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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

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

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PRELIMINARY STATEMENT

The parties to this case are referred to in this brief as they are in the Petitioners' Initial Brief. The Petitioners wish to point out that much of what is designated as "Counter-Statement of the Case and of the Facts" in Russell's Answer Brief is actually argument, and in many instances where that portion actually sets forth facts, it departs entirely from the Record. See Answer Brief pp. 1-7. In the interests of the schedule for briefing and argument established by this Court, the Petitioners have not moved to strike Russell's brief, but ask the Court to disregard his non-Record factual assertions. In the interest of organization, Petitioners address the arguments presented in the Counter-Statement under the headings where they appear relevant.

ARGUMENT

I. The First Amendment constrains court action, including the sealing of judicial records.

Respondent Russell asserts that the First Amendment addresses only "legislatively created infringements on the press," has no application to court action, and therefore has no place in the discussion in this case. See Answer Brief, p.12. This assertion is wholly without merit. The First Amendment constrains court action in a host of contexts. See, e.g., The Florida Star v. B.J.F., __ U.S. __, 109 S.Ct. 2603 (1989)(reversing judgment for invasion of privacy contravening First Amendment): Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); New York Times Co. v. Sullivan, 376 U.S. 254 (1964)(libel judgments cannot contravene First Amendment); Nebraska Press Ass'n v. Stuart, 427

U.S. 539 (1976)(First Amendment prohibits court-ordered prior restraint of speech absent satisfaction of three-part test); Pennekamp v. Florida, 328 U.S. 331 (1946)(court cannot punish contempt based on publication); see also State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d **904** (Fla. 1977). **Likewise,** the federal courts have held that the First Amendment constrains closure of judicial records and proceedings in criminal and civil cases, see Initial Brief at 14-17, based on a two part analysis: the historical tradition of openness and a finding that access serves important values.'/ Both an historical tradition of access to judicial records and the values and interests to be served by access -- the interests of justice -- are present with regard to the judicial records at issue in this case.

The nature or type of interest asserted in support of closure, regardless of whether the interest is expressed in a statute, does not vary the three-part constitutional test or the proponent of closure's burden to satisfy it by a specific factual demonstration. See, e.g., In re Washington Post Co., *807* F.2d **383** (4th Cir. **1986)**

'*See* also Globe Newspaper Co. v. Superior Court, 457 **U.S.** *596,* 604 **(1982):**

> Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. **214, 218** (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. Despite the defendant's assertions to the contrary, these prophylactic properties of access exist for these court records to the same degree as trials.

(rejecting argument that existence of CIPA-protected "national security interests" mandated application of different test or considerations); Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989)(rejecting argument that First Amendment rights did not attach to judicial records of acquittals, findings of no probable cause, dismissals, and nolle prosequi). Russell's effort to distinguish Pokaski, Answer Brief, p. 24-26, misstates the facts of that case, and the court's holdings.

Russell may be arguing that there is no historical tradition of access to pre-trial judicial **records** and **for** that reason the First Amendment does not constrain their closure. He cites nothing in support of this apparent argument, and as reflected in the Petitioners' Initial Brief, there have been numerous federal decisions to the contrary. The tradition in this State, indeed, in our democratic heritage, is access, a tradition with its roots in early American common law. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978).[2]/ By contrast, and contrary to

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[2]/ It is clear that the courts of this country recognize a general right to inspect and copy public documents, including judicial records and documents. In contrast to the English practice, ... American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.

See also Globe v. Pokaski, 868 F.2d at 503 (noting historical tradition of access citing plethora of materials available to framers of the Constitution). The public's right to inspect and copy judicial **records** actually pre-dates the United States Constitution. See United States v. Criden, 675 F.2d 550 (3d Cir. 1982)(First Amendment right of access to pre-trial proceedings); U.S. v. Criden, 648 F.2d 814, 819 (3d Cir. 1981)(right of access to tapes played during prosecution of Abscam defendants).

Russell's assertions, sealing and expunction of criminal records in Florida appears to be of recent, rather than historical, vintage. ***See*** Purdy v. Mulkey, 228 So.2d 132 (Fla. 3d DCA 1969), aff'd, 234 So.2d 108 (Fla. 1970)(reversing trial court order sealing court file and expunging sheriff's office fingerprints and photographs for lack of statutory authority or strong overriding equitable considerations). And even if this Court were to abstain from deciding this case on First Amendment grounds, Florida's common law and policy still constrain the sealing and perpetual closure of judicial records in absence of demonstrations and findings satisfying the Miami Herald Publishins Co. v. Lewis[3]/ three-part test. Russell has presented no legal authority or cogent reason for a ruling that the Lewis requirements are inapplicable to sealing in the first instance or to a later evaluation whether sealing should continue.

11. The trial courts cannot, consistent with federal and Florida law, seal criminal court files on a bare ruling based on "the interests of justice."

