OA 1-7-93

FILED
SID J. WHITE
SEP 8 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TIMES PUBLISHING COMPANY, MIAMI HERALD PUBLISHING COMPANY and THE STATE OF FLORIDA,

Petitioners,

v. CASE NO. 79,496

JOHN LEWIS RUSSELL, III,

Respondent.

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT, JOHN LEWIS RUSSELL, III

Richard S. Blunt
FBN 228435
110 South Armenia Avenue
Tampa, Florida 33609
(813) 253-3104
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

COUNTER STATEMENT OF THE CASE AND OF THE FACTS

Bad facts make bad law. The Court shall hear those words again in this Answer Brief.

In addition to the largely superfluous and somewhat distorted factual scenario laid out by the Petitioners in their Initial Brief, Russell would point out that this entire case really began in the fall of 1988 when the Miami Herald assigned an investigative reporter to do an article on the Bureau of Missing Children, Inc., a duly licensed, non-profit charitable organization founded in 1984 by Russell. The intended beneficiaries of the Bureau were, and still are, missing and abused children. As a long time private investigator, Russell was able to enlist literally hundreds of fellow private investigators, in Florida and elsewhere, who agreed to donate their time to help locate missing children. The Bureau would solicit contributions from the public as a source of funds used to further the purposes of the charity and to pay the administrative expenses of running the charity. In 1988, the Bureau was raising funds in the Dade County area and apparently attracted the attention of the Miami Herald. In March of 1989 the initial article on the Bureau and Russell appeared in the Herald (R.152-154).

That article, and many more subsequently published by the St. Petersburg Times, contained many specific facts of Russell's previous intercourse with law enforcement. The

newspapers were able to learn case numbers, dates, dispositions, detailed facts of the individual incidents, information they could only have gotten from a source within the law enforcement community or the court system itself. From Russell's point of view, the system that was designed to protect him and other members of the public from the embarrassment of public disclosure of past criminal charges failed him completely. The Petitioners would argue that Russell should not have been able to get the closure relief in the first place. But just look at the the information the Herald and Times were able to uncover, and not only on Russell, but other people as well. The exhaustive series of slanted articles and scathing editorials the Times ran in the spring of 1991 (R. 102-151), and there have been more since then, shows just how illusory the entire concept of closure has become. As has been pointed out to other tribunals along the way, the Times' legal challenge to the closure statute and common law has been rendered moot by the media's obviously ready access to the very information they seek.

Because the Petitioners are making every effort to muddle the issues, the Court has to be very careful not to expand the scope of this inquiry beyond what the facts of this case allow. This is an appeal from a decision from the Fifth District. At the trial level, the Herald and Times petitioned the Orange County Circuit Court for an order

vacating previously entered orders which closed judicial criminal history records. The Petitioners did not seek access to other law enforcement records, just judicial records. At the hearing on the merits, the Petitioners presented no evidence whatsoever in support of their position, not one witness was sworn, not one affidavit was offered into evidence. Even the most basic element of any legal proceeding, the identity of the defendant, was not established by any evidence. The total lack of evidence, in essence, was what the Fifth District hung its hat on in Russell v. Times Publishing Co., 592 So.2d 808 (Fla. 5th DCA 1992), (hereinafter referred to as "Russell II"). No good cause plead, no evidence offered. Burden on Times. Case closed. The mere fact that a person had possibly received more than one closure of judicial records was insufficient, as a matter of law, to unseal those records.

The fact is that from the beginning of this case the Times and Herald did not recognize the distinction between a court's inherent, common law ability to close its own records, and the court's statutory ability to close executive branch records. This court's ruling in Johnson v. State, 338 So.2d 93 (Fla. 1976) and the express language in section 943.058 (2) Fla. Stat. (Supp. 1980 et seq.) notwithstanding, the Second District in Russell v. Miami Herald Publishing Co., 570 So.2d 979 (Fla. 2d DCA 1990) (hereinafter referred to as "Russell I") specifically told

the Herald that it was not entitled to executive branch records because it had not asked for them. In its Initial Brief, the Petitioners go on for page after page with references to section 943.058 Fla. Stat., and why Russell did not qualify for closure relief under the statute. None of that is material to either the narrow issue in this case, which is: what is the test and who should carry the burden when judicial criminal history records closure orders are sought to be vacated, or the broader issue of whether or not society is served by allowing the courts to use their discretion to seal completed criminal judicial files where justice and fairness to people improperly accused so requires. The statute simply has nothing to do with it.

Whether Russell was entitled to the closure of executive branch records pursuant to statute is certainly an attractive red herring which time and time again has been waved around by the Petitioners. At the trial court level, this ploy had some success. Judge Sprinkel apparently accepted the arguments, allegations and suppositions of the Times' counsel as being facts. Russell, through counsel, admitted nothing. Judge Sprinkel apparently accepted as fact the contents of the newspaper articles which appear in the Record. The Fifth District saw through the ruse, realized that the Times did not offer the type of proof Johnson required, and ruled accordingly. To a significant extent, the same scenario was played out in Hillsborough

County in **1989,** when the Herald came in to that trial court and, before it was reversed by the Second District in Russell I, got Judge Coe to unseal two of Russell's three closed files there. Try as they might, the Petitioners have only been able to prove that they have a burning desire to unseal these files.

