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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, 111,

Respondent.

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONERS, TIMES PUBLISHING COMPANY, MIAMI HERALD PUBLISHING COMPANY AND STATE OF FLORIDA

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PRELIMINARY STATEMENT

Petitioners, The Times Publishing Company, the Miami Herald Publishing Company, and the State of Florida seek review of a decision of the Fifth District Court of Appeal holding that the Times and the Herald had failed to show the "good cause" necessary for unsealing judicial records of Florida's Ninth Judicial Circuit Court relating to criminal charges against a John Lewis Russell, 111. This Court has accepted jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution ("conflict jurisdiction").

The Times Publishing Company is referred to herein as "the Times," the Miami Herald Publishing Company is referred to herein as "the Herald," and the State of Florida is referred to herein as "the State." Collectively where appropriate, these parties are referred to herein as "the Petitioners." Respondent John Lewis Russell, III is referred to herein as "Russell." References to the Record on Appeal are denoted as "R. ___"

STATEMENT OF THE CASE AND OF THE FACTS

John Lewis Russell, III is a private investigator and the founder and chief executive officer of the Bureau of Missing Children, Inc., a charitable fund-raising organization which solicits money from the public, having collected in excess of a million and a half dollars through, in Russell's attorney's words, "phone room operations, basically cold call solicitors[] ... [w]e are talking about boiler rooms" (R. 191-192).

In March of 1989 the Herald, later joined by the Times, began

their now three-year-long effort to unseal court records reflecting Russell's intercourse with Florida's criminal justice system. It was then that the Herald moved to vacate court orders perpetually withdrawing from public view judicial records concerning three incidents in which Russell was arrested in the Thirteenth Judicial Circuit (Tampa, Florida), in **1979, 1981** and **1984** on firearm, theft and cocaine charges, respectively. Although all records at present remain sealed, the details of Russell's arrests in the Thirteenth Judicial Circuit were fully set forth by his attorney both before the Thirteenth Judicial Circuit Court in a hearing on the Herald's motion to unseal the court files and in Russell's appellate briefs before the Second District. See Russell v. Miami Herald Publishing Co., 570 So.2d **979, 980** (Fla. 2d DCA **1990),** and R. **156-185; 186-**194. The details of those arrests are as follows.

I. The Tampa files and proceedings.

In **1979,** Russell was arrested in a Tampa convenience store for the felony of carrying a concealed firearm. **As** a felony conviction would have jeopardized his private investigator's license, Russell pled nolo contendere to a misdemeanor charge of carrying a concealed weapon, the court withheld adjudication, and Russell was placed on probation. In February 1980, represented by attorney Richard Blunt, who in January **1980** had left **the** Thirteenth Judicial Circuit State Attorney's office, Russell filed a "motion to expunge" all official records relating to his arrest (R. 160, **189, 194).** Russell eventually obtained orders sealing the felony and misdemeanor court files on June 6, **1980** and **October 3, 1980,**

respectively (R. 160, 161).

In 1981 Russell was again arrested in Tampa on a grand theft charge, which was subsequently dismissed on defense motion pursuant to 3.190(c)(4), Fla.R.Cr.P. Again represented by Mr. Blunt, Russell obtained a court order sealing judicial records of that arrest on July 6, 1982 (R. 161, 162).[1]/ Later, in 1984, Russell was arrested on felony charges of possession of cocaine and paraphernalia. Prosecutors issued a Letter of Release to Russell in connection with the charges, and he obtained an order sealing the judicial records on December 4, 1984 (R. 163-164). According to Russell, these court orders also sealed or ordered destroyed the records of criminal justice agencies other than the court, such as the Tampa Police Department (R. 160-166). Upon the Herald's motion, the Tampa trial court unsealed all records, judicial and non-judicial, as to Russell's 1981 and 1984 charges.[2]/ Russell appealed.[3]/

The Second District Court of Appeal reversed. In its opinion, the court held that henceforth in considering requests to seal judicial records, "in order for section 943.058 to be constitu-

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[1]/ Russell apparently later learned that the Florida Department of Law Enforcement maintained some public record of his 1981 arrest and obtained an additional sealing order from the court in November 1983 (R. 162).

[2]/ The trial court also denied Russell's motion to require the Herald to reveal its sources and to hold the Herald in contempt of court for having published information relating to Russell's Tampa criminal history (R. 181).

[3]/ The Herald appealed the trial court's refusal to unseal the court's records concerning Russell's 1979 firearm arrest.

tional," courts must apply the three-part test established by the United States Supreme Court in Press-Enterprise Co. v. Superior Court of California, County of Riverside, 478 U.S. 1, 106 S.Ct. 2735 (1986) ("Press Enterprise II"), for sealing of court records or proceedings generally. As the Second District noted, the Florida Supreme Court has enunciated a similar three-part test which the proponent of closure must meet for sealing of court records to be permissible. See Bundy v. State, 455 So.2d 330 (Fla. 1984). However the Second District further held that, because Russell's court files had been sealed for several years, his sealing orders were entitled to a "presumption of correctness." Thus, as to requests to unseal court files previously sealed or "expunged,"[4] the Second District held applicable a "modified" Press-Enterprise test in which the burden of proof falls upon the proponent of access: (1) vacation of the expunction order would serve the public interest; (2) there is a "substantial probability'' that, in absence of vacation of the closure order, the public interest would be harmed; and (3) no less restrictive alternatives are available. The court then remanded the case to the trial court for application to the court files of the new "unsealing" test.[5]/

On remand, the Tampa trial court refused to unseal any of the Russell court files. That ruling is presently on appeal to the

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[4]/ Under Johnson v. State, 336 So.2d 93 (Fla. 1976), court files are not destroyed (the literal meaning of "expunged") but are only sealed. *See* also Fla.R.Cr.P. 3.692.

[5]/ The Second District also reversed that portion of the trial court's order unsealing non-judicial records because the Herald had not sought that relief. Russell, 570 So.2d at 983.

Second District in that court's Case No. 90-03242. A separate motion filed by the Times shortly after the remand hearing is also the subject of an on-going appeal in the Second District, in its Case No. 91-00630. The Times' motion sought vacation of the Tampa court's orders to the extent that they sealed or expunged the records in the hands of law enforcement agencies other than the court relating Russell's 1979, 1981 and 1984 Tampa arrests.

11. The Orlando files and proceedings.

In the Spring of 1991, well after the Tampa trial court hearings and some months after the Second District appeals had been under way, the Times discovered that in addition to the sealed files in Tampa, there was reason to believe Russell previously had obtained three other sealing orders, sealing records of three other incidents of arrest in the Ninth Judicial Circuit (Orlando, Florida) (R. 81-84, 102-103). On May 9, 1991, the Times and Herald filed a motion in the Ninth Judicial Circuit seeking an order unsealing all Ninth Circuit Court files relating to John Lewis Russell, III (R. 81-194).[6]/

The motion was captioned "State of Florida v. John Lewis Russell, III" and bore only one case number, "77-1096" (R. 81). It sought access to the court's records based on the constitutional and common law principles of openness enunciated by the United States Supreme Court in the Press Enterprise case and by the Florida Supreme Court in Miami Herald Publishing Co. v. Lewis, 426

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[6]/ On the same day, the Times and Herald moved to stay their Second District appeals and for remand of those cases to the Tampa trial court for presentation of new evidence (R. 33).

