IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,479

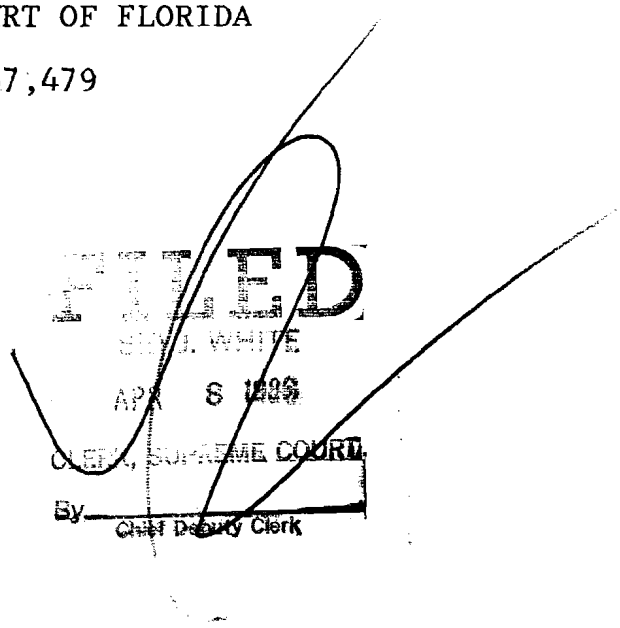
THE MIAMI HERALD PUBLISHING COMPANY and PALM BEACH NEWSPAPERS, INC.,

Petitioners,

v.

JOHN W. HAGLER and THE STATE OF FLORIDA,

Respondents.



ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER THE MIAMI HERALD PUBLISHING COMPANY

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INTRODUCTORY STATEMENT

In a transparent attempt to trivialize this important appeal, the State asserts "one is left to wonder why the Court has been pressed to take this case." (S.Br. 1)[1/] Any question as to the significance of this case is only the product of the State's misstatements of the facts and law, or its misunderstanding of the legal arguments presented in Petitioners' briefs. While the State's errors are detailed and corrected below, it should be noted from the outset that The Miami Herald did not present this Court with a "rehash" of prior arguments in its Initial Brief in this case. The purpose of that Initial Brief was to underscore the ramifications of a per se or absolute rule that the press has no enforceable right of access to depositions or unfiled deposition transcripts in criminal prosecutions. The brief demonstrated the folly of applying such a rule in circumstances where there was no contention that access would prejudice any person's rights and where the deposition to be taken was of the State Attorney himself.

Justice Barkett, then Judge Barkett of the Fourth District Court of Appeal, best described the vital importance of this case:

> Agreements to bypass the rules, and to take secret depositions of the State Attorney in a pending criminal case prosecuted by the same State Attorney's office, are much more prone to ensure speculation and distrust rather than ensure confidence in our legal system.

1/ "S.Br." shall refer to the Answer Brief of the State of Florida, followed by the cited page number; "App." shall refer to the Appendix to Initial Brief of Palm Beach Newspapers, Inc., followed by the tab numbers and page numbers, respectively.

The Miami Herald Publishing Company v. Hagler, 471 So.2d 1344, 1345 (Fla. 4th DCA 1985) (Barkett, J.). In this case a criminal defendant alleged that he was entrapped into selling cocaine to an undercover law enforcement officer because he had been trying to "shop" compromising photographs depicting the State Attorney with a woman who was not his wife.[2/] Although the prior depositions in the case all had been held in public, the deposition of the State Attorney was held in secret. The photos have never come to light; the attempted extortion was never investigated or prosecuted; and the defendant and the State entered into a plea bargain that resulted in the defendant receiving nothing more than probation. While this may be perfectly innocent, lawyers -- particularly state attorneys -- should avoid even the appearance of impropriety. Canon 9, Code of Professional Responsibility. As emphasized by Justice Barkett below, it was the denial of public access to depositions which fueled the appearance of impropriety here. 471 So.2d at 1344-45.

