IN THE SUPREME COURT OF FLORIDA

DONALD G. RESHA,

Petitioner,

v. CASE NO. 80,228

KATIE D. TUCKER,

Respondent.
_____/

ON REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

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PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT

Record citations are to Petitioner's Appendix To Petition For Review Of Order Sealing Court Files, submitted to the court below and sent up pursuant to this Court's Order. Citations are to "App. A," "App. B," etc.

STATEMENT OF CASE AND FACTS

The Florida Department of Law enforcement (FDLE) arrested Respondent Katie Tucker on February 7, 1990, one day after her resignation as executive director of the Florida Department of Revenue, for falsification of government documents in violation of § 839.25, Fla. Stat.

The Governor and Cabinet had suspended Tucker for 10 days upon receipt of an FDLE report showing that she had abused her office to persecute Petitioner Donald Resha and to destroy his reputation for his political opposition to Tucker and her husband, Daniel Miller, president of Florida AFL-CIO. The FDLE report concluded that Tucker caused Resha to be personally investigated and caused his two retail businesses to be audited; she also had stated that Resha was involved in arganized crime, money laundering and tax evasion as well as illegal trafficking in guns, drugs, and pornography.

Upon release of the FDLE report, Resha bought civil suit against Tucker for various state torts and federal civil rights violations. Tucker's 10 day suspension was to give her an opportunity to convince the Governor and Cabinet she should not be

fired. During this period, Tucker returned to her office to falsify and alter documents in an effort to show that the actions against Resha were the work of an overzealous underling acting without her knowledge or against her orders. As the documents began to surface, FDLE ran another investigation resulting in Tucker's arrest. Following the arrest, Resha amended his civil suit to add a federal count for civil rights cover-up.

Tucker pleaded nolo contendere and was sentenced on June 20, 1990, to a year's probation and payment of about $3500 in costs to FDLE and the court.

During discovery in the civil suit, Resha learned that Tucker had obtained a sealing, on October 3, 1991, of her criminal court file and all FDLE documents and physical evidence. App. F.

Because the sealed materials are essential to the civil suit, Resha intervened in Tucker's criminal case on January 26, 1992, moving to open the records. App. D. Tucker filed her opposition on January 20, 1992. App. C. The trial court held a hearing on January 27, 1992, at which it was revealed that Tucker had already used a provision of Florida's sealing regimen which enables a criminal defendant with a sealed record lawfully to deny ever having been arrested or sentenced. She had used the provision to obtain a position in the U.S. Coast Guard. App. B., at 18, 22, 27, 37, 40-41.

On February 24, 1992, Circuit Judge N. Sanders Sauls ordered temporary and restricted access to the FDLE materials, but no

access at all to the court file. App. A.

Resha petitioned the First District Court of Appeal on March 23, 1992, for permanent access to all the records. Tucker cross-petitioned, seeking to quash Resha's temporary access to the FDLE files.

On May 22, 1992, the First District Court of Appeal held that Resha should have no access at all, temporary or permanent, to any of the contested files of the court or FDLE. Resha v. Tucker, 600 So. 2d 16 (Fla. 1st DCA 1992).

On May 23, 1992, during the Memorial Day weekend, the First District Court of Appeal entered a writ of prohibition, staying civil trial on the federal civil rights counts until it could resolve the issue of Tucker's qualified immunity from suit based on her status as a public official. Tucker v. Resha, Case No. 92-1744 (Fla. 1st DCA 1992). Trial was had on the state law counts, resulting in a substantial jury verdict for Resha on May 29, 1992, including punitive damages, for defamation and invasion of privacy.

Resha sought rehearing and rehearing en banc on the sealing issue on June 8, 1992. Both were denied an June 30, 1992. Resha undertook timely petition for review in this Court on July 27, 1992. This Court granted review on October 13, 1992.

On Octaber 27, 1992, the First District Court of Appeal denied Tucker's claim of qualified immunity, freeing the federal counts for trial. Tucker v. Resha, supra. Further progress in that matter awaits this Court's disposition of the record sealing issue.

SUMMARY OF ARGUMENT

Though courts have an inherent power to control their own records, that power operates within certain restraints imposed by the common law and by the First Amendment as interpreted by the U.S. Supreme Court and by this Court.

Under the federal three-prong test, a party seeking to seal court records must demonstrate a compelling interest in closure, that the compelling interest would be harmed absent the closure, and that no less restrictive alternatives could protect the compelling interest. Additional requirements include prior public notice to allow challenges by the public or press and explicit written findings by the court detailing application of the three-prong test.

The Florida three-prong test is similar, but even more stringent. It requires proof of a serious and imminent threat to the administration of justice, an absence of alternatives, and proof that the closure would actually accomplish its stated purpose. It also requires the same advance notice and detailed written findings as the federal test.