So.2d 1 (Fla. 1982), and also based on the specific circumstances involved in the Russell cases then pending in the Second District: (a) it had already been conceded by Russell in court that he had obtained orders sealing four criminal court files in the Thirteenth Judicial Circuit; (b) there was reason to believe that Russell had obtained three additional sealing orders in the Ninth Judicial Circuit; and (c) the existence of previously sealed files in Orlando never before had been mentioned by Russell or his lawyer at any stage of the then two-year-old proceedings on the Tampa sealed files. (R. 82-83, 91, **94-96).** Exhibits to the Times' and Herald's motion included Russell's Initial Brief to the Second District Court of Appeal in Russell v. Miami Herald Publishing Co., 570 So.2d 979, and a portion of the transcript of the April 20, 1989 hearing on the Herald's earlier motion before the Thirteenth Judicial Circuit **(R. 156-194).**

Upon the receipt of the Times' and Herald's motion, the Ninth Circuit Clerk of Court located two sealed court files: in addition to the file bearing case number CR-77-1096, the clerk located a file for a case numbered CR-75-3275 (R. 5). A copy of the motion and notice of a May **20, 1991** hearing before the Honorable George A. Sprinkel, IV, the Ninth Circuit Court Judge assigned to hear the motion, were served on Russell's counsel, Richard Blunt, who without question received the papers and has and continues to represent Russell in the Tampa and Second District cases (R. 23, 100, **195-196).**

Counsel for the Times and Herald, the State of Florida, and

Russell appeared at the time scheduled for the hearing. Judge Sprinkel had in his possession at that time two case files, CR-77-1096 and CR-75-3275. The court announced from the bench that CR-77-1096 concerned a 1977 grand theft charge and CR-75-3275 concerned a 1975 worthless check charge. According to the court, both of these cases were sealed pursuant to an order dated February 4, 1980 (R. 5, 74-75).[7]/ At the time of the hearing counsel for Russell, Mr. Blunt, filed in his own name as the movant, a "Motion to Question the Jurisdiction of the Court and Motion to Quash Movants (sic) Motion to Intervene"; the trial court denied this motion and proceeded to consider whether the files should be unsealed (R. 197-199, 202).[8]/

Russell's attorney admitted to the trial court that the Orlando sealings had not been brought to the Tampa courts' attention during the Thirteenth Circuit and Second District proceedings on the newspaper's motions for access to the Tampa files and records (R. 31, 49-50), but argued that neither he nor

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[7]/ The Times' and Herald's motion also stated upon information and belief that there existed a sealed file concerning Russell relating to charges of carrying a concealed weapon and disorderly conduct in 1975 (R. 83). No such court file was located in advance of the hearing, and its case number, if any, was unknown to the court at that time (R. 200-201).

[8]/ In rejecting Mr. Blunt's argument that it had no jurisdiction to consider the motion to unseal its files, the trial court noted that Mr. Blunt, Russell's attorney in the Tampa and Second District proceedings, appeared at the hearing on Russell's behalf, filed a motion, and subsequently argued on behalf of Russell against the Times' and Herald's motion (R. 202). Thus, the court found it not only had jurisdiction to consider the disposition of its own files, it had also sufficiently accorded Mr. Russell the opportunity to be heard.

his client had any obligation to disclose the three Ninth Circuit sealings at that time:

> [I]t is up to the 2nd DCA now whether or not they think the alleged new Orange County problems the press is saying happened -- I'm not admitting to -- would be relevant. ... I'm not admitting it is the same person. I'm not admitting it happened, I'm not admitting the people (sic) that they think is over here is the same person, I'm not admitting to anything. And the beauty of it, your Honor, is that the law permits me to do that.

(R. 33-34). In fact, as the Record shows, Russell's attorney admitted Russell in fact never specifically revealed the existence of the Orlando sealings to the Tampa trial courts, not even on the numerous occasions Russell sought sealings and expunctions from the Tampa courts, where at least with regard to the sealing orders entered in 1980 and 1982, Russell was represented by Mr. Blunt (R. 31, 47, 49-50; 161-163).[9]

In a written order rendered May 30, 1991, the trial court granted the Times' and Herald's motion to intervene and to consolidate the criminal cases against Russell for purposes of the access question, and granted the Times' and Herald's request to unseal the files (R. 200-206). In doing so, the trial court recognized, as the Times' and Herald's motion had disclosed, that there were at least three different inquiries or "tests" potentially applicable to whether the files should be sealed: the three-part constitutional inquiry established by the United States Supreme Court in Press Enterprise (II) and the similar test established by

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[9] Mr. Blunt has stated that he knew nothing of the Orlando sealed files (R. 39). The Petitioners are in possession of no facts showing otherwise.

this Court in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982); the "good cause" inquiry suggested, prior to Lewis, in Johnson v. State, 336 So.2d 93 (Fla. 1976); and the Second District's test created in the Russell case, 570 So.2d 979 (R. 202-204). Choosing to apply the test most onerous to the Times and Herald, that created by the Second District Court of appeal in Russell, the court nevertheless granted the motion, ruling that the vacating of orders sealing the Ninth Circuit files serves the public interest; that in absence of the vacating of these orders there is a substantial probability that the public interest would be harmed; and that there is no less restrictive alternative that would adequately protect and serve the interests at stake here (R. 204). The trial court stated:

> The Court is guided by the concurrence of Judge Altenbernd of the Second District Court of Appeal in Russell [v. Miami Herald Publishing Co., 570 So.2d 979 (Fla. 2d DCA 1990)], supra. As he points out, it serves the public interest for the Court to vacate a sealing order obtained upon fraudulent evidence of entitlement to it. Id. at 984. While it does not appear that Russell obtained the sealing orders at issue here upon "fraudulent evidence" it does appear that he did not fully disclose their existence to the Tampa courts when seeking sealing and expungement of the records of subsequent criminal charges in that jurisdiction and that this failure bears on the question of whether those Tampa records should now be unsealed. The courts considering whether to unseal Russell's subsequently incurred criminal charges must do so with all of the facts in hand.
>
> Furthermore, Russell has had numerous contacts with the criminal justice system since his initial arrest in this circuit -- at least six contacts resulting in his arrest. It therefore does not appear that Russell --

> in Judge Altenbernd's words, the beneficiary of "judicial grace" in the form of artificial erasure of history -- did not profit from that grace. There is no longer any reason to keep records of his criminal charges secret from the public.

(R. 204-205).

The trial court further provided that the files would remain sealed for thirty days to give Russell time to appeal if he wished; on June 26, 1991, Russell timely filed notice of his appeal to the Fifth District Court (R. 205-208), represented again by Mr. Blunt.

In an opinion issued February 7, 1992, the Fifth District Court of Appeal reversed the trial court's order unsealing the criminal court files. In doing so, the court framed and decided the issue as follows, on the authority of Johnson v. State, 338 So.2d 93 (Fla. 1976):

> The question before us is whether properly sealed court records remain "public records" within the meaning of our statutes and constitution. We hold that they do not. They are former public records, now sealed, subject to being reopened as public records upon "good cause shown."

Russell V. Times Publishing Co., 592 So.2d 808, 809 (Fla. 5th DCA 1992). The court concluded that no "good cause" had been pled or evidence offered, and remanded the case with directions to continue the files under seal. In a footnote the court queried whether Florida's constitutional right of privacy "attach[ed] to those records once public but now sealed?" but noted that neither party had briefed or argued the issue. Id. at 809 n.2.

Thereafter, the Times, the Herald, and the State timely filed their Notice of Intent to Seek Discretionary Review by this Court

on the ground that the Fifth District Court of Appeal's decision expressly and directly conflicted with decisions of this Court and other district courts of appeal. On July 15, 1992, this Court issued its order accepting jurisdiction.[10]/

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in this case, along with the decisions of the Second District Court of Appeal in Russell v. Miami Herald Publishing Co., 570 So.2d 979 (Fla. 2d DCA 1990), and the First District Court of Appeal in Resha v. Tucker, 17 F.L.W. D1328 (Fla. 1st DCA, May 22, 1992), ignores more than a decade of this Court's and the United States Supreme Court's precedent. The Supreme Courts of the United States and the State of Florida have held that the law requires a party seeking to prohibit public inspection of court files to establish, at the least, a compelling interest necessitating closure, that closure will be effective in protecting this interest, and that there is available to accomplish this protection no alternative means less

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[10]/ After the Ninth Circuit hearing but before the court had reduced its decision to writing, the Second District Court of Appeal granted the newspapers' motions to stay the appeals in both cases pending there and relinquished jurisdiction to the Tampa trial court for sixty days. The court extended its remand until resolution of Russell's appeal in the Fifth District Court of Appeal after the Fifth District denied a motion to expedite the briefing schedule filed by the Times, the Herald and the State. Upon notification that the Fifth District Court of Appeal had reversed the Ninth Circuit Court's order unsealing the court files, the Second District Court of Appeal withdrew its remand order and directed that the briefing schedule in the cases pending there continue. Those cases have now been fully briefed but oral argument has not yet been scheduled. The Second District has been notified that this Court accepted the Fifth District's decision for review.

restrictive to the public's access rights. The district courts have refused to apply this test.

The district court decisions establish a class of criminal court files for which the rules are entirely different -- those sealed along with executive branch records pursuant to a motion based on some version of Florida's "sealing and expunction statute" and Florida Rules of Criminal Procedure 3.692 and 3.989. The First, Second and Fifth Districts' decisions placing on the public the burden of showing why access to court records should be granted contravene the higher courts! precedent without any appropriate reason, and impermissibly burden the public's First Amendment and Florida common law rights of access to judicial records concerning completed criminal prosecutions. In such cases, and particularly in this case, the honor and integrity of the judicial system and public's ability to fulfill its obligation to monitor government depends on access to judicial records.