REPLY TO THE STATE'S MISSTATEMENTS OF THE FACTS

The State claims "petitioners never sought to attend the deposition of State Attorney David Bludworth in

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2/ Contrary to the State's suggestion in its Brief, Defendant Hagler approached the police informant with these photgraphs before there was any arrest on cocaine charges, and even before the subject of cocaine was ever discussed between Hagler and the informant. (App. 2, at p. 13).

this case." (S.Br. 1)[3/] This statement is quite simply false. The uncontroverted facts are stated in the affidavit of Miami Herald reporter Mike Boehm:

> 3. State Attorney David Bludworth was subpoenaed by Defendant's Counsel on August 2, 1983 to appear for a deposition August 16. I planned to attend and to write a news article on the deposition.
>
> 4. On or about August 15th, I was advised by Defendant's attorney Nelson Bailey that Mr. Bludworth's deposition had been cancelled. Mr. Bailey advised that the deposition would be rescheduled, but that he had agreed with the State Attorney's Office not to give the press prior notice.
>
> 5. During the next few days I telephoned Mr. Bailey on several occasions to ask when and where the deposition would be held and to urge him to allow me to attend. Mr. Bailey told me the deposition had not yet been rescheduled, but that he could not give me the information even after a time and place had been set unless the State Attorney's Office released him from their agreement.
>
> 6. I also asked Assistant State Attorney Sandra Kabboush for notice of the time and place of Mr. Bludworth's deposition. She refused to tell me and stated the press and public had no right to attend.

(App. 13).

The State's second misstatement of the record is its assertion that "the Court correctly observed that no case brought to its attention held that criminal discovery

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3/ The State is eager to claim this case involves no Chapter 119 public records claim (S.Br. 1) because a transcribed deposition in the custody of the State Attorney's office or held by the Public Defender is a "public record" within the meaning of Section 119.011 Florida Statutes. Since there is no statutory exemption to the public inspection and copying provisions of Chapter 119 for deposition transcripts (compare Section 119.07 with 119.011), the press and public enjoy a statutory right to unfiled deposition transcripts held by public officials.

depositions were 'judicial proceedings' open to public attendance or that there was a public right of access to untranscribed or unfiled depositions." (S.Br. 2) This is, again, simply false. The trial court was presented with cases which explicitly so held, and explicitly disagreed with them:[4/]

> As to the Circuit Court opinions cited by movants' counsel in support of the motion, this court must respectfully disagree insofar as they ruled that the mere taking of depositions is a judicial proceeding to which the public and press has a right to attend.

(App. 17, at p. 5). In fact, the trial court's order stated that on this issue "I seem to be in the minority among my colleagues on the subject." (App. 17, at p. 7) (See also App. 16, at p. 9; App. 14 at pp. 14-15)

The State next claims that the State Attorney did not have "knowledge the press was seeking to litigate any closure of the depositions" (S.Br. at 3). The record is uncontroverted that the press had attended the prior depositions in this case, that press coverage of those depositions had been extensive, and that access was not denied until the State Attorney was to be deposed. Moreover,

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4/ The trial court actually stated that no Florida appellate decisions had held that depositions are judicial proceedings to which the press has a right of access. The trial court, however, was quite mistaken as to this point. In fact, both Florida appellate cases relied upon by the trial court recognized that the press enjoys a qualified right to attend criminal depositions, regulated by the court through protective orders. Ocala Star Banner v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867, (Fla. 1st DCA 1979). The source of the trial court's confusion was apparently the fact that both cases held the public's right to attend depositions is qualified, not "absolute", and both cases stated in dicta that a deposition is not a true judicial proceeding. (See discussion infra.)

access initially was denied pursuant to an agreement between the State Attorney's office and Hagler's defense counsel, and then by court order following full argument by the State Attorney's office. All of these developments were fully reported in the press (App. 11, 20), and at every hearing the Assistant State Attorney, purportedly on behalf of the State Attorney's office, opposed access. The State's assertion can be believed only if the Assistant State Attorney acted without the knowledge and authorization of the State Attorney through all of these sensitive proceedings of such fundamental importance.

