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SUPREME COURT OF FLORIDA

CASE NUMBER: 70,910

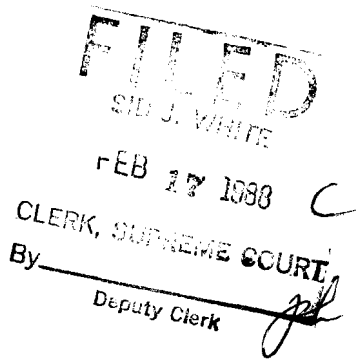
DEMPSEY J. BARRON,

Petitioner,

v.

FLORIDA FREEDOM NEWSPAPERS, INC.,

Respondent.



PETITIONER'S REPLY BRIEF ON THE MERITS

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POINT I

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.

In their briefs, the press have consistently mixed apples with oranges and have attempted to convince this court of a non-existent principle of law. Different principles of law, and, therefore, different standards of review are applicable depending upon whether the issue involved is one of criminal trials, judicial documents, private litigation or civil proceedings in general, and domestic relations cases. The instant case involves a domestic relations proceeding and documents filed therein. The press have attempted to have this Honorable Court apply a strict scrutiny test when such is not utilized in judicial documents filed in civil proceedings much less necessary or applicable in domestic relations cases.

The law is consistent in that the first amendment to the United States Constitution does assure a right of access to criminal trials. Those cases that have so declared are the cases relied upon by the newspapers collectively. *Press-Enterprise Company v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*voir dire* proceedings); *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 610-611, 102 S.Ct. 2613, 2622, 73 L.Ed.2d 248 (1982) (minor's testimony during rape trial); *Richmond Newspapers, Inc. v. Virginia,*, 448 U.S. 555, 517, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980) (criminal

trial). Thus, the standard to be applied to determine whether the trial court correctly denied public access to a criminal trial is a "heightened scrutiny" test formulated by Chief Justice Burger in *Press-Enterprises*, when he stated:

> 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. The interest to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprises, supra, 104 S.Ct. at 824; *see also, Globe Newspapers, supra,* 147 U.S. at 606-607, 102 S.Ct. at 2619-2620; *Richmond Newspapers, supra,* 448 U.S. at 580-581, 100 S.Ct. at 2829.

However, the Supreme Court has not held the heightened scrutiny test to apply to civil litigation. Just as declared by Justice O'Connor in her concurring opinion in *Globe Newspapers, supra,* 457 U.S. at 612, 102 S.Ct. at 2623, "Thus I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials."

Even in the criminal trial context, a distinction is drawn between the trials themselves and other aspects, such as pre-trial depositions. In that same case, Chief Justice Burger, in his dissenting opinion, joined by Justice Rehnquist wrote the following: "The court seems to read our decision in *Richmond Newspapers* as spelling out a First Amendment right of access to all aspects of criminal trials under all circumstances. This is plainly incorrect." *Globe Newspaper, supra, id.* at 613, 102

S.Ct. at 2623 (citations omitted). *Accord, Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987), *cert. den.*, ___ U.S. ___, 108 S.Ct. 346, 98 L.Ed.2d 327 (1987).

Additionally, it is consistent throughout all jurisdictions in the United States that there is merely a common-law right of access to judicial records, whether in civil cases or criminal cases, which is also referred to as a presumption of a public right of access. *See Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1068-1069 (3d Cir. 1984); *In re Continental Illinois Security Litigation,* 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corporation v. Federal Trade Commission,* 710 F.2d 1165, 1168-1179 (6th Cir. 1983), *cert. den.*, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984). The press has incorrectly cited these cases for the proposition that a constitutional right of access applies to civil documents. *Amicus Curiae Briefs* of Tallahassee Democrat, Inc. at p. 14 n.11.; Miami Herald Publishing Company at p. 10; Sentinel Communications Company at p. 19.

Likewise, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 41-44 (C.D. Cal. 1984), held that a common-law presumption of access attached to civil litigation documents. The court specifically rejected a first amendment right of access although the Miami Herald Publishing Company declared in its brief that it "recogniz[ed] first amendment right of access to documents filed during pretrial civil proceedings." *Answer Brief of Amici Curiae* at p. 10. The one case that did hold that the products of discovery embody first

amendment interests held that it was a limited first amendment interest scrutinized under a less severe standard than ordinarily applied to prior restraints. *In re San Juan Star Company*, 662 F.2d 108, 115 (1st Cir. 1981) (cited for incorrect proposition by the Sentinel Communications Company at p. 19 and the Tallahassee Democrat, Inc. at p. 14). It is interesting to note that, although the case was a civil rights action, it involved the killing of two suspected terrorists by police officers, which is more closely aligned with criminal cases than civil. *Accord, Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (presumption of openness applied to proceedings which related to the release of convicted prisoners because there is little difference between those proceedings and a criminal trial; did not decide the issue of whether the presumption of openness applied to all civil trials).