Before the Petitioners were in a position to know the facts, in earlier proceedings they accused Russell of fraud and perjury. Adjectives used by the Times and its attorneys to describe Russell's legal counsel were only slightly more complimentary. Because they failed to understand the discretionary nature of a court's ability to seal their own files, the Herald and Times just could not understand how Russell was able, under the law, to obtain more than one sealing. Then it came out that Russell had, in fact, disclosed to the Hillsborough County trial courts in the 1981 and **1984** cases (in the petitions to expunge themselves) that he had been the recipient of prior closure relief (R. **47,** 56, **161, 164).** Those were the only two petitions for closure filed when section 943.058 Fla. Stat. (Supp. **1980)** was in effect. All prior relief sought was pursuant to section 901.33 Fla. Stat. which did not require disclosure of priors. The Petitioners' statement that Russell never disclosed the existence of prior closure relief to the Tampa courts when required (Initial Brief p. **31)** is pure nonsense and an outright fabrication, although it is typical of the

Petitioners' style. Although Russell feels that a complete litany of the history of his alleged executive branch records closure relief is not germane to the more narrow issues presented by this case, detailed summaries of Russell's Hillsborough County proceedings were both explained to Judge Sprinkel (R. 29 et seq.) and are set forth in one of Russell's earlier briefs (R. 160-169).

One of the more obvious aspects of this case is the back-door fashion in which the Times and Herald are attempting to have this Court declare that the whole concept of judicial criminal records closure in Florida is unconstitutional. Now that this case is being heard by the Supreme Court, the Petitioners have another potential target for its smoke screen. To date, none of the district courts of appeal have accepted the Petitioners' argument that Russell's judicial records should be opened just because (A) Russell has obtained more than one closure and (B) the Times wants to see them. The lower courts seem to be saying that if you want to change the status quo (i.e. closed records), you have the burden of proof. Implicit in Russell I and Russell II is the principle that, in and of itself, more than one judicial record closures are within the scope of the law. There could very well be another rule for the closure of executive branch records closed pursuant to statute, but that issue is not before the Court in this case.

At all times herein it must be remembered that the issue in this case pertains only to a very narrow class of judicial records, i.e., criminal history records discretionarily sealed by the court in the interest of justice after those cases were completed. Until those files were sealed, all proceedings and records were handled in a routine, very public fashion and forum. The records in controversy here were sealed in accordance with a long standing common law tradition which exists in Florida that gives trial judges the ability to seal judicial criminal files at the conclusion of an unwarranted arrest or prosecution. This procedure is no more than basic justice.

SUMMARY OF ARGUMENT

First Amendment arguments submitted by the Petitioners are misplaced. First Amendment considerations can only be given to legislatively created encroachments on freedom of the press. Inasmuch as judicial record keeping cannot be the proper subject matter of legislation, the common law concept of closing court records when the ends of justice may be served (as recognized in Johnson and Russell I) cannot run afoul of the First Amendment because it is a judicially, not legislatively, created concept. What does apply is the Petitioners' common law right of access argument. There is a significant difference. What this Court needs to determine is whether society has a greater interest allowing trial court judges discretion to order the

occassional closure of judicial records to alleviate incorrect governmental activity (e.g. a bad arrest), or should the Petitioners' argument in this case put an end to what the Johnson court recognized as a valuable asset to society. Make no mistake about it, accepting the Petitioners' argument would, of necessity, require a reversal of Johnson, and totally eliminate the inherent power of the courts to minimize the negative effects of a publicly available criminal history record of a person improperly accused.

Is it possible for this court to continue to allow discretionary closures yet not recede from the firmly entrenched body of law developed in the 1980s such as Barron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988), Bundy v. State, 455 So.2d 330 (Fla. 1984), Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) et al.? Certainly. Consistent with Johnson, the court's historically based tradition of discretionary sealing of completed criminal cases where the defendants have been improperly accused are factually and legally distinguishable from those cases under the purview of Barron, Bundy and Lewis. The common law access considerations as set forth in those cases are cogent and are designed to preserve the public's right to an open judicial process. As recognized in the case law, common law access and even First Amendment rights of the public and representatives of the press are

not absolute. As pointed out by this Court in Barron (at p. 117), while a strong presumption of openness exists, the law has established numerous exceptions to protect competing interests. This case will require the Court to balance the desirability of continuing to permit trial judges to exercise the inherent, discretionary ability to seal judicial records against the countervailing interests of the press.

