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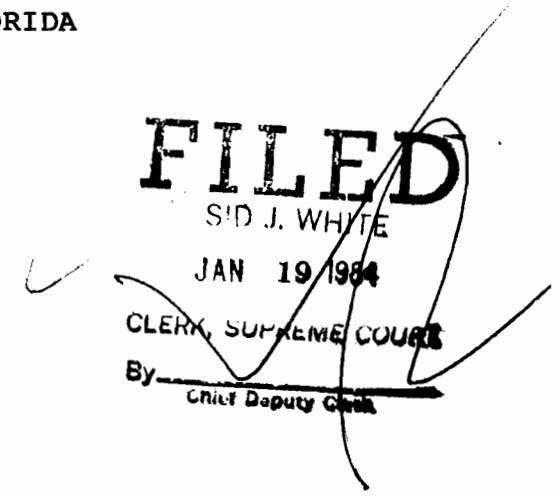
IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 64,151



HOWARD NEU, Mayor; ROBERT LIPPELMAN, JAMES DEVANEY, DIANE LORD BRANNEN and JOHN A. HAGERTY, as Members of the North Miami City Council,

Petitioners,

vs.

MIAMI HERALD PUBLISHING COMPANY,

Intervenor/Respondent,

and

STATE OF FLORIDA ex rel. JANET RENO, as State Attorney for the Eleventh Judicial Circuit of Florida, and as a citizen of the State of Florida,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

As a Matter of Great Public Importance

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Herald, it seems, is suddenly gifted with the unerring ability to miss the point. Since the Herald's attorneys are usually crack shots, their abysmal markmanship here is anything but accidental.

With the beguiling grace of an expert skiier, the Herald has slalomed around every impediment on the course --even with respect to such a monstrous crevasse as Section 90.502, which to an observer is capable of swallowing Berns and Doran whole, the Herald nonchalantly deters far around it, but throws great clouds of snow in the air to obscure that fact.

The Herald is no fool, and we'd be fools to accept the Herald's nonchalant failure to connect with the issue as anything but contrived. The truth of the matter, and the Herald knows it, is that for a skiier on this particular course to connect squarely with even a single of Petitioners' points is to crash in a hurdling mass of splintered propositions and broken logic -- hence the Herald's cunning evasions and non sequiters. The Herald's brief is all flying snow and fast moves. What is needed, is to slow the film down. Unfortunately to dissect and analyze each of the Herald's evasions in 15 pages would be impossible, so Petitioners must rely on the Court to judge for itself how completely the Herald has dodged each of the major issues. In this short reply, all Petitioners will do is to direct the Court's attention to certain major landmarks on a course which this Court, now or someday, will have to travel for itself.

ARGUMENT

I. The Meaning of the Law and its Application to these facts.

With the exception of mathematics, all language is vague and ambiguous. But both as a practical matter and a matter of principle, most words and sentences have a genuine meaning upon which literate people can agree. Otherwise language itself would become a farce. The Sunshine Law is as clear in its language as language can be. It says, in no uncertain terms, that when members of a government body meet to officially bind themselves to a public policy, they must do so in public view.[1]

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1. There may indeed be occasions for calling on a court to
(Continued next page)

All literate citizens would agree, assuming they are not perverse, that the key statutory terms encompass the formal exercise of binding public power by government officials acting in their official capacities. The Sunshine Law by its express terms is directed to acts by government boards which, because they are binding acts of government, modify the world by their very occurrence. Indeed, the Sunshine Law itself removes any lingering doubt on this, by illustrating exactly what conduct it means to include, namely resolutions, rules or other formal actions which are "binding" acts of government.[2]

Such specificity and clarity of language and purpose, Petitioners' submit, must mean that some other types of human

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decide whether at a particular gathering of officials binding public policy has been established. But that is not the source of the ephemeral jurisprudence created by this Court in Berns and Doran, upon which this case was decided below. The source of that law is not the Court's need to define "official government action" and distinguish it from other conduct involving government officials, but rather that the Court, for its own reasons, chose to take a path which made that fundamental statutory distinction irrelevant.

