IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,479

THE MIAMI HERALD PUBLISHING COMPANY and PALM BEACH NEWSPAPERS, INC.,

Petitioners,

v.

JOHN W. HAGLER and THE STATE OF FLORIDA,

Respondents.

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Petitioner The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc. ("The Miami Herald"), adopts the Statement of the Case and Facts submitted by Petitioner Palm Beach Newspapers, Inc., in its Initial Brief.

SUMMARY OF ARGUMENT

This is the third of four appeals[1/] this Court has taken this term to decide a single fundamental issue: whether the Fourth District Court of Appeal was correct in holding that any lawyer for any party in any criminal prosecution may for any reason, or for no reason, exclude the public from the depositions taken in the case, and from any unfiled transcript.

The Miami Herald presents below only two arguments:[2/] First, the factual variety and contextual richness of access claims involving criminal depositions, amply

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1/ The four appeals now before the Court are Post-Newsweek Stations, Florida, Inc. v. State, 474 So.2d 344 (Fla. 3d DCA 1985) ("Fuster"); State v. Freund, 473 So.2d 274 (Fla. 4th DCA 1985) ("Freund"); Miami Herald Publishing Co. v. Hagler, 471 So.2d 1344 (Fla. 4th DCA 1985); Palm Beach Newspapers, Inc. v. Burk 471 So.2d 571 (Fla. 4th DCA 1985) ("Burk")

2/ The Miami Herald hereby adopts and incorporates by reference all arguments and authorities relied upon by all Petitioners and amici in support of Petitioners in the briefs filed in the Burk case and the Fuster case, as well as the briefs filed by Palm Beach Newspapers and amici curiae in this case. In Burk, The Miami Herald showed that both the express language of Rule 1.280(c), and the intent of its drafters, presume access absent the entry of a

(footnote continued)

illustrated by the four appeals now pending before this Court, demonstrate the folly of a per se or absolute prohibition on public scrutiny of the deposition process in criminal cases. "Good cause" interpreted consistently with this Court's teachings in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), and State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), as well as the access doctrine propounded by the United States Supreme Court in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), and their progeny, is the appropriate standard for deciding criminal deposition access cases.

2/ (continued)

protective order based on a showing of "good cause" for closure. Similarly, it was shown that both the First Amendment and Florida's commitment to open government as articulated in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) ("Lewis"), preclude a per se denial of access. Access may be denied only on findings made on a case-by-case basis and only upon a movant's showing that compelling reasons justify closure and that the protective order entered is narrowly drawn. The Initial Brief of Palm Beach Newspapers, Inc. in Burk also emphasized that access to unfiled deposition transcripts and court reporters' untranscribed notes is required by Florida's Public Records Law. The Amicus Curiae Brief of The Times Publishing Company in Burk explained that any purported logistical problems relating to access could not support a denial of public access to depositions, analogizing to this Court's "cameras in the courtroom" decision in Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 404 (Fla. 1977). In Fuster, this Court was briefed on how the special public interest in the tragic epidemic of child abuse precludes a per se denial of access to the victims' depositions where counsel for the children themselves do not object. For the sake of judicial economy, no further reference will be made to these arguments here.

Second, the State and the Fourth District have fundamentally misconstrued the precedential significance of Seattle Times Co. v Rhinehart, 467 U.S. 20, 104 S.Ct. 2199 (1984). That decision, properly understood, and to the extent it is relevant, supports application of the Lewis and Globe Newspaper tests for closure of criminal depositions because it required at least a "good cause" showing for a protective order entered in a civil case. The First Amendment interests supporting public access to the criminal justice system are even more compelling than those supporting public scrutiny of civil litigation.

ARGUMENT

I. THE DISPARATE FACTUAL CIRCUMSTANCES OF THE FOUR DEPOSITION ACCESS CASES NOW BEFORE THIS COURT DEMONSTRATE THE INAPPROPRIATENESS OF THE PER SE CLOSURE RULE ADOPTED BY THE BURK MAJORITY AND APPLIED IN THE CASE AT BAR.

Both this Court and the United States Supreme Court have developed court access rules which call for case-by-case adjudication of closures[3/], and which employ

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3/ Press-Enterprise Co. v. Superior Court, 104 S.Ct. 819, 824 (1984) ("closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness"); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 at n.20 (1982) (trial court must "determine on a case-by-case basis whether closure is necessary"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (closure appropriate only where an "overriding interest" is "articulated in findings"); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 8 (Fla. 1982)

(footnote continued)

fact-specific tests[4/] designed to sift out meritless closure motions from those very rare circumstances when justice may best be served by a closed door.

