59

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 67,081

DONALD RASMUSSEN,

Petitioner,

vs.

SOUTH FLORIDA BLOOD SERVICE, INC.

Respondent.

DISCRETIONARY REVIEW OF A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE COUNCIL OF COMMUNITY BLOOD CENTERS

H. ROBERT HALPER
CHRISTINA W. FLEPS
O'CONNOR & HANNAN
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-1400

Counsel for Amicus Curiae
Council of Community Blood Centers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

The Petitioner has invoked this Court's discretionary jurisdiction to review a decision of the Third District Court of Appeal reported as South Florida Blood Service, Inc. v. Rasmussen, 467 So.2d 798 (Fla. 3d DCA 1985), which certified the following question:

> Do the privacy interests of volunteer blood donors and a blood service's and society's interests in maintaining a strong volunteer blood donation system outweigh a plaintiff's interest in discovering the names and addresses of blood donors in the hope that further discovery will provide some evidence that he contracted AIDS from transfusions necessitated by injuries which are the subject of his suit?

467 So.2d at 804-805, n. 13.

This Court has jurisdiction under Article V, Section 3(d)(4), Florida Constitution, and should affirm the Court of Appeals' decision and order quashing the subpoena which sought production of the names and addresses of 51 volunteer blood donors of the South Florida Blood Service.

Although the subpoena on its face seeks production only of the names and addressses of the blood donors, its use will be far broader. Petitioner seeks this information to establish that Rasmussen, plaintiff in the main automobile accident case, contracted AIDS in blood transfusions necessitated by injuries sustained in the accident. Thus, Petitioner will be seeking information that one or more of the donors either has AIDS or is in one of the high-AIDS-risk groups, primarily homosexuals with multiple partners and intravenous drug abusers. Establishing

such facts will necessarily require inquiry and investigation into medical history, sexual practices, drug use habits, etc., all among the most intimate aspects of the donors' lives.

Florida discovery rules provide that discovery of relevant, non-privileged information may be limited or prohibited to prevent annoyance, embarrassment, oppression or undue burden or expense. In determining whether the prospect of such harm requires controls or prohibitions on discovery, a court must balance the interests seeking discovery with those opposing it. In this case, as the Court below correctly held, the balance of interests overwhelmingly favors barring discovery.

Several interests lie on the side of the balance against discovery. First, the blood donors who would be the immediate targets of Petitioner's discovery have compelling privacy interests in freedom from inquiry and probing by lawyers and investigators into the intimate, highly private facts of their medical histories, sexual activities, and possible drug use, and in avoiding the possibility of disclosure of such private facts in litigation or otherwise. The subpoena originally granted by the trial court contained no protections limiting the scope of inquiry or the extent of possible disclosure.

The donors' privacy interests are heightened greatly in this case by the fact that the inquiry and potential disclosure concern the highly stigmatic subject of AIDS, which has been the source of ostracism and discrimination for persons merely

believed to have the disease. The donors' interests in freedom from unwarranted intrusion into their private lives and disclosure of private information are protected by the Federal and Florida Constitutions.

The second interest opposing disclosure in this case is that of blood centers responsible for sustaining the nation's all-volunteer blood supply, and of blood recipients and the nation as a whole in avoiding inappropriate obstacles to that goal. These interests would be seriously impaired by a rule permitting probing by lawyers and investigators into the private lives of volunteer blood donors who are non-parties to litigation. The prospect of such probing, one which blood centers would have to disclose to potential donors, would deter donation, at a time when the supply of blood donors has already been reduced by necessary measures to exclude possible AIDS carriers and also by a widespread fear that the act of donating blood itself can cause AIDS. Federal and state courts have recognized the possible chilling effect of discovery in like contexts, tissue donation and epidemiological research. Research subjects and tissue donors have been protected from discovery of their identities and other facts even though the information sought was, or would lead to, relevant and non-privileged information. Likewise, the courts of this State have protected non-parties to litigation from such discovery.

The third interest opposing discovery is that of the State of Florida, which this year enacted a statute designed to

protect persons who take a blood test for AIDS antibodies from all non-consensual disclosure of their identities or the fact that they are taking the test, except in the context of professional medical evaluation and diagnosis. The interests stringently protected by the statute -- those of individuals who might have AIDS in avoiding disclosure of that stigmatizing possibility -- are precisely the interests of the blood donors in this case. The donors' interests should be afforded the same protection.

Standing against the interests of the blood donors in privacy, of blood centers, blood recipients and the nation in maintaining adequate blood donation incentives, and of the State of Florida in protecting possible AIDS victims from non-medical identification, is the Petitioner's asserted interest in "proving" that he obtained AIDS in transfusions of the donors' blood. As the Court below correctly reasoned, that interest is slight in this case because there is no indication that inquiry and investigation into the donors' private affairs will add significantly to the proof of causation. Petitioner already has the expert testimony of Rasmussen's treating physician that Rasmussen's AIDS was contracted through the transfusions. None of the 51 blood donors has been identified as an AIDS victim through matching by the blood service with reported AIDS cases. Further, even if investigation revealed that some of the donors are in high-risk groups, this would not establish by any means that any one of them has AIDS or is a carrier, or that the

disease was transmitted in transfusions: the incidence of AIDS even in high-risk populations is very low, and in transfusions, even lower.

The dissent below, the Petitioner, and amicus curiae Miami Herald Publishing Company suggest that this case implicates additional interests -- namely, society's and blood recipients' interests in discouraging high-AIDS-risk persons from donating blood. Those interests are not involved in this case, would not be served by granting discovery in any event, and, as the Court below rightly pointed out, are public health goals to be pursued (and now being vigorously pursued) by public health laws and regulations and not by discovery rules designed only to aid in the litigation process. The holding in this case -- that the privacy interests of blood donors in this AIDS-related litigation, and the interest of society in a healthy volunteer blood donation program, outweigh Petitioner's interests in discovery against non-parties which would yield, at most, evidence of questionable probative value -- is a narrow one. The decision is well-founded and should be sustained by this Court.

STATEMENT OF THE CASE AND FACTS

The main litigation is an automobile accident case which occurred in early 1982. Petitioner/plaintiff Donald Rasmussen ("Petitioner"; "Rasmussen") sued for personal injuries he sustained when struck by a motor vehicle owned and operated by defendants William DeLoatche and Leonel Monterroso. R.2. Rasmussen was hospitalized for his injuries at St. Francis Hospital, where he received 51 units of blood supplied by Respondent South Florida Blood Service ("SFBS") from volunteer blood donations. R.2. Subsequently, Rasmussen was diagnosed as having "acquired immune deficiency syndrome" ("AIDS") and died from complications related to the disease. In a deposition, one of Rasmussen's treating physicians stated his medical conclusion that the AIDS was caused by the blood transfusions at the St. Francis Hospital. R.2. Petitioner also has the deposition statement of a Center for Disease Control ("CDC") epidemiologist that Rasmussen was a "blood transfusion" case of AIDS. P.A. 20.[1/]

Rasmussen served on the SFBS a subpoena duces tecum seeking production of the names and addresses of the 51 blood donors. R.2. The trial court denied a motion by the SFBS to quash the subpoena or for a protective order and ordered production of the information. R.3. The Third District Court of Appeal granted a Petition for Certiorari to review the trial court's order and quashed the order. The subpoena seeking the

---

1/ The designation "P.A." is used herein to refer to the Amended Appendix to Brief of Petitioner.

names of the 51 volunteer blood donors from the SFBS (R. 13-19) is presumably intended to enable Petitioner to obtain information which would corroborate this expert opinion. While the subpoena on its face seeks only the names and addresses of the volunteer donors, the uses to be made of this initial information are necessarily far broader because "Petitioner must prove the source [of Rasmussen's AIDS] to be blood received at St. Francis Hospital." Amended Brief of Petitioner at 5. Such proof could entail several steps. The first, would be to compare the donors' names with reported AIDS cases; however, the SFBS has already taken this step, and has found no match. R.104. Therefore, it would be necessary to go directly to the donors to inquire whether any of them has AIDS, or employ inquiry or surveillance to establish that one or more of the donors belongs to one of the high-AIDS-risk groups (primarily homosexuals with multiple partners and intravenous drug abusers). If these efforts yielded no positive results, or if confirmation of positive results were sought, the donors' blood could be subjected to the serologic HTLV-III antibody test recently licensed by the U.S. Food and Drug Administration ("FDA").