Consequently, contrary to the allegations set forth in the answer briefs, a heightened scrutiny test is not applied to judicial records in civil litigation since there are no competing constitutional rights involved.

It has long been recognized that every court has supervisory powers over its own records and files and may deny access when court files may be used for improper purposes. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); *Tax Analysts v. United States Department of Justice*, 643 F.Supp. 740 (D.C. Cir. 1986); *Rogers v. Proctor & Gamble Company*, 107 F.R.D. 351 (E.D. Mo. 1985). It is of paramount importance to note that the United States Supreme Court specifically cited to

divorce cases when it declared that the common-law right of inspection should bow 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." *Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 600, 98 S.Ct. 1312. The *Nixon v. Warner Communications, Inc.,* case is the only federal case that has even alluded to a divorce case. Consequently, none of the cases cited by the newspapers are support for their position that the heightened scrutiny test should be applied in the instant case.

The newspapers have collectively argued that the trial court erred in applying a common-law standard and asserted that a constitutional standard based on the first amendment freedom-of-speech-and-press is the proper standard to apply in the instant case to the sealing of the files and closure of the proceedings. However, no such standard has ever been established by this court or the United States Supreme Court. Only a common-law right of access should be considered where civil action files and domestic relations proceedings are involved. *Minneapolis Star & Tribune Company v. Schumacher,* 392 N.W.2d 197 (Minn. 1986); *Times Herald Printing Company v. Jones,* 717 S.W.2d 933 (Tex. 1986). Under the common-law right, a presumption in favor of access arises, *see In re Knoxville News-Sentinel Company,* 723 F.2d 470, 474 (6th Cir. 1983); *Joy v. North,* 692 F.2d 880 (2d Cir. 1982), *cert. den.,* 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983), so that a party

seeking to restrict access must assert a sufficiently strong interest in support of denying access in order to overcome the presumption. Such is precisely what the trial court did in the instant case.

The trial court found that there was a cogent reason which was the determinative factor in the court's decision to seal the file and close the hearing. It is undisputed that a common-law right, as opposed to a first amendment right, attaches to court records. *See Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 597, 98 S.Ct. at 1311 ("It is clear that the courts of this country recognize a general right to inspect and copy---judicial records and documents"); *Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983); *State ex rel. Bilder v. Township of Delavan,* 112 Wis.2d 539, 334 N.W.2d 252 (1983); *In re Estate of Hearst,* 67 Cal.App.3d 777, 136 Cal.Rptr. 821 (1977). Consequently, the newspapers have absolutely no support in the law for their position that the trial court should have applied the heightened scrutiny test, *i.e.,* the three-prong criminal law test, to the files. The only true question remains as to the standard to be applied in domestic relations proceedings, as opposed to files, to be discussed more extensively under Point II.

A balancing test is applied to determine whose interests should prevail when a common-law right of access is involved. *Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 598, 98 S.Ct. at 1312. The Supreme Court has applied a two-part analysis when considering whether the standard for access to a particular

aspect of a trial or a particular court document must be based upon common law or constitutional grounds. *Minneapolis Star & Tribune Company v. Schumacher, supra,* 392 N.W.2d at 203. The "Court first examines the proceeding or document to determine whether it has historically and philosophically been presumed open to the public." *See, e.g., Press-Enterprise Company v. Superior Court of California,* ___ U.S. ___, 106 S.Ct. 2735, 2741 92 L.Ed.2d 1 (1986); *Richmond Newspapers, supra,* 448 U.S. at 564-575, 100 S.Ct. at 2820-2826. If a historical and philosophical analysis leads to a "presumption of openness" *id.* at 573, 100 S.Ct. at 2825, the Court then examines the constitutional right asserted to determine whether it "affords protection" to the proceeding or document in question. *Id.* at 575-581, 100 S.Ct. at 2826-2829.