The circuit and district courts of this State appear to have largely misunderstood this Court's decisions concerning separation of powers and public access to court files. As a result of the confusion, there exist a significant number of court files, spanning three decades, to which the lower courts consider inapplicable well-established First Amendment and common law access rules. Significantly, with few exceptions, Florida's sealing and expunction statute states that citizens who have obtained its relief may lawfully deny they have ever been arrested; it has also resulted in mass destruction of executive branch records, leaving

the judiciary the sole accurate, but now inaccessible, repository of history.

Because the Legislature is without power to cure the abuses and misunderstandings which have infected the court system, it falls to this Court to do so. Accordingly, the Petitioners ask this Court to reaffirm its long-standing commitment to an open and accessible judiciary, to reject the decisions and reasoning of the district courts, and to unseal, as the trial court did, the Ninth Judicial Circuit criminal court files specifically at issue in this case.

ARGUMENT

I. The Fifth District Court's decision contravenes this Court's decisions, and those of the United States Supreme Court, establishing First Amendment and common law rights of public access to court files.

This Court has resolutely established that the separation of powers doctrine prohibits the Legislature from mandating access to -- and thus closure of -- court records. Locke v. Hawkes, 595 So.2d 32 (Fla. 1992). Nevertheless, confusion reigns in the lower courts, centering on Florida's sealing and expunction statute, where the lines of authority have become blurred.

To date, three Florida courts of appeal, including the Fifth District Court of Appeal below, have directly addressed the question of what test or inquiry is applicable to requests for public access to criminal court files withdrawn from public view on a motion filed pursuant to some version of Florida's "sealing and

expunction statute."[11]/ All three courts have arrived at a different conclusion,[12]/ -- the Fifth and the Second District both in cases involving Russell and sealed court files. None of these conclusions comports with the constitutional and federal and state common law concerning public access to judicial records.

As the United States Supreme Court and other federal courts have held, the public has the right of access to judicial proceedings and to court records and files, a right firmly grounded in the First Amendment to the United States Constitution. Press-Enterprise Co. v. Superior Court (11), 478 U.S. 1, 106 S.Ct. 2735 (1986)(public has First Amendment right of access to closed preliminary hearing in criminal case); Press-Enterprise v. Superior Court (I), 464 U.S. 501, 104 S.Ct. 819 (1984)(public has First Amendment right of access to transcripts of jury voir dire proceedings closed by court order); Globe Newssaser Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613 (1982) (public has First Amendment right of access to courtroom during testimony of juvenile victim of sex offenses); Richmond Newspapers v. Virginia, 448 U.S.

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[11]/ Section 901.33, Fla. Stat. (effective 1974 to October 1, 1980); section 943.058, Fla. Stat. (effective October 1, 1980 to October 1, 1988). The statute was amended again in 1988 but retained its same number, and again in 1992, effective April 8, 1992. See Chapter 92-73, Laws of Florida (1992). None of the three courts mentioned the applicable Rules of Criminal Procedure. The Petitioners submit that to the extent such motions seek to seal or expunge court records, they would only be proper pursuant to Rules of Criminal Procedure 3.682 and 3.989, and constitutional requirements.

[12]/ Compare Russell v. Times Publishing Co., 592 So.2d 808 (Fla. 5th DCA 1992), with Russell v. Miami Herald Publishing Co., 570 So.2d 979 (Fla. 2d DCA 1990), and Resha v. Tucker, 17 F.L.W. D1328 (Fla. 1st DCA, May 22, 1992).

555, 100 S.Ct. 2814 (1980)(closure of criminal trial violated First Amendment); The Washington Post v. Robinson, 935 F.2d 272 (D.C. Cir. 1991)(First Amendment right of access to plea agreement and related documents); Globe Newspaper Co. v. Pokaski, 868 F.2d 502 (1st Cir. 1989)(public has First Amendment right of access to previously sealed records of criminal cases ending in acquittals, findings of no probable cause, nolle prosequi, or dismissals); Oregonian Publishing Co. v. United States District Court, 920 F.2d 1462 (9th Cir. 1990)(access to plea agreement); United States v. Suarez, 880 F.2d 626 (2d Cir. 1989)(First Amendment right of access to Criminal Justice Act attorney payment forms); In re The New York Times Co., 828 F.2d 110 (2d Cir. 1987), cert. denied, ___ U.S. ____, 108 S.Ct. 1272 (1988)(First Amendment right to inspect documents filed in connection with pretrial suppression hearings); In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986)(First Amendment right of access to documents filed in connection with plea and sentencing hearings); United States v. Peters, 754 F.2d 753 (7th Cir. 1985)(First Amendment right to inspect trial exhibits); United States v. Smith, 776 F.2d 1104 (3d Cir. 1985)(First Amendment right to inspect bill of particulars); In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984)(First Amendment right of access to records submitted in connection with criminal proceedings); Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983)(First Amendment right of access to documents filed in pretrial proceedings). As the court explained in Globe Newspaper Co. v. Pokaski, 868 F.2d at 502, a case invalidating on First Amendment

grounds a state sealing and expunction statute, "The basis for this right is that without access to documents the public often would not have a 'full understanding' of the proceedings and therefore would not always be in a position to serve as an effective check on the system."

Public access to governmental records, as well as proceedings, is the cornerstone of our system of enlightened self-government. Without access to these important sources of information about government operations, including those of the judiciary, the public and press could not monitor the functioning and performance of their governmental institutions.

> The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive Public scrutiny and criticism. ... There must be some compelling reasons before some or all of the records of a court proceedins may be sealed.

Sheppard V. Maxwell, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515 (1966) (emphasis supplied, citations omitted).[13]/ Moreover, as the United States Supreme Court has explained, "People in an open society do

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[13]/ For these reasons, the press has been recognized as the public's surrogate for purposes of protecting and enforcing the public's access rights. See Richmond Newspapers v. Virginia, 448 U.S. 555, 572-73, 100 S.Ct. 2814, 2825 (1980); State ex rel. Miami Herald Publishins Co. V. McIntosh, 340 So.2d 904 (Fla. 1976).

not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Press-Enterprise (I), 464 U.S. at 509, 104 S.Ct. at 823, quoting Richmond Newspapers v. Virginia, 448 U.S. at 572, 100 S.Ct. at 2824. Thus, the Supreme Court itself has recognized the dangers inherent in judicial secrecy: secrecy not only impedes the public's proper performance of its central role in the American governmental system, it also breeds public distrust and suspicion of government, including the courts. Both of these dangers are presented just as much by sealed records as by closed trials and both are present in this case.

As the Florida Supreme Court's decisions reflect, this Court, too, stands steadfastly behind the value of open government, including access to court records. See McIntosh, 340 So.2d at 910 ("Whatever happens in any courtroom directly or indirectly affects all the public. To prevent star-chamber injustice, the public should generally have unrestricted access to all proceedings"). In fact, the public's right of access to court records and proceedings was firmly imbedded in the common law of Florida and this State's long-standing tradition of government "in the sunshine" even before the United States Supreme Court held that the public's right of access to judicial records and proceedings is of federal constitutional stature. Barron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988)(right of access to case file in state senator's marriage dissolution proceedings); Bundy v. State, 455 So.2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S.Ct. 1958 (1986)

(access to criminal proceedings); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 3 (Fla. 1982)(access to sealed suppression hearing documents); Sarasota Herald Tribune v. Holtzendorf, 507 So.2d 667 (Fla. 2d DCA 1987)(access to sentencing documents): Florida Freedom Newspapers, Inc. v. Sirmons, 508 So.2d 462 (Fla. 1st DCA 1987), affirmed, 531 So.2d 113 (Fla. 1988)(dissolution of marriage litigant's interest in keeping private information related to present and future financial support "not sufficiently compelling" to justify closure; public access essential to preserving independence and integrity of judicial process): Miami Herald Publishing Co. v. Chappell, 403 So.2d 1342 (Fla. 3d DCA 1981)(trial court erred in closing competency hearing based solely on confidentiality statute; three-part balancing test must be met); Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980); Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979)(striking down blanket order automatically sealing depositions in criminal and civil actions); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979); News Press Publishing v. State, 345 *So.* 2d 865 (Fla. 2d DCA 1977) (striking down restrictions on public access to filed criminal deposition transcripts based on lack of compelling reason for sealing); Miami Herald Publishing Co. v. Collazo, 379 So.2d 333 (Fla. 3d DCA 1976)(unsealing of settlement agreement in civil action concerning person shot by Miami police).