Such methods of attempted proof would "prove" very little because of the nature of AIDS and the HTLV-III antibody test. Establishing that one or more of the donors belongs to a high-AIDS-risk group would not establish that such donor is an AIDS carrier or has even been exposed to AIDS because the incidence of AIDS, even in high-risk populations, is very low.

Testing a donor today for the presence of AIDS by administering the HTLV-III antibody test would not establish that the donor actually has AIDS today, because the test has a very high "false positive" rate; nor would it establish that the donor was infected with the AIDS virus at the time of the blood transfusions because those transfusions occurred over three years ago and the tested donor could have been infected with the virus subsequently.

The Court below determined that the significant privacy interests of blood donors, and the interests of blood centers and the nation in a healthy volunteer blood system, outweighed the interests of Petitioner in discovering facts of questionable probative value.

ARGUMENT

I. BACKGROUND: THE NATIONAL BLOOD SERVICE SYSTEM AND AIDS

A. The Council of Community Blood Centers and the National Blood Service System

Amicus curiae the Council of Community Blood Centers ("CCBC"), established in 1962, is a nationwide association of 31 independent, non-profit regional and community blood centers operating at 56 locations in 33 states. The CCBC's member blood centers collect about 3.1 million units of whole blood annually, or approximately 25% of the nation's whole blood supply. The CCBC is one of three national private-sector organizations with overlapping memberships -- the CCBC, the American Red Cross, and the American Association of Blood Banks -- which represent the regional and community blood centers now responsible for over 90% of whole blood collections in the United States.[2/]

The focal point in the evolution of policy for the national blood service system was the National Blood Policy ("NBP") enunciated by the Federal government in 1973. The NBP represented the Federal response to growing concerns about possible supply inadequacies, inefficiencies, excessive costs, and above all hepatitis contamination in the national blood supply, which was then heavily dependent upon commercial collections. A central goal of the NBP, founded on the observation

---

2/ Office of Technology Assessment, United State Congress, Blood Policy and Technology (January 1985) (hereinafter "OTA Report") at 52-53.

that commercially collected blood was more likely to be contaminated with hepatitis than volunteer blood, was the establishment of an all-volunteer system for blood and blood collection. Specifically, the NBP aimed to:

> 1) encourage, foster, and support efforts to bring into being an all-voluntary blood donation system and to eliminate commercialism in the acquisition of whole blood and blood components for transfusion purposes. The ultimate aims of this policy are improvement in the quality of the supply of blood and blood products....3/

Pursuant to the goals of the NBP, and pursuant to its own commitment to the safety and adequacy of the nation's blood supply, the CCBC includes in its Statement of Principles a provision that its member blood centers should be Federally licensed, not-for-profit organizations which

> maintain vigorous public education and donor recruitment programs in order to meet all blood needs from volunteers who donate blood without financial incentives.4/

The CCBC's members, and those of the other two blood center organizations, the American Red Cross and the American Association of Blood Banks, have fulfilled the NBP's goal of an all-voluntary blood collection system. Today, all blood collections by the CCBC's 56 facilities are from volunteer donors. The proportion of the national blood supply furnished by volunteer donors has increased from less than 90% in 1975 to virtually 100%

3/ 39 Fed. Reg. 32702 et seq. (September 10, 1974).

4/ CCBC, Statement of Principles (July 14, 1982).

today.[5/] Maintaining an adequate supply of volunteer donors at all times is especially important as a result of the successful transition to an all-volunteer system, and because blood is a product with a very short "shelf life" which cannot be stockpiled to meet emergencies.

While pursuing the goal of maintaining an adequate volunteer blood supply, the blood center organizations must pursue an equally critical goal: achieving the maximum degree of safety from infectious diseases such as hepatitis and, more recently, AIDS. The blood center associations the Federal Food and Drug Administration ("FDA"), the Centers for Disease Control ("CDC"), and other concerned organizations have continuously collaborated in developing measures to increase blood safety through tests to exclude contaminated blood and screening to prevent possible disease carriers from donating. These measures have necessarily reduced the supply of volunteer donors and will continue to do so. Thus, improving recruitment of safe donors and avoiding inappropriate disincentives to donation remain vital to the voluntary blood system's continued ability to serve the nation's needs for blood.

B. The Blood Collection Process and AIDS

In the 1980s, the national blood service system and national public health authorities encountered an unprecedented challenge in AIDS. AIDS, or "acquired immunodeficiency

---

5/ OTA Report at 51.

syndrome", is a disease now almost conclusively demonstrated to be of viral origin, with an extremely high mortality rate, apparent transmission through bodily fluids via means such as sexual contact and intravenuous drug abuse, and no known cure.

The first handful of AIDS cases appeared in the early 1980s.[6/] The early cases were concentrated among homosexuals and bisexual men, intravenous drug abusers, and persons of Haitian origin. Eventually, AIDS began to appear in hemophiliacs. AIDS still occurs predominantly among these groups, which have the following respective shares of total AIDS cases: homosexual and bisexual men with multiple sex partners (74%); intravenous drug users (17%); Haitians living in the United States (5%); and hemophiliacs (1%).[7/]

It was not until late 1982 that AIDS began to appear in persons who had received blood transfusions.[8/] (To date, the incidence of AIDS in transfusion recipients remains extremely low, estimated at approximately 6 cases of AIDS for every million persons transfused, or less than 1/1000th of 1%.[9/]) As soon as evidence of transfusion-related AIDS emerged, the blood center

---

6/ Centers for Disease Control, AIDS Weekly Surveillance Report April 1, 1985) (hereinafter "CDC Weekly Report") at 3; OTA Report at 99.

7/ CDC Weekly Report at 1.

8/ According to the first report from the Centers for Disease Control ("CDC") on the association of transfusions with AIDS, the first 18 cases reported were diagnosed in a 12-month period ending in August 1983. OTA Report at 100.

9/ Id.

groups collaborated on a joint recommendation in January 1983 for screening procedures and other methods to respond to the AIDS threat.[10/] This recommendation became the basis for a March 1983 guideline developed by the FDA, the blood center groups, and other interested organizations, on methods to decrease the risk of AIDS in transfusions. Pursuant to these recommendations and guidelines, the nation's blood centers implemented an AIDS screening procedure for donors.[11/]

This screening procedure is a two-step process. First, a medically-trained interviewer asks a prospective blood donor if he has experienced any specifically described physical symptoms associated with AIDS. If the donor gives any positive or "suggestive" responses, he is deferred as a donor. Second, the donor receives a written statement which provides information about AIDS and explains that the blood center, to ensure a safe community blood supply, asks persons in described groups at high risk of AIDS to refrain from donating. The statement advises that the prospective donor may leave the blood center immediately without providing any explanation, or may discuss the matter confidentially with the person conducting the interview and

---

10/ American Red Cross, American Association of Blood Banks, and CCBC, Joint Statement on Acquired Immune Deficiency Syndrome (AIDS) Related to Transfusion (January 13, 1983).