For example, in *Gannett Company v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 62 L.Ed.2d 608 (1979), the Court considered whether access to pretrial proceedings in a criminal case falls within the purview of the sixth and fourteenth amendments. The Court found that historically the public had little or no right to attend pretrial criminal proceedings. The court also found a philosophical objection to public access to pretrial proceedings in the "strong societal interest in [the] constitutional guarantees extended to the accused." *Id.* at 383-384, 99 S.Ct. at 2907. The lack of a presumption of openness to pretrial proceedings from both a historical and philosophical perspective meant "that

members of the public have no constitutional right under the sixth and fourteenth amendment to attend criminal trials."

In *Richmond Newspapers, supra,* 488 U.S. at 569, 100 S.Ct. at 2823, the Court, by contrast, found a first amendment right of access to trial proceedings in criminal cases. The Court examined at length the history of criminal trials and stated that "the historical evidence demonstrates conclusively that ....criminal trials both here and in England had long been presumptively open."

The same simply cannot be said of domestic relations cases. Historically domestic cases could not have been presumed open to the public since there was no right to a jury trial at common-law in cases of equity. Divorce suits have always been regarded as being in the nature of a suit in equity, section 61.011, Florida Statutes, and, therefore, the state constitutional provision does not secure the right of a jury trial for such cases. *See Smith v. Barnett Bank of Murray Hill,* 350 So.2d 358 (Fla. 1st DCA 1977) (state constitutional provision secures the right of a jury trial for cases in which a jury trial was traditionally afforded at common-law). An action for divorce is entirely dependent on statute, as there was no common-law right to divorce. *Merritt v. Merritt,* 369 So.2d 1005 (Fla. 2d DCA 1979). Consequently, Barron respectfully submits that a balancing test is not only applied to the closure of his divorce files but also to the closure of the trial proceedings themselves. *See Press-Enterprise Company v. Superior Court of California,* 454 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (guarantees of open public proceedings in

criminal trials cover proceedings from *voir dire* examinination of jurors since jurors were selected in public at common-law).

The case relied on so heavily by all of the newspapers applied the common-law standard of "cogent reasons." In *State ex rel Gore Newspaper Company v. Tyson*, 313 So.2d 777 (Fla. 4th DCA 1975), the court declared that a trial court may exclude the public and press in civil proceedings for cogent reasons. The instant trial court based the closure precisely upon that, *i.e.*, cogent reasons which the trial court found to exist pursuant to a statutory exemption from the disclosure of said information, an issue not involved in *Tyson*. Of further import is the fact that *Tyson* was decided prior to Florida's constitutional right of privacy amendment. None of the newspapers have addressed the fact that the trial court based its closure upon a statutory basis to which the public records act does not apply.[1]

Whatever right the press may have, whether it be a common-law or constitutional right, it is a right that belongs to the people. And the people of the State of Florida have specifically limited their right to know by exempting from the public records act public records made confidential by statute. § 119.07(2)(a) Fla. Stat. (1987). The public records act exemption declares that the person contending the record is exempt from inspection and examination shall state the basis of the exemption which he contends is applicable to the record including the statutory

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[1]This court has before it the sealed files and, therefore, can review the file and determine that the file does contain documents that are required by law to be confidential.

citation to an exemption created or afforded by statute. *Id.* The trial court declared in its order denying the intervenor's motion to set aside the order that "[t]he motion filed requesting closure of the proceedings and sealing the file does state with specificity and supporting documents the information upon which the court's closure order is based." The court found, however, that if it specifically stated the reason in the order then it would have done away with the reason to have the file sealed. Since the request for closure was based on a specific statutory exception to the Public Records Act, the reasons stated by the trial court, although not stated with specificity, rise to the level of a "cogent reason" since it was not done merely for the wishes of the parties as was the situation in *Tyson*.

Barron respectfully submits that the statutory exemptions found to be excluded from the Public Records Act are to protect individual privacy interests. In *Yeste v. Miami Herald Publishing Company*, 451 So.2d 491, 494 (Fla. 3d DCA 1984), *rev. den.*, 461 So.2d 115 (Fla. 1984), for example, the court held that the portion of a death certificate which contained the medical certification of the cause of death was made confidential by statute and was therefore exempt from public inspection. The court declared that if made public, this information could cause public embarrassment to the deceased's family and that the legislature had thought it best to keep that portion of the death certificate confidential and deleted so as to spare the feelings of the deceased's family.

