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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 70,910

DEMPSEY J. BARRON,

Petitioner,

v.

FLORIDA FREEDOM NEWSPAPERS,

Respondent.

ON REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner was the appellee and the respondent was the appellant in the First District Court of Appeal. In this appeal, the parties will be referred to as "petitioner" or Barron and "respondent" or Florida Freedom Newspapers, Inc.

The following symbol will be used:

"App." Appendix

POINTS ON APPEAL

POINT ONE

TRIAL COURTS ARE AFFORDED THE POWER TO SEAL THEIR RECORDS AND CLOSE PROCEEDINGS IN CIVIL CASES WHEN INTERESTS OF PRIVACY OUTWEIGH THE PUBLIC'S COMMON LAW RIGHT TO KNOW.

POINT TWO

EVERY CITIZEN HAS A RIGHT OF PRIVACY IN LITIGATION THAT DOES NOT INVOLVE THE STATE.

POINT THREE

THE DECISION AS TO ACCESS IS ONE WHICH RESTS IN THE SOUND DISCRETION OF THE TRIAL COURT.

POINT FOUR

THE PRESS DID NOT HAVE THE RIGHT TO HAVE ITS PETITION HEARD PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.100(d).

STATEMENT OF THE CASE AND FACTS

On January 28, 1986, Laverne Barron filed a petition for dissolution of marriage in Bay County Circuit Court. On September 9, 1986, the Honorable Don T. Sirmons ordered that the clerk seal the file and that further proceedings in the cause were to be conducted in private. The trial court based its order on article I, section 23, Florida Constitution, and the case of *Sentinel Communications Company v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), *rev. den.*, 403 So.2d 328 (1987). The order was entered pursuant to Dempsey J. Barron's motion to seal the file and was entered after argument was heard. (App. 1).

On September 30, 1986, Florida Freedom Newspapers, Inc. filed a motion to intervene pursuant to Rule 1.230, Florida Rules of Civil Procedure and alleged that the material contained in the circuit court file "may be relative as to Senator Barron's position of trust with his constituents." (App. 2).

On October 2, 1986, Florida Freedom Newspapers, Inc. filed a motion to set aside the trial court's order of September 9, 1986, again alleging that the matters contained within the court file "may have a bearing upon the position of trust which Senator Barron now occupies." The motion to set aside the order was based on the alleged fact that the document was a public record under Chapter 119 of the Florida Statutes. The motion was further based on the alleged movant's right to gather the news, and therefore, upon the movant's alleged first amendment rights

guaranteed under the United States and Florida Constitutions. (App. 3).

A hearing was held on October 13, 1986, on the motion to intervene and motion to set aside the September 9, 1986 order. The trial court granted the motion to intervene in order that Florida Freedom Newspapers, Inc. could question the validity of the court's order closing the hearings and sealing the file. However, the court denied the intervenor's request to re-open the file and open further proceedings to the public. The trial court denied the motion to set aside the order by balancing the right of the public to attend a judicial proceeding versus the court's power to protect the individual rights of the parties in a civil proceeding. The trial court specifically relied on *State ex rel. Gore Newspaper Company v. Tyson*, 313 So.2d 777, 782 (Fla. 4th DCA 1975), for its inherent power to exclude the public and press from any judicial proceedings in order to protect the rights of litigants if there are cogent reasons for doing so. The court relied on *English v. McCrary*, 348 So.2d 293 (Fla. 1977), for its discretionary authority.

The court stated that its decision was not based solely upon the wishes of the parties to have their dissolution of marriage proceedings conducted in private but, rather, there was a cogent reason presented to the court which was the determinative factor in the court's decision to seal the file and close the hearing. *Cf., Goldberg v. Johnson*, 485 So.2d 1386 (Fla. 4th DCA 1986) (court granted access to the court records since the parties did

not present any cogent reasons for keeping the records sealed). The court found itself in a dilemma, however, because if it stated the exact reason for closing the file, as requested by the intervenor, then, in fact, the court had done away with the reason for keeping the file sealed. The court noted, though, that the motion filed requesting closure of the proceedings and sealing the file did state with specificity, and with supporting documents, the information upon which the court's closure order was based. The court found further support for its decision as the information contained in the motion requesting closure of the proceedings was uniquely private to Senator Barron and that there was a statutory basis upon which to base the closure of the information from the public. (App. 4).

Florida Freedom Newspapers, Inc. then filed its petition for review of order excluding press and public from access to judicial records pursuant to Florida Rule of Appellate Procedure 9.100(d) with the district court on October 24, 1986, wherein it not only contested the trial court's order of closure, but also requested a stay of the divorce proceedings. The petitioner filed a cross-petition for review of order excluding press and public from access to judicial records and proceedings and granting motion to intervene on November 3, 1986. (App. 5).

The district court granted Florida Freedom Newspapers, Inc.'s emergency motion to stay the divorce proceedings on November 19, 1986. (App. 6).