11/ Director, Office of Biologics, United States Food and Drug Administration, Recommendations to Decrease the Risk of Transmitting Acquired Immune Deficiency Syndrome (AIDS) from Blood Donors (May 23, 1984).

medical history who, after the discussion, may defer the prospective donor without further questions.[12/]

This procedure is designed to exclude possible AIDS carriers while avoiding unnecessary, intrusive inquiry into an individual's personal habits and sexual preferences and militating against fear and trauma by making medical information about AIDS available immediately and on a strictly confidential basis. Experience thus far shows that this procedure has been effective in convincing the highest-AIDS-risk populations to refrain from donating blood.[13/]

When this screening procedure was first implemented, there were no laboratory methods for identifying the presence of the AIDS virus in blood. On March 2, 1985, however, a serologic test which detects the presence of AIDS antibodies (the "HTLV-III antibody test") was licensed by the FDA.[14/] The test is now being implemented by the CCBC's members and other blood centers across the nation, in addition to the existing screening procedure described above, and promises to virtually end AIDS transmission in blood. Indeed, the Director of the AIDS Clinic of the San Francisco General Hospital, Dr. Paul Volberding, stated July 25 on national network news that the test would

---

12/ Id.

13/ OTA Report at 101; see also, Approval of Blood Donor Test for AIDS Antibody is Expected, N.Y. Times (March 2, 1985) at 6.

14/ CCBC Newsletter (March 4, 1985) at 3.

largely eliminate blood transfusions as a source of future AIDS cases.[15/] Dr. James Curran, Director of the CDC, reported after reviewing results of a study which used the test on more than a million units of blood that "we have pretty much solved the transfusion-associated AIDS cases."[16/]

The procedures developed by the blood center groups and Federal authorities for implementing the new serologic test, like the earlier AIDS screening procedures, stress safety, informed consent, and confidentiality. All persons accepted as blood donors are informed their blood will be tested, and those not wishing the test are not accepted as blood donors. Donors must also be told that if their test results are positive, they will be placed on the blood center's deferral list. The recommendations include strong provisions to ensure confidentiality of results:

> Physicians, laboratory and nursing personnel, and others should recognize the importance of maintaining confidentiality of positive test results. Disclosure of this information for purposes other than medical or public health could lead to serious consequences for the individual. Screening procedures should be designed with safeguards to protect against unauthorized disclosures. Donors should be given a clear explanation of how information about them will be handled. Facilities should consider developing contingency plans in the event that disclosure is sought through legal process. If donor deferral lists are kept, it is necessary to maintain confidentiality of such lists. Whenever appropriate, as an additional safeguard,

---

15/ NBC Nightly News (July 25, 1985).

16/ Experts Deem U.S. Blood Supply Safe from AIDS, N.Y. Times (August 1985).

donor deferral lists should be general, without indication of the reason for inclusion.17/

The HTLV-III antibody test is certain to result in over-exclusion of donors. Because the test detects only antibodies, not the AIDS virus itself, it has a high "false positive" rate, i.e., identification of persons as AIDS carriers who are not actually infected with the disease. The manufacturer's testing data predict that, for a blood center collecting 100,000 units of blood annually, implementation of the test could result in discarding 610 units of blood annually and deferring 220 donors.18/ Moreover, early experience shows that the requirement of the test itself is deterring donations. A New York Blood Center donor survey in early 1985 found that the test decreased willingness to donate among 25% of respondents. Blood center officials anticipate that the test will shrink the donor supply because of more stringent informed consent requirements and the psychological association of donating blood with the "bad news" of a positive test result.19/

17/ Centers for Disease Control, Food and Drug Administration, Alcohol, Drug Abuse, and Mental Health Administration, National Institutes of Health and Health Resources and Service Administration, Department of Health and Human Services, Provisional Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to Virus Causing Acquired Immune Deficiency Syndrome (January 11, 1985).

18/ CCBC Newsletter (March 4, 1985) at 3.

19/ CCBC Newsletter (February 1, 1985) at 5.

In addition to the necessary exclusion of potential blood donors through AIDS screening and testing procedures, blood centers must also contend with an unnecessary contraction in the donor population as a result of AIDS: the hysteria-induced belief that blood donation itself can cause AIDS. A Roper poll conducted in late 1983 revealed that nearly 25% of respondents cited donating blood as a perceived cause of AIDS.[20/] Indeed, this fear was so widespread that it recently prompted the Surgeon General to distribute a paper to newspapers across the nation urging readers to "donate blood regularly" and explaining:

> There is no way that a donor can contract AIDS or any other disease by giving a pint of blood. Despite the known safety of donating blood, some people are afraid to give. In fact, blood donations are down from a year ago, and there is evidence that some previous donors are staying away from blood drives because they are afraid they will get AIDS.[21/]

Likewise, the American Medical Association's House of Delegates deemed it necessary to pass a resolution requiring the Association to "use its publications to assist physicians to educate patients that donating blood does not expose the donor to the risk of [AIDS]."[22/]

20/ Id. at 4.

21/ Public Health Service, Department of Health and Human Services, Donate Blood Regularly (December 1984) (hereinafter Donate Blood Regularly) (emphasis added).

22/ American Medical Association, Resolution No. 39 (June 20, 1984).

Throughout the history of AIDS, the blood centers, their organizations, and Federal authorities have deployed all available techniques to prevent blood contamination with AIDS and to minimize embarrassment, discrimination, and fear for those who are told not to donate blood. The removal of high-risk persons from the donor population through the personal and laboratory screening methods, and the additional removal of non-AIDS-risk donors through the overbreadth of these screening techniques and the public hysteria surrounding AIDS, has increased the urgency of maintaining an adequate supply of healthy donors.

II. THE OPINION OF THE COURT OF APPEALS SHOULD NOT BE OVERTURNED.

A. Florida Discovery Rules Permit Prohibiting Discovery to Avoid Burden, Oppression or Embarrassment.

Florida discovery rules permit limits or prohibitions on discovery to prevent annoyance, embarrassment, oppression or undue burden or expense. Fla. R. Civ. P. 1.280(c); 1.410(b), (d)(1); Dade County Medical Association v. Hlis, 372 So.2d 117, 121 (Fla. 3d DCA 1979). These rules permit a court to control discovery in all its aspects to prevent undue invasion of privacy. Springer v. Greer, 341 So.2d 212, 214 (Fla. 4th DCA 1976), appeal dismissed, 351 So.2d 406 (Fla. 1977). In order to determine whether discovery is appropriate in a given case, a court must balance the competing interests affected by the discovery request. Hlis, 372 So.2d at 121.

B. Overwhelming Interests Favor Denying Discovery.

It is the responsibility of the CCBC and its member blood centers, pursuant to the dictates of national blood policy, to collaborate with other blood centers and government authorities to ensure continuously available supplies of voluntarily-donated blood. In pursuing this institutional mission, the CCBC's member centers serve the interests of potential transfusion recipients in access to blood whenever it is needed, the national interest in maintaining the adequacy and safety of the blood supply, and the interests of the blood donors they recruit in protection of privacy and confidentiality of medical and personal information and test results. All of these interests -- most critically, the donors' constitutionally protected privacy interests -- would be infringed if the requested subpoena were granted.

1. The requested subpoena would violate the constitutionally protected privacy interests of blood donors.

a. The discovery sought by Petitioner would involve intrusion into intimate areas of the donors' lives.

When a blood center recruits a volunteer donor, that donor is entitled to expect that no punishment after the fact will follow his act of altruism in donating blood. Above all, the donor legitimately trusts in the confidentiality of private, personal information. Indeed, with respect to AIDS, the critical importance of confidentiality is explicitly addressed by the U.S.

Public Health Service in its guidelines for donor screening[23/] and in the procedures for administering the new HTLV-III antibody test,[24/] which blood centers observe.

The confidentiality blood donors reasonably expect concerning personal information disclosed in the donation process would be directly violated by the use Petitioner must make of the donors' names and addresses to establish an inference that the AIDS which caused Rasmussen's death resulted from blood transfusions. The major premise of amicus curiae Miami Herald Publishing Company ("Miami Herald") is that nothing more than a list of names and addresses is involved in the desired discovery and no "intimate facts" would be probed. If that were so, a page from the telephone book would be just as valuable to Petitioner: Petitioner must, by his own statement, "prove" that the donors' blood caused Rasmussen's AIDS, and a list of names and addresses by itself proves nothing. Petitioner's attempt at proof would at least require showing that one or more of the 51 donors is a member of a high-AIDS-risk group. Because these groups consist overwhelmingly of homosexual males with multiple partners and intravenous drug abusers, Petitioner would have to probe into the most private and intimate aspects of the donors' lives.

