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,

vs.

THE STATE OF FLORIDA,

Respondent

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ON REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

REPLY BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

Under the applicable Rules of Civil and Criminal Procedure, it is the Court which regulates attendance at deposition.

The State does not have the right to arbitrarily exclude third persons from deposition. The State may apply for a protective order, which will be granted "for good cause shown ...."

As the State declined to offer any cause, let alone "good cause," the trial court properly denied the State's motion for protective order.

The State simply chooses to ignore the substantial body of state and federal authority contrary to its position.

In the meantime, on April 11, 1986, the en banc Third District has joined the First, Second, and Fifth Districts in recognizing the authority and responsibility of trial courts to regulate access to criminal discovery depositions.

ARGUMENT

THE STATE DOES NOT HAVE THE RIGHT TO EXCLUDE THE PUBLIC FROM CRIMINAL DISCOVERY DEPOSITIONS ABSENT A SHOWING OF "GOOD CAUSE"

The State's argument in this case is based on a fundamental misconception. The trial court, not the State, possesses the express power to control the conduct of discovery. Discovery occurs under the auspices of the Court, and is not a private venture of the parties.

Under the applicable Rules of Criminal and Civil Procedure, the trial court has the discretion to regulate attendance at deposition. Moreover, the Florida Rules of Civil Procedure provide a clear standard for the exercise of this discretion: "good cause." Fla.R.Civ.P. 1.280(c) (made applicable to criminal discovery depositions through Fla.R.Crim.P. 3.220(d)).

In this case, the trial court properly considered the State's request for closure, the defendants' objection to the request, and the public's legitimate interest in the conduct of the prosecution. Balancing all of the competing interests, the trial court ordered that the depositions be open to the public, and the depositions were so conducted without incident. This Court should affirm this proper exercise of the trial court's discretion and reverse the decision of the Fourth District Court of Appeal.

The State argues that it has the absolute right to exclude the public from depositions whenever it chooses, without making a showing of any kind. Initial Brief of Respondent, the State of Florida, at 1 (hereinafter "State's Brief"). In support of its position the State makes five arguments.

First, the State argues that depositions have "never" been open to persons other than parties. State's Brief at 1, 2. To the contrary, a number of Florida cases have employed the protective order procedure for regulating attendance by nonparties at deposition. See cases cited in Initial Brief of Petitioner The Miami Herald Publishing Company, at 8-9 (hereinafter "Petitioner's Initial Brief"). Federal authorities are in accord. Id. at 10. With minor exception the State simply ignores those cases.

Second, the State argues that since Rule 1.280(c) refers to "'discovery', not 'depositions'," the media's argument regarding the Rule would logically extend the access right to other types of discovery materials which the State believes should not be open. State's Brief at 2. Again, the State fails to read the Rules. Rule 3.220(d), Florida Rules of Criminal Procedure, applies to "Discovery Depositions." Under that Rule, deposition procedure "shall be the same as that provided in the Florida Rules of Civil Procedure." Id. Thus, the Rule -- and the issue presented by this case -- deals solely with access to depositions.

Other criminal discovery issues are treated by other provisions of the Rules of Criminal Procedure, and in any event are not before the Court in the present case.

Third, and equally far afield, the State argues that parties may arbitrarily exclude nonparties from depositions because, under the law of trespass, lawyers could exclude third persons from their offices. State's Brief at 3. The State begs the question. Discovery occurs under the Court's rules, and the judge decides how discovery will be conducted. The State must comply with the Rules, which require a showing of good cause for exclusion of nonparties. Who will attend is a decision for the Court -- not the State -- to make.