2. This was explained at great length in Petitioners' initial brief, and will not be belabored except to note that in re-writing the law, the Court rendered the last clause of 286.011 totally meaningless. The statute says that official acts must occur at a public meeting and that no action shall be binding unless taken at a public meeting. If a city council has fact-finding discussions with its city attorney, and this Court holds (consistent with Berns and Doran), that such discussions are subject to the statute, then the last clause becomes meaningless, since nothing has occurred which could be binding or made "not-binding" by force of the Law. On the contrary, the "binding" or "non-binding" character of the behavior is not even relevant under Berns and Doran. The logical proof of this is that no matter what the councilmen or city attorney said to each other at the meeting, if they were all to die immediately afterwards, the world would be exactly at it would be if they had never spoken at all, which is not the case after a meeting at which Petitioners bind themselves to official acts of government.

activity are not encompassed by the law. This Court erred in ruling to the contrary, albeit sotto voce, that official and formal governmental action means un-official in-action including pure discussion in the absence of any resolution, rule or other binding action (formal or otherwise), and it was that error which is the source of the problem.

Professor Kurland has remarked on the tendency by courts to create law which reflects their social policy objectives, uninhibited by constitutional or statutory authority. Kurland states

> "Nowhere else -- except when a parent admonishes a child -- are you likely to find so bold a proposition that something is so because the speaker has said it is so on many earlier occasions. Legitimation of usurped power by ipse dixit is, of course, not confined to the court. Nor is it only the judiciary that says arrogation of powers is justified by earlier examples of the illegitimate use of that power. But then the Nazis taught us many lessons in government, one of which was that iteration is the mother of "Truth". Kurland, "Is the Constitution Dead, Too?" 76 U. of Chicago Mag. pp. 28-29, (Winter 1984).

Berns and Doran were not interstitially filling gaps in a jurisprudence based on law -- as might be the case, for example, if this Court on occasion had been called on to determine if "official government action" had occurred at a particular gathering of public officials. Rather, in the Berns and Doran and derivative cases, this Court created its own preferred standards to control the population and government at large. Were this not the case, then this Court could never have concluded (as it has done persistently, but not consistently)

that purely informal and unofficial and non-binding discourse is ipse dixit official government action.[3] The Herald's only response to this is to say that "law serves a normative function," which begs the question of whose "norms" a statute is designed to serve -- the Legislature's or this court's?

Kurland's comparison of ipse dixit judicial lawmaking to the Nazis is hyperbolic and Petitioners concede this Court's objectives are unquestionably decent ones. But however decent this Court's predilection toward open government may be, the danger in applying tawdry means to lofty ends is that it confirms Jefferson's warning that the judiciary would reach for power until all law-making was in its grasp. Reckless or not, Petitioners ask this Court to recede from its dogmatic syllogism which runs as follows: (1) the Sunshine Law states that all discussions among government officials involving possible government action must occur at a public meeting; (2) this is such a discussion; (3) ergo, it must occur at a public meeting.

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3. This Court has stated over and over that where the language of a law is plain and conveys a plain meaning, there is no occasion to resort to statutory construction to interpret it. The Legislature is presumed to have meant what it said, and there is no room for "construction" or "interpretation" of a law as plain as the Sunshine Law. The courts cannot search for excuses to give a different meaning to words used in a statute, nor take clear language in a statute and extend or modify it. Where the language of a statute limits its application to a particular class, for example "official government action" which is "binding", the statute should not be enlarged or expanded to cover matters not falling within its language, for example mere fact-finding conferences with an attorney. Where a statute enumerates the things on which it is to operate, it is to be construed as excluding from its operation all those matters not expressly included. Literally dozens of this Court's decisions are cited for these propositions in 30 Fla. Jur. Statutes, Sections 79 through 90.

Syllogisms are a guide to policy only if their premises are true, and the premise above is "true" only in the ipse dixit sense noted by Kurland. Moreover, even if we subscribed to the doctrine that a court's "good" social policy objectives justified it in ignoring all known principles of separation of power and statutory construction, still that would not justify this Court's lawmaking, for as Petitioners have shown (and as everyone else secretely acknowledges), the ends actually achieved by the Court correspond not at all with the ends intended.

In light of Doran and Berns, it may well be a "cry in the wilderness" to say so,[4] but this Court was entirely wrong to assert (as it again asserted last month in in Marston) that the Sunshine Law was enacted to protect the public from "closed-door politics." Our republican form of government protects the public from closed-door politics; the Sunshine Law protects the public - as its plain language states -- from the binding action behind closed-doors. The answer to "closed-door politics" is political -- if for example the citizens of North Miami do not approve of Petitioners having closed door fact-finding discussions with their attorney about pending City litigation, then our form of government provides them a way of expressing their opinion, and also of enforcing it. They may at public meetings urge Petitioners to stop, and if Petitioners fail to do so, or fail to convince the public of the wisdom of their course, Petitioners