23/ Supra note 10.

24/ Supra note 16.

b. The right to privacy is protected by the Federal Constitution.

As the Court of Appeals decided and amicus curiae Miami Herald concedes (see Brief of Amicus Curiae Miami Herald Publishing Co. at 10), invasion and disclosure of intimate private facts, such as affliction with a stigmatizing disease, drug use habits, and sexual practices, invades a zone of disclosural privacy protected by the Federal Constitution. Griswold v. Connecticut, 381 U.S. 479 (1965); Whalen v. Roe, 429 U.S. 589 (1977); Press-Enterprise v. Superior Ct., 464 U.S. 501 (1984).

In Whalen, the Supreme Court recognized the constitutional "right of the individual to be free in his private affairs from governmental surveillance and intrusion ... and not to have his private affairs made public." 429 U.S. 598, n. 24. There the Court held that this right was not "grievously threatened" by the facial provisions of New York State's comprehensive statutory scheme to prevent unlawful diversion of dangerous drugs, which required filing forms identifying patients for whom the drugs had been prescribed with the state health department, confining access to the forms to a limited number of public health personnel, prohibiting public disclosure of patients' identities, and providing security measures to prevent disclosure.

In Press-Enterprise, the Court recognized the "compelling interest" of an individual in avoiding intrusion into, or disclosure of, highly personal matters in the context of litigation:

> The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. The trial involved testimony concerning an alleged rape of a teenage girl. Some questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons. For example, a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interest of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

464 U.S. at 511-12 (emphasis added).

The "historic values" to which the Court referred were the "compelling" interests of an accused and society in the openness of trial (including jury selection), which "enhances both the basic fairness of the trial and the appearance of fairness so essential to public confidence in the system," 464 U.S. at 508, "vindicates the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected," id. at 509, and thus "plays as important a role in the administration of justice today as it did for centuries ...". Id. at 508. The Court found that these historic and compelling societal interests would be unduly infringed by a broad closure order barring any release of transcripts of an entire voir dire proceeding, in view of the fact that the potential privacy interest of a juror could

be protected by the opportunity to answer questions about particularly sensitive subjects in camera away from other jurors and the public.

No comprehensive state schemes or overwhelming societal interests, and no such countervailing protections for the interests of an individual subject to potential invasion of privacy, such as existed in Whalen and Press-Enterprise, exist in this case. On the other hand, the potential for "embarrassment and emotional trauma" which concerned the Court in Press-Enterprise is extraordinarily present in the instant case, and the privacy interests of the donors are more acute, because the inquiry to be conducted by Petitioner concerns AIDS.

An inquiry about AIDS, unlike investigation into one's personal habits or sexual practices, is not just uncomfortable and intrusive; it also carries the potential for stigma and discrimination. Petitioner, arguing that "in litigation concerning diseases other than AIDS, blood donor confidentiality has apparently not been granted to blood banks" (Amended Brief of Petitioner at 8-9, emphasis added) and that the donors "voluntarily revealed their identities to the SFBS without reservation" (id. at 11), simply ignores this central aspect of

the case.[25/] In fact, as the Court of Appeal recognized, AIDS, unlike any other disease, "is the modern day equivalent of leprosy." Opinion at 6. The ignorance and terror raised by AIDS have caused its victims, and even persons suspected of having AIDS, to be shunned and censured on the job, in insurance, in housing, even among friends and family. Reports of such cases are legion, and they demonstrate how cruelly persons even associated in some way with AIDS can be victimized by others' inflamed imaginings about the disease.[26/]

25/ Petitioner also argues that blood centers other than the SFBS have provided donor information. The only source of this argument is the deposition of Mr. Gus Sermos of the Centers for Disease Control (P.A.22-51). Mr. Sermos addressed only the providing of donor information to the CDC -- a most limited form of disclosure very different from disclosure to lawyers for probing and investigation in litigation. Moreover, Mr. Sermos actually stated that "in some cases the blood banks give the information and, in some cases, they don't" (P.A.35, emphasis added), thus refuting any suggestion of common practice or general lack of concern about the consequences of AIDS-related disclosure which Petitioner might seek to convey.

26/ For example, the director of legal services for a New York AIDS victims organization has sued employers for dismissing workers who had AIDS, or who merely had friends with AIDS. AIDS And Its Victims: Support Networks Grow, N.Y. Times (February 21, 1985) at B1 (hereinafter "AIDS Victims"). Officials in Broward County, Florida fired two AIDS-infected workers after doctors refused to guarantee that casual contact would not spread the disease. In Louisiana, a man was fired from his job after he wrote a People magazine article about living with the fear of AIDS. CBS News, "Face the Nation" (July 28, 1985). All over the country, healthy gay men are being fired when they appear at work with rashes and chest colds. AIDS Spreads to the Courts, Newsweek (July 1, 1985) at 61.

The "grim" fate of AIDS victims in institutions has been recognized by at least one court, which noted that AIDS victims are "greatly feared by fellow inmates and,

(Continued)

Granting the requested subpoena in this case will raise such prospects for 51 individuals who donated blood over three years ago. It is no answer to suggest, as did the dissent below, that no one would know of the inquiry to be conducted by Petitioner's lawyers. The subpoena quashed below contained no safeguards of the confidentiality of its victims, and no limits on the nature or scope of the inquiry Petitioner could conduct once armed with the names and addresses of the donors. Even if such limitations were established, however, at the very least friends and family would know. The possibility of human carelessness in the investigation process, simple human curiosity, and the demonstrated interest of the local and

---

apparently, ostracized." Cordero v. Coughlin, 607 F. Supp. 9 (D.C.N.Y. 1984). An entire ethnic group, Haitians, has suffered from association with AIDS, "because it makes other Americans hesitant about any contact with them and diminish[es] their job opportunities and ability to assimilate, culturally and socially, into American society." Haitians and AIDS, Washington Post (April 13, 1985) at A22.

AIDS victims and suspected AIDS victims have difficulty finding housing, and "even the fact that they have AIDS must be hidden or they will be turned away." For People With AIDS, Housing Is Hard To Find, N.Y. Times (June 25, 1984) at B4. New York State has sued a cooperative apartment house whose tenants allegedly sought to evict a doctor, merely because he treated patients with AIDS, and told him they wanted to evict him because they feared AIDS patients and believed the nature of the doctor's practice would lower their apartment values. A Move To Evict AIDS Physician Fought By State, N.Y. Times (October 1, 1983) at 31. AIDS victims have returned from the hospital to find that friends or family no longer want them or landlords have evicted them. A recent New York Times report tells of a woman who was afraid to let friends know she had AIDS because those who knew distanced themselves from her, and of a young man whose mother told him the disease was a "damnation from God." AIDS Victims, supra.

national press in this case (already covered at least by the Miami Herald[27] and Newsweek Magazine,[28]) make it likely that others, including employers, insurers, and landlords, would know of the blood donors' association with the plague of AIDS. Indeed, it is apparently the mission of amicus curiae Miami Herald to ensure that the public knows: as characterized in its Motion for leave to File a Brief as Amicus Curiae, Miami Herald's specific interest in seeking disclosure is to vindicate "a publisher's right to know" and "the right of the Miami Herald to gather the news."[29]

Even where the special stigma associated with AIDS is not involved, the identity of medical donors has been protected from disclosure. Head v. Colloton, 331 N.W.2d 870 (Iowa 1983); In Re: June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 415 A.2d 73 (1980). In Head v. Colloton, the Supreme Court of Iowa prohibited access to a hospital's record of the

---

27/ Blood Donors' Names Stay Secret, Miami Herald (April 25, 1985) at 1.