It appears that Russell has misperceived the Petitioners' argument. The Petitioners do not contend that judicial records can never be sealed in the first instance, or remain sealed after challenge, consistent with the First Amendment and Florida common law. The Petitioners simply ask this Court to require that the Press-Enterprise' and Lewis tests be satisfied by persons seeking

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[3]/ 426 So.2d 1 (Fla. 1982).

[4]/ Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735 (1986).

relief pursuant to § 943.058, Fla. Stat., and Rules 3.692 and 3.989, Fla.R.Crim.P., and that courts sealing judicial records make the required findings. Russell, however, apparently argues that courts should be permitted to "continue discretionary sealing of judicial records" -- apparently unconstrained by Press Enterprise or Lewis -- because of the existence of section 943.058 and its predecessors. The unbridled "discretionary" sealings advocated by Russell cannot be sanctioned without overruling Lewis and departing from Press-Enterprise.

Almost in the same breath, Russell asserts that section 943.058 "has no bearing on this case." Certainly, Russell has an interest in directing this Court's scrutiny away from the fact that when he obtained sealings and/or expunctions of his judicial and executive branch records in Tampa in 1982 and 1984, he did not satisfy the statutory requirements, which Rule of Criminal Procedure 3.692, and certainly Rule 3.989, appear to have adopted by reference with respect to the sealing of court records.[5]/ To the extent that § 943.058's existence has paved the way for the sealing and destruction of governmental records for years and is now

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[5]/ Courts considering the statute have concluded, constitutional errors aside, that they did not have discretion to deny closure if the petitioner met the statutory criteria. See Merritt v. State, 522 So.2d 93 (Fla. 1st DCA 1988); Thomas v. State, 513 So.2d 163 (Fla. 2d DCA 1987); Canter v. State, 448 So.2d 64 (Fla. 3d DCA 1984). If a court lacks discretion to refuse to seal records when petitioners meet the criteria, it is illogical to conclude that the same court has such discretion when the defendant does not meet the criteria. Therefore, Russell's argument in favor of continued "discretionary" sealing does not benefit him. He obviously did not qualify in 1982 and 1984, irrespective of his admittedly undisclosed Orlando sealings.

asserted as a bar to unsealing those records which remain, it does bear on this case. This case is an opportunity to clarify the law regarding Florida's sealing and expunction statute in at least three respects: (1) Did this Court intend for 3.692 to effectuate 943.058's relief with regard to court records according to the statutory criteria? (2) Are persons who request sealings of judicial records pursuant to the rules required to meet the constitutional and common law criteria for sealing in addition to the statutory criteria? and (3) Must the same constitutional and common law tests be satisfied by the proponent of closure when access to sealed court files is later sought? For the reasons explained more fully in Petitioners' Initial Brief, they submit that the answer to all three questions should be ***yes.***

Russell further asserts that Petitioners are asking the court to declare unconstitutional the sealing of court records in this State and section 943.058 of the Florida Statutes. Petitioners are not; they simply seek reaffirmation of the existing law and this Court's guidance and action to remedy unconstitutional and erroneous applications and interpretations of the law, which Russell advocates in requesting a continuation of unconstrained "discretionary" sealings.

It may be that a person "improperly accused" -- an assertion thus far unsupported with regard to Russell -- can present facts establishing a compelling interest satisfying Press Enterprise and Lewis, both in the first instance and when the sealing is

challenged later.[6]/ But even in such instances, the remaining two portions of the constitutional and common law tests should also be met.

Russell appears to assert that there are no alternatives to total closure of court files which a court could find protective of whatever compelling interest is asserted. Of course, there are. One possible alternative is the redaction of identifying information, such as the arrested person's name, from the judicial records. In that way, the public could scrutinize the wrongful government conduct, and individual officers' wrongful actions would not be wiped from the slate, but the "improperly accused" individual would obtain relief.

As the record in this case reflects, it is not an isolated circumstance for one former defendant to have sealed court files relating to multiple, successive incidents of arrest. It is unknown whether any of these sealings were supported by the necessary constitutional and common law findings. That said, all post-1980 versions of Florida's sealings and expunction statute have made clear that the Legislature intended only once-in-a-lifetime sealing or expunction of law enforcement records. "One to a customer" is the Legislatively expressed policy of the State of Florida. It should be that of the judiciary because (1) Rules

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[6]/ For example, a court might find a compelling interest in sealing court files relating to a person arrested as a result of mistaken identity or wrongful government conduct such as entrapment, where the person shows by a specific, not a generalized, demonstration the harm that will befall him if the records remain open to public inspection. It is unknown what occurred in Russell's cases at any level because the records remain sealed.