Fourth, the State attempts to distinguish the federal decisions relied on by Petitioner by suggesting that decisions under Federal Rule of Civil Procedure 26(c) have no persuasive force. State's Brief at 3-4. To the contrary, Rule 1.280(c) is essentially identical to Federal Rule 26(c), and where that is so, "federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules." Wilson v. Clarke, 414 So.2d 526, 531 (Fla. 1st DCA 1982) (citation omitted); Tallahassee Democrat, Inc. v Willis, 370 So.2d

867, 872 (Fla. 1st DCA 1979). The State concedes that federal discovery materials are presumptively open. State's Brief at 4.[1]

Fifth, the State takes contradictory positions by arguing on page 1 of its Brief that "depositions have never been open," State's Brief at 1 (emphasis added), and then, within a few pages, arguing that any historical analysis is irrelevant. Id. at 4. Certainly any historical analysis must be done with caution, but the historical materials suggest that in an earlier era the ultimate decision rested with the responsible judicial officer rather than parties. Petitioner's Initial Brief at 14-15.

An analogy to the provisions of the Rules may be found in Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). In that case, a plurality of

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[1]In an effort to avoid federal authority adverse to its position, the State says that the Federal Rules of Civil Procedure contemplate that all depositions will be publicly filed, as opposed to selective filing in Florida. State's Brief at 4, citing Fed.R.Civ.P. 30(f)(1) & Fla.R.Civ.P. 1.310(f)(2).

The State has overlooked Rule 5(d), Federal Rules of Civil Procedure, which permits the federal court to order that depositions and other discovery material not be filed. Under authority of Rule 5(d), district courts have adopted Local Rules under which depositions are not filed unless needed for consideration by the Court. E.g., Rule 10(I)1.-4., Rules of the United States District Court, Southern District of Florida; Rule 7(A), Rules of the United States District Court, Northern District of Florida; Rule 3.03(d), Rules of the United States District Court, Middle District of Florida.

Accordingly, Florida and federal practice under their respective Rules coincide.

the Court held that a criminal defendant did not have the right to exclude the press from a pretrial suppression hearing.[2] The question of access, the Court held, should be determined on a case-by-case basis by the trial judge, not by the parties. In so holding, the Court distinguished between the recognized right of the defendant to a public trial and the right -- which the Court held the defendant did not have -- to demand a private trial:

> The question in this case is not . . . whether the Sixth and Fourteenth Amendments give a defendant the right to compel a secret trial. . . . If that question were presented, it is clear that the defendant would have no such right. See Singer v. United States, 380 U.S. 24, 35, 13 L.Ed.2d 630, 85 S.Ct. 783 ("[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial").

443 U.S. at 382 n.11, 99 S.Ct. at 2907 n.11, 61 L.Ed.2d at 623 n.11.

Likewise here the State does not have the right to unilaterally exclude the press and public from depositions. The question of attendance, like other questions pertaining to the conduct of discovery, remains "within the broad discretion of the trial court" and the purview of the Rules.

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[2]The Supreme Court has since recognized 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).

See, e.g., Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967). The State does not cite -- as indeed it cannot -- any authority to the contrary.

The Third District Court of Appeal, sitting en banc, recently affirmed a trial court order which granted access to a deposition on precisely these grounds. Estrada v. Snyder, Case No. 86-767 (Fla. 3d DCA April 11, 1986) (en banc), pending on certified question, Case No. 68,625 (Fla. 1986). The trial court had granted a press request to attend a deposition in a criminal case over the objection of the defendants. By a vote of 7-2, the Third District affirmed the trial court's exercise of discretion and certified the following question to this Court:

> May either or both parties in a criminal case exclude members of the public, including the press, from attendance at pretrial discovery depositions?

Copies of the trial court's order and the order of the Third District are attached hereto. The Third District order, which was issued on an expedited basis, indicates that its opinions are to follow.[3]

Finally, the State may not claim an unfettered right to exclude the public from criminal discovery depositions where, as here, the defendants want the depositions to be open. Such a right violates the

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[3] In so ruling, the Third District took a similar position to that of the First, Second, and Fifth District Courts of Appeal, and a number of reported trial court decisions. See cases cited in Petitioner's Initial Brief at 9.

defendants' Sixth Amendment right to a public trial, independent of any First Amendment or other public right of access. See Waller v. Georgia, supra.

CONCLUSION

For the foregoing reasons the decision of the Fourth District Court of Appeal should be reversed and the judgment of the trial court reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner The Miami Herald Publishing Company was served by mail this 28th day of May, 1986 upon the following:

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