On numerous occasions, this Court, like the United States Supreme Court, has described and explained the values served by openness and the hazards posed by secret records and proceedings:

access serves to improve the quality of testimony offered in judicial proceedings, encourages the participants in the system to perform their duties in a strictly conscientious fashion, educates the public as to the workings of its government and courts, and encourages trust, confidence and respect for government, including the judicial system and the law. See, e.g., Richmond Newspapers, 448 U.S. at 569, 571, 100 S.Ct. at 2823-24; Barron, 531 So.2d at 117. Thus, in Florida, judicial proceedings and records are attended by a strong presumption of openness -- not dependent for its existence on the First Amendment -- because this Court views openness as "basic to our form of government ... essential to the judicial system's credibility in a free society." Barron, 531 So.2d at 116.[14]/ Preservation of respect for the judiciary and the court system's integrity is central to this case, where a former criminal defendant sealed records of charges against him on at least five different occasions. A proper constitutional test will

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[14]/ In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong, and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions, in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential to the public welfare.

Barron, 531 So.2d 116-117, quoting In re Shortridge, 99 Cal. 526, 530-31, 34 P.2d 227, 228-29 (1893).

limit such abuses and unsealing Russell's records here will move in the direction of repairing some of the damage done to the integrity of the court system.

Based on the values served by open records and proceedings and their inextricable link to the American concept of enlightened self-government, the United States Supreme Court and the courts of Florida have held the "essential" public right of access cannot be abridged or curtailed except for the most compelling reasons. The United States Supreme Court's Press-Enterprise test embodies this principle. Under the Press-Enterprise 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 absence of closure, the compelling interest would be harmed, and (3) there are no alternatives to closure that would adequately protect the compelling interest. Press Enterprise Co. v. Superior Court (II), supra.[15]/

The Florida Supreme Court's formulation of the test, by its terms arguably more stringent than the United States Supreme Court's and grounded in Florida's common law, requires a party seeking to exclude the public from judicial records or proceedings

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[15]/ That this test is identical to the one applicable to issuance of prior restraints -- orders prohibiting publication or speech, see Nebraska Press Association v. Stuart, 427 U.S. 539, 562 (1976) -- shows how seriously the United States Supreme Court disapproves of abridging public access rights. See also Bundy v. State, 455 So.2d 330, 337 (Fla. 1984)(closure of proceedings and records must meet the same strict judicial scrutiny as orders of prior restraint since the effect on the ability of the press to disseminate information about court proceedings is roughly the same).

to show that (1) closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) no less restrictive alternatives are available, and (3) closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 3 (Fla. 1982); see also Bundy v. State, 455 So.2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S.Ct. 1958 (1986). In Barron, this Court held that the "strong presumption of openness" attends court proceedings and records not only in criminal cases but also in civil cases, and modified the language of the Lewis test only slightly so that it would apply directly in civil cases. Barron, 531 So.2d at 118-119. Moreover, contrary to the Fifth District Court of Appeal's decision below, the Second District's decision in Russell, and the First District's in Resha v. Tucker, this Court has made clear that the party seeking closure -- here, Russell -- not the party opposing closure or seeking access, must bear the burden of justifying abridgment of the public's rights and interests in access to records and information. See Barron, 531 So.2d at 118: Lewis, 426 So.2d at 7; see also Reiter v. Mason, 563 So.2d 749 (Fla. 3d DCA 1990); Goldbers v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986).

Even the claim that public access to judicial proceedings and records will deprive a criminal defendant of his Sixth Amendment right to a the fair trial does not automatically prevail over the public's access rights, and in fact, this claim often fails. See Bundy, supra. Likewise, individual litigants' interests in

maintaining their privacy or avoiding public disclosure of embarrassing information do not automatically rise to the level necessary to seal official court records from public view. Globe Newspaser Co. v. Superior Court, 457 U.S. 596 (1982)(general assertion of privacy interests do not justify excluding public from criminal trials); Barron, 513 So.2d 113 (refusing to seal court files to protect individual from embarrassment in dissolution of marriage case); Chaspell, supra (holding balancing test must be met to close competency hearing); Goldberg v. Johnson, supra.[16]/

The Fourth District Court of Appeal's observations in Goldberg v. Johnson, 485 So.2d at 1389 (citations omitted, emphasis in original), emphasizing that secrecy is the exception rather than the rule and is not justified by generalized assertions of privacy rights or other interests, is particularly germane to this case:

> [A] litigant's preference that the public not be apprised of the details of his litigation is not grounds for closure. Were it otherwise, we suggest that a large percentage of the court proceedings in this nation would be closed. In addition, the [proponent of closure's] perception of harassment in the media's reporting of court proceedings involving the guardianship does not rise to the level of an imminent threat to the administration of justice. ... "[T]he open court concept is an indispensable part of our system

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[16]/ See also, applying Nebraska Press Association v. Stuart test, Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667 (1979)(state interest in protecting juvenile offender not sufficient to justify punishment of news media for publication of name): Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535 (1978)(protection of public trust in judicial system and judges' reputations from harm as result of unfounded complaints to judicial qualifications commission insufficient to justify prohibition on publication of such information).

> of government and our way of life.'' Thus, barring some recognized exception, such as a threat to the administration of justice, or that the parties could not be accorded a fair trial if the public and press were present, it does not suffice to say that [the movant for access] has no legitimate interest in these records since "it is not the public's reason for attending but rather the public's right to attend that is to be evaluated."

Thus, a central error in the Fifth District's decision below is clear: the court simply refused to recognize the public's right of access to court files. The First District in Resha v. Tucker made the same error. In addition, all three district courts addressing the issue of court files sealed pursuant to Florida's sealing and expunction statute (or, more properly, Rules of Criminal Procedure 3.692 and 3.989) erred in a related, crucial respect. They all held that the burden of establishing reasons for access **falls** to the public. None of this Court's decisions, nor any of the United States Supreme Court, hold that once a court grants a motion to seal a court file, the burden of establishing facts in support of access at any time shifts to the public.[17] Indeed, as this Court explained in Barron, "This heavy burden is placed on the party seeking closure not only because of the strong presumption of openness but also because those challenging the

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[17] This Court stated without limitation in Barron, "Second, both the public and news media shall have standing to challenge any closure order. The burden of proof in these proceedings shall always be on the party seeking closure." 531 So.2d at 118. This Court also "disapprove[d] that portion [of Sentinel Communications Co. v. Smith, 493 So.2d 1048 (Fla. 5th DCA 1986, rev.denied, 503 So.2d 328 (Fla. 1987)] placing the burden of proof on the challenging party rather than the party seeking closure." Id. at 119.

[closure] order will generally have little or no knowledge of the specific grounds requiring closure." Barron, 531 So.2d at 118-119. In a case striking down on constitutional grounds a sealing and expunction statute, the First Circuit similarly found that placing on the public the burden of vindicating access is itself an intolerable infringement on the First Amendment. See Globe Newspapers, Inc. v. Pokaski, 868 F.2d 497, 507 (1st Cir. 1989).

Upon examination of the facts of this case through the lens of the first prong of the Press Enterprise II/Lewis test, it becomes clear that there is no compelling governmental interest -- much less one posing a serious and imminent threat to the administration of justice -- justifying closure of the Ninth Judicial Circuit's criminal court files.

A. There is no compelling interest supporting the continued sealing of these court files.

Russell has no Sixth Amendment right to a fair trial -- no pending criminal charges -- to weigh in the balance against the presumption of openness and the First Amendment and common law rights of the public in the criminal court files at issue. His interest in maintaining the secrecy of the Ninth Circuit's Court files, to the extent he has presented it, appears to lie mainly in the fact that he had his arrest records sealed in 1980 pursuant to Florida's sealing and expungement statute and does not wish the criminal charges against him exposed to public scrutiny.[18]/ This

[18]/ Again, although Russell has never asserted that he sought relief under Fla.R.Cr.P. 3.692, and the constitutional and common law standards set forth above, they would have been the only proser basis for sealing court files.

is obviously an interest of a lesser dignity than a present criminal defendant's Sixth Amendment right to a fair trial.