The facts of this case also give this Court the opportunity to apply Florida's privacy amendment to closed judicial criminal history records. The entire purpose of discretionary sealing done pursuant to common law traditon or by statute is to allow an improperly accused person the legal right to "privatize" certain personal information, that is, the right to deny criminal history. This right is even codified by statute. If this Court were to accept the privacy concept, placing the burden on the opponent of closure when an effort is made to vacate previously closed judicial criminal history records would make even more sense and support the "good cause" rationale of Johnson.

ARGUMENT

I. The Fifth District Court's decision follows Johnson and can be reconciled with other Florida and United States Supreme Court decisions.

In rejecting the Petitioners' request that the Orange County judicial files allegedly belonging to the Respondent

be opened, the District Court had little trouble deciding that inasmuch as the Petitioners were attempting to change the status quo, the Petitioners would have the burden of proof. That court was not at all interested in the allegation that Russell had received subsequent closure relief in Hillsborough County. What the Fifth District said to the Petitioners is this: if you want to be successful in unsealing previously sealed judicial files, under Johnson you are going to have to come forward with evidence of "good cause". The records you are after have been under seal for two decades. They are no longer public records and the original trial court orders which sealed those files has the benefit of a presumption of correctness. You did not either plead, or offer proof of, "good cause". Merely showing up at the trial court and wanting access to non-public judicial records is insufficient. And it does not matter if there is more than one closed record.

The issue addressed by the Fifth District in Russell II was essentially the same issue addressed by the Second District in Russell I. The Second District apparently felt obliged to also address the issue of the constitutionality of the sealing statute, in addition to what is the appropriate test for the unsealing of judicial criminal files. But the constitutionality of sections 943.058 or the former 901.33 Fla. Stat. are not the issue with the facts of this particular case. Putting that issue aside, then, the

common ground between Russell I and Russell II is how they treated the issue of burden of proof (i.e." presumption of correctness" in Russell I's language), and what is the proper test for unsealing judicial records. On the **burden** of proof aspect of the decisions, both courts agreed. The Petitioners, as movants, had the burden. In Russell I, the Second District announced it's newly fashioned three part test and remanded the case back down to the trial court for proceedings consistent with that test. A subsequent Hillsborough County trial court hearing was held, at which the Petitioners again presented no proof in support of their position. No proof to meet the three part test. No proof to meet the "good cause" requirement under Johnson. No proof of anything. That decision is currently on appeal by the Petitioners to the Second District. No doubt that this Court's decision in this case will effect, or totally control, that district court proceeding.

The Fifth District handled the issue with considerably less complexity. The burden remained with the Petitioners, but the test came directly from Johnson. Curiously, the Fifth District did not even mention Russell I. The only other case in Florida to consider these issues now comes from **the** First District Court of Appeal in Resha v. Tucker, 600 So.2d 16 (Fla. 1st DCA, 1992), which disposed of the issue in a fashion which was similar to the treatment **afforded** by the Fifth District **in** Russell I, i.e., burden on

opponent of closure, no "good cause" shown. In summary then, all of the district courts agree that the burden in these types of proceedings is on the opponent of closure, the First and Fifth Districts follow the Johnson "good cause" inquiry, and the Second District has fashioned a three part test centered around the public interest.

It took the Petitioners forty eight pages to express one main point. They believe that First Amendment and common law access principles which place the burden of proof on the proponent of closure, as developed by federal and state courts in the 1980s, render this Court's ruling in Johnson obsolete, and the district courts' rulings in Russell I, Russell II and Resha simply wrong.

The Petitioners make a concerted effort to attach First Amendment considerations to this case. The First Amendment addresses itself exclusively to legislatively created infringements on the press and, since this case revolves around the inherent power of the court to seal its own records, the entire body of First Amendment law cited by the Petitioners is misplaced. Which is not to say that common law access considerations differ in every respect. They do not. However, the cases seem to suggest that, at least when the issue is whether the press has the right to attend a pretrial suppression hearing, if the court's decision does not have to be based upon constitutional provisions, but on common law access principles, Florida courts have "more

leeway" in determining disputed issues. Lewis at p. 6 citing Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898 (1979).

The broad question in this case is whether or not Florida trial judges can use their discretion to seal judicial criminal history records without running afoul of the press' right of common law access to judicial proceedings and records. It seems to Russell that when this question is answered, a resolution of the other, more narrow, question presented, who has the burden and what is the test for unsealing records, can be answered. If this court were to decide that press access to records is more important to society than the ability of a judge to seal a court record of an individual wrongfully accused, then the burden of vacating prior sealing orders should logically fall upon the proponent of closure. In that circumstance, the burden on the proponent of closure would be impossible to meet. Johnson would have to be reversed, and the Florida "tradition" of discretionary sealings would be at an end. Additionally, if this were the Court's ruling, then most certainly Florida's sealing and expungement statutes would be unconstitutional, and the press could, and would, then proceed back to the trial courts to unseal every judicial file ever sealed. This case could very well result in havoc, a clerk of the court's nightmare. And all for what? A very much for-profit Florida newspaper's burning desire to

know what is in those files. That's it. There has been no fraud or perjury pled or proved (Russell I, Resha). There has been no allegation or proof of judicial misconduct. All we have here is an editorial board of a wealthy, conservative newspaper whose opinion it is that Florida law should not permit a person to benefit from an act of **judicial** grace.