Fourth, the State claims the photographs "merely depicted Bludworth at a party on a boat" (S.Br. 3). Once again, the State is wrong. The testimony was that all of the photographs were of State Attorney Bludworth and a female paralegal who worked in his office (and to whom he was not married). The police informant testified:

> Q.: Describe, as best you can, what is depicted in the photographs?
>
> A.: Just is David at a party and on a boat, and basically that's all it is, just some shots of him alone sometimes, him and this girl, just nothing to it, just, you know, standing there looking at the camera smiling and obviously having a good time.

(App. 2 at p. 26) Detective Arthur Newcomb testified:

> Q.: Did you ever have an understanding of who the girl was in the photographs?
>
> A.: I believe it was one of the paralegals in the office. That's about the extent of it.
>
> Q.: In other words, it was the same girl in all the photographs?

A.: I believe so.

(App. 5 at p. 61).

While the photos seen by the police informant were not lewd, he testified that although he had seen 12-20 photographs (App. 2 at p. 12), he did not see all of the photos:

> Q.: Okay, why were you making an effort to keep him interested in pending negotiations, whether they were for real or not?
>
> A.: Well, there was supposed to be some more photos.
>
> * * *
>
> Q.: Was it your understanding you saw all of them, or not?
>
> A.: It was my understanding I did not see all of them.

(App. 2 at p. 32). The point is that the photos were alleged to depict improper conduct by the State Attorney, and their alleged value to a purchaser would be to try to extort legal favors from Mr. Bludworth.[5/]

Fifth, the State pillories Petitioner Palm Beach Newspapers, Inc. for its "scurrilous speculation about the State's participation in a conspiracy to suppress information." (S.Br. 4). While the State uses strong language ("contemptible query," "innuendo") to criticize Palm Beach, the context of Co-Petitioner's remarks makes it clear that the strange facts of this case -- and the secretive conduct of the State Attorney's office -- raise these speculations,

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5/ Of course The Miami Herald expresses no opinion as to whether the photos actually depicted improper conduct by Mr. Bludworth.

not the newspaper. Chief Investigator Ralph Wiles testified that an extortion case was not pursued against Hagler because it was felt that the State Attorney's office would have a conflict-of-interest due to the subject matter of the photos; consequently, the matter was referred to the Florida Department of Law Enforcement. (App. 1 at pp. 17-19, 30, 37). But F.D.L.E. took no action (App. 1 at p. 37), and Detective Newcomb flatly contradicted Wiles' testimony by denying that conflict of interest had ever been discussed or that any referral was made to F.D.L.E. (App. 5 at pp. 38-39)

Mr. Bludworth testified on the subject of his possible conflict-of-interest in prosecuting Hagler for the sale of cocaine, given that Hagler claimed to have compromising pictures of him:

> Q.: Do you know enough facts to have an opinion about whether or not there is any kind of potential conflict of interest in your office prosecuting this case rather than referring it to somebody else?
>
> A.: Well, I asked, you know, because that's always, every time I run for office been accused of, you know, being very -- not taking any, you know, dismissing ourselves from a lot of cases and I asked Sandy and, you know, to ask you if you thought that someone else ought to handle it. You know, if we had a conflict, you know, I really don't see, I didn't see the entrapment. I heard entrapment because, I never met him, we never discussed anything. I only heard after the fact that he had done something so, and I didn't know what he was arrested for. He was arrested for something, cocaine or something like that. You know, I don't know. I asked her to talk about it, you know, I assumed she talked to you because I know you --

Q.: Let me ask you this: --

A.: I'm willing to let somebody else, if you thought we had a conflict.

(App. 3 at pp. 20-21) The point, again, is not whether the photos were actually compromising or even whether Bludworth had a conflict, but rather the appearance of conflict being fostered by the denial of access.

Finally, the State says "the Miami Herald's brief states as a fact that Hagler received 'only 3 months probation' for the sale of cocaine. The record shows he received 3 years." (S.Br. 4) If by this assertion the State means Hagler received 3 years probation for the sale of cocaine to a police undercover agent, the State is correct. The Herald erred as to the length of the probation, but not as to the point it was making -- Hagler got no jail time.