Any claim Russell might make that he has federal or state constitutional privacy rights in the Ninth Circuit Court files should be found without merit here. Russell's failure to raise either state or federal constitutional privacy rights in either of the lower courts should preclude him from raising such issues in this Court as a basis for keeping the court files sealed.[19]/

In evaluating such a claim -- should this Court decide to address it for guidance to the lower courts -- the Court must decide whether the contents of court files concerning former criminal defendants are susceptible to a reasonable expectation of privacy which society is prepared to recognize. Significantly, in a context other than access litigation, the United States Supreme Court has held that the reputational interests of an acquitted criminal defendant, underlying his claim to a federal constitutional right of privacy in documents and information reflecting his arrest and prosecution, are not of federal constitutional stature. Paul v. Davis, 242 U.S. 693, 96 S.Ct. 1155 (1976)(police distribution of flyer naming acquitted criminal defendant "Active Shop-

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[19]/ Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); Clark v. Department of Professional Regulation, 463 So.2d 328, 334 (Fla. 5th DCA 1985); Nelson v. Pinellas County, 343 So.2d 65 (Fla. 2d DCA 1977), reversed on other grounds, 362 So.2d 279 (Fla. 1978): Security Mutual Casualty Co. v. Bleemer, 327 So.2d 885 (Fla. 3d DCA 1976); Hosking v. Hosking, 318 So.2d 558 (Fla. 2d DCA 1975). In a footnote to its opinion in Russell, the Fifth District explicitly noted that the parties had not raised or addressed Florida's constitutional right to privacy. 592 So.2d at 808 n.2.

lifter" not invasion of federal right to privacy; information not kind entitled to constitutional protection). Indeed, it is generally recognized that arrests and prosecutions are public affairs. See Restatement (Second) of Torts, § 652D and comment f (1977).

Other federal courts have similarly recognized that information of the type Russell seeks to secrete from the public here is not "private in the constitutional sense" since federal constitutional protection extends only to information most intimate and personal in nature. Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3d Cir. 1991)(information contained in police report concerning wife's allegations of spousal abuse not protected by confidentiality branch of constitutional privacy right); Wade v. Goodwin, 843 F.2d 1150 (8th Cir.), cert. denied, 488 U.S., 109 S.Ct. 142 (1988)(constitutional privacy protections extend only to most intimate matters).

The Florida courts have not interpreted Florida's constitutional privacy amendment, art. I, sec. 23, Fla. Const., with the breadth that would encompass information in a frequent, former defendant's several criminal court files. To the contrary, Florida's decisions indicate, like the federal decisions, that intimate, personal, "sensitive" information is the type Article I, section 23 protects from government intrusion. See Rasmussen v. South Florida Blood Service, Inc., 500 So.2d 533 (Fla. 1987)(AIDS victim's effort in personal injury suit to trace source of illness to contaminated blood given as result of accident: privacy rights

of donors justify Civil Procedure Rule 1.260(c) protective order preventing plaintiff from discovering their names); In re T.W., 551 So.2d 1186 (Fla. 19789)(privacy amendment implicated in disclosure of personal matters and decision-making); Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985)(privacy amendment implicated in government's subpoena of bank records, but rights overcome by law enforcement interests); Florida Board of Bar Examiners re: Applicant, 443 So.2d 71 (Fla. 1983)(privacy rights implicated by psychiatric disclosure requirements in Bar application, but overcome). It would be a significant departure from this Court's precedent to hold that an individual has a reasonable expectation of privacy that society is prepared to recognize in court files containing information about multiple arrests and multiple efforts to secrete that information from the public and courts in several jurisdictions.

The most Russell has asserted here, if he has preserved privacy claims for appeal at all, is a claim based vel non on the existence of the various versions of the Florida statute and Rules of Procedure (although Russell has never asserted the Rules of Procedure as a basis for his relief) providing for sealings and expunction of arrest records.[20] A close analysis of the Florida Statutes providing for sealing and expunction of arrests records, the Rules of Procedure effectuating similar relief for court records, and the constitutional standards shows that, far from

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[20]/ Of course, the statute alone cannot affect or control court records. Johnson v. State, 336 So.2d 93.

supporting Russell's and the district courts' views that Russell has an overriding right or interest in keeping the court files below secret from the public, they demonstrate all of Russell's records should be unsealed.

1. The statute, Rules of Procedure and case law must be interpreted consistently.

Since the mid-1970's the Florida Statutes have provided for some persons who meet their criteria to have "records of the arresting authorit[ies]", later called "criminal history records," sealed or expunged. See §901.33, Fla. Stat. (1979); §943.058, Fla. Stat. (1980 Supp.); 8943.058, Fla. Stat. (1988). The statute was originally enacted to accord persons arrested but not adjudicated guilty of any offense a "fresh start," to allow them to go forward in life free of the blemish of a criminal record. Originally, and as the statute appeared when Russell obtained his Orlando sealings, it did not purport to place a limit on the number of sealings or expunctions a former criminal defendant could obtain, nor did it purport to apply to records of the courts. See 901.33, Fla. Stat. (1979). Significantly, the statute accorded the person arrested the right to deny that he had ever been arrested in response to "any non-judicial inquiry" in that regard. Id. After Johnson v. State, this Court adopted a rule of criminal procedure, 3.692, effectuating with regard to court records the relief envisioned by the Legislature. See 343 So.2d 1247 (rule effective July 1, 1977).

Then, the Legislature substantially amended its statute effective October 1, 1980. This version, renumbered as section 943.058 of the Florida Statutes, was in effect at the time Russell

obtained three of his four Tampa sealings and expunctions. With regard to judicial records, the statute provided:

> The courts of this state shall continue to have jurisdiction over their own procedures, including the keeping, sealing, expunction, or correction of judicial records containing criminal history information.

See § 943.058(2), Fla. Stat. (1980 Supp.).[21]/ With regard to the courts' power to seal other criminal history records, the new statute set forth four criteria for obtaining relief:

> (a) The person who is the subject of the record has never previously been adjudicated guilty of any of a criminal offense or comparable ordinance violation.
>
> (b) The person who is the subject of the record has not been adjudicated guilty of any of the charges stemming from the arrest or alleged criminal activity to which the records expunction petition pertains.
>
> (c) The person who is the subject of the record has not secured a prior records expunction or sealing under this section, former s. 893.14, or former s. 901.33; and
>
> (d) Such record has been sealed under this section, former s. 893.14, or former s. 901.33 for at least 10 years; except that, this condition shall not apply in any instance in which an indictment or information was not filed against the person who is the subject of the record.

See § 943.058(2), Fla. Stat. (1980 Supp.) (emphasis supplied). This Court's rule remained substantially unchanged, but in 1984 this Court adopted Rule 3.989 setting forth new forms of petition, affidavit and order. The forms clearly indicate the Court contemplated and intended to effectuate with regard to court records no broader relief than provided for executive branch records.

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[21]/ This portion of the amendment merely conformed the statute to Johnson v. State, 336 So.2d 93, and codified respect for the separation of powers doctrine.

Unfortunately, the lower courts of this state appear never to have understood that the statute and rules of procedure had to be interpreted in a constitutional fashion. Instead, they appear to have erroneously looked to the statute and rules only, ignoring Press-Enterprise II, Lewis, and Barron, and sometimes even ignoring the statute and rules, as Russell's cases demonstrate.

2. Russell obtained relief in error".

Russell submitted to the court below (R. 43-47) that he sought his second and third Tampa expunctions on the authority of § 943.058, Fla. Stat., which remained unchanged in pertinent part from 1980 until 1988. Under the clear terms of the statute, Russell did not qualify to have executive branch criminal history records sealed or expunged in 1982 and 1984, having previously obtained sealing of four earlier criminal incidents (three in Orlando, one in Tampa consisting of both felony and misdemeanor files), yet he was somehow able to obtain such orders from the Thirteenth Judicial Circuit. Moreover, Russell's Tampa sealings contravened the Rules of Procedure for the same reason: this Court's rules of procedure only intended to provide for court records that relief the Legislature had enacted for executive branch records. See Fla.R.Cr.P. 3.692(a). Thus, not only was Russell never required to meet the constitutional standards for sealing court files, he was never even required to meet the terms of the Rules of Procedure or the statute.[22] Furthermore, by his

[22] He has never asserted that he sought to meet the standards or that the Tampa or Orlando courts required him to do so.

attorney's admission, the existence of other sealed or expunged records was never specifically disclosed to the Tampa courts.