3.692 and 3.989 show that this Court intended it, and (2) any second, third -- or sixth -- sealing of a court file would fail constitutional and common law standards: a person cannot obtain more than one sealing of law enforcement records. On a second, third -- or sixth -- arrest, sealing the court file would not be effective in protecting him from specific embarrassments or harms because the other law enforcement agency records could not be sealed consistent with the statute. **See** In re Grand Jury Investigation, 543 So.2d 757 (Fla. 2d DCA 1989)(court has no power to seal or expunge executive branch records of person who does not meet terms of § 943.048).

Only this Court has the authority to remedy the abuses of judicial compassion apparent here. Russell discourages this Court from doing so, raising the specter of "a clerk of court's night-mare." Certainly, inconveniences arose from the First Circuit's ruling in Pokaski, that court files sealed without the **proper** findings must **be** unsealed. The First Amendment and Florida's longstanding common law tradition of open government should not be trounced by administrative inconvenience.

111. The absence of a record that the required findings were made supports access, not closure.

Russell argues that the files below should remain sealed because the Petitioners have failed to show constitutional and common law access considerations were ignored when closure relief was initially granted. **However,** Russellhas never assertedthathe met the constitutional or common law tests when he obtained the

orders sealing the court files in either of the two jurisdictions. In essence, Russell argues for an assumption that the findings required under the First Amendment and Florida's common law were made. Such an assumption departs from the United States Supreme Court's and this Court's precedent. Under the established law, the absence of findings of fact on the record that the compelling interest test has been met militates in favor of unsealing. A trial court's failure to make specific findings of fact enunciating the compelling reason for closure is error in itself and constitutes an abuse of discretion. Press Enterprise (II), 478 U.S. at 1314, 106 S.Ct. at 2743; Lewis, 426 So.2d at 9.

In Pokaski, the First Circuit specifically rejected the very argument Russell now makes. There, in support of the sealings granted by the portion of the statute providing for them on a judicial finding of "substantial justice," the State argued that the First Circuit should assume the trial courts made the specific, individualized findings required by the First Amendment and should continue those court files under seal. The First Circuit ruled that absent a showing that the constitutionally required findings were, in fact, made the petitioners for access were entitled to view the records. Clearly, as the federal court has interpreted First Amendment access rights, they do not yield to "assumptions."

Russell's argument favors in insurmountable barrier to access, an inappropriate barrier at least impliedly recognized and disapproved by this court in Barron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988). In this case, as in most, the

proponents of unsealing have no access to the court files at issue and are prevented from supporting their request with specific reference to the contents of the files, or the absence of the required contents, i.e., the specific findings of a compelling interest, effectiveness, and no alternative means. Without access to the records, proponents of access are prevented even from identifying and presenting live witnesses to address the question of whether the necessary findings were made, such as the assistant state attorney who appeared at the hearing (if there was a hearing, and the proponents are unable, without access, to even determine that); Russell's attorney, if he had one: or any clerk of court or law enforcement official, if one were present. Even if such witnesses could be located, the vindication of the public's access rights when then be conditioned on the witnesses' remembering that the constitutional and common law standards were not met. From a practical standpoint, acceptance of Russell's argument erects an impossible hurdle in derogation of existing law.

In sum, the law prevents an assumption that the constitutional and common law standards for sealing court files were satisfied. Russell has never asserted that he met those standards.[7]/ He has not tried to meet them presently. As such, the files cannot remain sealed in accordance with Press Enterprise, Lewis and Barron.

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[7]/ Indeed, he asserted that his Tampa judicial records were sealed on a judicial finding of "unusual circumstances," a standard far below that required by the First Amendment and Florida's common law.

IV. Article I, section 23 of the Florida Constitution does not support continued sealing of the court files in this case.

For the first time in this case, Russell argues that a subject of sealed judicial records has a right of privacy in such "non-public" records under Article I, section 23 of the Florida Constitution. As to Russell, this Court should not entertain this late-asserted claim. It was not made in the trial court and was not raised on appeal to the Fifth District Court.

However, if the Court chooses to address it in an abstract or larger context, the Court should be wary, for several reasons (as it was in Barron), of announcing a blanket rule that the subject of sealed judicial records has constitutionally protected privacy rights in such records. Analysis of whether a protectable privacy interest exists must be specifically fact-based and individualized. Generalized interests in privacy or reputation have been held to be insufficient to overcome the First Amendment right of access to judicial records. In Pokaski, 868 F.2d at 507, n.18, the First Circuit stated that a court needs to know the specific harm a petitioner for sealing of judicial records would suffer before granting the relief; only in this way can the court can ensure that the relief is narrowly tailored as the constitution requires. See also Press-Enterprise v. Superior Court (I), 464 U.S 501, 512, 104 S.Ct. 819 (1984)(before voir dire can be closed, prospective juror must make affirmative request to ensure factually valid basis for belief that closure infringes a significant interest in privacy); Globe Newspaper Co. v. Superior Court, 457 U.S. at 608 (invali-

dating statute requiring closure of proceedings during testimony of sexually assaulted minors without regard for desires of victim or for specific harms to be suffered); Barron, 531 So.2d at 119.