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4. The Herald accuses Petitioners of "reckless disregard" of the Court's prior decisions. It may indeed be "reckless" to tell a court it is wrong, but Petitioners have carefully considered the Court's prior decisions. Perhaps all too carefully.

may be removed from office. The sole objective of the Sunshine Law is to guarantee the public meeting at which citizens may demand explanations and express their opinions, and it accomplishes that end by preventing Petitioners from exercising in secret their delegated power to bind the body politic and thereby avoiding the checking effect of popular will.[5]

The Sunshine Law was never intended to allow this Court to decide, as parens patriae, the policy question when Petitioners may talk to the City Attorney about litigation. Such grasping of power by the Court is even more unseemly when one considers that if any institution (other than the citizens of North Miami) is empowered to decide that issue, it is the Florida Legislature, and it did decide it and did so contrary to this Court. See Section 90.502, Fla. Stat. (1982). But of course, the Heald assures the Court the Legislature "didn't mean it" so

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5. That our political system thus guards against "secret politics" is perfectly expressed by events surrounding this very litigation. Because the Herald has a strong policy position on this issue, during the city elections which occurred at the same time as the appeal below, the Herald editorialized strongly against one of the candidates who supported Mr. Simon's efforts in this case, and in favor of a candidate who specifically supported the Herald's position in this case. Moreover, the Herald editorialized that the undersigned law firm should be removed as counsel for the City because it opposed the Herald in this litigation. (The issue in this case was thus litigated in the courts and also the court of public opinion.) The Herald was partially successful in its political campaign; the Herald's candidate won office and has tried (thus far unsuccessfully) to pursuade the city council to repudiate its former position. The Herald thus speaks out of two sides of its mouth -- on the one hand it knows that the citizens of North Miami can and should decide this very controversy, yet it simultaneously asks this Court to deprive those citizens of their right to do so.

presumably the Court can safely ignore what the Florida Legislature decided.

The Court's only proper role under this law is to decide the very narrow and simple question whether a formal exercise of official, binding governmental power has occurred. And the answer to that question in the present case is decidedly "no" -- Petitioners never intended or proposed or claimed the right to settle any case or take any other official or binding action on anything, but rather only to investigate the City Attorney's work. It is only because the Herald secretely realizes the vulnerability of Berns and Doran[6] that it has tried to create a spurious "fact issue" to circumvent the caselaw, by asserting in effect that "Even if Berns and Doran are wrong, or overruled by the Legislature, the meeting would still be illegal because Petitioners would actually take official actions by settling lawsuits at the meeting."

As shown by the parties' joint stipulation, under certain circumstances the City Council may (but only may) be required to take official action in settling litigation. The Sunshine Law requires such official action to be taken at an

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6. The Herald is insecure for good reason, based on Sec. 90.502 and because in Marston this Court said that factfinding was not encompassed by the law. Marston thus added a sixth strand of Sunshine Law jurisprudence, by distinguishing between "decision making functions," which are encompassed by the Sunshine Law, and "fact-finding" functions which are not. The Court did not explain why "fact-finding" is not part of "decision making" nor how a potential criminal defendant is to distinguish these two utterly vague concepts and stay "within the law," but given the new dichotomy, an attorney-client case conference per se is clearly a "fact-finding" function.

unqualifiedly public meeting, as Petitioners have repeatedly and formally stipulated. See Petitioners' initial brief. Petitioners find the Herald's assertion that Petitioners would settle cases in secrecy very annoying, for the truth is the Herald deliberately proceeded in the trial court with the strategy of trying to win the case without establishing that the city would take any official action at the meeting, and then (after being "frankly amazed" when that strategy failed), seeking to manufacture a "factual issue" on appeal which it intentionally buried at trial.[7]

The Herald was plaintiff below and challenged the proposed meeting under the Sunshine Law. It asserted in its pleadings that Toby Simon could not have a meeting to discuss pending City litigation with members of the Council.[8] The Herald

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7. Incidentally, the Herald's claim that appellate counsel is ignorant of the facts and wasn't involved in the trial court proceeding is both wrong and silly. Appellate counsel was involved in the trial court proceeding and attended the trial in this case; the City's other trial counsel actively participated in these appeals, and the "involvement" of a lawyer in the proceedings below is utterly irrelevant anyway. The Justices of this Court, who must decide the case, were not involved in the trial, and our entire legal system runs on the basis of attorneys and judges and juries none of whom are personally familiar with what happened before. The only real question raised by such fancied claims is why, if the Herald's legal position is as solid as its nonchalant responses suggest, does it find it necessary to pollute the record with spurious factual issues and attacks on the integrity of Petitioners and their attorneys (including Toby Simon)?