The court in *Yeste* specifically rejected the Miami Herald's argument that, apart from any statute, it had a free press right of access to the medical certification portion of Dr. Yeste's death certificate. "We are cited to no constitutional authority in Florida or elsewhere which has ever held that a newspaper has a free press right of access to public records such as that presented in the instant case. We decline to be the first court to so hold." *Id.* at 495. *Accord, 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 exact same reasoning and rationale applies in the instant case since the court file contained information which the citizens of Florida have declared confidential. Just as the press in *Yeste* had no free press right of access to the medical certification portion of Dr. Yeste's death certificate since it was specifically exempted by statute, the press in the instant case likewise has no free press right of access to the sealed file. The trial court, as discussed *supra*, specifically looked at the documents and the statute making the document confidential and declared that the files and proceedings should be sealed since they were excluded from the Public Records Act. § 119.07(3)(a), Fla. Stat. (1987).

Article one, section 23 of the Florida Constitution, Florida's right of privacy, incorporates the Public Records Act which, as discussed *supra*. The act specifically exempts materials made

confidential by statute so that Barron's constitutional right of privacy attaches to those documents and the court proceedings since they were specifically sealed by order of the court. To be discussed *infra*, the Public Records Act likewise excludes from the public's right to know court files specifically closed by order of the court. § 119.07(4), Fla. Stat. (1987). Federal courts have consistently held that disclosure of information that is specifically exempted under the federal Freedom of Information Act would constitute an invasion of privacy. *E.g., United States Department of State v. Washington Post Company,* 456 U.S. 595, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982); *Core v. United States Postal Service*, 7320 F.2d 946 (4th Cir. 1984); *Kiraly v. F.B.I.*, 728 F.2d 272 (6th Cir. 1984); *The Miami Herald Publishing Company v. United States Small Business Administration*, 670 F.2d 610 (5th Cir. 1982); *United States v. Westinghouse Electric Corporation,* 638 F.2d 570 (3d Cir. 1980).

For instance, the Court in *United States Department of State v. Washington Post Company, supra*, 456 U.S. at 601, 102 S.Ct. at 1961, held that any information contained in a "personnel" or "medical" file would be exempt from any disclosure as it would constitute a clearly unwarranted invasion of personal privacy to disclose the information. The Court continued that congress sought to protect an individual's right of privacy by preventing the disclosure of information which might harm the individual. Barron respectfully submits that the exact same rationale applies in the instant case and that the trial court should be affirmed

on this basis alone since to disclose it would be an invasion of Barron's right of privacy.

Barron further submits that the reasoning and rationale for applying a heightened scrutiny test to criminal trials simply is inapplicable to civil trials in general and specifically to divorce proceedings. The importance of the public having an opportunity to observe the functioning of the criminal justice system has long been recognized by the courts in this state and in other jurisdictions. Criminal trials in the United States have by historical tradition, and under the first amendment, been deemed presumptively open to public scrutiny and this "...presumption of openness inheres in the very nature of the criminal trial under our system of justice." *Richmond Newspapers, Inc. v. Virginia, supra,* 448 U.S. at 573, 100 S.Ct. at 2825. As stated by Justice Hugo Black in *In re Oliver*, 333 U.S. 257, 266, 68 S.Ct. 499, 504, 92 L.Ed. 682 (1948):

> This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common-law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.

The nature of criminal law is such that it punishes offenses against the collective public and, accordingly, members of the public have an interest in observing the criminal justice process to be assured that offenses perpetrated against them are dealt with in a manner that is fair to their interest, and fair to the interests of the accused. *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414, 417 (1987). In *Fenstermaker*, the issue before the

court was the extent of permissible public access to arrest warrant affidavits. The court declared that the threshold inquiry in a case such as the one before them where a common-law right of access is asserted is whether the documents sought to be disclosed constitute public judicial documents. The court answered the question in the affirmative by declaring that the documents that are filed with the magistrates constitute "judicial" documents. However, in the instant case, the documents and sealed files are not public judicial documents since they are specifically excluded as public records by the Public Records Act.

Of importance to the instant case, also, is the court's analysis of the tradition of keeping proceedings and records of the criminal justice system open to public observation. This analysis simply does not hold true in civil proceedings wherein the state is not a party, hence, "private litigation." The same interests do not need to be protected so that a lesser standard than that of heightened scrutiny should apply.

The standard utilized by the trial court and the court in *Sentinel Communications Company v. Smith*, 493 So.2d 1048 (Fla. 5th DCA 1986), *rev. den.*, 503 So.2d 328 (Fla. 1986), *i.e.*, the cogent reason standard, fully protects the press and public's common-law right of access as well as taking into consideration the private individual's rights. The trial courts of the State of Florida are certainly capable and competent to ascertain whether or not the reasons for closure are cogent ones. Trial

courts are in the best position to judge the demeanor of the parties, to know the nature of the individuals and interests involved, and, therefore, are in a much better position than an appellate court to make a proper determination of whether or not a cogent reason has been presented. To be discussed *infra*, however, the petitioner respectfully submits that a standard less strict even than cogent should apply to domestic relations cases since it is those cases that can be used to gratify private spite or promote public scandal through publication.