I say it again, bad facts make bad law. Russell has bad facts. The Petitioners know this and are undoubtedly banking on the hope that the members of this Court will not have an excess of sympathy for an individual who has received three, possibly more, record closures. But the principle behind this case could just as easily have been litigated by someone with only one closure. Or maybe not even one, but someone who was petitioning for his first judicial records closure. The Petitioners' rather obvious strategy is to throw plenty of ***eggs*** at Russell (i.e. detail for this Court the entire history of Russell's intercourse with the criminal justice system and all of his, **alleged, closures),** with the hope that the Petitioners' indignation would infect the Court to the extent that the Court will forget that these facts are the exception, certainly not the rule, and decide that society's interest in permitting the trial judges to close judicial records for improperly accused people is outweighed by public's right to completely

unfettered access to judicial records. That result would be like throwing the baby away with the bath water.

It has not happened very often in nearly four years of litigation, but Russell has to agree with the Petitioners on one point. On page 12 of their Initial Brief, Petitioners state that the "district court decisions establish a class of criminal court files for which the **rules** are completely different...." But here is where the agreement stops. They continue that such a distinction is "without reason".

Public access cases, and even true First Amendment cases, all discuss the basic principle that whereas a strong presumption exists for openness of judicial proceedings and records, the law has established numerous exceptions to protect competing, overriding interests. Courts must balance the rights and interests of the parties to the litigation with those of the public and the press. Barron at p. 117; Lewis passim; Press Enterprise Co. v. Superior Court (I), **464** U.S. **501, 104** S.Ct. **819 (1984)** at **p. 824**; Press Enterprise Co. v. Superior Court (11), **478** U.S. 1, **106 S.Ct. 2735 (1986)** at **p. 2741.**

The Barron court possibly covered the most bases when it discussed the many areas in the law where closure may be permitted. That court envisioned permissable closure when, among other considerations, a party could show it was necessary "to comply with public policy set forth in the constitution, statutes, rules or case law", "to avoid

substantial injury to a party by disclosure of matters protected by a common law or privacy right...", OF a party could establish a "constitutional right of privacy" Barron p. 118. The Respondent would submit that he meets all three of these criteria. The value of the court's ability to seal judicial criminal history records where justice would be served simply, and clearly, outweighs the interest of the public, as represented by the press, in keeping all judicial records open for inspection under any circumstance.

Ironically, it would seem that both interests which have to be balanced in this case are truly, or at least apparently, public interests. On the one hand, the Johnson court speaks of the value to society of discretionary sealing of criminal judicial records to people improperly accused. On the other hand is the well established common law principle which supports open judicial proceedings and records. The press, as self-appointed and self-interested spokesman for the public (at least nominally), is essentially advocating that the courts should not be permitted to seal judicial records for the benefit of deserving members of the public no matter how unwarranted the arrest or prosecution might have been, no matter how damaging the resulting criminal history record might turn out to be to the individual. The Times and Herald are really not concerned about what is in the best interests of the public, their main concern is selling newspapers. The

press is hardly an unbiased, objective representative of the people. Here, society's interests seemingly collide. The Petitioners cannot see the forest through the trees, they are wolves in sheeps' clothing, as it were.

The narrow issue presented in this case is whether or not the district courts were correct in placing the burden of proof on the Petitioners, and what test should a court use when asked to unseal judicial records. It is hard to envision how this Court could answer those questions without discussing the inherent common law right of a court to seal its own records in the first place as recognized in Johnson. As stated earlier, the Respondent does not believe that the facts of this case call for an analysis of the constitutionality of the sealing statute, or the validity of Russell's executive agency record closures closed pursuant to statute.

At the outset, it should be pointed out that as a result of the language the Second District utilized in Russell I, i.e. the three part test, some Hillsborough County criminal trial judges are now requiring a first time otherwise qualified petitioning defendant to come forward with evidence of "compelling reasons" for a closure to be ordered. It is a burden which is as hard to define as it is to actually meet. To say the least, in the Second District, because of the extra burden placed on defendants courtesy of what is essentially dicta in Russell I, closure of judicial

criminal records pursuant to either the statute or common law is nearly impossible to achieve. Currently pending in the Second District are numerous cases where the State is appealing first time sealings granted by the trial courts where the State is maintaining that **those** defendants did not show sufficiently compelling reasons, under Russell I, to justify the sealing order. This Court has the opportunity to clarify this situation if it chooses to discuss the **legality** of discretionary sealings in completed criminal case where justice requires.