Russell's citation and discussion of United States Department of Justice v. Reporters Committee for Freedom of the Press, **489 U.S.** 749, **109** S.Ct. 1468 (1989), implies that the case addresses a federal right of privacy relevant in this case. At issue in Reporters Committee was whether an exemption to the federal Freedom of Information Act (FOIA) applied to an individual's multi-jurisdictional rap sheet as compiled by the federal government. The case cannot be read to create or endorse a federally protected right of privacy in state court records, sealed or not, concerning an individual's arrests and prosecutions. Significantly, the Court was concerned in Reporters Committee with the ramifications of disclosing a vast, centrally located, computer-contained and indexed federal storehouse of information concerning individual citizens, not the scattered source documents, such as are at issue in this case. In addition, the case did not concern records to which a First Amendment or state common law right of access attached, such as are at issue here. The case underscores the importance of public access to the source documents -- court files -- themselves: with federal and state rap sheets unavailable to the average non-law-enforcement-officer citizen, the only means available for that citizen to learn of another's criminal history is the court's records.

Second, the Court should not accept Russell's characterization

of sealed judicial records as containing "traditionally, statutorily and definitionally non-public personal information." Answer Brief at 33. This Court has already rejected the argument that a statutory exemption from Florida's Public Records Act -- like section 943.058 as applied to executive branch records -- creates "statutory rights of privacy" in non-judicial records covered by the exemption. Cape Publications, Inc. v. Hitchner, 549 So.2d 1374 (Fla. 1989)(newspaper which printed facts from records exempt from Chapter 119 not liable for invasion of privacy in action by parents acquitted of felony child abuse). Moreover, in Barron this Court eschewed creating a special class of judicial records -- those in dissolution proceedings -- in which privacy rights or interests asserted by the litigant entitled him to seal the court files from public view in absence of a particularized showing that the harm of disclosure outweighed the public's protected interest in access.[8]/ In other words, under this State's common law on access, the courts must weigh such rights on an individual, case-by-case basis, even in dissolution cases. Thus, Article I, section 23 cannot be viewed, as Russell would have it, as creating or protecting some greater right or interest in the continued sealing of criminal court files, which by simple logic do not have the potential for

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[8]/ As this Court noted, any that privacy rights protected by Article I section 23 "may be negated of the content of the subject matter directly concerns a position of public trust held by an individual seeking closure." Barron, 531 So.2d at 118. Justice Ehrlich, concurring, specifically rejected the conclusion that the Florida Constitution could create a right in any case to private judicial proceedings or court files, citing Justice Overton's concurring opinion in Forsbers v. Housing Authority of the City of Miami Beach, 455 So.2d 373, 375 (Fla. 1984).

containing the personally intimate information as would probably be present in the case file concerning a dissolution of marriage. Russell's citation of Michael v. Douglas, 464 So.2d 545 (Fla. 1985), and Forsberg v. Housing Authority of the City of Miami Beach, 455 So.2d 373 (Fla. 1984), is unclear, but appears to be in support of his argument that the courts should balance individual's assertions of privacy rights or interests against the public's interest in access to government records. See Answer Brief at 31. Those cases simply recognized that Article I, section 23 does not provide for individual privacy rights in government records which are public under Chapter 119 of the Florida Statutes.

Russell's arguments wholly ignore the public's interests, pertinent to self-governance, in examining reasons why those charged with crimes are eventually directed out of the criminal justice system by plea bargain, nolle prosequi, dismissal, or other disposition. Because such cases present no public trial, access and opportunity to observe these cases may be even more valuable to public assurance that the system works. Moreover, Russell does not address those factors, particularly pertinent here, which can heighten the public's need for information -- such as where a former defendant goes on to actually solicit charitable contributions.

In any event, Press Enterprise and Florida's common law access test already provide for the case-by-case balancing of privacy rights or interests asserted by litigants, such as Russell, with the public's rights and interests in access. The potential

existence of some recognizable and protected privacy right or interest in any court file presents no reason for departing from or modifying the existing law.

CONCLUSION

On First Amendment grounds, or on common law grounds alone, this Court should reject the decisions of the district courts of appeal establishing new, and disparate, inquiries governing access to judicial records in completed criminal prosecutions, and should reaffirm Barron and Lewis. In light of Russell's inability to meet those tests by advancing a compelling interest warranting the continued sealing of judicial records concerning him, and in light of the clear public interest in examining them, Petitioners ask that the Court order them unsealed for public inspection.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to RICHARD S. BLUNT, ESQ., 110 S. Armenia Avenue, Tampa, FL 3309, this 21 day of September, 1992.

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