On February 2, 1987, Mrs. Laverne H. Barron, wife of the instant petitioner, filed a motion to vacate the stay and alleged that the stay was entered the day before the commencement of trial in the dissolution of proceedings action and that the stay had resulted in irreparable harm to the wife. (App. 7). Dempsey J. Barron likewise filed an emergency motion to vacate the stay on February 23, 1987, alleging, among other grounds, that the proceeding had already been stayed for over five (5) months and that a new trial date had been set for March 9 through March 12, 1987. The motion continued that if the trial did not occur during that trial time, then the trial could not take place until after the legislative session had ended due to Senator Barron's functions as a Senator.

On March 6, 1987, the district court issued an order affirming the trial court decision to close proceedings and vacating the stay alleging that an opinion would follow. (App. 8). However, three (3) additional months later, on June 1, 1987, the district court issued an opinion reversing the previous order to close the file in the trial court. *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So.2d 462 (Fla. 1st DCA 1987). The decision ultimately rendered by the district court did not address nor dispose of Senator Barron's cross-petition.

The petitioner filed its notice to invoke discretionary jurisdiction with this court.

SUMMARY OF THE ARGUMENT

Closure of divorce files has been a traditional, accepted procedure in Florida courts, designed to protect the interests of litigants. At the initial stage, when the files are sealed, the question is solely whether there are cogent reasons to do so. This standard inherently recognizes that there must be some valid reason to seal the record before the public's common law right to access is cut off.

Once the order is entered, a presumption of correctness exists as to the sealing order, and another, stricter standard, must be met before the files may be unsealed. This is the "good cause/ends of justice" standard of *Johnson v. State*, 336 So.2d 93 (Fla. 1973).

These two standards fully protect the public's common law right of access to court records. The press has no greater right than the general public to access, and no constitutional provision provides either the press or the public with an elevated power to intrude into properly sealed court files. As against a non-constitutional, non-statutory right of the public, the parties to a dissolution proceeding have fundamental statutory and constitutional rights to have such files sealed. These fundamental rights exist regardless of the public figure status of the litigants involved.

Since neither the public nor the press have a first amendment right of access to court materials or proceedings in a civil case, the decision as to access is one left to the sound discretion

of the trial court. Once the trial court has exercised its discretion in light of the relevant facts and circumstances of the particular case and has articulated a cogent reason for denying access, the appellate court is left solely with the purpose of determining whether the trial court abused its discretion. As with all divorce cases in Florida, the instant trial court was imbued with the discretionary standard set forth by this Honorable Court in *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). The district court in the instant case utterly failed to give credence to the standard of review in the instant case and gave a *de novo* review of the instant proceedings.

By reversing the lower court's order, the district court elevated non-constitutional rights above the fundamental constitutional privacy rights of dissolution litigants as private individuals. Such a policy decision threatens upheaval on the courts of this state as the courts seek to achieve some balance to protect the legitimate interests of the thousands of citizens of this state who have had their dissolution records sealed and who have justifiably relied upon this comforting shield of confidentiality which the district court below put asunder. As held in *Sentinel Communications Company v. Smith*, *supra,* 493 So.2d 1048, it is an essentially governmental function to provide citizens with an impartial forum in which they may present and resolve their private disputes and controversies. In order to fairly resolve many such private controversies, it is necessary for the litigants and witnesses to assert and admit embarrassing

details of the private lives of the litigants and of innocent third persons.

The court continued that if this could not be done without the deterrence of unwanted publicity, a legal system could not meet the basic need for which it was established. Acknowledging that while citizens collectively and as a general have a right to know how the legal system is functioning, neither the general public nor the press has a legitimate right to intrude into a closed court file in order to learn, publish, and sell embarrassing assertions as to the intimate details of an individual citizen's private life, merely because the assertions and details have been disclosed in a judicial forum in a case involving private civil general litigation to which the general public -- the state -- is not a party. Private civil litigation, in other words, is simply litigation which is not constitutionally public and does not involve the state. Therefore, the First District's assertion below that there is no private litigation in the State of Florida is utterly without basis in law or fact.

ARGUMENT

POINT ONE

TRIAL COURTS ARE AFFORDED THE POWER TO SEAL THEIR RECORDS AND CLOSE PROCEEDINGS IN CIVIL CASES WHEN INTERESTS OF PRIVACY OUTWEIGH THE PUBLIC'S COMMON LAW RIGHT TO KNOW.

Whether the issue is the sealing of court files or the issue is the closure of civil proceedings, the standard remains the same as the right remains the same. The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. *Nixon v. Warner Communications*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1311-1312, 55 L.Ed.2d 570 (1977). Likewise, as opposed to criminal trials, there is no constitutional right of public access to civil proceedings as well as to judicial records and documents. *Sentinel Star Company v. Edwards*, 387 So.2d 367, 374 (Fla. 5th DCA 1980). The public and press simply have a common law right of access to civil proceedings. Consequently, since there are no competing constitutional rights involved in the instant case such as the competing constitutional right of the first amendment with a criminal defendant's constitutional right of a public trial, there is no reason or need to utilize the three-pronged test as set forth in *Miami Herald Publishing Company v. State*, 363 So.2d 603 (Fla. 4th DCA 1978). The First District, therefore, erroneously declared that the *Miami Herald Publishing* standard must be applied to all civil cases.