POINT II

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

Not only does every citizen have a right of privacy in civil litigation, but this Honorable Court has held that defendants in criminal trials have privacy rights under article I, section 23 of the Florida Constitution. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 379-80 (Fla. 1987), *cert. den.*, ___ U.S. ___, 108 S.Ct. 346, 98 L.Ed.2d 372 (1987). Certainly, if criminal defendants have privacy rights in criminal trials, then citizens have no less in civil litigation.

In *Burke*, this court balanced the rights of the public and press under the first amendment with the privacy rights of the accused and other trial participants under the first amendment and article I, section 23 of the Florida Constitution as well as the defendant's due process rights and the right to a speedy and public trial by an impartial jury in the venue where the crime was allegedly committed, in holding that the press is not entitled to notice and the right to attend pretrial discovery depositions in a criminal case. In so holding, this court relied, in part, on *Press Enterprise Company v. Superior Court*, 464 U.S. 5011, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), which case this court stated to have held:

> The court held that it was error to close the proceedings [jury selection in a criminal trial] and totally suppress the transcript because there were no findings that the right to a fair trial and privacy interests were threatened....

Id. at 380 (emphasis added). Consequently, the arguments advanced by the press in the instant case that citizens have no privacy rights in civil litigation has no basis in the law.[2]

As this court so succinctly declared in *Firestone v. Time, Inc.*, 271 So.2d 745, 750 (Fla. 1972), a line must be drawn somewhere between what the public has a right to know about a public figure and the area of that public figure's activities that fall outside the area of public or general interest. Barron respectfully submits that public figures cannot be denied a private life, or soon we will have no public figures worth having. (App. 1). The instant dissolution of marriage proceeding is of no real concern to the public since Barron is not a professional marriage counselor, for example, so that there is no logical connection between the divorce action and the inquiring concern of the public whose patronage is sought. *Id.* at 752. Consequently, although "inquiring minds" may want to know of Barron's private affairs as relates to his dissolution of marriage proceedings, it is of no real public concern as defined by this court.

> But withal, we are committed to the view that neither wealth, social position nor fame, of themselves, render the private affairs of those involved amenable to constitutionally protected unbridled public scrutiny

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[2]In a classic first amendment case, the United States Supreme Court has recently balanced privacy interests of individuals against high school students' first amendment rights in holding no violation of first amendment rights occurred when school officials deleted two (2) pages from the school newspaper. Hazelwood School District v. Kuhlmeier, ___ U.S. ___, 108 S.Ct. 562 (1988). Senator Barron likewise has a right to have his privacy interests balanced against the public and press' common-law right of access to the judicial records and proceedings.

> under the guise of public or general interest. That the public was curious, titillated or intrigued with the scandal in the Firestone divorce is beyond doubt. But we again emphasize the distinction we make between that genre of public interest and real public or general *concern*. Applying the suggested test, where in this case is the logical relationship between the marital difficulties of the Firestones and real public concern? The matter certainly doesn't inhere significantly within the areas of public concern we categorized earlier; and no category otherwise can be articulated except prurient curiosity, which we reject as too frivolous a predicate upon which to expend constitutional rights.

Id. (emphasis supplied).

Firestone is in accord with not only Barron's position but with the case law in other jurisdictions. In *George W. Prescott Publishing Company v. Register of Probate for Norfolk County,* 395 Mass. 274, 479 N.E.2d 658 (1985) (App. 2), upon motion, the records of the divorce proceedings involving a public official were impounded. The public official, Mr. Collins, was the treasurer of Norfolk County and the Chairman of the Norfolk County Retirement Board. On August 1, 1984, a motion to impound the records was granted by the trial court.

On December 24, 1984, the George W. Prescott Publishing Company, publisher of The Patriot Ledger, a daily newspaper, filed a complaint against the register of the probate, and Ann and James Collins, seeking relief from the impoundment order. Procedurally this is precisely what occurred in the instant case. The complaint in the *George W. Prescott* case, however, alleged that Treasurer Collins was under investigation by both the State Ethics Commission and the State Public Employee Retirement Administration, and that his misconduct in office had been the

subject of numerous articles in The Patriot Ledger. The allegations of Collins's misconduct involved, among other things, the placement of certain relatives on the county payroll, and his management of the county's financial affairs. Treasurer Collins' financial affidavits were part of the court file that were sealed.