ARGUMENT

THE STATE'S ARGUMENTS DO NOT SUPPORT A PER SE CLOSURE RULE FOR ALL CRIMINAL DEPOSITIONS

A. The State's Policy Arguments Do Not Require Per Se Closure In Lieu Of The Protective Order Mechanism Under The Rules Of Procedure.

The arguments raised by the State in this case are scarcely deserving of response. The State suggests that there is not the "slightest evidence" that the State Attorney "conspired to secret his deposition testimony." The facts are that the depositions taken in this prosecution were open to the press until Mr. Bludworth was to be deposed, and then the State and the Defense "cooperated" -- if

"conspired" is not the right word -- to exclude the public. Moreover, the allegedly compromising photographs of Mr. Bludworth have never come to light. Thus, the credibility of Hagler's extortion claims are impossible to gauge.

The State next asserts that if the press has access to depositions, so must legions of the public (S.Br. 7-9). But this argument simply overlooks the traditional remedy for public access at trial where there is inadequate seating to accomodate the public: "pool reporting." The State also ignores that prior depositions in this case were open to the public without incident, and that open depositions have been taken in numerous other criminal cases in Palm Beach County. Most fundamentally, the State has forgotten that the precise purpose of the protective order rule is crowd control; if an "overcrowding" problem ever were to develop in a particular case, then Rule 1.280(c)(5) -- and not a per se closure rule -- is the mechanism to solve it.

The State incorrectly claims that no case -- "state or federal -- held a deposition to be a 'judicial proceeding' open to public attendance." (S.Br. 7-8) This is simply wrong. Not only have the federal courts held depositions to be "presumptively open" under the Rules of Procedure,[6/] but Short v. Gaylord Broadcasting Co., 462

6/ See, e.g., National Polymer Products v. Borg-Warner Corp., 641 F.2d 418, 423 (6th Cir. 1981); Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980); American Telephone and Telegraph Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

So.2d 591 (Fla. 2d DCA 1985) and numerous other Florida decisions have held depositions are to be open to the public.[7/]

The State then erroneously suggests Petitioners have ignored the "fair trial" rights of the accused. (S.Br. 9) But it is the State that has ignored this right. While the press Petitioners have asserted only a qualified right to attend depositions (which gives way, upon a proper showing of prejudice, to the defendants' fair trial rights), the State claims the press has absolutely no right to attend depositions, irrespective of whether there is even a claim of prejudice to fair trial rights. The case at bar is a perfect illustration of this point: no claim could be made that public access to the deposition of the State Attorney would prejudice Hagler's right to a fair trial.

7/ Sentinel Star Co. v. Booth, 372 So.2d 100, 102 (Fla. 2d DCA 1979) (deposition transcripts); News-Press Pub. Co., Inc. v. State, 345 So.2d 865, 867 (Fla. 2d DCA 1977) (deposition transcripts held to be "records of a court proceeding"). Based on the same analysis, numerous trial judges have held that criminal depositions in Florida are open to the public, and in accordance with those orders, depositions have been conducted publicly. See, e.g., Florida v. O'Dowd, 9 Media L. Rep. 2455 (BNA) (Fla. 18th Cir. Ct. Oct. 13, 1983) (Mize, J.); Florida v. Tolmie, 9 Media L. Rep. 1407 (BNA) (Fla. 15th Cir. Ct. March 3, 1983) (Cook, J); Florida v. Reid, 8 Media L. Rep. 1249 (BNA) (Fla. 15th Cir. Ct. March 8, 1982) (Goldman, J.); Florida v. Sanchez, 7 Media L. Rep. 2338 (BNA) (Fla. 15th Cir. Ct. Nov. 17, 1981) (Mounts, J.); Florida v. Hodges, 7 Media L. Rep. 2424 (BNA) (Fla. 20th Cir. Ct. Dec. 21, 1981) (Pack, J.); Florida v. Alford, 5 Media L. Rep. 2054 (BNA) (Fla. 15th Cir. Ct. Oct. 19, 1979) (Mounts, J.); Florida v. Diggs, 5 Media L. Rep. 2597 (BNA) (Fla. 11th Cir. Ct. March 4, 1980) (Nesbitt, J.); Florida v. Bundy, 48 Fla. Supp. 205 (Fla. 2d Cir. Ct. Apr. 26, 1979) (Cowart, J.). Even civil depositions have been presumed open in Florida. Withlacoochee v. Seminole Electric, 1 Fla.Supp.2d 1377, 8 Media L. Rep. 1281 (BNA) (Fla. 13th Cir. Ct. March 11, 1982) (Miller, J.); Cazarez v. Church of Scientology, 6 Media L. Rep. 2109 (BNA) (Fla. 6th Cir. Ct. Oct. 31, 1980) (Bryson, J.); Johnson v. Broward County, 7 Media L. Rep. 2125 (BNA) (Fla. 17th Cir. Ct. Oct. 22, 1981).