In order to fully comprehend the error of the First District's declaration, a general review of basic constitutional law is

necessary. The Court's decision in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), firmly established for the first time that the press and the general public have a constitutional right of access to criminal trials. In reviewing the history of the presumption of openness of a criminal trial, the Court declared that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. *Id.* at 567-72, 100 S.Ct. at 2822-24. The right to a "public trial" also is explicitly guaranteed by the sixth amendment only for "criminal prosecutions." Consequently, since the public has a constitutional right to attend criminal trials, as the public has a right to be tried publicly for criminal offenses, then the first amendment gives the public a constitutional right to have reported what transpires in a criminal trial. *Richmond Newspapers, Inc. v. Virginia, id.,* at 573-75, 100 S.Ct. at 2825-26.

But even the right of access to criminal trials, although of constitutional stature, it is not absolute. *See Richmond Newspapers, Inc. v. Virginia, supra,* at 581, n.18, 100 S.Ct. at 2830, n.18; *Nebraska Press Association v. Stuart*, 427 U.S. 539, 570, 96 S.Ct. 2791, 2808, 49 L.Ed.2d 683 (1976). The circumstances, however, under which the press and public can be barred from a criminal trial are limited; the state's justification in denying access must be a weighty one. Therefore, in a criminal proceeding, a three-pronged test has been established in Florida that must be met in order to balance the need for open government and public

access, through the media, to the judicial process and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury. *Miami Herald Publishing Company v. Lewis*, 436 So.2d 1, 7 (Fla. 1982); *Bundy v. State*, 455 So.2d 330 (Fla. 1984).

The balancing test is required as the right to attend criminal trials is implicit in the guarantees of the first and fourteenth amendments as declared by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia. Accord, Ocala Star Banner Corporation v. Sturgis*, 388 So.2d 1367, 1369 (Fla. 5th DCA 1980). The three-pronged test is necessary to balance competing constitutional rights, the fundamental rights of an accused to a fair trial by an impartial jury guaranteed through the sixth amendment, and the public's first and fourteenth amendment right to attend criminal trials. *Miami Herald Publishing Company v. Lewis*, *supra*, 436 So.2d at 3. There is no corresponding constitutional right of the public to attend civil trials, but, rather, it is a common law right. *Sentinel Star Company v. Edwards, supra,* 387 So.2d at 374. The United States Constitution only grants a right to public trial in criminal cases. *State ex rel English v. McCrary*, 348 So.2d 293 (Fla. 1977).

The press pressed to open civil trials based on *Richmond Newspapers*. The Supreme Court, however, held in *Seattle Times Co. v. Rhinehart*, 464 U.S. 20, 37, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), that, at least in the federal system, the pre-trial discovery process with its volumes of potentially valuable news

worthy material was not subject to press access. Thus, depositions remain closed to the press in most civil cases. This court has relied on *Seattle Times* for establishing the rule in Florida that likewise, in the state system, the pre-trial discovery process is not subject to press access. *Sentinel Communications Company v. Gridley*, 510 So.2d 884 (Fla. 1987). It is also extremely interesting to note that this court has likewise held the *Seattle Times* standard to depositions in criminal proceedings. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987).

The instant respondent sought below to have the First District enforce some alleged constitutional right that they declared belonged solely to the press. In declaring that the constitutionally mandated three-pronged test the *Miami Herald Publishing Company v. State* case espoused, the First District has given the press its very own constitutional right and changed the constitution of the United States by declaring that civil cases are now constitutionally mandated to be public. Consequently, not only has the First District rewritten the law as to when the three-pronged test must be utilized in Florida, but it additionally has changed the constitution of the United States and of Florida.

This Honorable Court declared over twenty (20) years ago:

> Freedom of the press was never intended to be a special privilege extended to its publishers. On the contrary, it was conceived by the writers of the constitution and of the bill of rights to be a right of the people in a democracy to unrestricted information and presentation of views on government for which the press was a tailor-made medium of dissemination. <u>Freedom of the press, therefore,</u>

is a people's personal right rather than a property right.

Firstamerica Development Corporation v. Daytona Beach News-Journal Corporation, 196 So.2d 97, 99 (Fla. 1966) (emphasis added). Therefore, if an individual does not have the right of access, then the press does not have the right of access. The press only has the right to print what the public has the right to hear. As declared by the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the first amendment does not guarantee the press a constitutional right of special access to information not available to the general public. The press has absolutely no rights of its own and can only assert the rights that the public can assert. The press is not an entity that itself is protected by the United States Constitution nor the Florida Constitution. The press simply stands in the shoes of the public and has no greater rights than the public has.

The three-pronged test that the First District has declared must be met in the instant case is simply inapplicable as the balancing test enunciated in *Lewis* and *Bundy* is not necessary in a civil trial as there are no competing constitutional rights of the public involved and, consequently, none for the press to assert.