28/ AIDS Spreads to the Courts, Newsweek (July 1, 1985) at 61.

29/ What media attention can mean for an individual believed to have AIDS is well illustrated by the recent coverage of the Rock Hudson case. When Mr. Hudson's actions led reporters to suspect he had AIDS, they pursued the story vigorously, first until they confirmed the suspicion of AIDS and then until they confirmed rumors that Mr. Hudson was gay -- a fact Mr. Hudson had chosen to keep private throughout his life. These revelations were aired to the entire nation. They were "the lead story on all the major television networks..." and also "a front-page article in lots of newspapers, some of which had been carrying the story for days." R. Cohen, A Star Gets AIDS, Washington Post (July 27, 1985) at A23.

identity of a potential bone marrow donor, even where the requestor was a dying leukemia victim for whom only the one individual whose identity he sought had been identified by the bone marrow registry as a suitable donor. The court noted the constitutionally-based privacy interest of the donor and the tissue center's duty to protect it:

> When a person submits to a hospital procedure, the hospital's duty should not depend on whether the procedure is for that person's benefit or the potential benefit of someone else. The fiduciary relationship is the same, and the standard of care is the same. In addition, just as with patients generally, a potential donor has a valuable right of privacy. An individual's interest in avoiding disclosure of personal matters is constitutionally based. [Citations omitted]. A valuable part of the right to privacy is the right to avoid publicity concerning private facts ... This right can be as important to a potential donor as a person in ill health.

331 N.W.2d at 876 (emphasis added). In In Re: June 1979 Allegheny County Investigating Grand Jury, the grand jury proceedings concerned production of records relating to surgical tissue specimens, including names of patients whose tissues had been submitted. Although the court held in this criminal investigatory proceeding that the safeguards established in the grand jury proceeding were sufficent to protect the confidentiality of the individuals' medical records, the decision clearly recognizes the important privacy interests of tissue donors.

Likewise, the privacy interests of research subjects, who in effect "donate" their bodies and medical histories, have

been protected from inquiry in litigation in which disclosure of their identities and other information would have led to relevant and non-privileged evidence. Lampshire v. Proctor and Gamble, 94 F.R.D. 58 (N.D. Ga. 1982) (privacy interests of women participants in toxic shock syndrome study, where information concerned personal hygiene, medical and sexual histories, protected by denial of discovery sought by tampon manufacturer in suit involving liability for toxic shock syndrome); Andrews v. Eli Lilly, 94 F.R.D. 494 (N.D. Ill. 1982) (privacy interests held to protect identities of subjects of diethylstilbestrol study from discovery sought by diethylstilbestrol manufacturer in case involving liability for the drug). These cases, prohibiting disclosure of research subjects' and tissue donors' identities in litigation, refute the claims of Petitioner and amicus curiae Miami Herald that the donors' interests are not "ripe" for adjudication and can be protected after Petitioner is given their names and addresses and commences his investigation.[30/] Indeed, this contention ignores the very purpose of discovery limitations -- to prevent oppression or embarrassment before it occurs.

Petitioner also strains to distinguish the research cases on the grounds that research does not involve a "link" between research subject and litigant similar to the "link"

30/ It is urged that Petitioner may only want to check the donors' names against public health records of AIDS cases. However, this check has already been made by the SFBS. Petitioner clearly seeks to conduct a deeper amd more direct probe into the donors' lives.

between Rasmussen and the donors in this case, and that no pledge of confidentiality was made to the blood donors. See Amended Brief of Petitioner at 10-11. But the asserted "link" in this case is no more than the link of claimed relevance -- because private information about donors may be relevant to the issue of defendant's liability. This "link" was indeed present in the research cases. Of course, Petitioner suggests that there is a "link" of liability, but this case does not present that issue. It is not Rasmussen's suit against the SFBS or its donors, and Petitioner has no ground for suggesting negligence by the blood service or the donors.

As for the pledge of confidentiality, such a pledge is not the basis of the donors' privacy interests. Moreover, no such pledge was necessary at the time of the blood donations in this case, because AIDS had not appeared in transfusions, and thus blood donors did not need protection from possible inquiries about AIDS and/or private sexual and drug practices which might cause exposure to AIDS. Today, all potential blood donors do receive broad pledges of confidentiality in the course of the compulsory screening and testing procedures for AIDS (see pp. 14-17, supra).

The donors' rights to privacy in this case are additionally heightened by the fact that they are not parties to the lawsuit. Unlike the parties, who consent to inquiry in pursuit of benefits in the litigation, these donors have consented to no inquiry or intrusion. For comparable reasons, Florida courts and

Federal courts have denied discovery of medical information pertaining to non-parties. In Argonaut Ins. Co. v. Peralta, 358 So.2d 232 (Fla. App. D3), cert. denied, 364 So.2d 889 (1978), the court emphatically refused to allow discovery of non-parties' medical records in a medical malpractice case. The court stated:

> ... to permit a party to inject into the public record medical information of a stranger to the suit, under the guise that it has a bearing on the competency of the doctor, would be unconscionable. The question in medical malpractice is whether or not the doctor, in treating the plaintiff, used a standard of care commensurate with that used in the community and that question can be answered by utilizing other methods of proof than the invasion of strangers.

358 So.2d at 233 (emphasis added).

Similar protections were afforded in Fidelity & Casualty Co. v. Lopez, 375 So.2d 59 (Fla. App. D4 1979) (discovery of medical records of all patients referred to a physician in prior two years denied in a suit alleging wrongful termination of insurance benefits); Teperson v. Donato, 371 So.2d 703 (Fla. App. D3 1979) (medical records of other patients not ordered produced in a medical malpractice action); and Springer v. Greer 341 So.2d 212 (Fla. 4th DCA 1976), appeal dismissed, 351 So.2d 406 (Fla. 1977) (identity of nonparty patients protected in discovery of pharmacist's records). See also Lampshire, supra; Andrews, supra; Richards of Rockford Inc. v. Pacific Gas & Electric, 71 F.R.D.

388 (N.D. Cal. 1976).[31/] The innocent strangers to the lawsuit in the instant case should likewise be protected from being "thanked" for their charity in donating blood by invasion from lawyers and detectives.

c. The right to privacy is protected by the Florida State Constitution.

The Florida Constitution, recently amended, now explicitly guarantees the very right threatened by the subpoena in this case -- "the right to be left alone." Fla. Const., Art. I, §23. Amicus curiae Miami Herald ignores this decisive protection of privacy and argues that there is no right of "disclosural privacy" in Florida. Miami Herald relies, however, on a line of cases principally involving the single area excepted from the State constitutional guarantee of privacy -- public records. Id. Not only do these cases involve this specifically excepted realm, they by no means justify amicus' contention that this Court has not recognized a right to "disclosural privacy." To the contrary, these cases and the State Constitution do recognize such a right, and endorse the very balancing test

---

31/ Amicus curiae Miami Herald makes a most perplexing argument that the Court below erred in relying on Seattle Times v. Rhinehart, ___ U.S. ___, 104 S.Ct. 2199 (1984) to support the proposition that there are limits on a litigant's rights to compel discovery from a non-party. In fact, the Court below relied for that proposition on Argonaut, supra, and Springer, supra. Opinion at 6. The Court cited Rhinehart only, and accurately, for the proposition that discovery orders are "state action which is subject to constitutional limitations." Opinion at 7.

employed by the Court below to decide cases where privacy rights clash with other interests.

Two of these cases were decided before the Constitutional amendment. The first, Laird v. State, 342 So.2d 962 (Fla. 1977), is really not apposite to the present case because it concerns the "narrow issue of whether the state can prohibit private possession of marijuana." 342 So. 2d at 962. Thus, the disclosure of private information is not involved, nor is the intrusion of strangers into personal privacy, but simply a police-power prohibition on certain conduct to serve broad governmental goals. Further, the case was very narrowly restricted in issue and holding: the Court simply held that smoking marijuana at home is not the kind of conduct protected by the constitutional right to privacy, and that there is no "fundamental right" to smoke marijuana. 342 So.2d at 962,963.