Of course, Russell argues that he was not required to disclose his prior sealings,[23]/ when seeking any of his relief. But § 943.058(6)(b)3, Fla. Stat. (1980 Supp.) specifically stated that the subject of sealed or expunged criminal history records may lawfully deny or fail to acknowledge the records except when he subsequently petitions for another sealing or expunction. See also, as to court records, Rule 3.692(a), Fla.R.Cr.P. ("Such petition shall state the grounds upon which it is based and the official records to which it is directed and shall be supported by an affidavit of the party seeking relief which affidavit shall state with particularity the statutory grounds and facts in support of such motion").[24]/ Russell supports his argument that he was not required to be entirely truthful with the Tampa courts by citing post-1980 § 943.058(3), Fla. Stat. and asserting it "permitted" multiple sealings and expunctions of executive records, and apparently court records. Russell's construction of subsection (3) of § 943.058 renders it a "bonus section" available to defendants who did not meet the criteria of subsection (2)(a)-(d), including

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[23]/ Russell's attorney submitted to the court below that his client "didn't get specific" and "didn't have to" (R. 47-48). The exact averments Russell made are unknown because the Tampa court files remain sealed.

[24]/ As if it was not already clear enough, the form adopted in 1984, Rule 3.989, makes clear just how specific this Court wanted petitioners to be. It is unfortunate that an applicant for judicial grace would believe it appropriate to withhold clearly relevant information in absence of a form asking for it.

the "one sealing per customer" rule. Russell's construction is erroneous.

Subsection (3) of the statute allowed a court to order expunction of criminal history records maintained in the state's central criminal history depository, the Florida Department of Law Enforcement,

> only upon a specific finding by a circuit court of unusual circumstances requiring the exercise of the extraordinary equitable powers of the court. Upon a finding that the criteria set out in paragraphs (2)(a)-(c) have been met, the records maintained by [FDLE] may be ordered sealed by any court of competent jurisdiction."

See 943.048(3), Fla. Stat. (1980 Supp.). First, a finding of "unusual circumstances" obviously does not form a legitimate basis under Press-Enterprise (II) and Lewis for the sealing of court files. Moreover, it does not form a legitimate basis for the relief Russell obtained as to his non-judicial criminal history records either: the relief Russell requested was not available to him in 1982 because (1) he had already obtained sealings of four criminal incident records and (2) the "unusual circumstances" provision applies only to FDLE records.

Russell has argued below that two district court decisions, Torres v. State, 566 So.2d 843 (Fla. 3d DCA 1990), and State v. Greenberg, 564 So.2d 1176 (Fla. 3d DCA 1990), show that the statute in effect from 1980 through 1987 did provide for sealing or expunction of criminal history records under the "unusual circumstances" provision even though the defendant did not meet the statutory criteria, including the lack of previous sealings or

expunctions. Greenberg, on which Torres is based, misquotes the statute, taking the "unusual circumstances" language out of context. Neither case is good authority for Russell's position. The Second District Court of Appeal did not even agree with him. Russell, 570 So.2d at 982.

It is possible the Tampa courts accepted Russell's erroneous construction of the statute in 1982 and 1984 and sealed his court files and other records on a finding of "unusual circumstances," giving Russell on multiple occasions the "right to deny" he has ever been arrested. With regard to court records, this is a showing far lower than the First Amendment and common law require. It also could be that Russell's failure to specifically disclose the extent of his sealed or expunged records collection to the Tampa courts played a role in the courts' decisions. The very attorney who represented Russell in connection with his first and second Tampa sealings and expunctions stated before the court below that he knows nothing about the Orlando sealings (R. 39-40). Russell could not have disclosed them to the court if the attorney handling several of his Tampa motions did not know about them. The information may have made a difference. It should have, and this Court should take this opportunity to state whether a former defendant can ever show a compelling interest justifying multiple sealings of court records.

Thus, even if this Court chooses to recognize a "compelling governmental interest" in protecting unconvicted criminal defendants from the future harm of an open criminal record, that

interest is insufficient to support closure of court files in this case.[25] Whatever the original circumstances, it now appears quite clearly that all of Russell's records should be opened for public inspection. Russell should not be able to maintain the relief he erroneously obtained in Orlando after ~~erroneously and deceptively~~ obtaining more of the same in Tampa. It simply presents an affront to this Court's authority and to the compassionate Legislature that spawned the confusion in the first place.

It should also concern this Court that numerous litigants, apparently including Russell, have been able to obtain the extraordinary relief of having records sealed on numerous occasions without having to make the showing required, and have taken repeated advantage of statutes and rules adopted to give first-offenders a break. It clearly concerned the Legislature, which amended section 943.058 this year to require petitioners for sealing and expungement of criminal history records to obtain an FDLE certificate of eligibility certifying that they have never obtained such relief before. See Ch. 92-73, ~~Laws of Fla.~~ (1992). However, the Legislature is without power to correct the abuses perpetrated concerning court records. It falls to this Court to do

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[25] In Globe v. Pokaski, 868 F.2d 497, the court found that a statute automatically sealing court files in cases where the defendant was found not guilty, where a "no bill" was returned or where "no probable cause" was found, and permitting the court to seal cases ending in nolle prosequi and dismissal, served a compelling state interest. Nevertheless the court held that to meet First Amendment standards, individualized showings by each defendant were required. Individualized showings are also required under Lewis and Barron. Russell has not demonstrated such a showing now or that he made one in 1980.

so.

Indeed, the Legislature itself has already recognized the overriding fact-based nature of the public's interest in access to true criminal records of some persons not convicted of crimes. In response to judicial decisions prohibiting courts from exercising any discretion to deny relief even as to executive branch records when the criteria of 943.048(2) were met, the Legislature amended the statute in 1988.[26]/ Gonzalez v. State, 565 So.2d 410 (Fla. 3d DCA 1990), supplies a succinct statement of the public's interest in such cases, which has equal application to this case:

> All of the exceptions [to when a person may lawfully deny or fail to acknowledge criminal history] involve situations where the public interest in knowing of a person's criminal record is at stake. Similarly, the public places its trust in fire fighters who at any given moment may be called to render assistance in a life threatening situation. For the public safety, there is a compelling interest in knowing the character of the public employees who serve the community. This is especially true where, as here, a fire fighter has pled nolo contendere to cocaine charges. ... Accordingly, it is within the trial court's discretion to find that the public has just as much right to know of the criminal records of existing public employees as it does to know of the criminal records of those seeking a Position of public employment or trust.

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[26]/ The amendment states:

> This subsection does not confer upon any person who meets the criteria set out in this subsection a right to the sealing or expunction of any criminal history record, and any request for sealing or expunction of a criminal history record may be denied at the sole discretion of the court. (Emphasis added.)

Id. at 411-12 (emphasis supplied).[27]/

Given the importance this Court has placed on public access to court records, and the importance to the public of the ability to examine the circumstances of this particular case, it is clear that Russell cannot advance any interest in support of continued closure which meets the "clear and imminent threat to the administration of justice" prong of the Lewis test. It does not appear he ever did, and in truth it is the public who can advance such an interest here.

B. The sealing orders below also clearly fail the "least restrictive means" test

The final prong of the Press-Enterprise three-part tests requires a finding that there are no alternatives to closure that would adequately protect the compelling interest asserted. The second and third parts of the Lewis/Barron test require findings that no less restrictive alternatives are available and that closure will be effective without being broader then necessary to protect the compelling interest asserted. These parts of the tests concern the permissible scope and duration of closure orders. Ordinarily it appears contemplated that at some point, closure orders will terminate. See, e.g., Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (order entered to protect fair trial rights terminates on sequestration of jury); News Journal Corp. V. Foxman, 559 So.2d 1227 (Fla. 5th DCA 1990)(same). The Constitution and

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[27]/ The Gonzalez court echoed this court's analysis in Barron, 531 So.2d at 118: "[A] privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure."

common law also require that such orders be limited to that information found to jeopardize the compelling interest asserted. **See,** e.g., Barron.

The orders below are perpetual, wholesale sealing orders -- excluding the public from entire court files forever, and thus are unconstitutional applications of any **"right"** the Legislature created and any grace afforded by this Court's rules of procedure. Orders such as these exceed the least restrictive means of accomplishing the objective of wiping the slate clean for the person innocent or wrongfully charged. The **orders** sweep from view all records, not just those portions sufficient to accomplish the purpose. For this reason alone, this Court can find the orders below **invalid.**[28]/

11. There is no reason for this Court to depart from the constitutional and common law sealing standards in this case or in section 943.058 cases generally.