The first prong of the test protects the defendant's right to a fair trial; the second prong employs a traditional first amendment technique; and a third prong employs practical considerations. *The Miami Publishing Company v. Chappell*, 403

So.2d 1342, 1345 (Fla. 3d DCA 1981). Cases utilizing the three-pronged test enunciated in *Miami Herald Publishing Company v. Lewis, supra,* 436 So.2d at 1, all involve criminal proceedings with the sole exception being *Goldberg v. Johnson*, 485 So.2d 1386 (Fla. 4th DCA 1986), which Barron submits is a clear misconception of the law. *See, e.g., Miami Herald Publishing Company v. Lewis*, 452 So.2d 144 (Fla. 4th DCA 1984); *State ex rel Time Publishing Company v. Patterson*, 451 So.2d 888 (Fla. 5th DCA 1984); *Palm Beach Newspapers, Inc. v. Cook*, 434 So.2d 355 (Fla. 5th DCA 1983); *Times Publishing Company v. Penneck*, 433 So.2d 1281 (Fla. 2d DCA 1983).

As stated *supra*, as opposed to criminal trials, there is no constitutional right of public access to civil proceedings. *Sentinel Star Company v. Edwards, supra,* 387 So.2d 367, 374. The public and press have a common law right of access to civil proceedings. Accordingly, the press is not entitled to notice of a hearing in advance of closure for civil hearings since no constitutional right is implicated. *Id.* The only notice that would be required extends no farther than to the persons actually present at the time the motion for closure is made. *Gannett Company, Inc. v. DePasquale*, 433 U.S. 368, 401, 99 S.Ct. 2998, 2916, 61 L.Ed.2d 608 (1979) (Powell, J., concurring); *In re Knoxville News-Sentinel Company, Inc.*, 723 F.2d 470, 475 (6th Cir. 1983). The court, therefore, in its discretion, rather than having to meet the stringent standard of *Lewis*, may order a civil

case to be heard privately. *State ex rel. v. McCrary, supra,* 328 So.2d at 260.

The right of access to judicial records is likewise a common law right of non-constitutional origin. *United States v. Edwards*, 672 F.2d 1289, 1292 (7th Cir. 1982); *Johnson v. State, supra,* 336 So.2d 93, 95; *Miami Herald Publishing Company v. Collazo*, 329 So.2d 333, 336 (Fla. 3d DCA), *cert. den.,* 362 So.2d 1100 (Fla. 1976); 66 Am.Jur.2d *Records and Recording Laws,* §15 (1973). In *Nixon v. Warner Communications,* 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), during the trial of several of ex-president Nixon's former advisors, certain tape recordings were played to the jury in open court and reels of tapes were admitted into evidence. Transcripts of the tapes furnished to the reporters were widely reprinted in the press.

At the close of the trial at which four of the defendants were convicted, and following an earlier unsuccessful request to copy, broadcast, and sell to the public portions of the tapes, certain broadcasters petitioned for immediate access to the recordings. The district court denied permission, *United States v. Mitchell,* 397 F.Supp. 186 (D.D.C. 1974), but the court of appeals reversed, 551 F.2d 1252 (D.C. Cir. 1976). The Supreme Court then reversed again in favor of non-access and held:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents....
>
> It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power

> over its own records and files, and access has been denied where court files might become a vehicle for improper purposes...
>
> ...<u>the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.</u>

435 U.S. at 597-599, 98 S.Ct. at 1312-1313 (footnotes omitted) (emphasis added). *Accord, Johnson v. State, supra*, 336 So.2d at 94.

While recognizing that it would be difficult to distill from the relatively few judicial decisions all the factors to be weighed in determining whether access is appropriate, the Court suggested it would be proper to consider such matters as whether the information would be used to gratify private spite or promote public scandal through the publication of painful and sometimes disgusting details of a ... case. *Id.*, at 598, 98 S.Ct. at 1312. Courts have denied access to "the painful and sometimes disgusting details of a divorce case." In *In re: Caswell,* 18 R.I. 835, 29 A. 289 (1893), cited in *Hurst Corporation v. State*, 484 A.2d 292, 295 (Md. App. 1984), the court stated:

> But it is clearly within the rule to hold no one has a right to examine or obtain copies of public records for mere curiosity or for the purpose of creating public scandal. To publish and broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable

> restrictions as to the time and mode of examining same; but they should not be used to gratify private spite or promote public scandal.

The petitioner submits that since the Florida Freedom Newspapers, Inc. has offered no justifiable reason for unsealing of the instant court files or for the right to attend the judicial proceedings, it can be assumed that the information obtained would be used to gratify private spite or promote public scandal. This is buttressed by the fact that the petitioner has referenced the fact that Terry Joe Kennedy was added as a necessary party. (Petition at 18).