The second pre-amendment case, Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980), considered a certified question concerning public records, specifically, whether a right of privacy existed under either the Federal or State Constitutions which rendered Florida's public records law unconstitutional. In that case, the Jacksonville Electric Authority engaged a consulting firm to conduct a search for a managing director. The firm interviewed employees of electric utility companies and amassed data on the individuals' employment records, personalities, families, and personal habits. A television station sought access to the consultant's

files under the State public records law before the completion of the final report.

The Court considered U.S. Supreme Court cases discussing the right of privacy, and determined that the Federal Constitution had not been held to guarantee a "general" right to privacy, which the Court described as the "right to be left alone." Rather, the Court had left protection of this right to the States. The Court looked for guidance in determining the application of this right in the public records context to the Fifth Circuit's approach in Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). Plante formulated a balancing test to be applied when privacy rights conflict with other interests.

On the facts of the case before it, the Court determined that the consultant's private notes made during or shortly after interviews, and intended only to memorialize, but not communicate formally, were not public records and therefore not to be released under the public records law. The remaining documents reflecting employee histories, which were submitted to the public authority, were public records because the consultant was an agent of the public authority. Applying the balancing test, the Court held only that the Federal and State Constitutions did not establish a right of privacy extending to public records.

It is noteworthy that the Court in Shevin was closely split. Four Justices agreed in the majority opinion. One concurred with the result but disagreed in the dicta that there

does not exist a "general" right to privacy. The Chief Justice concurred and dissented, noting that the U.S. Supreme Court's decisions in Whalen, supra, and Nixon v. Administrator of General Services, 433 U.S. 425 (1977), did recognize an undefined "general" right of privacy. One dissenting judge pointed out that since the U.S. Supreme Court's decision in Griswold v. Connecticut, the penumbra of those constitutional provisions establishing a right to privacy has been consistently expanding.

The State Constitution was amended in 1980 immediately after the decision in Shevin. The amendment guarantees the very right "to be left alone" which the Florida Court Supreme Court expressly found to be the "general" right of privacy not guaranteed as to public records in Shevin. See 379 So. 2d at 636. The amendment also included a specific exemption for public records. Thus, it would appear that the legislature intended to endorse the Court's result in Shevin, finding public records not covered by a State or Federal constitutional right to privacy, but overrule the dicta in the opinion to the effect that the "general" privacy right "to be left alone" is not constitutionally protected.

The remaining cases cited by amicus Miami Herald simply uphold the explicit public records exemption in the new constitutional amendment. The case of Forsberg v. Housing Authority of the City of Miami Beach, 455 So. 2d 373 (Fla. 1984), involved an effort by tenants in a public housing development to enjoin the public housing authority from allowing public access

to information provided to tenants and prospective tenants. The case held that the housing authority's files were "public records," and the State constitutional right of privacy does not shield such "public records." With respect to the Federal constitutional right to privacy, this case simply determined that the right to "disclosural privacy" is not absolute, but that, when such a right is asserted, a balancing test must be applied. A special concurrence by one judge stressed the extensive underpinnings of the right to privacy in the decisions of the U.S. Supreme Court and in tort law.

In Michel v. Douglas, 464 So.2d 545 (Fla. 1985), employee records of a tax-supported hospital, kept as part of the hospital's permanent files, were held to be public records under the Florida Public Records Act, not addressed by any exemptions in that law, expressly excluded from State Constitution's guarantee of privacy, and not covered by any broader guarantee of privacy which might exist under the Federal or State Constitutions.

The case of Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984) again involved a request for release of public records under the public records law. Here, a newspaper requested the release of employee records of a police officer. The Court simply held that no automatic delay is permissible in disseminating requests for public records, overruling a statute which provided for the custodian of records to have the power to delay dissemination of public record information for 48 hours.

In short, the entire line of cases cited by amicus Miami Herald simply stand for the proposition that, when a right of privacy is asserted, a balancing test is to be applied (as the Court below did) and for the proposition that public records are exempt from the new State constitutional guarantee of privacy. The public-records exemption is inapposite in the present case, which involves the records of a private entity licensed by the Federal government and, though "regulated", not in any way an agent or instrumentality of the State like the public entities in Shevin, Forsberg, Michel, and Tribune. The State constitutional right "to be left alone" does not exist in other contexts and weighs heavily in the balance in the instant case.

2. The requested disclosure threatens the interests of blood centers, blood recipients and the nation in adequate volunteer blood donations.

While the CCBC's member blood centers have a fiduciary responsibility to the donors they recruit for the consequences of blood donation (see Head v. Colloton, supra), they are likewise responsible to the interests of potential blood recipients in continued access to blood. In fulfilling this responsibility to blood recipients, the CCBC's members also serve the Federal policy interest in a sound volunteer blood system, expressed in the National Blood Policy.

The National Blood Policy ("NBP") was issued by the then Department of Health, Education and Welfare ("HEW"; now "HHS") in 1974 in response to the findings of an HEW Task Force

on the Nation's Blood System. The Task Force concluded, inter alia, that blood supplies were inadequate and blood quality was uneven due to substantial reliance on commercially-obtained blood. These concerns with quality and supply were paramount in the "ten policies" and "six critical issues" which the NBP identified "in support of national blood policy goals."

These policies and issues called for efforts toward an all-volunteer system for blood, methods to assure ample donations, measures to meet the extraordinary demands that may arise in national and regional emergencies, inducements and authorities to exclude commercial acquisition of whole blood or blood components, and mechanisms to address the special problems of accessibility for hemophiliacs and others with continuing or extraordinary needs for blood or blood products.[32/] The Federal government gave the private-sector blood organizations the "lion's share" of responsibility for implementing these and other National Blood Policy goals, and specifically charged the private sector with "accomplish[ing] the transition to an all voluntary blood donor system."[33/]

In the intervening decade, that transition has been accomplished, but the interest of the Federal/private-sector partnership in assuring adequate supplies of safe blood remains just as compelling today. The successful achievement of the

---

32/ 39 Fed. Reg. 9326 (March 8, 1974).

33/ 39 Fed. Reg. 32704 (September 10, 1974).

transition to all-voluntary system only sharpens the importance of maintaining adequate availability of safe donors at all times. Indeed, a recent bulletin issued by the Surgeon General to newspapers around the country noted diminutions in the blood supply and called on readers to join with their friends and colleagues in donating blood regularly.[34/]

The critical need for sufficient donors has intensified with the advent of AIDS. As explained earlier, as soon as the first evidence of possible AIDS transmission in blood came to light, blood organizations and the Federal government implemented standard procedures to screen out persons in the high-risk groups -- at the time, the only means scientifically available to prevent contamination of the blood supply with AIDS. Now that a laboratory test for AIDS antibodies has been developed, the blood centers are also implementing this further means of defense against AIDS transmission in blood.

These measures are designed to screen out donors at a high risk of carrying AIDS. The screening procedure alone has largely been effective in doing so, and the laboratory test promises virtually to end AIDS transmission in blood. See p. 15, supra. The necessary result, of course, is a reduction in the supply of blood donors. The donor population has also been reduced unnecessarily, however, by the widespread fear that donation itself can transmit the disease. See pp. 17-18, supra.

34/ Supra note 19.

The impact of this belief has been so great that both the American Medical Association and the Federal government have launched public education efforts to reassure the general public that there is no AIDS risk in donating blood.35/

Needless to say, the AIDS epidemic has already posed a host of difficulties for blood centers and Federal authorities whose mission is to maintain adequate supplies of safe blood. These problems, and the prospect of possible regional blood emergencies, are bound to be exacerbated by a rule which creates a serious disincentive to donation by everyone, not just persons at high risk of AIDS. Even as blood centers tried to reassure potential donors that volunteering for a blood drive would not raise the risk of AIDS, they would have to inform donors of a different risk -- that donating blood would expose them to investigation as possible carriers of the odious disease.