Notwithstanding the extensive record of decisions discussed above, three of Florida's district courts of appeal, the Second in Russell, 570 So.2d 979, the Fifth in the decision on review here, and the First in Resha v. Tucker, have rejected this Court's decisions in Lewis, Bundy, and Barron, and United States **Supreme** Court precedent, and have decided that once records have been sealed pursuant to section 901.33 or 943.058 of the Florida

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[28]/ Petitioner the State of Florida has particular concern for the breadth of courts' sealing and expunction orders. They have largely resulted in wholesale destruction of executive branch records, including in some instances FDLE records, leaving the courts **as** the sole repositories of accurate history.

Statutes and Rules 3.692 and 3.989, constitutional and common law access concerns and values are no longer implicated and the Supreme Court's tests no longer apply. None of the reasons advanced by any of the district courts of appeal present cogent reasons for departing from the Press-Enterprise cases or modifying Lewis, Bundy, and Barron.

A. Johnson v. State has been stretched too far.

The Fifth District Court of Appeal cited and relied on Johnson v. State, 336 So.2d 93 (Fla. 1976), for its holding that the Times and Herald had to show "good cause" for unsealing the Ninth Circuit criminal court records relating to Russell, and distinguished the authorities cited above by categorizing them as standing for the proposition that the public should have full access to "trials and other public proceedings." In Johnson, this Court held Florida's sealing and expunction statute[29]/ unconstitutional to the extent it purported legislatively to require expunction (that is, destruction) of judicial records; in this Court's view such a command impermissibly encroached on its own procedural rule-making authority. This Court stated that while the Legislature can define substantive requirements for sealing and expunction and can properly provide for such a right, the Legislature may not consistent with the Florida Constitution mandate procedures for the court system. Thus, this Court decided as a matter of policy that court records would not be destroyed or "expunged," but would only

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[29]/ Then newly enacted Chapter 74-206, Laws of Florida (1974); this law was numbered 901.33 when codified in the statutes.

be sealed, subject to the courts' power to reopen them. The Court then adopted Criminal Procedure Rule 3.692.

Johnson v. State was decided well before Lewis, Bundy, Barron, and the Press-Enterwise cases. It did not purport to address the First Amendment and common law access concerns presented by this case; it does not appear from the opinion that any such question was presented to the Court. In fact, the opinion's reasoning suggests that had the questions been presented, the Court would have invalidated the statute on First Amendment grounds, as in Globe v. Pokaski, and would have held that the Legislature could not require sealing of judicial records in derogation of the constitutional standards. In light of Lewis, Bundy, and Barron, the "good cause" language in Johnson v. State cannot be read, as the Fifth District read it below, to set forth the appropriate inquiry for a court considering a motion to reopen sealed files. To construe Johnson in such a fashion eviscerates more than a decade of precedent from this Court and the United States Supreme Court addressing the subject of access to court records and proceedings. The holdings of Barron, Lewis, Bundy, and the Press-Enterprise cases, along with the host of other federal and Florida cases cited above, are not limited to "trials and other public proceedings," as the Fifth District seemed to say they are.[30]/ An examination of just a few of the cases cited, including Barron, Lewis, and Globe v. Pokaski, shows that they address access to

[30]/ See, e.g., Barron, 531 So.2d at 118 (specifying presumption of openness applies to both filed records and court proceedings).

judicial records in the same terms and with the same concerns, or even heightened concerns, for public access which adhere in trials and hearings generally.

The Fifth District Court below framed the issue in this case as "whether properly sealed court records remain 'public records' within the meaning of our statutes and constitution." 592 So.2d at 808. The court held "that they do not. They are former public records, now sealed, subject to being reopened as public records upon 'good cause shown.'" Id.[31]/ The Fifth District's language appears to suggest that when a judicial record is made secret by court order it somehow changes in nature, character or dignity and is no longer subject to those rules governing court records generally. But by the very terms of this Court's decisions, and those of other district courts of appeal on judicial access issues, this cannot be so. See also Lifecare International, Inc. v. Barad, 573 So.2d 1044 (Fla. 3d DCA 1991)(civil court file sealed when case settled; when opposing non-party's motion to unseal two years later, proponent of sealing had to meet Barron test); Reiter v. Mason, 563 So.2d 749 (Fla. 3d DCA 1990)(proponent of closure offered no "particularized justification" for continued closure; file unsealed).

The courts may be unconstitutionally applying section 901.33 or 943.058 of the Florida Statutes as mandating sealing in the

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[31]/ How the court came to use the terms "public record" and "former public record" is unclear: none of the parties had asserted that court files generally, or the Ninth Circuit files in issue in particular, are governed by Florida's Public Records Act, Chapter 119 of the Florida Statutes.

first instance or continued sealing of court files. Of course, a Florida Legislative enactment cannot contravene the First Amendment to the United States Constitution or court decisions addressing access to the judicial branch of government, and certainly not the separation of powers doctrine. This Court may have assumed that it did not have to amend Rules 3.692 and 3.989 after Press-Enterprise (II), Lewis and Barron were decided in order for the lower courts and litigants to understand the significance of the decisions. Sadly, however, they have not understood, in spite of the clarity of this Court's opinions. As Barron, and certainly Locke v. Hawkes, make clear, the existence of a statute expressing a policy preference for denial of public access to a class of documents or proceedings cannot end the inquiry under the three-part test: such a statute, as an expression of the interests to be protected, is only a factor to weigh in the balance. See also In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986)(existence of Classified Information Procedures Act does not excuse court from making constitutional three-part inquiry when considering motion to seal sentencing hearing and documents); Miami Herald Publishing Co. v. Chappell, 403 So.2d 1342 (Fla. 3d DCA 1981)(reversing trial court order closing competency hearing based on Baker Act; requiring application of three-part test). Even so, the statute does not suggest the Legislature condones successive sealings by one defendant.

B. The passage of time and conclusion of a case do not eviscerate the public's access rights.

The only other identified bases for applying to Russell's

criminal court files a standard different from that established in Lewis, Bundy, and Barron is that time has passed since Russell obtained his sealing orders and the cases have concluded. These justifications appear inherent in the Fifth District's decision.[32]/

None of this Court's previous decisions have suggested that the public loses its rights of access to court files when a case concludes or because a case concludes. To the contrary, the same rights apply. As the District of Columbia Circuit Court explained in a case addressing the First Amendment right of access, Mokhiber v. Davis, 537 F.2d 1100, 1105-06 (D.C. Cir. 1988):

> To the extent [a right of access] exists, it exists today for the records of cases decided a hundred years ago as surely as it does for lawsuits now in the early stages of motions litigation. The fact that a suit has gone to judgment does not in any sense militate against the public's right to prosecute a substantiated right to see the records of a particular case. Moreover, access to court records does not involve relitigation of the underlying dispute, so the rationale behind requiring extraordinary circumstances for post-judgment intervention does not as a rule apply to access claims.

See also, e.g., Bank of America Nat. Trust & Sav. Asso. v. Hotel Rittenhouse Asso., 800 F.2d 339 (3d Cir. 1986)(access to settlement documents); Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985)(access to concluded litigation); Goldberg v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986)(same). Indeed, the public's interest in access to criminal cases is surely heightened as to those cases where no public trial ever occurred -- there was less

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[32]/ The First District in Resha v. Tucker similarly distinguished Barron on the ground that it involved closure in an on-going case. The Second District held that because Russell's records had been sealed for several years, the orders sealing them must be afforded a presumption of correctness.

of an opportunity in the first place to monitor the dispensation of justice. Recognizing a First Amendment right of access to completed criminal case files in Globe Newspapers, Inc. v. Pokaski, 868 F.2d 497, 502-503, the First Circuit correctly framed the issue, "the question before us is not whether there is a right to the information but whether the Commonwealth has, by providing access in the past, given the public sufficient opportunity to obtain that information."[33]/ The court held that it did not, and explained, "That access is obtained after completion of the case makes no difference. As the district court pointed out, access to completed proceedings is indispensable where what is at issue is the system itself." 868 F.2d at 503 n.12.[34]/ "The system itself" is obviously at issue in the present case.