Since there is no constitutional right to inspect and copy judicial records, even in criminal cases, a court, in its discretion, may seal documents if the public's right of access is outweighed by competing interests. *United States v. Hickey,* 767 F.2d 705 (10th Cir. 1985); *United States v. Smith*, 602 F.Supp. 388 (M.D. Pa. 1985). In the instant case, the public's common law right of access is far outweighed by the petitioner's competing interests. The petitioner has a substantive right to have the court records sealed and the proceedings conducted in private by virtue of the constitutional right to privacy. The Florida courts have not been reluctant to extend privacy rights when the requirements of the Public Records Act, chapter 119, Florida Statutes (1985), conflict with other statutory provisions protecting privacy interests. *See, e.g., Yeste v. Miami Herald Publishing Company,* 451 So.2d 491 (Fla. 3d DCA), *rev. den.,* 461 So.2d 115 (Fla. 1984); *Alice P. v. Miami Daily News, Inc.*, 440 So.2d 1300 (Fla. 3d

DCA 1983), *rev. den.,* 467 So.2d 697 (Fla. 1985); *Gadsden County Times, Inc. v. Willis*, 377 So.2d 817 (Fla. 1st DCA 1979).

The purpose behind the right of the public and media to attend trials and inspect court records is obvious. It is through the exercise of such a right that the public knows what transpires in courts. That right, however, in the words of Justice Powell in *Nixon, supra*, 435 U.S. at 589, "bow before the power of a court to ensure that its records are not 'used to gratify private spite or promote public scandal' through ... publication...." The respondent simply has no countervailing interest sufficient to overcome the finding made by the trial court of its justifiable concern for the individual rights of the parties in the instant civil proceedings.

The respondent did not even allude to a generalized claim of what the file might contain that would be of a newsworthy matter for the public. To allow the press access to the instant sealed files and the divorce proceedings would fly in the face of all that is deeply rooted in our heritage and defies notions of fair play. The right of privacy is so deeply embedded in American jurisprudence that the respondent must come forward by demonstrating that the intrusion of privacy serves some compelling public interest. No showing, much less a compelling public interest, has been alleged that would overcome the petitioner's right to be free from broadcasting the painful details of his divorce case. Such broadcast not only would fail to serve any useful purpose in the community, but, on the other hand, would directly tend to the

demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure.

An additional ground for upholding the trial court can be found in the Florida Statutes. In enacting the so-called "no-fault" divorce, the Florida legislature declared the purposes to be:

> (a) To preserve the integrity of marriage and to safeguard meaningful family relationships;
>
> (b) To promote the amicable settlement of disputes that have arisen between the parties to a marriage; and
>
> (c) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.

Sec. 61.001, Fla.Stat. (1985). To have allowed the respondent to intervene and order the court files be unsealed for public viewing would thwart the legislatively avowed purposes of Florida's "no-fault" dissolution of marriage proceeding. As stated in *Linda v. Linda*, 352 So.2d 1208, 1209 (Fla. 4th DCA 1978):

> The so-called 'no-fault' divorce law was enacted, in part, to get rid of emotional and financial blackmail made possible by the continued threat of mental torture by way of embarrassing harassment through public washing of dirty linen.

Since the respondent has not even alluded to a legitimate interest in these proceedings, their only interest then can be that it wants to harass through public washing of dirty linen. *See Havanature v. 747 Travel Agency, Inc.*, 463 So.2d 404 (Fla. 5th DCA 1985). To allow the court files to be unsealed and the divorce proceedings conducted in public would only destroy the integrity of the family relationships that have survived dissolution

proceedings so far. It cannot be argued in good faith that to allow the respondent to have the court files unsealed and the proceedings conducted in public would be in the interest of justice when the files were sealed and the proceedings closed for the sake of the individual rights of the parties.

The press's reliance on the fact that Barron is a public figure so that they should be able to snoop is likewise a misconception. Public figures are not necessarily public for all purposes even in first amendment analysis.

> Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in [*Gertz v. Robert Welch, Inc.*, 418 U.S. 423 (1974)], even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent [a party to the divorce] freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the state in order to obtain legal release from the bonds of matrimony. We have said that in such an instant [r]esort to the judicial process ... is no more voluntary in a realistic sense than that of a defendant called to defend his interests in court.' ...We hold respondent was not a 'public figure' for the purpose of determining the constitutional protection afforded petitioner's [Time Magazine's] report of the factual and legal basis for her divorce.

Time, Inc. v. Firestone, 424 U.S. 448, 454-455, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

Consequently, the press's allegation below that they had a right to the material as it may be relative as to Senator Barron's position of trust with his constituents has absolutely no bearing on any issues in the instant case since Dempsey J. Barron was

compelled to go to court by the State of Florida in order to obtain legal release from the bonds of matrimony. As so pungently declared by the court in *Sentinel Communications Company v. Smith, supra,* 493 So.2d at 1049:

> The fact that the husband-father in the domestic relations case was, and is, a judge does not distinguish this case from all other similar cases. People get married and divorced, not as judges, doctors, lawyers, editors, preachers, policemen, plumbers, plasterers, or painters, but as natural human beings just as all other citizens. The husband-father and the wife-mother and their children in this case have, and should have, the same rights in domestic relation litigation as every other citizen -- no more and no less. If the privacy rights of the litigants and third persons in this case are not recognized and respected, then no citizen has any right of privacy in private litigation.

Trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public's right to know. *See, e.g., In Re: Knoxville News-Sentinel Company, Inc.*, 723 F.2d 470 (6th Cir. 1983); *Brown & Williamson Tobacco Corporation v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *In Re: Halkin*, 598 F.2d 176, 190-192 (D.C. Cir. 1979); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 362 N.E.2d 1189 (1977) (sealing of record at preliminary injunction stage of judicial proceedings between bank and state banking commissioner not an unconstitutional infringement on free press guarantee). Consequently, the First District's allegation that article I, section 23 of the Florida Constitution did not give Senator Barron any right of privacy to the instant proceedings is fallacious.

Accord, Seattle Times Company v. Rhinehart, supra, 467 U.S. at 30, 104 S.Ct. at 2206.

It must be noted that the portions of the record that were sealed were submitted pursuant to Florida Rules of Civil Procedure to which, of course, the press has no first amendment right to as declared by the Supreme Court in *Rhinehart*. As declared by the Court in *Rhinehart*, discovery may seriously implicate private interests of litigants and third parties. *Id.* at 35, 104 S.Ct. at 2208. That is precisely what occurred in the instant case as Senator Barron was compelled to submit certain documents pursuant to the rules which did seriously implicate his privacy interests in the documents. This court may take notice of the fact that the documents that are under seal are records to which Senator Barron has a privacy interest. *United States v. Westinghouse Electric Corporation*, 638 F.2d 570 (3d Cir. 1980).

POINT TWO

EVERY CITIZEN HAS A RIGHT OF PRIVACY IN LITIGATION THAT DOES NOT INVOLVE THE STATE.

Prior to the people of Florida voting to amend the Florida Constitution to include a constitutionally mandated right of privacy, this court declared that the privacy interest was characterized to be an individual's interest in avoiding public disclosure of personal matters as so declared pursuant to the federal constitution. *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So.2d 633, 637 (Fla. 1980). As stated by this court, the concept of privacy or the right to be let alone is deeply rooted in American heritage and is founded upon historical notions and federal constitutional liberty. *Winfield v. Division of Para-mutual Wagering, Department of Business Regulation,* 477 So.2d 544 (Fla. 1985).

> The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect... they sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, against the government, the right to be let alone -- the most comprehensive of rights and the most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed.944 (1928), (*Brandes, J. dissenting*). In fashioning a right of privacy, the United States Supreme Court has protected the decision-making or autonomy zone of privacy interests in the individual. The Court's decisions include matters concerning

marriage, procreation, contraception, family relations, and child bearing, and education. *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The Supreme Court has also declared that one has a privacy interest in avoiding the public disclosure of personal matters. *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *Whalan v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

Consequently, the petitioner respectfully submits that the right of privacy involved in the instant case not only involves the Florida Constitution but the fourteenth amendment's concept of personal liberty. The limits of the fourteenth amendment right of privacy, *see Whalan v. Roe, supra,* 429 U.S. at 598, n.23, 97 S.Ct. at 875, n.23, 51 L.Ed.2d 64 (1977), are not rigidly defined. However, the Supreme Court has described the cases protecting the fourteenth amendment privacy right as involving "at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600, 97 S.Ct. at 876.

There can be no question but that the petitioner has a federal, as well as a Florida, constitutional right to be let alone and free from the Florida Freedom Newspaper, Inc.'s intrusion into his private life that is contained within the sealed court files. The petitioner's competing constitutional rights include his right to avoid the public disclosure of his personal matters,

matters concerning his marriage, and his family relations. The press, on the other hand, has a mere common law right to inspect public records. Not only does the press have a mere common law right to inspect documents, there is no presumptive right of access to the instant records as the documents are under seal. *United States v. Smith*, 602 F.Supp. 388, 397 (M.D. Pa. 1985). *Accord, Belo Broadcasting Corporation v. Clark*, 654 F.2d 423 (5th Cir. 1981). Any right the press does have ends at the point where the petitioner's right to privacy begins, and that right begins with the sealed court files.

The Second District has declared that even in the context of criminal cases, Florida's constitutional right of privacy could provide a means of further protection for those wishing to "be let alone." *Doe v. Sarasota-Bradenton Television Company, Inc.*, 436 So.2d 328, 330 (Fla. 2d DCA 1983). However, in *Doe*, the Second District declared that the state constitutional provision must yield to the federal constitution's guarantee of press freedom. In the instant case, though, there simply is no countervailing federal constitutional guarantee of press freedom so that Florida's constitutional right of privacy given to each citizen in the State of Florida by the citizens of the state of Florida must prevail.

The petitioner submits that Florida's constitutional right of privacy could very well indeed have been a response to the lack of sensitivity to the rights of others that is sometimes displayed by the unfettered exercise of first amendment rights by the

press. Prior to the adoption of Florida's constitutional right of privacy there was no countervailing state constitutional privacy right in Florida. Consequently, the press's alleged first amendment right was arbitrarily exercised when unnecessary and detrimental to the rights of others. The citizens of Florida have given the instant petitioner as well as every other citizen of Florida the right to be let alone in the instant circumstances and that right should be upheld by this court.

