY OF ARGUMENT

Petitioners, Palm Beach Newspapers, Inc., Scripps-Howard Broadcasting Company, The Miami Herald Publishing Company, and The News and Sun Sentinel Company, ask the Court to review a decision of the Fourth District Court of Appeal which arbitrarily excludes the press and public from pretrial depositions in a criminal case. The Court has jurisdiction over this case 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 two reasons: (1) the decision is in express and direct conflict with a decision of the Second District Court of Appeal, and (2) the decision, by relying on a case pending before this Court, Palm Beach Newspapers, Inc. v. Burk, ___ So.2d ___, 10 Fla. L. W. 1435 (Fla. 4th DCA 1985)(Supreme Court Case No. 67,352), is in prima facie express and direct conflict with a decision of this Court. Jollie v. State, 405 So.2d 418 (Fla. 1981).

ARGUMENT

I.

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

In Short v. Gaylord Broadcasting Company, 462 So.2d 591 (Fla. 2d DCA 1985), the Second District interpreting the rules of procedure which govern the taking of depositions,[5] held the

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5. Florida Rule of Criminal Procedure 3.220(d) authorizes the taking of discovery depositions in criminal cases and

(Footnote continued on next page)

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.

In reversing a trial court order which had permitted the press to attend pretrial depositions and essentially rejecting the notion that any showing must be made before public access to depositions is limited, the Fourth District expressly recognized in its per curiam opinion that it was taking "the opposite view from Short." Because of this express and direct conflict of opinions, this Court may exercise jurisdiction over this case.

II.

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

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(Footnote continued from previous page)

states, "Except as provided herein, the procedure for taking such deposition[s] . . . shall be the same as that provided in the Florida Rules of Civil Procedure. Civil Rule 1.280(c)(5) provides that "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a person or party . . . including . . . that discovery be conducted with no one present except persons designated by the court."

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."[6] Id. at 420.

Because the Fourth District's per curiam opinion cited as controlling authority Palm Beach Newspapers, Inc. v. Burk, supra, and that case is pending review by this Court, a prima

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6. This Court in Jollie expressed the underlying equal protection rationale for continuing to grant review on the basis 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 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 equally all similarly situated litigants that this Court held it would find a prima facie express conflict in, and therefore review, cases citing as controlling authority a decision that either has been reversed by this Court or is pending review (the latter, presumably because of the probability of reversal).

facie express conflict exists and allows this Court to exercise its jurisdiction to review the decision.[7]

CONCLUSION

This Court has jurisdiction to review the Fourth District Court of Appeal's decision in this case for two independent reasons: (1) the decision on its face expressly and directly conflicts with the Second District Court of Appeal's decision in Short v. Gaylord Broadcasting Company, and (2) the decision relies on Palm Beach Newspapers, Inc. v. Burk, an en banc decision of the Fourth District Court of Appeal which is pending review in this Court. Because this case raises issues of great public importance, as indicated by Judge Letts' special concurrence and because this case presents the Court with unique facts with which to scrutinize the legal conclusions of the

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7. 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, Judge Letts special concurrence makes it clear that the Fourth District considers this case reviewable in its present form. 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)."

Fourth District, the Court should exercise its discretionary jurisdiction to review this case.

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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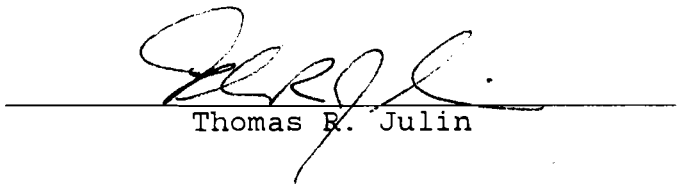

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