The Fourth District abandoned this rule of case-by-case adjudication and fact-sensitive analysis to adopt a per se closure rule for all criminal depositions where any party's lawyer objects to public access. The Fourth District adopted this rule despite the clear holding of the United States Supreme Court in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), that per se closures are invalid.

3/ (continued)

("The trial court should begin its consideration with the assumption that a pretrial hearing be conducted in open court unless those seeking closure carry their burden to demonstrate a strict and inescapable necessity for closure."); State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1977) ("Since no two criminal trials are exactly alike, each trial judge . . . must balance the rights of free press and fair trial to assure that justice and fairness prevail in each trial.").

4/ Press-Enterprise, supra, at 824 ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."); Globe, supra, at 606-07 ("Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."); Richmond Newspapers, supra, at 581 ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."); Lewis, supra, at 6 (party seeking closure must show that (1) "closure is necessary to prevent a serious and imminent threat to the administration of justice", (2) "no alternatives are available" short of a change of venue, and (3) "closure would be effective" but no "broader than necessary to accomplish its purpose"); McIntosh, supra, at 908 ("In determining restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to litigation with those of the public and press.").

The folly of a per se rule, and the wisdom of this Court and the United States Supreme Court in rejecting such a course, is amply illustrated by the factual circumstances of the four criminal deposition access cases now before this Court.

In Burk, the lawyers for the State and the defense agreed to take depositions without filing the required notices to circumvent a court order denying the State's motion to exclude the public from the depositions. A second trial judge eventually ratified this evasive tactic, holding first that the public would not be allowed to attend the depositions and ultimately that the deposition transcripts were not required to be released. It is important for this Court to understand the reasons these lawyers sought closure. The depositions at issue were of witnesses in the criminal trial of Linda Aurilio for the attempted murder of her husband, Carl. The defense lawyer believed public access would lead to further pretrial publicity, which would not assist the defendant. The State did not want public depositions because Linda Aurilio was also a key witness in an unrelated prosecution of her husband. The depositions could have raised serious questions about her reliability and credibility as a witness against him. They may also have raised doubts concerning certain law enforcement officials involved in his prosecution. This case shows that the lawyers in a criminal case should not, even where they agree on closure, have the unfettered right to displace the judge

as the decisionmaker on access, because they may have no interest in preserving the public's right to know what is happening in a prosecution. The interest of the lawyers is not coextensive with the public interest in access.

The cases following Burk amplify the inappropriateness of the Burk rule which, because it is absolute, mandates closure. In the case at bar, the State and the defense agreed, as they did in Burk, to conduct depositions without noticing the court file. However, here the crucial deposition was of David Bludworth, the State Attorney for the Fifteenth Judicial Circuit. Moreover, the deposition concerned the fact that the defendant Hagler had allegedly attempted to sell compromising photographs of the State Attorney himself to an undercover agent. Hagler eventually worked out a plea bargain with the State Attorney's office, pleading guilty to selling cocaine, receiving only three months probation, and thus never going to public trial.

Certainly it would be difficult to imagine a set of facts in which public access to a deposition would be more appropriate. The State Attorney was deposed in a case which called the integrity of the State Attorney's office into question. At a time when access was crucial to assuring the public of the quality and honesty of its officials and the legal system, it was denied solely on the whim of the lawyers in the case, one of whom worked for the deponent accused of misconduct.

Again, it is clear the interests of the lawyers are not adequate surrogates for the public interest. The State Attorney may have sought to avoid public disclosure of his misconduct, while the defendant may have agreed to closure with the hope of a better plea bargain. Yet none of the peculiar facts of this case were even considered by the Fourth District Court of Appeal in affirming the denial of access. The one-sentence per curiam affirmance simply cited Burk. Only Judge Barkett's special concurrence suggested the true importance of the case, yet she too was obligated by the en banc decision in Burk to concur in the denial of access.

The facts of Freund illustrate another difficulty with the absolute Burk closure rule. In Freund, the depositions of four State witnesses were properly noticed by the defendants, Freund and Trent. When reporters appeared at the depositions, the State objected and sought a protective order to bar their attendance. Both defendants Freund and Trent, however, indicated that not only did they not object to the media's presence, they actively desired that the depositions be open to the public. The court, noting both the significance of the defendants' lack of objection to access and the complete lack of any evidence necessitating closure, denied the State's motion for protective order. Depositions in the case proceeded and were taken without incident. Yet applying the Burk rule, the Fourth District reversed and held the depositions must be closed even where

(i) defendants explicitly seek the protection afforded them by public scrutiny of the criminal justice process, (ii) the trial judge concurs in providing that protection, and (iii) the state advances no reason for closure.