8. Thus the Herald's trial memorandum stated in its opening paragraph that the suit sought a declaration as to the legality of a proposed meeting of the City Council "at which pending litigation would be discussed." The suit arose, the Herald informed the Court, because the council wished to discuss pending litigation with the City Attorney, and the Herald specifically alleged and argued that merely to discuss litigation was illegal under Berns. The Herald's trial brief repeatedly asserted that (Continued next page)

never alleged, much less proved, that the City "really" intended to take official action at the proposed meeting, for example by settling any litigation.[9] Since the City was the Defendant and had never intended to settle anything at the meeting, much less "secretely settle" lawsuits,[10] and since the Sunshine Law on its face applied only to official action, and since the City was hardly obligated to prove anything, least of all the negative of a proposition it had never asserted anyway, the Court heard the case and ruled in favor of the City. And the Third District held the meeting would be illegal on the basis of Berns and Doran because mere discussion of litigation in secret was illegal, thus rejecting the Herald's effort to inject a spurious fact issue on appeal.

Still the Herald refuses to admit that it's lawsuit died from self-inflicted wounds, and persists in attacking the

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pure discourse was illegal because the discussions were themselves "official acts." The complaint asked the Court to enjoin Petitioners from meeting to discuss public business. And at trial, Mr. Bohrer for the Herald began by explaining that the City Attorney "sought the closed meeting so he can discuss these pending litigations in private" (Nov. 5, 1982 hearing, p.4). Later he asserted that the caselaw meant that such mere discussion of pending litigation was itself an "official action."

9. The Herald presumably did not raise the issue because it wanted to obtain a judgment in its favor broadly ruling that the City's proposed meeting was illegal based on discussion alone, not merely because it would involve secret settlement of litigation. Thus when the Herald in its brief says the parties were "frankly amazed" by the trial judge's decision, the Herald means it was frankly amazed that a mere trial judge could see through the Herald's ploy.

10. That is an absurdity anyway -- one can't "settle" a case in "secrecy" from the opposition. The only matters Petitioners want to keep secret from their adversaries are strategy matters.

trial court's finding of fact (that the meeting was solely for discussion), by dredging up a paragraph from the stipulation and twisting it to mean that secret settlements would occur at the meeting. Paragraph 9 stated that at the meeting the city attorney intended to discuss the potential liability and strengths and weaknesses of pending cases, and evaluate them so that the City Council could make a determination as to a settlement position, including a range of settlement figures and conditions.

The Herald knows perfectly well what the parties intended by that sentence, namely that the proposed meeting would involve discussion and evaluation (fact-finding), and that any settlement action by the council would itself have to occur at a public meeting where, incidentally, the public could demand Petitioners divulge every "secret" and the issue of secrecy could be aired and decided by the ultimate sovereign.

II. Due Process

The Herald evades all of Petitioners' due process arguments. With respect to the obvious vagueness of the Sunshine Law jurisprudence, the Herald merely asserts "it isn't vague" and leaves it at that. With respect to the problem of interpreting the Sunshine Law in such a fashion as to throttle Petitioners' communications with their attorney, the Herald answers that"cities do not have due process rights," which is completely beside the point.

The Herald trivializes the argument that Berns and Doran unconstitutionally deprive Petitioners and their attorney of due process, and have been overruled by the Legislature through Sec. 90.502, Fla. Stat. (1982). Berns and Doran held that under the Sunshine Law Petitioners cannot have confidential communications with their attorneys. And Petitioners are subject to criminal and administrative sanctions (including removal from office by the Governor, investigation and prosecution by the State Ethics Commission and State Attorney), under scores of federal, state and local laws not the least of which are the Sunshine and Public Records laws themselves. Indeed the Respondents (which include Janet Reno) at footnote 2 of their answer brief even accused Petitioners of a crime because they'd spoken on occasion to the City Attorney on the phone. The time when legal assistance is required is the time when Janet Reno accuses a person of illegal conduct, so it is no answer to say that Sec. 768.28 immunizes Petitioners of personal liability for their "official" conduct. One does not say that a criminal defendant does not need a lawyer "if he's innocent," or if "he's immune" from liability -- the defendant needs a lawyer prior to the time that a court determines whether he's innocent, or immune. Thus when Janet Reno accuses Petitioners of being criminals (being "guilty of violating the Sunshine Law and being subject to penalties"), the Sixth and Fourteenth Amendments immediately came into play. Petitioners have a right to legal representation, and this Court has deprived them of such representation by ruling that they can only talk to their

attorney in front of Janet Reno who's already threatening to prosecute them as criminals.