To uphold the First District's decision in the instant case would be to declare that the citizens of Florida did not mean what they said when they adopted article I, section 23 of the Florida Constitution which specifically declares that all citizens have the right to be let alone unless the public has a right of access to public records and meetings as provided by law. As correctly declared by the First District in the instant case, this court would not agree that judicial court proceedings are encompassed within section 119.011(2), Florida Statutes (1985). The court cited to *In re: The Florida Bar*, 398 So.2d 446 (Fla. 1981). The closed court files simply are not public records pursuant to the public records act as the legislature specifically exempted a public record which is made a part of a court file and which is specifically closed by order of the court. Sec. 119.07(4), Fla.Stat. (1987). Therefore, the press has no constitutional right nor statutory right to the instant sealed file.

POINT THREE

THE DECISION AS TO ACCESS IS ONE WHICH RESTS IN THE SOUND DISCRETION OF THE TRIAL COURT.

Inherent in our judicial system is that every court has supervisory power over its own records and files. Consequently, since there is no constitutional right to the information in the instant case or the trial proceedings, the decision as to access is left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case. *Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 600, 98 S.Ct. at 1312. Access has been denied where court files might become a vehicle for improper purposes. As declared in *Nixon*, the common-law right of inspection has bowed before the power of a court to ensure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Such is what precisely occurred in the instant case. The petitioner submits that the press was hoping to find some type of scandal by publishing the details of the petitioner's divorce case.

Because no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rests within the sound discretion of the courts, subject to appellate review for abuse. *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev. sub nom., Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). The First District, rather than reviewing the trial

court's decision for an abuse, reviewed the entire file and substituted its judgment for that of the trial court. The petitioner submits that appellate court's function should have gone no further than to seeing whether or not the trial court articulated a sufficient basis for closure. The trial court did indeed state that it had a cogent reason for sealing the court record and closing the proceedings. The petitioner respectfully submits that the First District lost sight of the tier system of courts in Florida.

Trial courts have traditionally been imbued with great discretion in certain areas since the consideration of competing values is one heavily reliant on the observations and insight of the presiding judge. This court has declared that in divorce proceedings the trial court has such broad discretion that if reasonable men could differ as to the propriety of the action taken by the trial court then the trial court could not have abused its discretion. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). There can be no doubt but that reasonable men could differ as to whether or not the trial court should have sealed the instant court file. Therefore, under *Canakaris* and the state of the law in Florida, the trial court did not, and could not, have abused its discretion in preventing the press from harassing the petitioner through public washing of dirty linen.

When the press appealed the closure order to the First District, the burden was on the press to demonstrate that the trial court abused its discretion. Neither the press nor the

First District even eluded as to how the trial court abused its discretion, much less established that the trial court did, in fact, abuse its broad discretion. Consequently, the issue now before this court is a legal issue, *i.e.,* the standard to be applied in the instant case. The law never has been, and cannot now be, that an appellate court is allowed to substitute its judgment for that of a trial court. Since the First District utterly failed in its function as an appellate court, the decision must be reversed on this basis alone. But this ground, of course, is not the only ground that the First District erred as the First District also declared that the three-pronged test must be applied rather than a balancing test.

Decisions as to access are properly handled on an *ad hoc* basis by the trial court, who is in the best position to recognize and weigh the appropriate factors on both sides of the issue. Appellate courts are ill-equipped to second-guess this determination as how to best accommodate the interest of the parties involved, including the rights of the press. Therefore, this court should simply review the order of the trial court to determine whether the court articulated a cogent reason for sealing the court files and closing the proceeding. If the court did, which a mere perusal of the instant order will show, then an appellate court's function terminates as in such a case the court could not have abused its discretion.

POINT FOUR

THE PRESS DID NOT HAVE THE RIGHT TO HAVE ITS PETITION HEARD PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.100(d).

Florida Rule of Appellate Procedure 9.100(d) implemented the "strict procedural safeguards" requirement laid down by the United States Supreme Court in *National Socialistic Party of America v. Village of Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977), Fla.R.App.P. 9.100, *Committee Notes*. In that case, the Court held that state restraints imposed on activities protected by the first amendment must either be immediately reviewable or subject to a stay pending review. The instant case did not involve an activity protected by the first amendment but, rather, as discussed *supra*, the right of the press or the public to obtain access to civil court proceedings or judicial records is a common law right. Since neither the state nor anyone else sought to impose restrictions on any rights protected by the first amendment, the strict procedural safeguards of an immediate appellate review was not mandated nor needed in the instant case. *See Nebraska Press Association v. Stuart*, 423 U.S. 1319, 96 S.Ct. 237, 46 L.Ed.2d 199 (1975); *Friedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

Not only did the press not have the right to bring the instant appeal pursuant to Rule 9.100(d), it additionally had no right to a stay pending review as declared in *Skokie*. The fact that the instant divorce proceedings were stayed from October 1986 until March of 1987, is an injustice in and of itself. The

emotional turmoil and mental distress caused by the press's attempt to snoop is nothing less than incredible.