Clearly, the First Amendment does not permit courts to shift the burden of showing why access should be granted to the public. See Globe v. Pokaski, 868 F.2d at 507. Barron and Lewis indicate Florida common law similarly prohibits what the district courts have done here. In the Boston Globe's challenge of the constitutionality of an expunction statute, the First Circuit explained:

> This concept of "now or never," "speak now or forever hold your peace" is a strict, harsh one, narrowly confining First Amendment

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[33]/ Like Florida's, Massachusetts' statute and case law did not address eventual unsealing.

[34]/ The First Circuit characterized the "present prospect of future access" to court files in criminal cases as a "felt presence" and rejected views underestimating "the contribution to governance of investigative reporting aimed at exposing bribery, ex part dealings and judicial or other misconduct in connection with the disposition of criminal cases."

> interests in what might be a large problem of governance to a temporarily immediate, discrete episode. It seems to us to contradict the insight, expressed in Richmond Newspapers, 448 U.S. at 572, 73: "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire if chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." If the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously.

Globe Newspaper Co. v. Pokaski, 868 F.2d at 504.

Moreover, no version of Florida's sealing and expunction statute nor any version of Rule 3.692, Fla.R.Cr.P. (entitled "Petition to Seal or Expunge") has ever provided a time limit or parameter for a former defendant to seek this relief. It is anomalous at best to suggest that while a former criminal defendant can seek to seal his or her court file at any time, the public's rights of access are altered or abridged by the passage of time.

A close reading of Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867 (Fla. 1st DCA 1979), the case cited by the Second District in support of its ruling that a presumption of correctness attached to the Tampa trial court's sealing orders, reveals that Willis does not contain a holding to that effect. The Willis case invalidated a circuit court administrative order automatically sealing all depositions filed in court files in Florida's Second Judicial Circuit on the ground that it contravened the rules of procedure providing for public access to court files, Rule of Civil Procedure 1.260, and the similar rule of criminal procedure

providing for individual parties and witnesses to seek protective orders to prevent public disclosure of depositions on a case-by-case basis. The Willis court's rejection of the media's First Amendment access arguments cannot be stretched too far: Barron, Lewis, and the Press-Enterprise cases had not been decided at that time. Furthermore, the remark the Second District Court of Appeal relied on for its "presumption of correctness" is more properly read in context: it appears the Willis court was rejecting the notion that no court records could ever properly be sealed consistent with the First Amendment; clearly, as is evident from the court's disposition of the matter, the court was not holding that once a sealing order is entered, even if entered in demonstrable absence of the proper findings, the order must be presumed correct. See also Globe v. Pokaski, supra (requiring unsealing of all automatically sealed files and those sealed by court order in absence of proper findings by court). A "presumption of correctness" in access cases impermissibly elevates the court system's general interest in finality of decisions over the First Amendment and the public's rights and needs.

According presumptions of correctness to sealing orders such that the burden of showing why court records should become public shifts to the public also eviscerates other rules applicable to closing court files. In particular, in addressing the procedural requirements for sealing court files or exclusion of the press and public from court proceedings, this Court and the district courts of appeal have held that the press and public must be accorded notice and an opportunity to be heard on the issue of closure.

See, e.g., Barron; Lewis; State ex rel. Miami Herald Publishins Co. V. McIntosh, 340 So.2d 904 (Fla. 1976); Times Publishins Co. v. Penick, 433 So.2d 1281 (Fla. 2d DCA 1983); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979). There is no showing in the Record in this case (or in Russell, 570 So.2d 979 or Resha v. Tucker) that the press or public had actual notice or the opportunity to be heard at the time the sealing orders were entered.

In sum, if this Court allows to stand the allocation of burden and standards of proof established by the district courts in the two Russell cases and the Resha case, it will make access to court records the exception and not the rule. The facts of the cases demonstrate that unsealing criminal court files under these burdens is nearly impossible.

III. The Fifth District erred in finding insufficient evidence in the record *to* support the trial court's decision.

The trial court specifically found that the public interest would be better served by unsealing the court files at issue in this case (R. 204). It came to that conclusion not on a record devoid of any evidence as the Fifth District suggests, but based on the facts established by Russell's own filings and admissions in the Tampa and Second District cases and his counsel's admissions before the trial court.

Central to the trial court's decision to open the sealed files here were the existence of proceedings in the Thirteenth Judicial Circuit and the Second District Court of Appeal in which the movants are seeking to vacate orders sealing or expunging court files and other law enforcement records concerning Russell's three

Tampa arrests, the existence of two Ninth Circuit criminal court files identified by the Clerk of Court as concerning worthless check and grand larceny charges against a person of the same name, and Russell's counsel's admission that the Orlando sealed files were not disclosed to the courts in Tampa either when Russell originally sought the sealings of his Tampa files or during the two previous years during which Russell opposed the newspapers' requests for access, based on the "beauty" of the law that allegedly permitted him to conceal the information and not fear perjury charges (R. 31,47,49,50).[35]/ Of course, attorneys' representations, admissions and stipulations in court are binding on their clients. Spitzer v. Bartlett Bros. Roofing, 437 So.2d 758 (Fla. 1st DCA 1983); Parhiala v. State, 368 So.2d 672 (Fla. 1st DCA 1979), citing Laird v. Air Carrier Engine Service, 263 F.2d 948 (5th Cir. 1959); A. Duda & Sons Cooperative Ass'n v. United States, 504 F.2d 970 (5th Cir. 1974).

Given the existence of the sealed Ninth Circuit files and Russell's counsel's own admission that Russell did not disclose their existence to the Tampa courts either when seeking his sealings there or in connection with the more recent access litigation, the public's interest in the files is obvious. It appears the Fifth District would have the Petitioners prove the contents of all the sealed files, an unnecessary and impossible burden.[36]/

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[35]/ The trial court's decision was not grounded in any facts concerning Russell's guilt or innocence of the Ninth Circuit charges, which is not even an issue bearing on this case.

[36]/ As indicated earlier, the executive branch takes expunction orders literally.

If the criminal court files at issue do not concern Russell, he has no standing to assert the interests of the person they do concern.[37]/ Their unsealing will not harm him, since it will not be his criminal history revealed, and they will have no relevance or effect on the concurrently transpiring Tampa access proceedings. If the records do concern Russell, what he essentially asserts is a "right" to keep secret from the public -- not to mention the judges of the Thirteenth Judicial Circuit and Second District Court of Appeal -- information bearing directly on the propriety of his actions in seeking and obtaining the extraordinary relief of having six criminal incidents sealed. As this Court has previously observed, "To attain true justice the written law must be seasoned with a proper amount of common sense." State ex rel. Miami Herald v. McIntosh, 340 So.2d 904, 910 (Fla. 1976).

CONCLUSION

This Court should reaffirm its long-standing precedent and hold that notwithstanding the existence of Florida's sealing and expunction statute and Rules of Criminal Procedure 3.692 and 3.989, the constitutional and common law tests for sealing judicial

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[37]/ Ordinarily, one has standing to assert only one's own privacy rights and interests. To have standing to assert the privacy rights of another, there must be a special relationship, such as one of trust or confidence between the third party and the person seeking to assert the third party's privacy rights on his or her behalf. See, e.g., Eisenstandt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972)(person dispensing contraceptive to single woman had standing to assert her privacy rights); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965)(physician had standing to assert marital, sexual privacy rights of his patients). Not even an employer/employee relationship is sufficient to give one party standing to assert privacy rights of another to prevent disclosure of records concerning another. Daytona Development Corp. v. McFarland, 454 So.2d 761 (Fla. 2d DCA 1984).

records from public view must always be satisfied both when sealing is initially granted and for sealing to continue once it is challenged. Changing the Barron/Lewis and Press-Enterprise II tests for a class of judicial records -- as the First, Second and Fifth Districts have done for those judicial records sealed pursuant to motions based on section 943.058, the rules of procedure and their predecessors -- directly contravenes the holdings and analyses of those precedents and opens the door for their emasculation. In any event, this Court bears the ultimate power and responsibility to regulate the administration of the judicial system and its records, to correct abuses of it, such as that which is evident here, and to take action necessary to restore public confidence.

The trial court below made a sound assessment of the public's interest, and that of the court system, in ascertaining the truth. For the foregoing reasons, this Court should reverse the decision of the Fifth District Court below, reinstate and affirm the decision of the trial court in this case, and should order the records at issue unsealed and open for public inspection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and appendices thereto were furnished by U.S. Mail to RICHARD S. BLUNT, ESQ., 110 South Armenia Avenue, Tampa, FL 33609, this 10th day of August, 1992.

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