The instant case differs significantly in that the press in the instant case did not, as well as it could not, make any allegation as to legitimate interest in Barron's dissolution proceedings such as the press made in the above case. Barron respectfully submits that if the press had, indeed, been able to make such an allegation then the divorce proceedings would come within the *Firestone* definition of public concern and the press would be on different footing. The only "footing" the press is on in the present case, however, is a fishing expedition in the mere hopes of finding something that will titillate the prurient curiosity of the public.

In reaching its decision in *George W. Prescott*, the Massachusetts Supreme Court initially discussed the rule regarding discretion in regulating the course of discovery in domestic cases. The rule discussed is analogous to Florida Rule of Civil Procedure 1.280(5),(6) for the Massachusetts' rule provides that "[f]or good cause shown, the court... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The court acknowledged that, although the rule did not explicitly refer to impoundment, courts in other jurisdictions have interpreted

cognate rules as authorizing impoundment in appropriate circumstances.

The court specifically cited to the United States Supreme Court decision in *Seattle Times Company v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which held that the impoundment of materials obtained in the course of pre-trial discovery was supported by "a showing of good cause," did not violate the first amendment. Barron respectfully submits that the standard of cogent reason is equivalent to, and in fact, a higher standard than "a showing of good cause."

The Massachusetts' court continued that *Seattle Times* was consistent with their long-standing view that a court has inherent equitable power "to impound its files in cases and to deny public inspection of them ...when justice so requires," citing to *Sanford v. Boston Herald-Traveler Corporation*, 318 Mass. 156, 158, 61 N.E.2d 5 (1946). Such a holding is consistent with the law in Florida as well in that a court likewise has the inherent equitable power to control what transpires in the courtroom and to seal their records from public review where the ends of justice require. *Johnson v. State*, 336 So.2d 93 (Fla. 1976).

Barron submits that in determining whether a cogent reason exists, a trial court is required to balance the privacy interest at issue against any competing principle of publicity. Such was the standard utilized by the Massachusetts Supreme Court in determining the existence of "good cause" for impoundment. *Id.* at 662.

> We conclude that the legitimate expectations of privacy, possessed by most litigants in domestic relations proceedings, would ordinarily constitute "good cause" to justify impoundment of discovery materials which are confidential in nature.

See Seattle Times Company v. Rhinehart, supra, 104 S.Ct. at 2208, n.21, 2209 (protection of privacy interests or avoidance of "annoyance, embarrassment [or] oppression" sufficient to constitute good cause).

Under the facts of the *George W. Prescott* case, however, the court stated that a different standard must be applied when the deposition testimony at issue concerned a public official and when the testimony was relevant to allegations of misconduct in office. The court, consequently, remanded the case to the trial court to reconsider its ruling in light of said statement. Such a holding is consistent not only with Barron's position, but the law in Florida. Since there have been no allegations of misconduct in office nor has the press pointed to any legitimate public concern, this Honorable Court should proceed no further than determining that the legitimate expectations of privacy possessed by most litigants in domestic relations proceedings attach to Senator Barron and justifies the sealing of the instant proceedings.

Of additional importance to the instant case is the court's discussion of exactly when a public official has a diminished privacy interest. Counter to the arguments and positions of the press in the instant case, the court declared that a public official has a significantly diminished privacy interest with respect to information relevant to the conduct of his office.

Accord Rawlins v. Hutchinson Publishing Company, 213 Kan. 295, 543 P.2d 988 (1975). There has been no allegation that the information in the instant case is relevant to the conduct of Senator Barron's office as well as there could be none. Consequently, Senator Barron has no diminished privacy interest in his dissolution proceedings.

In determining that Treasurer Collins had a diminished privacy interest, the court cited to Prosser, *Privacy*, 48 Cal. L. Rev. 383, 410-412 (1960) and the Restatement [Second] of Torts, §652D, Comment d (1977), "[w]hen the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy."[3] This is in harmony with this court's holding in