As it did in this case, the Fourth District in Freund relied solely on the authority of Burk. Because of the absolute character of the rule announced in Burk, the court necessarily ignored numerous facts which distinguished Freund from Burk -- e.g., the procedural posture of the case, the factual findings of the trial court which were entitled to deference, the defendants' explicit announcement that they did not want access to be curtailed, and the fact that all the depositions in the case had been successfully concluded in the open.

The third case following Burk evidences yet another aspect of the many difficulties posed by the absolute Burk closure rule. Fuster concerned access to the depositions of the alleged minor victims of sexual abuse in a widely publicized prosecution. In Fuster, as in Freund, it was the State that sought closure of the depositions. The only legal authority cited in support of closure was Burk. The State presented no sound basis for closure nor any evidence to support closure because, the State argued, Burk did not require either.

The trial court granted the State's motion and the Third District Court of Appeal affirmed, relying on Burk. As in this case and Freund, the Fuster court made clear that

it considered its result to be conclusively determined by Burk. Also as in this case and Freund, the court apparently felt obliged to ignore the compelling facts of the case. The State sought to close only the depositions of the child deponents. Yet, attorneys for the parents of the children scheduled for deposition stated they had no objection to the press attending the deposition, thereby eliminating the only conceivable reason for closure.

In addition, special procedural precautions were taken in Fuster to protect the children, which responded to many of the objections to access raised in Burk. Thus, the logistical problems with access were removed when the deposition room was fitted with a one-way mirror. Spectators, however many, could observe the proceedings from an adjacent room without disrupting the deposition in any way. Similarly, the Burk holding that depositions were not judicial proceedings because no judge was present was rendered inapposite in Fuster. The trial judge indicated that he would attend some depositions and that he would at least be available during all depositions to rule on questions as they arose. Despite these fundamental distinguishing facts, the Third District, over the dissent of Judge Hendry, simply affirmed the denial of access on the absolute authority of Burk.

As a review of the cases now before this Court makes clear, Burk must be reversed. The District Courts of Appeal are interpreting Burk to require closure of deposi-

tions and deposition transcripts whenever the lawyer for any party requests the public be excluded -- even when the facts indicate there is no cognizable state interest advanced for closure (Fuster, Burk, Freund, and Hagler); the witness to be deposed wants the protection of public access (Fuster); the judge will be available to monitor the deposition (Fuster); the judge determines that closure is unnecessary (Freund); the defendants object to the denial of public access (Freund); and the deponent is the State Attorney and the subject a matter of great and legitimate public concern (Hagler).

For no principled reason, Burk has carved out an exemption from public access for depositions despite the fact that every other aspect of the criminal justice process in Florida, from arrest through conviction, is presumptively open to public scrutiny, pursuant either to the Public Records Law or the First Amendment and the common law right of access. The unprecedented decision of the Fourth District Court of Appeal in Burk should be reversed.

II. TO THE DEGREE RHINEHART IS RELEVANT TO THIS APPEAL, IT IS CONTRARY TO THE DECISION OF THE FOURTH DISTRICT.

The Burk Court found "inferentially significant" the decision of the United States Supreme Count in Seattle Times Co. v. Rhinehart, 104 S.Ct. 2199 (1984). However, as a review of the facts in Rhinehart reveals, the Fourth District Court of Appeal wholly misconstrued its signifi-

cance. First, Rhinehart did not even purport to address, let alone decide, the question raised in Burk and the companion appeals; namely that of public access to criminal discovery proceedings. Second, to the extent Rhinehart is relevant to the case at bar, it is contrary to the per se denial of access mandated by Burk and its progeny. Finally, the Burk court failed to recognize that Rhinehart merely noted mistaken dicta regarding historical practices in civil discovery which originated in the Chief Justice's concurring opinion in Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

A. Rhinehart Did Not Address The Issue Of Public Access To Criminal Depositions.

Rhinehart was a libel suit brought against the Seattle Times by a highly controversial religious group (the Aquarian Foundation), its spiritual leader (Rhinehart), and certain of its members. The plaintiffs contended the Seattle Times had published false defamatory articles about the group which discouraged contributions and caused a decline in membership. The defendants undertook broad discovery of the plaintiffs' financial affairs, membership and donors, and were provided with income tax returns and financial information relating to the plaintiffs. No depositions in the case were closed.