What would be the state of the law should this Court decide only the narrow issue of burden and test of an application to unseal without addressing the probably more important issue of the inherent power of the court to seal its own files in the first place? If the Court simply holds that the district courts were correct in placing the burden on the Petitioners, and the "good cause" test as per Johnson, Russell II and Resha is still appropriate, or even if the law **as** stated by the Second District in Russell I is accepted, by implication only will this Court have issued guidance to the lower courts when they are asked to seal the judicial criminal history records of a first time petitioner.

What would be the ramifications if **this** Court decides **that** the district courts have improperly placed the burden on the press, and, upon a motion to vacate requires the

proponent of closure to reestablish his right to closed judicial records? What shall be required of the proponent of closure at that type of hearing? Will the burden on the proponent of closure at a hearing intended to set aside a previous closure be the same, or different, than the burden and test a proponent of closure has to meet for an initial closure order to be entered in the first place? If there is a different burden or test, why should it be different. Isn't the basic issue the same (right of press access) whether being heard on the first go-round as the second?

It looks to Russell as if, in either scenario, this Court almost has to decide whether Florida trial judges should have the inherent power to seal their own records when balanced against the public's right of access as advocated by the press. Russell does not see how this case will make any sense without both the narrow, and the broader issue, being addressed.

11. Allowing trial courts to continue discretionary sealing of completed criminal cases in the interest of justice complies both with established constitutional and common law access principles.

Under the more onerous, constitutionally based Press Enterprise II test, the party seeking closure of a court record or proceeding must show that (1) closure serves a compelling interest, (2) there is a substantial probability that, in the absense of closure, the compelling interest would be harmed, and (3) there are no alternatives to

closure that would adequately protect the compelling interest. As stated earlier, Russell maintains that this case should not be decided by this Court based upon First Amendment principles because statutory law has nothing to do with the inherent power of the court to seal its own records. Nonetheless, the court's ability to seal its own records recognized in Johnson can withstand scrutiny even if examined under a constitutional lens.

First of all, can this type of closure serve a cornpelling interest? The compelling interest was identified by Judge Altenbernd in his concurring opinion in Russell I (at p. 984) as the interest society has in allowing the courts to minimize the harm caused by incorrect government activity. It was also identified by this Court in Johnson.

Secondly, can a proponent of closure show that in the absense of closure, the compelling interest would be harmed? The answer to that question, with reference to this particular factual and legal scenario, lies in the answer to the first question above. That is, obviously, there are only two choices here: to seal, or not to seal. If a deserving person comes before the court seeking to have sealed criminal history records resulting from, for example, an unlawful arrest, in the absense of sealing the defendant's record would still be available for public scrutiny. The compelling interest, protection of the people from incorrect governmental activity, would be harmed.

And lastly, are there any alternatives to closure? Again, in this circumstance (as opposed to the choices a trial judge has, for example, when asked to close a pre-trial suppression hearing or other important criminal proceeding), there are only two choices available. Seal, or not seal. There are no other alternatives.

As can be seen, then, the constitutional standards as set forth by both the Florida and United States Supreme Courts **(1)** do not make too much sense in their application to the issues and facts of this case and **(2)** to the extent those standards do apply and make sense, the tradition of discretionary sealing to correct incorrect government activity comport with those standards.

Inasmuch as the issues addressed by this Court in Lewis were primarily aimed at balancing the right of a criminal defendant to a fair trial versus the right of the press to an open judicial proceeding, a discussion of how that case effects this case seems pointless. Of more importance is an examination of Barron, wherein this Court, on page **118** of that opinion, broadly ruled that in any proceeding designed to limit public access to judicial records or proceedings, the burden **"shall** always be on the party seeking closure". No doubt about it, the Petitioners understandably rely very heavily on that phrase to support their argument that the district courts, in this case, wrongly place the burden of proof on them, the opponent of closure.

How does Russell get around Barron? Sounds like a football game here. By pointing out all of the differences in facts, and law, between the cases. Dempsey Barron's domestic proceeding was never open to the press or public. The trial judge had closed the proceeding early on and the case proceeded to final judgment as a closed proceeding. Russell's Hillsborough County criminal cases were handled in a routine, public fashion, prosecuted by a constitutional officer of the state, the state attorney. The press had complete, unfettered access to all of the proceedings and records until the sealing matter was heard by the court, again at a very public hearing. At least some of the judicial files in controversy here have been sealed for two decades.

Some special considerations must be given to the type of records which are the subject matter of this case, that is, we are not dealing with press access to a criminal trial, or suppression hearing, or other important criminal proceedings. We are not dealing here with depositions, settlement agreements, or access to divorce proceedings. To the Respondent's knowledge, no case cited by the Petitioners deals even remotely with the discretionary closure of criminal court judicial records where substantial justice would be done by closing the record of someone who was improperly accused. No one can argue that the public interest is best served by memorializing incorrect

governmental activity. Indeed, at the very heart of the public access to judicial proceedings principle is the concept that openness prevents "star-chamber injustice". The injustice of being falsely accused, in our very limited factual scenario, is exactly what closure is intended to prevent.