An element of fundamental fairness under the due process clause and the guarantee of access to courts under the Fifth, Sixth and Fourteenth Amendments is the right to effective assistance of counsel. This right applies in all criminal proceedings and in many administrative and civil proceedings as well, and includes the right to private communication with one's attorney. See Dreher v. Sieloff, 636 F.2d 1141 (7th Cir. 1980) (The opportunity to communicate privately with an attorney is an important element of the Fourteenth Amendment); Case v. Andrews, 603 P.2d 623 (Kan. 1979) (the right to counsel includes the right to maintain the confidentiality of attorney-client discussions and to exclude state access to such communications).[12]

Finally, the Legislature of Florida, subsequent to Sec. 286.011 and Berns and Doran, recognized the above constitutional doctrine and specifically stated that Petitioners have the right to confidential attorney-client communications, and stated that the right applied in all proceedings (including this one, or any other Sunshine Law or Public Records proceeding, whether criminal

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12. See also numerous cases cited at West's Federal Practice Digest 2nd, Constitutional Law, Keynote 268.1(6), for the propositions that minimum due process and the Sixth Amendment forbids the government from interfering with the attorney-client relationship. See Castillo v. Estelle, 504 F.2d 1243 (5th Cir 1974); Hart v. Davenport, 478 F.2d 203 (1st Cir. 1973); Barker v. Wainwright, 459 F.2d 8 (5th Cir. 1972); U.S. v. Irwin, 612 F.2d 1182 (9th Cir. 1980). In Bassett v. Braddock this Court imposed a limiting construction on the Sunshine Law due to a constitutional provision which had almost no bearing on the discussions there at issue, and as to which this Court frankly acknowledged at most only "possibly" applied.

or civil). It is a fundamental rule of statutory construction that such a subsequent statute, which specifically excepts conduct generally included by a prior law, must prevail and be given effect. This is so well established that dozens of Florida Supreme Court cases are cited for that proposition in 30 Fla. Jur. Statutes, Sec. 111-121, and it was applied to this very controversy by the Federal District Court in the Titan decision, and by this very Court in the Tribune decision, both cited in Petitioner's initial brief. The best the Herald can say about this issue is that the Legislature "didn't mean it" and that even if it did, the Herald already had a "vested right" to intrude on Petitioners' statutory privilege, as if the Herald could grant itself legal "rights" merely by asserting them.[13]

Even with respect to Chapter 90, the Herald simply refuses to focus on the problem, which is not surprising since only a dyslexic could read Section 90.103 and conclude that Petitioners have an "attorney-client privilege" yet can only talk to their attorney in front of their adversaries and in the daily newspapers. It is certainly difficult to convince this Court that, when in the teeth of Berns and Doran, the Florida Legislature specifically and expressly stated that Petitioners had the privilege to communicate confidentially with their attorney, that didn't mean Petitioners had the privilege to communicate confidentially with their attorney. But the Herald

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13. Any "right" the Herald has to listen in on Petitioners' statutorily privileged conversations will have to be established by the Supreme Court, not by the Herald's editors.

explains that it has something to do with the State's interest in the "mental fitness and emotional stability" of attorneys, or Nixon's attempt to undermine the Constitution.

CONCLUSION

The Herald's brief is a lullaby to sooth the Court back to sleep. Petitioners apologize for making a racket, but all is not well with the Sunshine Law jurisprudence. Petitioners understand how little inclined the Court is to recede from its prior decisions, but it would be best for the long-term legitimacy of the Court to do so.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 16th day of January, 1983 to Sanford L. Bohrer, Esq., Thomson, Zeder, Bohrer, Werth, Adorno & Razook, 1000 Southeast Bank Building, Miami, FL 33131; Thomas K. Petersen, Esq., Chief Assistant State Attorney, 1351 N.W. 12th Street, Miami, FL 33125; Richard J. Ovelmen, Esq., General Counsel, Miami Herald Publishing Co., 1 Herald Plaza, Miami, FL 33131; and Gerry Hammond, Esq., Asst. Attorney General, Dept. of Legal Affairs, The Capitol/Ste. 1603, Tallahassee, FL 32301.

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