There is little doubt that the prospect of unplanned-for, unanticipated third-party inquiry about one's private life, sexual proclivities, and medical history will deter blood donation. No reward comes from participating in a blood drive -- no money, no recognition, no credit on the job. On the other hand, blood donation does require some minor sacrifices -- inconvenience, time lost at work, and minor pain. Studies of blood donor motivation reveal that fear of such consequences is the overriding motivation for non-donors and that donation is

---

35/ AMA Resolution, supra n. 20; Donate Blood Regularly, supra n. 19.

easily deterred.[36/] If the fear of a momentary needle prick or a few seconds' faintness, or the minor inconvenience involved in leaving home or work to travel to the blood center, can deter donation, surely the prospect of probing by lawyers and investigators about the stigmatizing issue of AIDS will chill donor altruism.

36/ A 1974 study by two researchers at Skidmore College concerning blood donor and non-donor motivation concluded that motivations of nondonors were: legitimate medical excuses, fear of needle, general aprehension, and fear of after-effects. Oswalt and Napoliello, Motivations of Blood Donors and Non-Donors, J. of Applied Psychology (1974). A recent survey of eligible non-donors at Hartford, Connecticut insurance companies, where blood donation programs are extraordinarily prevalent and publicized, and where non-donors are thus "surrounded by solicitation and convenient donation opportunities sufficient to convert into donors many people who would otherwise be non-donors," found that the overwhelming reason for non-donation was "fear" of unspecified consequences (the unsolicited response of 61% of the group). Drake, Finkelstein, and Sapolsky, The American Blood Supply (M.I.T. Press 1982) at 93 (emphasis added). A study of non-donors by researchers at the National Bureau of Standards found that "the possibility of a traumatic experience such as fainting, or fear of pain" was a significant reason for a decision not to donate among persons who had donated at least once in the past. Technical Analysis Division, United States National Bureau of Standards, Blood Donor Eligibility, Recruitment, and Retention in the United States, (1971).

Finally, a study conducted for the American Red Cross reveals that relatively insignificant problems or costs are sufficient to inhibit donation. Of persons who had never been asked to donate and never donated, 23% claimed not to have donated because of inconvenience, and 52% said that they had never donated because they regarded blood donation as too painful or too dangerous. Among persons who were considered "inactive donors," 34% failed to participate because of claimed inconvenience, and 25% because of fear of pain or danger. American Red Cross, Analysis and Design of a Model Regional Blood Management System (1972).

The dissenting judge below suggested, without explanation, that prospective donors need never know of this lurking consequence of blood donation. That sanguine view is not justified. In this case, a question of first impression will be resolved by the highest court of this State, and thus, the decision will have broad precedential impact. As a matter of their fiduciary responsiblity to their donors (see Head v. Colloton, supra), blood centers across the country would have to inform donors that exposure to inquiry and investigation in lawsuits years later might be a consequence of donation.

Even without such direct information from blood centers to potential donors, the decision is bound to be broadly disseminated by the media. AIDS remains one of the most widely and prominently covered topics of the day, in all its ramifications. The media's interest in the specific subject of this case is readily apparent from the coverage of the decision below[37/] and the appearance of the Miami Herald Publishing Company as amicus curiae before this Court.

The Court below joined other courts and public authorities in preventing the chilling effects of discovery of personal information on activities analogous to blood donation: tissue donation and epidemiological research. Head v. Colloton, supra (finding that evidence of the "possible chilling effect on disclosure" reinforced the conclusion that a potential donor's

---

37/ See supra nn. 27-28.

privacy rights precluded disclosure of her identity, 331 N.W.2d at 876); Lampshire v. Proctor and Gamble, supra (recognizing the CDC's "public health mission" in granting a motion for protective order preventing a tampon manufacturer from discovering from the CDC personal identifying information about women participants in a study of toxic shock syndrome); Andrews v. Eli Lilly, supra (quashing diethylstilbestrol manufacturer's subpoena seeking records of participants in a "unique" study of the drug's effect because the manufacturer's litigation interest was outweighed by the privacy interests of research subjects, who "will not provide their records absent such a promise [of confidentiality] in order to avoid a breach of their privacy," and by the data needs of researchers, whose "sources would dry up," 97 F.R.D. at 499); Richards of Rockford, supra (protecting identities of research subjects, employees of defendant, from discovery by defendant because need for confidentiality of subjects "if [scholars'] research is to be accomplished" outweighed defendant's interest in "largely supplementary" information); 45 C.F.R. § 46.111(a)(7) (1981) (Federal regulation requiring medical researchers to maintain privacy of human subjects, based in part on specific concerns about vulnerability of research data to subpoena, see 43 Fed. Reg. 56, 181-82 (1978)).

The concerns about deterring participation in research expressed by a public health doctor, and quoted with approval by the court, in the Andrews case are instructive for the case before this Court:

> The threat of possible extension [of an adverse decision] to other studies would suffice to modify the general behavior of physicians and patients with respect to collaboration in a broad range of studies. The end result to be feared is a very substantial reduction in the quality and quantity of epidemiological research and the loss of information that contributes to advancement in the standards of medical care for our population.

97 F.R.D. at 499, quoting Affidavit of William M. Haenszal, M.D. The threat posed by the instant subpoena to the volume of blood donations is the same as the threat to the quantity and quality of epidemiological research through potential disclosure of information about research subjects in Andrews. As in Richards, Petitioner's need for the requested disclosure is "largely supplementary" to other proof he has. The same balance struck in those cases should be struck by this Court to affirm denial of discovery.

3. Granting the requested subpoena would conflict with this State's interest in protecting the privacy of persons who might be associated with AIDS.

Since the Court below issued its decision in this case, action by the Florida legislature has added to the weight of interests opposing disclosure. In response to the FDA's licensing of a serologic test for AIDS antibodies, and the concerns for confidentiality which the availability of that test has aroused, the legislature of this State has enacted a law establishing stringent confidentiality protections for persons

who undergo voluntary serologic testing for an "infectious disease". Florida Statutes § 381.606(1) et seq. (1985).

The new statute authorizes the Secretary of the State Department of Health and Rehabilitative Services to declare the existence of a threat to the public health when there is an occurrence of an infectious disease which may be transmitted serologically, and to "order such preventive, treatment, and ameliorative measures as shall be advisable from medical and public health perspectives...." Within this broad mandate, the statute provides specifically for the establishment of serologic test facilities and the confidentiality of test subjects' identities. The statute states:

> No person shall be compelled to identify or provide identifying characteristics which, if disclosed, would identify any individual who receives or has received a serologic test. Any person who discloses the serologic test result to another person, unless the disclosure is to the person receiving the test, is guilty of a misdemeanor of the first degree....

F.S. § 381.606(4)(a).

The sole exceptions to this broad rule against disclosure of the identities of persons being tested are the following: 1) written consent of the individual tested; 2) disclosure "pursuant to the standard practice of medicine or public health," including consultation between physicians to determine diagnosis and treatment and communication of test results between a testing facility and physician authorizing the test; or 3) disclosure during medical or epidemiological research

without the individuals' names or identifying characteristics. Disclosure in any other circumstances is a misdemeanor. Id.

These provisions are plainly designed to protect persons who may be at risk of fearsome and socially stigmatizing diseases such as AIDS from any non-consensual disclosure of that possibility. It is noteworthy that the statute prohibits disclosure of the mere fact that an individual has taken a serologic test, not just the results of that test. Thus, the statute protects the interest of a person who is suspected by himself or others to have AIDS in avoiding disclosure of that very fact -- the precise interest of the blood donors in this case. There is no reason in this case to establish a judicial rule in direct conflict with the legislative policy expressed in the new statute.