As pointed out by this Court and the United States Supreme Court, openness tends to improve the quality of testimony, encourages the participants to perform their duties in a conscientious fashion, educates the public as to the workings of its government and courts, and encourages trust, confidence and respect for the government. The first two considerations (i.e. quality of testimony and conscientious performance of duties) have nothing to do with the social policies which favor discretionary judicial closures in the instant cases, as these were prosecutions which ended without trials or convictions. The last two values served by openness, (i.e. education of the public and respect for government), are simply public policy considerations which, in the case of improper governmental activity, are best served by the closure of judicial criminal history records which do nothing but perpetuate the ill effects of that improper activity. And in any event, the public's interests are always represented by the State Attorney, a bona fide representative of the people, a constitutional officer of the state, who handles both the

initial prosecutions and the subsequent proceedings to close criminal judicial records. The State Attorney is not a potted plant. If the people are not best served by the closure of judicial criminal history in a particular case, the State Attorney can, and should, voice his or her objection at the closure hearing. The trial judge, elected by the people, of course, is vested with the ultimate authority to use discretion in these situations. If an individual trial court judge abuses his authority to grant criminal record closures, the political process is designed to let the voters decide whether or not that judge deserves to be reelected. The St. Petersburg Times is well aware of the political process, see its editorial criticizing Judge Harry Coe (R. 151).

Consideration must be given to the First Circuit's opinion in Globe Newspapers, Inc. v. Pokaski, 868 F.2d 502 (1st Cir. 1989). That case was based strictly upon First Amendment principles because the court record closure scheme in Massachusetts emanated from statute, not apparently, from a common law tradition. Perhaps because that court was dealing with the more onerous First Amendment considerations, the First Circuit never discusses the balancing of competing interests analyses required by this Court in Barron and Lewis, but entirely relies upon the constitutionally based presumption of openness, a burden that Massachusetts did not overcome with its statutory

scheme. A significant part of that statute was that the closure was done administratively, without any court involvement at all. Significantly lacking in the Pokaski decision was any mention of any state constitutional right to privacy considerations (possibly not available) under Massachusetts law.

At page 506 of Pokaski, the First Circuit gives lip service to an individual's (apparently non-constitutional) privacy interests, agreeing that an arrest record often proves to be a substantial barrier to employment. Nowhere in the opinion does that court give any consideration to the palliative effect of the court's ability to correct improper governmental activity. However, the First Circuit goes on to say that "we agree that preventing the public disclosure of records that defendants do not want released, and that the state is not required to release under the First Amendment, is a compelling interest given the harm that disclosure of such records can cause."

What the above language seems to suggest is that if First Amendment considerations do not apply, then an individual's privacy interests alone are sufficiently compelling to allow a court to close a completed criminal record. That is exactly what we have in this case, and more. First Amendment considerations do not apply because no legislation is involved. Secondly, a defendant's reputational and privacy interests (possibly of state

constitutional stature) are certainly involved when he or she applies for closure. And more than just that, society itself is benefitted because the relief permitted is often intended to correct improper governmental activity.

Pokaski also should be analyzed in light of the facts of that case. The Boston Globe was investigating reports that the trial judge initially had found the defendant police officer guilty of a drug offense, but had changed his ruling after learning that the police officer would lose his job if convicted. At issue in Pokaski, then, was the performance of the judicial system itself. No such weighty circumstances are at issue here. Initially, in order to determine whether the First Amendment was implicated, the Pokaski court applied the two step test as established by Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, (1980). Pursuant to that test, the first step is an inquiry into whether historical tradition indicates that the proceedings or records were presumptively open. In our case, that question can be answered "yes" and "no". Florida's historical tradition is both for presumptive openness and for discretionary closure to correct improper governmental activity. The second step is an inquiry into whether "public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise 11 at p. 2740. Whereas in Pokaski it was the functioning of the judiciary itself which was in issue,

the same cannot be said for the facts of this case. This analysis is important for two reasons. First, it is clear that the facts of our case do not carry with it First Amendmant implications. Second, it only highlights the factual and legal distinctions between all of the existing cases dealing with First Amendment and common law access issues with the instant case. Although the Petitioners would urge this Court to rely on Pokaski, it's holding cannot be logically applied here because its constitutional analyis is simply not appropriate. Furthermore, if First Amendment considerations can be set aside, Pokaski seems to stand for the proposition that privacy interests can be sufficiently compelling in order to justify closure. Pokaski at p. 506.

III. The Petitioners have made no showing that constitutional and common law access considerations were ignored by the trial courts when closure relief was initially granted.