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[3]*Accord* Yorty v. Stone, 259 So.2d 146 (Fla. 1972) (for purpose of determining whether presidential candidate's right of privacy is violated by requiring his name to appear on primary election ballots, candidate is a "public whose right to privacy yields to public interest"). The Miami Herald's reliance on Kapellas v. Kofman, 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969), is not only misplaced for the proposition that the press declares, but actually supports Barron's position that he has a right of privacy in the instant case. Kapellas evolved from an editorial published in the press discussing certain alleged facts as to Mrs. Kapellas who was at the time a candidate for the city council. The court held that the facts of that case did not support an action for invasion of privacy since the facts published about the Kapellas' children were "newsworthy." The court continued that because of their public responsibilities, government officials and candidates for such office have always been considered public figures. In choosing those who are to govern them, the public must be afforded the opportunity of learning about any facet of the candidate's life <u>that may relate to his fitness for office.</u> The court continued, however, that even when the subject of commentary is a public official or one closely related to an official, the disclosure of some matters may constitute such an invasion into the individual's private life with so little justification that the publication may be unprivileged. Barron respectfully submits that the instant proceedings involve precisely that, *i.e.*, an invasion into his private life with little social justification. The press has simply gone to far. *Accord* App. 5.

Firestone and should be reaffirmed by this court in the instant case.

Since the court determined that the public has a vital interest in full disclosure of all information which was relevant to Treasurer Collins' alleged misuse of authority, then the documents at issue could only be impounded on a showing of overriding necessity which must be based on specific findings. That is the standard that the press in the instant case is requesting this court hold as to the dissolution proceedings of Senator Barron. Such is not the law and cannot be the law when, as declared by the Fifth District Court of Appeal in *Sentinel Communications Company v. Smith, supra*, 493 So.2d 1048 (Fla. 5th DCA 1986), Senator Barron got married and divorced not as a public official, but as a natural human being just as all other citizens. There is simply no need for Florida's constitutional right of privacy, a means of protection for those wishing "to be let alone," to yield to the federal constitution's guarantee of free press since it is not implicated in the instant case. *See Doe v. Sarasota-Bradenton Florida Television Company, Inc.*, 436 So.2d 328, 330-332 (Fla. 2d DCA 1983) (Florida's constitutional right of privacy must yield to the federal constitution's guarantee of a press freedom when the information is obtained through the vehicle of a public criminal trial).

Additionally, as declared by the United States Supreme Court in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), states are not completely helpless

to provide protection to the privacy rights of their citizens. "If there are privacy interests to be protected in judicial proceedings, the states must respond by means which avoid public documentation or other exposure of private information." The citizens of Florida have so responded by specifically exempting the documents submitted by Barron in the trial court, as well as files specifically sealed by order of a court, from the public and press' right to know. The State of Florida, through the citizens of Florida, did not declare that if one is a public official then the exemptions do not apply. The federal courts have consistently held that government officials, by virtue of their positions, do not forfeit their personal privacy for federal freedom of information purposes. *E.g. Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856 (D.C. Cir. 1981); *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978).

The federal decisions are in accord with *George W. Prescott* in that if the information sought concerns, for example, campaign contributions, then the public figure may have a diminished privacy interest. Such simply is not what this court is presented with in the instant case. *Accord Plaquemines Parish Commission Counsel v. Delta Development Company, Inc.*, 472 So.2d 560 (La. 1985) (public officials have diminished right to privacy concerning information having to do with their conduct in office and any revenues derived therefrom).

The Miami Herald has made the allegation that Barron was not compelled to go to court in that he could have chosen to participate in a confidential mediation process, citing to the Supreme Court Commission on Matrimonial Law and section 61.183, Florida Statutes. (App. 3). Such an allegation is without basis inasmuch as the only mediation process available is pursuant to section 61.183 which declares that "[i]n any proceeding in which the issues of custody, primary residence, or visitation of a child are contested, the court may refer the parties to mediation. Mediation services may be provided by the court or by any court-approved mediator." There were not any issues in the instant case involving custody, primary residence, or visitation of children.

Beginning January 1, 1988, Florida circuit and county judges will have the power to refer all contested civil actions to mediation or non-binding arbitration. Mediation in the area of family law is to be included. (App. 4). Common sense will tell one that legislation that does not go into effect until January 1, 1988, has no effect on a proceeding that has already been terminated by that date. Consequently, as declared by the Fifth District in *Smith*, Barron was, indeed, compelled to go to court in order to have his marriage dissolved and he went as a citizen of Florida, not as a public official. And when Barron did go to court as compelled, he had just as much right to be let alone with regards to his private life and affairs as every other citizen of the state of Florida. If the law were to become as the press has alleged, that public officials have absolutely no

private life of their own, then it is, indeed, a very sad state of affairs. The line must be drawn somewhere and Barron respectfully requests that the line be drawn when his right of privacy conflicts with "inquiring minds."