However, to avoid public dissemination of the identities of the group's donor and members' list for the preceding ten years, the plaintiffs filed a motion for protective order requesting both that the trial court not

compel the above discovery and that the defendants be prevented from disseminating the information gained through this discovery. Plaintiffs argued that dissemination of the identities of other donors and members "would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association." 104 S.Ct. at 2203.

The trial court denied the plaintiffs' request for a protective order on the ground they had failed to introduce any evidence to support their conclusory allegations and thus had failed to show "good cause" why a protective order should be entered. 104 S.Ct. at 2203-04. As a result, the plaintiffs submitted a series of detailed affidavits revealing several incidents of attacks, threats and assaults on the group's membership, and satisfactorily showing that the public release of the donor and membership lists would adversely affect the group's membership and income, and subject its membership to additional harassment. Based on this evidentiary showing, the trial court refused to enter a blanket protective order barring dissemination of all information gained in discovery, and instead entered a limited protective order. The order in no way restricted the Seattle Times' access to any discovery materials, and no members of the public had asserted any right of access to the discovery materials. The order was limited to certain specified items of discovered information, namely the names and addresses of the group's current and past "members, contributors or clients," and information regarding the financial affairs of

the plaintiffs themselves. The trial court determined such a limited protective order was "necessary" to prevent "the chilling effect that dissemination would have on a party's willingness to bring his case to court". 104 S.Ct. at 2205.

Rhinehart thus differs from Burk in three fundamental ways. First, Rhinehart is a civil case, not a criminal prosecution. As demonstrated below, Rhinehart itself recognized that the dissemination of information concerning criminal prosecutions implicates far more important interests than would "garden variety" civil litigation. Second, Rhinehart simply did not address the public's right to monitor the criminal discovery process; it dealt only with a private party litigant's right to publish highly protected private information obtained solely through civil discovery. Finally, Rhinehart did not involve a per se closure rule, but rather a very narrowly drawn protective order based on an evidentiary showing of "good cause."

Both the Washington and United States Supreme Courts in Rhinehart were careful to distinguish discovery in criminal prosecutions from the civil discovery at issue before them. This distinction is vital when "the court properly weighs the respective interests of the parties" in determining whether to issue a protective order. Rhinehart v. Seattle Times Co., 654 P.2d 673, 690 (Wash. 1982). The Washington Supreme Court expressly distinguished the discovery in Rhinehart from discovery in criminal prosecutions:

"The public generally does not have the same interest in the conduct of civil actions that it has in criminal actions, for the public is a party to a criminal action, the plaintiff being the state or other governmental body." 654 P.2d at 688. The Washington Court noted that "the commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions thereof are without question events of legitimate concern to the public . . ." 654 P.2d at 686, quoting, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). The Court further recognized the strong public interest in access to discovery information which bears on the operation of governmental processes:

> The court's concern for the protection of First Amendment rights, at least insofar as access to governmental processes is concerned, increases in proportion to the intensity of the legitimate interest which the public has in learning about those processes.

654 P.2d at 687.

The Washington Supreme Court expressly contrasted the lack of any legitimate interest in the dissemination of the Rhinehart civil discovery materials with the extraordinary public interest in access to discovery in a criminal case such as this in which there is revealed information relevant to the public's understanding of both the criminal justice system and the behavior of the officials administering that system:

> There is involved here no evaluating or criticism of judges or other officials administering the system nor of the system itself, but only a proposal to

> exploit the fruits of that system. Thus, this vital consideration which has sometimes led the courts to favor the interests of speech and press over the rights of a defendant in a criminal trial are entirely absent.

654 P.2d at 689-90.

In sharp contrast with Rhinehart, the facts of the four deposition access appeals pending before this Court involve public scrutiny of the criminal justice system itself, and the public officials administering that system.

The second fundamental distinction between Rhinehart and the cases now before this Court is that Rhinehart simply is not a public access case, let alone a case involving public access to the criminal justice system. There was no public access claim presented, and no holding made relating to public access. The actual question decided was whether a protective order restricting a civil litigant's ability to disseminate information obtained through discovery should be treated as a classic prior restraint. 104 S.Ct. at 2208. To so rule would have essentially eliminated this type of protective order from American civil discovery practice since the "heavy presumption" against such orders is virtually impossible to overcome in the context of judicial proceedings. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). That protective orders entered against litigants in civil cases are not per se invalid "prior restraints" hardly justifies a per se rule excluding the public from the criminal discovery process.