The Respondent does not desire to be unnecessarily redundant, but he does want this Court to be aware that the Petitioners are experts in assuming facts and they make every effort to blur the distinction between the sealability of judicial criminal history records and executive branch criminal history records. Much of their Initial Brief concerns itself only with the relief permitted by statute, and what the legislature intended, and the First Amendment applications to the facts of this case. It is clear, at

least since 1988, that the legislature has taken the one closure per customer stance. That is fine, but it has absolutely no relevance to the judicial records closure relief obtained by Russell. As pointed out to Judge Sprinkel in Orlando, especially with reference to any alleged judicial record closure relief in Orange County or elsewhere, Russell was entitled to all of the relief he received.

The Petitioners relentlessly hammer away on a familiar theme: Russell has been **"deceptive"**, he did not make the "required showing" when the relief was initially received, and he has "taken advantage" of the law (Initial Brief p. 34). With respect to judicial criminal history records sealed pursuant to the court's inherent power as recognized in Johnson and Russell I, where is the requirement that a person is limited to one closure? What makes the Petitioners so sure that the Orange County closures they are attacking were not granted by one judge, on one day, with full knowledge of the facts and circumstances, and with the consent of the State? And as the Record reflects, Russell did disclose the existence of prior closure relief to the Hillsborough County trial courts when he required to do so by statute. Is it not possible for one person to be the subject of more than one bad arrest, especially a private investigator? Where have the Petitioners proved that when any of the closures were originally granted the trial courts

did not consider what compelling circumstances there very well might have been? The Petitioners entire argument is replete with both non-existent and assumed facts. All of these glaring holes in the Petitioners' case serve as great, if not the only, reasons why the lower courts were correct in placing the burden of proof on the opponent of closure.

IV. Sealed judicial records are non-public and should enjoy constitutionally protected status under Florida's privacy amendment.

Florida is at the forefront of promoting open government through the Sunshine Law and the Public Records Act, chapter 119 Fla. Stat. (1991). In fact, a substantial amount of the information the St. Petersburg Times was able to gather and include in the series of articles entitled "Hiding the Past" which appears in this Record was obtained through access to computer data bases which would be totally unavailable in most other states. Generally speaking, records in the possession of a governmental agency are required to be made available for public inspection (section 119.07(1)) and are therefore subject to public disclosure. Exceptions are allowed as set forth in section 119.07(3). The Florida legislature has, by general law, provided for numerous exceptions, including the exception as specified in section 943.058 (1991) which includes executive branch law enforcement agency criminal history records sealed or expunged in conformity with statute. It can be said, then,

that criminal history records closed by a court pursuant to a court's inherent authority or statute are non-public records and are not subject to public disclosure.

As pointed out by the Fifth District in Russell II (at p. 508) and by the Petitioners in their Initial Brief, Florida's constitutional privacy amendment, art. I, sec. 23, Fla. Const., may very well have an impact on this case. The Fifth District apparently felt comfortable placing the burden on the Petitioners not only because of the "good cause" language in Johnson, but also because the judges felt that Russell's records were no longer public records within the meaning of Florida's Public Records Act (see Russell II at p. 809).

The Petitioners discuss the privacy issue in a different light. Their contention is that (1) the burden should have been on Russell to keep his records closed and that (2) Russell's privacy interests in keeping his arrest records publicly inaccessible are not sufficiently compelling to justify continued closure. The Petitioners then go on to cite several Florida cases (Initial Brief p. 26,27) which have very little to do with the issue in this case. Noticeably lacking in their Brief is any reference to Forsberg v. Housing Authority, 455 So.2d 373, (Fla. 1984). In **Forsberg** this Court ruled that because Florida's privacy amendment specifically does not apply to public records, any records which are subject to public disclosure under chapter

119 Fla. Stat. (1977) cannot be the subject of a constitutional right of privacy claim. By implication, then, if judicial records have been sealed by the court pursuant to Florida's "tradition", or pursuant to statute, those records should be good candidates for constitutionally protected status.

Justice Overton, in his specially concurring opinion in Forsberg, encourages Florida courts to apply the "balancing test" as required by both the Florida and United States Supreme Courts. When asked to decide whether records should be publicly available, the courts should require that an individual's privacy interests be weighed against the public interest in open government. The test Justice Overton suggests is remarkably similar to the balancing test discussed in First Amendment/common law access cases. After all, the issues are essentially identical, i.e. interest of society in open government and courts versus certain countervailing individual and governmental concerns. Additionally, in Michel v. Douglas, 464 So.2d 545 (Fla. 1985) this Court likewise ruled that hospital district's personnel records were not exempted from the operation of chapter 119 Fla. Stat., and thus Florida's privacy amendment could not be utilized to block disclosure of those hospital records.

A few years later in Barron, this Court went even further. "Under appropriate circumstances, the

constitutional right of privacy...could form a constitutional basis for closure" (Barron at p. 118). The question of constitutional protection boils down to whether or not, traditionally, there is an expectation of privacy (see Winfield V. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985)) in judicial criminal history records sealed at the discretion of the court, after the criminal case is completed, when the trial judge is convinced that closure is in the interest of justice and would serve to minimize incorrect governmental activity.