As with all divorce proceedings, the parties had been under extreme duress and stress and there was absolutely no reason for it to continue in light of the fact that the press had presented no counter-balancing reasons to report and attend the divorce proceedings. The press had made an illusionary argument that they would be irrevocably harmed unless the stay was granted but such was that -- illusory. This court has suggested that divorce proceedings be completed within six (6) to nine (9) months due to the stress placed upon the parties in such proceedings. The instant divorce had been ongoing for approximately ten (10) months prior to the stay being entered by the district court. The divorce did not go to trial until approximately one and a half years from the date of inception due to the actions taken by the press and the appellate court.

The First District had held in *State ex rel. English v. McCrary*, 328 So.2d 257, 260 (Fla. 1st DCA 1976) (Smith, J. *concurring specially*):

> To have issued a rule *nisi* in response to the suggestion in order to give Mr. and Mrs. Morrison and others affected an opportunity to present their views on the matter, we would have effectively shut down a unique judicial proceeding which makes extraordinary demands for compassion and sensitivity on the judge, the parties, and the lawyers. To have done that in order to evaluate at leisure the competing interest of the public in witnessing the painful dismemberment of a marriage would invert the purpose of the discretionary writ, which is to alleviate, not to create, 'great

> urgency, special emergency or absolute necessity.'

The petitioner respectfully requests this Honorable Court to express the judiciary's universal disdain for the disruption of one of the most sensitive of judicial proceedings -- a marriage dissolution -- and declare that Rule 9.100(d) was never intended to allow the press to appeal an adverse ruling in a civil proceeding.

The fact that the press could forestall a divorce proceeding shows precisely how far asunder the law pursuant to alleged first amendment rights has gone. The liberty of the press was declared to be essential to the nature of a free state but that it consisted in laying no previous restraints upon publication. In *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), the Supreme Court pronounced against prior restraints by declaring that the government could not censor or muzzle the press once it had obtained information. The Court also held, however, that while the press was free to publish what it discovered, it had no constitutional protection in its search for information before publication. *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

In the instant case, the press is attempting to assert some alleged news gathering right. The press made an effort in the federal courts to assert its news gathering right, a right which had never been recognized by the courts, in the form of a constitutional shield under the first amendment free press clause. The effort failed when the Supreme Court decided *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). In

Branzsburg, the Supreme Court refused to find constitutional protection for newsmen who had been subpoenaed by grand juries investigating criminal activities.

The press has also only traditionally had the expressly guaranteed freedoms of the first amendment when it came to information about the government as the first amendment shared a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Thus it has been held that to the extent that the first amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one. *Globe Newspapers Company v. Superior Court, etc.,* 457 U.S. 596, 605-606, 102 S.Ct. 2613, 2619, 73 L.Ed.2d 248 (1982). Since the government is a party to criminal trials, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole.

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process with benefits to both the defendant and to society as a whole. Moreover, public access to criminal trials fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process -- an essential component of our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Id. at 606, 102 S.Ct. at 2619-2620. Since the government is not

a party in civil suits, there simply is no corresponding first amendment right to civil proceedings.

The press has not, to this day, achieved an outright pronouncement by the Supreme Court of a news gathering right. However, the First District in the instant case has indeed given the press such a right. The Supreme Court has declared that the press has no special right to gather news, even about the government. *Nixon v. Warner Communications, Inc., supra,* 435 U.S. 589.

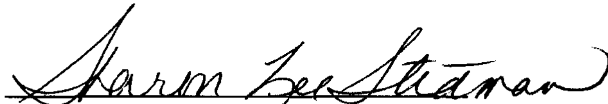
The petitioner submits that Florida has provided a statutory scheme for access to public records in Chapter 119. The petitioner further submits that the citizens of Florida have declared what the press and the public has the right to know and how to proceed to get that information. The citizens of Florida set up the specific exemption from that right of access for court files that have been specifically closed by order of the court. Sec. 119.07(4), Fla.Stat. (1987)

The citizens of Florida have declared what the press has the right to know in its public records act and has likewise declared what the press has no right to know via the constitutional right to privacy. The press sidestepped the public records act and is into the realm of the petitioner's zone of privacy. Every citizen of Florida has a right of privacy and no citizen of Florida should have their painful divorce stayed for no reason other than the press's attempt to promote public scandal. Such simply cannot be.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the petitioner respectfully requests that this Honorable Court reverse the judgment of the First District Court of Appeal.

Respectfully submitted,



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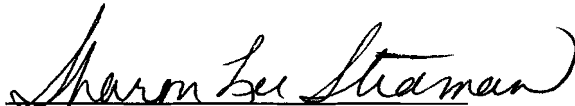
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to William A. Lewis, Esquire, Post Office Box 1579, Panama City, Florida 32402 and Clay H. Coward, Esquire, Suite 1599 Firstate Tower, 255 South Orange Avenue, Orlando, Florida 32801 by United States Mail this 23rd day of December 1987.



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