Finally, the protective order in Rhinehart was not only very narrowly drawn, it permitted such public disclosures as were necessary to litigate the case. This narrowly drawn civil discovery order, very limited in scope and based on good cause, simply does not justify the per se closure rule for criminal depositions adopted by the Fourth District.

B. To The Degree Rhinehart Is Relevant To The Per Se Closure Rule Adopted In Burk And Applied Here, It Is Authority Contrary To that Rule.

The Washington Supreme Court recognized: "In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties." 654 P.2d at 690. Although the specific "interests" to be balanced were never articulated by either the Washington Supreme Court or the United States Supreme Court, an examination of Rhinehart shows the protective order actually entered was wholly consistent with both the "compelling governmental interest, narrowly drawn" test of Globe Newspaper and this Court's three-part test in Lewis.

1. "Compelling governmental interests" justified the Rhinehart protective order.

The United States Supreme Court made it clear that the protective order in Rhinehart was supported by substantial interests of constitutional dimension:

> It is apparent that substantial governmental interests were implicated. Respondents, in requesting the protec-

> tive order, relied upon the right of privacy and religious association. Both the trial court and the Supreme Court of Washington also emphasized that the right of persons to resort to the courts for redress of grievances would have been "chilled."

104 S.Ct. at 2210 n.24.[5/] The Court recognized that the plaintiffs in Rhinehart had made an uncontroverted evidentiary showing through their numerous affidavits that "compelled production of the identities of the Foundation's donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association" by subjecting those persons to a reasonable probability of threats, harassment or reprisals. Id. at 2203. The protective order in Rhinehart thus served to prevent a "serious infringement on privacy of association and belief guaranteed by the First Amendment." Brown v. Socialist Workers' 74 Campaign Committee, 459 U.S. 87, 103 S.Ct. 416, 420 (1982).

In so holding, Rhinehart followed a long line of precedent embodying the fundamental principle that the First Amendment prevents the public disclosure of the identities of members of groups who are likely to be harassed as a result of such identification. The right to engage in anonymous freedom of association is a fundamental civil liberty. Thus the United States Supreme Court recently

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5/ This finding also satisifies the "serious and imminent threat to the administration of justice" prong of this Court's Lewis test.

struck down the disclosure requirements of a campaign expense reporting law as applied to "a minor political party which historically [had] been the object of harassment by government officials and private parties." Brown, supra, at 418. The Court held:

> The First Amendment prohibits a state from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment or reprisals.

Id. at 425. Accord: Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544 (1963); Louisiana v. NAACP, 366 U.S. 243, 296 (1961); Bates v. City of Little Rock, 361 U.S. 516, 523-24 (1960). The Supreme Court explained the rationale of these decisions in Talley v. California, 362 U.S. 60, 65 (1960) :

> The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.

In fact, this right is so compelling that the forced disclosure of membership lists, even for valid trial litigation purposes, is seldom allowed because it chills a group's associational rights and its right to go into court to protect those rights. NAACP v. Button, 371 U.S. 415, 437 (1963). Because such substantial First Amendment interests supported the protective order in Rhinehart, the case is consistent with both the Globe Newspaper test and the Lewis test, and contrary to the per se rule of exclusion adopted in Burk.

2. The Rhinehart protective order was narrowly drawn.

Both the United States and Washington Supreme Courts found the Rhinehart protective order narrowly tailored to protect the compelling governmental interests at stake. In language similar to this Court's in Lewis, the Washington Supreme Court emphasized both the lack of any "satisfactory alternative" to the protective order, and the "effectiveness" of the protective order in operating "to prevent the threatened harm." 654 P.2d at 677. Indeed, the Washington Supreme Court highlighted the narrowness of this protective order by noting that the defendants had already obtained the "income tax returns of Rhinehart and some financial information relating to the other plaintiffs," 654 P.2d at 675, as well as "access to a sufficient amount of information about the plaintiff and his organization to produce a vivid series of accounts about their activities," 654 P.2d at 689. The Washington court emphasized the protective order was not "too broad" because it did not apply to information "revealed in open court or otherwise made public by the plaintiff." 654 P.2d at 690 n. 9. Similarly, the United States Supreme Court emphasized that the protective order did not restrict dissemination of all discovery information but instead was expressly limited to that information protected by the First Amendment: "the financial affairs of the various plaintiffs, the names and addresses

of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients or donors to any of the various plaintiffs." 104 S.Ct. at 2204.