In Shaktman v. State, 553 So.2d 148 (Fla. 1989), Justice Ehrlich wrote separately on the topic of an individual's subjective expectation of privacy. A subjective expectation of privacy is not dispositive of an art. I, sec. 23 claim. Consideration must be given to whether or not those expectations are "legitimate"... and what are the objective manifestations of that expectation (Shaktman at p. 153). In the instant case, we have a "tradition" of discretionary closures, substantially strengthened by a statutory scheme which expressly gives a former criminal defendant the right to deny criminal history (section 943.058 (6)(b)). What stronger objective manifestation of a privacy expectation can there be than a judicial tradition and statutory authority for non-disclosure of criminal history information?

The United States Supreme Court issued a recent opinion in United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S.Ct 1468 (1989) which sheds some light on an analagous federal issue. In Reporters the Court was asked to decide whether an individual's F.B.I "rapsheet" was accessible to the media pursuant to the Freedom of Information Act. To probably oversimplify the ruling, the Court decided that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and when that request seeks no official information about a government agency, but merely records that the government is storing, the invasion of privacy is unwarranted.

Simply stated, the constitutional privacy issue in this case seems to be whether or not art. I, sec. 23 Fla. Const. affects public access to and disclosure of traditionally, statutorily and definitionally non-public personal information. If this Court was to decide that judicial criminal history records previously closed in the interest of fairness to people improperly accused were to be afforded with constitutionally protected status, it would not necessarily mean that the public and press could never, under any circumstance, gain access to those files. All that Russell is suggesting is that persons who have obtained judicial relief in this fashion and for these reasons have

the reasonable expectation of privacy which should be constitutionally protected. If this were the case, then the "good cause" language in Johnson would make even more sense, and the rationale for placing the burden of proof on the party attempting to vacate a closure order would be logically and intellectually more appealing.

CONCLUSION

This case gives this Court the rare opportunity to define another exception to the presumption that the press and the public should have unfettered access to judicial proceedings and records. To define this particular exception would only recognize that from time to time our government does make mistakes, does arrest and prosecute innocent persons, and that the scar left on such people can and should be removed by an act of judicial grace. The courts are really the only branch of government to have the opportunity to correct the harmful results of improper governmental activity. In order to overcome the presumption of openness, both federal and Florida case law requires a balancing of competing interests. Because the case does not involve First Amendament constitutional principles, the Court has "more leeway" to allow for exceptions to the presumption of openness. In no other area of common law access, or even true First Amendment cases, does society in general benefit so much from the court's ability to seal judicial records. The stigma of a publicly available arrest

record can hound a person forever. Employers seldom concern themselves with whether or not a person was actually guilty of the offense. The Respondent would simply assert that society is better off by allowing elected trial judges the discretionary authority to close judicial criminal history records where justice would be served than to outlaw what has become a tradition in Florida.

And it makes sense to put the burden on the opponent of closure in a proceeding designed to vacate an earlier closure order. Give the trial judges the credit they deserve, they are elected by the people to dispense **justice,** to have both brains and common sense. Florida law should presume that trial judges can make the correct determination of those criminal history records which should be closed and those which should not be closed. Judicial closure is not a new concept in Florida, courts have been exercising their discretion from "time immemorial". It should not be presumed that all previously entered judicial closures have been the result of judicial misconduct or disingenuous defendants. To accept the Times argument would, of necessity, require a reversal of Johnson, end a tradition in **Florida** which truly serves the people well and would open the door for wholesale chaos in the courts. Imagine the consequences if this Court were to put the Barron burden on Russell and those similarly situated. The press would be at the courts' doorstep petitioning to set aside all previously

entered closure orders. All Florida persons who have benefitted by closure would now, once again, have to publicly relitigate and presumably show "compelling reasons" why their judicial criminal history records need still be closed. This would not be justice. This would be a circus.

Additionally, this case gives this Court another chance to define the parameters of Florida's constitutional privacy amendment. To date, the Supreme Court has decided what types of records do not qualify for constitutional protection, i.e. public records which are not excepted from chapter **119**. Inasmuch as the types of records at issue in this case are traditionally and statutorily non-public records, those individuals who are the subject of those records should be protected by Florida's privacy amendment.

Respectfully submitted,

R'chard S. Blunt
BN 228435
10 South Armenia Avenue
ampa, Florida **33609**
(813) 253-3104
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true **and** correct copy of the foregoing has been furnished by regular U.S. Mail to ALISON M. STEELE, **Esq.**, 535 Central Avenue, St. Petersburg, Florida 33701, and to WILLIAM C. VOSE, **Esq.**, Assistant State Attorney, P.O. Box 1673, Orlando, Florida 32802, this 4th day of September, **1992.**