C. The Interests Favoring Granting The Subpoena Are Slight.

1. Petitioner's litigation interest would not be advanced by granting the subpoena.

Petitioner asserts he needs the names and addresses of the 51 blood donors to "prove" that the AIDS which caused Rasmussen's death resulted from blood transfusions. Petitioner already has expert medical testimony to the effect that the transfusions caused the disease. No amount of inquiry, investigation, or blood testing to which Petitioner might subject the 51 blood donors would do more, at best, than confirm this expert testimony.

Since none of the 51 donors yet has AIDS, the best Petitioner can do is to unearth evidence that one or more of the donors is in a high-AIDS-risk group and/or that serologic testing reveals the presence of AIDS antibodies in one or more of the donors' blood. But in neither case will Petitioner "prove" that these donors' blood caused Rasmussen's AIDS. Even if a donor is in a high-AIDS-risk group, this would by no means establish that he is carrying AIDS, because the incidence of AIDS even in the high-risk groups is low. A positive test for HTLV antibodies would not establish that a person had the AIDS virus, because of the high "false positive" rate of the serologic test. Indeed, any proof that a donor has AIDS today would at best establish the inference that he had the disease at the time of the blood transfusions, since he could well have been exposed to the disease during the more than three years which have elapsed since then.

Furthermore, it is quite possible that all this probing and intrusion of the donors might yield absolutely nothing helpful to Petitioner -- no evidence that any one of the donors is in a high-risk group, much less that he has AIDS or that AIDS antibodies can be detected in his blood. Thus, if the requested subpoena is granted and Petitioner follows the information given to its limits, he may only succeed in harrassing and embarrassing donors and deterring blood donation.

2. The interest of blood recipients in freedom from AIDS would not be served by granting the subpoena.

The dissent below has suggested that weighing in the balance along with Petitioner's interests are "the rights of the blood donee to be free of AIDS and those of his survivors to recovery under the law when that horrendous result has in fact occurred." Opinion at 14. A similar suggestion is made by amicus curiae Miami Herald Publishing Company. These interests are not at stake in this case, nor would they or should they be pursued by the requested subpoena.

The litigants, plaintiff and defendant in an automobile case, are not a blood recipient and the blood center or the donor. Rasmussen is asserting his right as an accident victim to recover from the perpetrator for the consequences of the accident, not his right as a blood recipient to be free from AIDS.

Moreover, granting the requested subpoena will not in any way advance the interests of blood recipients in freedom from AIDS. The dissent suggests that a rule permitting disclosure of names of non-party blood donors to permit parties in that lawsuit to query the donors about connections with AIDS would benefit blood recipients by deterring high-risk persons from giving blood. That is not the case. With respect to the retroactive impact of the decision, it must be emphasized that the possibility of AIDS transmission in blood was not known in early 1982 when the donors in this case gave blood. There would have been no perceived need then for a rule deterring high-AIDS-risk

donors from giving blood. With regard to the prospective effect of the decision, such a rule would add absolutely nothing to measures in effect today to eliminate AIDS from the blood supply. These measures, screening procedures to discourage persons in high-risk groups from donating and serologic testing of potential donors' blood for AIDS antibodies, are the best available to science; indeed, experts view the HTLV-III antibody test as solving the problem of AIDS transmission in blood. See p. 14-15, supra.

These procedures are also carefully designed to prevent contamination of the blood supply with AIDS by eliminating donors who might be exposed to the disease, while avoiding deterring donations generally. The rule advocated by the dissent in this case would be the bluntest of all instruments, deterring all donors equally because invasion of privacy and potential association with AIDS are fearsome and stigmatic for everyone. In urging such a rule, the dissenting opinion indulges in the very "judicial self-importance ... at the expense of the legislature" for which it chastises the majority. The inappropriateness of such judicial action was aptly criticized by the majority below, which pointed out that the function of the discovery rules is to "aid the litigation process," not pursue public health goals. Opinion, n. 9.

The dissent and amicus curiae Miami Herald also suggest that a rule requiring disclosure in this case would be helpful to potential AIDS victims by assisting them to learn whether they

have AIDS. Such a suggestion is cavalier and disingenuous in the extreme. Knowledge of which populations are high-risk is so widespread that persons in those groups are abundantly aware of the possibility they may have AIDS. Further, anyone who is concerned that he may have AIDS has ample incentive to test his fear, and the means to do so with full protection of confidentiality, by going to a doctor or to a serologic testing facility established by the State (see F.S. § 381.606 et seq., p. 44, supra). A rule allowing lawyers and detectives to probe into the possibility of AIDS will not contribute to existing methods for its discovery and detection, but only add to the terrors and harrassment already confronting potential AIDS victims.

CONCLUSION

The subpoena at issue here would jeopardize the interests of volunteer blood donors in freedom from fearsome invasion of privacy and stigmatic association with AIDS, the interests of blood centers, blood recipients, and the Federal government in freedom from unwarranted deterrents to blood donation, and the expressed interests of the State of Florida in protecting the confidentiality of persons who might have AIDS. It would not, on the other hand, further Petitioner's litigation interest in establishing that he is entitled to recover from defendant for his death. The Court below correctly balanced the interests at stake, and its decision should not be disturbed.

Respectfully submitted,

H. Robert Halper
Christina W. Fleps
O'CONNOR & HANNAN
1919 Pennsylvania Avenue
Suite 800
Washington, D.C. 20006
Counsel for Amicus Curiae
Council of Community
Blood Centers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Amicus Curiae Council of Community Blood Centers was mailed to the following parties on the 10th day of October, 1985:

Diane H. Tutt, Esquire
Attorney for So. Florida Blood Service
BLACKWELL, WALKER, GRAY, ET AL.
One S. E. Third Avenue
Miami, Florida 33131

George C. Bender, Esquire
BENDER, BENDER & CHANDLER, P.A.
Attorneys for Petitioner, Donald Rasmussen
5915 Ponce de Leon Boulevard
Suite 62
Coral Gables, Florida 33146

Thomas J. Guilday, Esquire
Ralph A. DeMeo, Esquire
AKERMAN, SENTERFITT & EIDSON
P.O. Box 1794
Tallahassee, Florida 32302

Michael H. Cardozo, Esquire
Attorney for American Blood Commission
Suite 1004
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Edward Soto, Esquire
Attorney for The Miami Herald Publishing Co.
Suite 4310
200 So. Biscayne Boulevard
Miami, Florida 33131

Richard J. Ovelman, Esquire
Attorney for The Miami Herald Publishing Co.
One Herald Plaza
Miami, Florida 33101

CERTIFICATE OF SERVICE

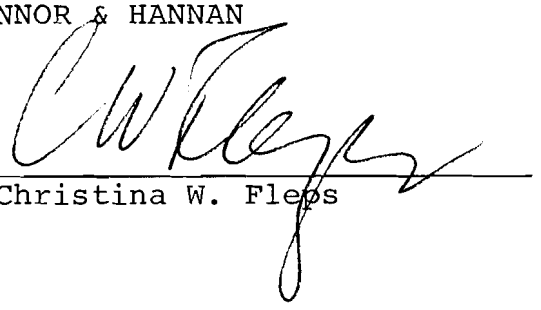
B. J. Anderson, Esquire
Kirk Johnson, Esquire
Attorneys for American Medical Association
535 North Dearborn Street
Chicago, Illinois 60610

John Thrasher, Esquire
Attorney for Florida Medical Association
801 Riverside Avenue
Jacksonville, Florida 32203

Betsy E. Gallagher, Esquire
Attorney for Dade County Medical Association
TALBURT, KUBICKI, BRADLEY & DRAPER
25 W. Flagler Street
Miami, Florida 33130

Roger G. Welcher, Esquire
25 W. Flagler Street
Miami, Florida 33130

O'CONNOR & HANNAN

By 
Christina W. Fleps