It therefore is clear from the decisions of both the Washington and United States Supreme Courts that the Rhinehart protective order satisfied both the "compelling governmental interests, narrowly drawn" test of Globe Newspaper and the three-part Lewis test.

3. The Rhinehart protective order analysis is inherently contrary to the Fourth District's per se closure rule.

Rhinehart demonstrates that the protective order mechanism delineated in the Rules is the appropriate procedure to employ when access to discovery information is to be denied. It further shows that judges applying the "good cause" standard in the Rules look to criteria remarkably similar to those set forth in Lewis and Globe.

Despite the weightiness of the rights they protect, neither Brown v. Socialist Workers '74 Campaign Committee, nor any of its predecessors, were held in Rhinehart to create a per se rule against the disclosure of identifying information. In fact, in Buckley v. Valeo, 424 U.S. 1, 71 (1976), the Supreme Court, in construing the right to engage in anonymous feedom of association, emphasized there must be specific evidence showing that harassment and threats will result from disclosure, and not merely general fears of

such harassment to justify limiting access. Id. at 72. The Court therefore expressly refused to impose a "blanket" rule prohibiting disclosure by minor parties, but required a case-by-case adjudication based on specific evidence presented. Id. at 74.

Contrary to the suggestion in Burk, Rhinehart does not support a per se rule denying access to discovery information. Indeed, the Washington Supreme Court in Rhinehart expressly recognized there was no automatic right to prevent disclosure of "information derived in a discovery proceeding", but instead one must first "apply for protection" under the rules of procedure. 654 P.2d at 690. The Court noted that "protection against use of [deposition] materials for publicity purposes" has "most frequently been achieved" by obtaining from the court a protective order "limiting the parties in attendance at a deposition and ordering the deposition sealed until further order of the court." 654 P.2d at 683. It is because the Fourth District here has rejected the need for such a protective order and its attendant good cause showing based on a compelling governmental interest in closure, that it must be reversed.

C. Rhinehart's Factual Recital of the History of Public Access to Civil Discovery Is Inaccurate Dictum.

Rhinehart upholds only the constitutionality of a protective order restricting a litigant's dissemination of certain information obtained through civil discovery, where

that order is narrowly tailored to serve important First Amendment interests. Although Rhinehart contains dicta asserting "pretrial depositions and interrogatories are not public components of a civil trial", the assertion plays no part in the actual decision of the case. Id. at 2207. The holding in Rhinehart in no way depends on any "historical denial of access."

In any event, this dictum is simply erroneous, based essentially on Chief Justice Burger's mistaken historical recitation in his concurrence in Gannett Co. v. DePasquale, 443 U.S. 368 (1979). This continuation of Chief Justice Burger's error is attributable to the fact it is dictum and was never briefed to the Court. The painstaking historical account of public access to civil discovery set forth in the Initial Brief of Petitioner The Miami Herald Publishing Company in Burk, at pages 8-19, shows the Chief Justice simply erred in his facts. Indeed, his historical perspective is belied by the most basic of facts: until 1980, all depositions, transcripts, and interrogatory responses were filed in federal court and available to the public absent entry of a protective order on a showing of good cause. The Supreme Court in Rhinehart apparently recognized this flaw in Chief Justice Burger's recital in Gannett, since it noted that: "to the extent that courthouse records [as a result of the filing of discovery materials] could serve as a source of public information access to that source customarily is subject to the control

of the trial court [through entry of protective orders]." 104 S.Ct. at 2207-08 n. 19. This, of course, is precisely the Petitioners' position in these appeals. Courts, not lawyers for a simple party, should decide whether the public may be excluded from criminal depositions. This is the access historically available to the public; it should be preserved.

CONCLUSION

For the foregoing reasons, the Fourth District's per se rule denying the public access to depositions in the absence of any showing of good cause must be overturned.

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I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner The Miami Herald Publishing Company has been furnished by mail this 24th day of February 1986, to the following:

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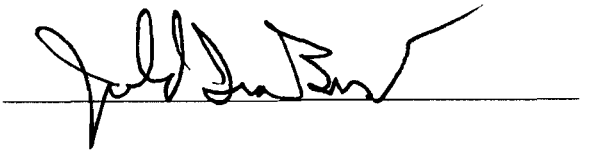

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