The State repeats the contention made in Burk that deposition answers are not "predictable." (S.Br. 9-10). But again, as set forth in the Petitioners' Initial and Reply briefs in Burk, the State ignores the various means of criminal discovery which increase predictability (review of the State's witness statements, police reports and exculpatory or Brady material), the alternative array of fair trial procedural safeguards (such as voir dire),[8/] and the fact that fewer than 3 of every 100 cases go to trial. The State also has failed to consider that its proffered per se closure rule rejects a right to access in cases where there is no possible prejudice.

B. Potential Pretrial Publicity Does Not Require Per Se Closure Of Depositions.

The State's appeal to prejudicial publicity is, in any event, overwrought. The United States Supreme Court has held that "pretrial publicity -- even pervasive, adverse publicity -- does not inevitably lead to an unfair trial". Nebraska Press Association v. Stuart, 427 U.S. 539, 554 (1976). Jurors need not begin the trial unaware of news reports regarding the crime with which the defendant is charged, even though those reports contain material inadmissible at trial. See Murphy v. Florida, 421 U.S. 794, 799 (1975). Even if pretrial publicity would likely create in

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8/ This Court has made it clear that prejudicial pretrial publicity may be handled through a panoply of alternatives to closure. Bundy v. State, 455 So.2d 330, 337-39 (Fla. 1984).

the minds of all prospective jurors a "preconceived notion as to the guilt or innocence of an accused," that fact, "without more," is insufficient to demonstrate a violation of the accused's right to a fair trial. Irvin v. Dowd, 366 U.S. 717, 723 (1961). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id.

Empirical research reinforces this traditional judicial skepticism concerning the prejudicial impact of pretrial publicity. These studies "indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence." R. Simon, The Jury: Its Role in American Society, at 117 (1980). Accord J. Buddenbaum, D. Weaver, R. Holsinger & C. Brown, Pretrial Publicity and Juries: A Review of Research, at 2 (1981). For example, an experiment at the University of Minnesota identified no difference in the verdict patterns of jurors exposed to prejudicial news stories before a mock trial and jurors who were not so exposed. See Kline & Jess, Prejudicial Publicity: Its Effect on Law School Mock Juries, Journalism Q., Spring 1966, at 113-16. Another study utilizing subjects drawn from local voter registration lists found that, to the extent jurors are influenced by sensational news stories before the trial, the trial process virtually eliminates any influence of the stories and leads to a verdict based solely on the trial evidence. See Simon, Murder, Juries and the Press, Trans-Action, May-June 1966,

at 40. "The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning, and greater detachment." R. Simon, supra, at 117. Other studies have produced similar findings. Moreover, research indicates that prospective jurors exposed to pretrial media coverage of a criminal case are less likely to prejudge the case than those who learned about it from other second-hand accounts. See Riley, Pretrial Publicity: A Field Study, Journalism Q., Spring 1973, at 17.

Such findings are emphatically confirmed by actual experience. Despite substantial adverse pretrial publicity, the trials of such notable criminal defendants as John DeLorean, John Hinkley, Claus Von Bulow, Dan White, Maurice Stans, John Connally and Angela Davis all ended in verdicts of acquittal. "These verdicts may be the most reliable and powerful data we have about jurors' ability to withstand pretrial publicity." R. Simon, supra, at 117-18.