POINT III

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

Since there is no first amendment right involved in divorce proceedings, but a common-law right of access, then the standard of review applicable is an abuse of discretion. *Meyer Goldberg, Inc. of Lorain v. Fisher Foods,*, 823 F.2d 159 (6th Cir. 1986); *Alexander Grant & Company Litigation*, 820 F.2d 352 (11th Cir. 1987); *Wilson v. American Motors Corporation*, 759 F.2d 1568 (11th Cir. 1985); *Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983). The highest court in the land has also held that the decision of access is best left to the sound discretion of the trial court, such discretion to be exercised in light of the relevant facts and circumstances of the particular case when there is no constitutional right to the information. *Nixon v. Warner Communications, Inc., supra,* 415 U.S. at 600, 98 S.Ct. at 1312. None of the cases relied on by any of the press involves a domestic relations case so that the cases they have relied on are no support for the instant case.

The standard for whether or not a trial court abused its discretion was succinctly set forth in *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980), which, contrary to the amicus, is the standard of the scope of review in Florida of this discretionary power granted to the trial court. *Mercer v. Raine*, 443 So.2d 944, 946 (Fla. 1983). In *Mercer*, the *Canakaris* standard was applied to the discretionary power of the trial court to grant sanctions. Thus, to justify reversal, it would have to be shown

on appeal that the trial court clearly erred in its interpretation of the facts and the use of its judgment and not merely that the court, or another fact-finder, might have made a different factual determination. The First District Court of Appeal in the instant case made a different factual determination, rather than applying the proper standard to the trial court's findings. Accordingly, under the well established law in Florida, the First District Court of Appeal erred in substituting its judgment for that of the trial court.

POINT IV

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

This Honorable Court recently defined prior restraint. "Prior restraint is a term of art which is customarily applied to orders prohibiting publication or broadcast of information already in the possession of the press. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)." *Florida Freedom Newspapers, Inc. v. McCrary*, 13 F.L.W. 92, 94 (Feb. 11, 1988). Barron respectfully submits that the instant case does not involve prior restraint so that the rationale and reasoning of allowing the press to immediately appeal under Florida Rule of Appellate Procedure 9.100(d) should not be allowed in the instant case nor in any domestic relations case.

The Supreme Court Commission on Matrimonial Law, relied upon by the Miami Herald, specifically noted that the state should develope a court-connected mediation process and make procedural improvements to avoid delays which can have a devastating effect on the parties and their children. (App. 3). To allow the press to delay a domestic relations case via Rule 9.100(d) runs counter to all that is right and just under our judicial system.

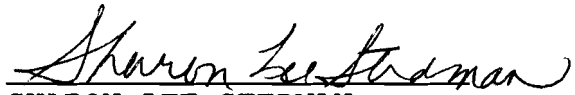
As noted by the Matrimonial Law Commission, matrimonial proceedings now comprise a substantial percentage of circuit

courts' civil cases and affect more individual citizens than any other matter within the civil jurisdiction of our courts. "The parties, because of their close relationship, become emotionally involved in the process and, at times, become irrational and vindictive, a condition which may be aggravated by the adversary nature of our traditional court processes." Mrs. Barron in the instant case eventually moved the First District Court of Appeal to lift their stay in order that the parties could proceed with their divorce on the ground that the stay was resulting in irreparable emotional harm to the wife. There is absolutely nothing under the present state of the law in Florida to prevent the press from doing precisely what they have done in the instant case to any other dissolution of marriage proceeding. Unless this Honorable Court announces that Rule 9.100(d) was never meant to be a vehicle to test every situation involving a denial of access by the press but, rather, was only meant to address issues involving the first amendment, then the press will be able to randomly and vindictively continue to cause irreparable emotional harm to parties in a domestic relations case already wrought with emotions and nerves stretched beyond human capabilities to withstand. If ever a case cried for court intervention, the instant case is it.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the petitioner respectfully requests this Honorable Court reverse the decision 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 and Franklin R. Harrison, Esquire, 304 Magnolia Avenue, Panama City, Florida 32401; C. Gary Williams, Esquire, Michael J. Glazer, Esquire, and Timothy B. Elliott, Esquire, Post office Box 391, Tallahassee, Florida 32302; Gerald B. Cope, Jr., Esquire and Laura Besvinick, Attorney at Law, 4870 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; Clay H. Coward, Esquire, David L. Evans, Esquire, William G. Mateer, Esquire, Suite 1599, Firstate Tower, 255 South Orange Avenue, Orlando, Florida 32801, by United States Mail this 15th day of February 1988.

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