Even when publicity from a sensational case arguably saturates a community, many potential jurors usually are not even aware of the existence of press coverage. See CBS, Inc. v. United States District Court, 729 F.2d 1174, 1179 (9th Cir. 1983). In one of the recent "Abscam" prosecutions of congressmen and other public officials on charges arising from an elaborate F.B.I. undercover "sting" operation, for example, the Second Circuit concluded that, despite extensive media coverage, "only about one-half of the prospective jurors indicated that they had ever heard of Abscam . . .

[and] only eight or ten [of those] had anything more than a most generalized kind of recollection what it was all about." Application of National Broadcasting Co., 635 F.2d 945, 948 (2d Cir. 1980). Accord United States v. Mitchell, 551 F.2d 1252, 1262 n.46 (D.C. Cir. 1976), rev'd on other grounds, 435 U.S. 589 (1978) ("it would be possible to empanel a jury whose members had never even heard the [Watergate] tapes").

Only on rare occasions are convictions so tainted by prejudicial publicity that they must be reversed. Nebraska Press Association v. Stuart, 427 U.S. at 554; see United States v. Haldeman, 559 F.2d 31, 60-61 & n.32 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied, 431 U.S. 933 (1977). Indeed, a study of 63,000 appeals of criminal convictions in all fifty states over a five-year period found that in only twenty-one cases did the states' highest appellate courts overturn convictions based all or in part on prejudicial publicity. See Spencer, Coverage Seldom Cause for Conviction Reversal, Press-time, Oct. 1982, at 16. Notably, only once has the United States Supreme Court reversed a conviction because it found that pretrial publicity, standing alone, made a fair adjudication impossible. See Rideau v. Louisiana, 373 U.S. 723 (1963).9/

9/ On other occasions, the Supreme Court has found trials to be fair despite jurors' admitted predisposition against the accused. See, e.g., Murphy v. Florida, 421 U.S. 794 (1975) (no due process violation despite jurors' knowledge of defendant's criminal record and admissions by several jurors that such knowledge probably would influence the verdict); Beck v. Washington, 369 U.S. 541, 579-88 (1962) (Douglas, J., dissenting) (due process claim rejected by Court despite unprecedented pretrial publicity which "thoroughly discredited" defendant, and failure of trial judge to admonish jurors regarding publicity and bias); Stroble v. California, 343 U.S. 181, 199-202 (1952) (Frankfurter, J., dissenting) (due process claim rejected despite "notorious widespread public excitement" and sensational news coverage of defendant's alleged sex crime).

C. Seattle Times Co. v. Rhinehart Confirms The Need For A Protective Order Based On A Showing Of "Good Cause" To Deny Access, Rather Than A Per Se Closure Rule.

Finally, the State seeks support for its position in Seattle Times Co. v. Rhinehart, ____ U.S. ___, 104 S.Ct. 2199 (1984), but that decision only held that the First Amendment is not violated by a protective order entered against a party in a civil case where it is based on "good cause." The State does not explain how such a ruling supports the exclusion of the public from criminal depositions in the absence of good cause or a protective order. The language from Rhinehart quoted by the State (S.Br. 11-12) deals with protective orders based on "good cause", not some arbitrary right to exclude the public.10/ The State can muster no support for its absolutist position.

CONCLUSION

For the foregoing reasons, the decision of the Fourth District Court of Appeal should be reversed.

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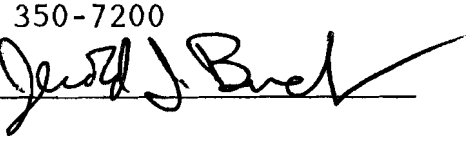
By: 

10/ The State queries: "If a litigant has no First Amendment right of access to discovery material, how do the press and public?" (S.Br. 12) But the State has completely misunderstood this passage. The First Amendment provides rights only against the government; thus, it provides a litigant no right of access to another private civil litigant's records or documents. However, once those records become part of the judicial process through court ordered discovery, the public has a right of access to them under the First Amendment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner The Miami Herald Publishing Company has been served by mail this 7th day of April 1986, to the following:

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