Neither Tucker, the trial court, nor the appellate court articulated any compelling interest or serious and imminent threat to the administration of justice. Had any of them made such an effort it would have been unsuccessful. Moreover, total and permanent sealing is the most restrictive possible alternative, not the least. No notice was given of the sealing and no findings were

made to justify the sealing. Tucker's sealing is remarkable in that it fails literally every requirement of both the federal and the state tests.

The court below erred in placing the burden on Resha to show good cause for opening the records and in establishing virtually insurmountable obstacles to showing good cause. This Court has repeatedly and unmistakably stressed that the burden must always rest on the party seeking closure. So too have the federal courts.

A general interest in personal privacy or the general desire to make a fresh start in a career are not adequate grounds to warrant closure of court records. Federal and Florida courts routinely reject much more compelling grounds for closure except in those exceedingly rare instances where one of thethree-prong tests can be satisfied. Tucker's sealing is uniquely disqualified. Under Florida's sealing statute, a sealed criminal record may not be denied for purposes of employment with a law enforcement agency, yet that is what Tucker has done.

The court below erred in refusing to consider the special status of public officials and governmental issues in the jurisprudence of access to public information. Public officials enjoy numerous privileges and immunities in communication not available to ordinary citizens, but they also must accept greater scrutiny and criticism than others have to endure. Official misconduct, especially when it rises to the level of crime, occupies the paramount position in the hierarchy of matters about

which the public has a right to know. In such cases the public's legitimate interest is not only in the operation of the judicial system, but also in the conduct of the defendant.

The right of access to judicial records does not expire with the passage of time. The court below erred in holding that a right of access to judicial records applies only in cases in which the live proceedings were improperly closed. The right of access to records is independent, not compensatory or remedial. The passage of time or the termination of a trial does not extinguish the right of access. If anything, the right grows stronger because countervailing interests such as a defendant's right to a fair trial will not apply to a completed case.

Failure to give notice compounds the error. In this case, the prosecutor who had consented to the sealing spoke out against it upon learning of Resha's objections. This support came too late, but had notice been given as required, the sealing probably would never have happened.

Resha can not prove an important count of his civil suit without evidence which exists only in Tucker's sealed records. Denial of his right to subpoena that evidence prevents him from vindicating his rights in court and therefore amounts to a violation of his state and federal constitutional rights of access to courts.

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The court below erred in refusing Resha the benefits of his rights as a victim under the state constitution. As one who

suffered direct and unique injury from Tucker's crime, Resha meets all standard legal definitions of victim. The District Court had no basis for not acknowledging sealing as a "crucial stage" of a criminal proceeding. It is perhaps the most crucial of all because it negates all the ones before it. In Tucker's case it permitted her to return to political power and become an official in a law enforcement agency, which greatly concerns Resha's peace of mind. In other cases sealing enables offenders to deny their record for the purpose of obtaining firearms, which is a great concern to many victims.

ARGUMENT

I. THE FIRST DISTRICT COURT'S DECISION IS CONTRARY TO DECISIONS OF THE U.S. SUPREME COURT AND OF THIS COURT WHICH ESTABLISH FIRST AMENDMENT AND COMMON LAW RIGHTS OF ACCESS TO JUDICIAL RECORDS.

This Petition seeks review of Resha v. Tucker, 600 So. 2d 16 (Fla. 1st DCA 1992), a decision enforcing the sealing of the criminal records of Katie Tucker. In challenging that decision, this Petition necessarily and informally calls into question Russell v. Times Publishins Co., 592 So. 2d 808 (Fla. 5th DCA 1992) (hereinafter Russell II[1]) and, to a lesser extent, Russell v. Miami Herald Publishins Co., 570 So. 2d 979 (Fla. 2d DCA 1990) (hereinafter Russell I). These cases represent a recent and mutually reinforcing trilogy of departure from the binding

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[1] Russell II is already before this Court as Case No. 79,496.

precedents of courts of greater dignity. All three rest upon the unstated premise that some talismanic quality exempts the sealing of records of completed criminal cases from the standards required for all other judicial closures.

The separation of powers mandated in Article 11, § 3 Fla. Const., and the special administrative powers over the court system reposed in this Court under Article V, § (2)(a), prohibit a coordinate branch of government, such as the legislature, from requiring the closure of court records in Florida. Johnson v. State, 336 So. 2d 93 (Fla. 1976). The same doctrines and provisions prohibit a coordinate branch of government from requiring the opening of court records. Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992). Thus Florida's oft-amended sealing statute[2] controls only the disposition of executive-branch records except to the extent that it may be viewed as incorporated by Rules 3.692 and 3.989, Fla. R. Cr. P.

Courts, therefore, as an independent branch of government, have discretion over the maintenance and disposition of their own records. That discretion, however, is not exercised in a vacuum and is far from absolute. It is circumscribed by the requirements

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[2] The version in effect at the time pertinent to this case appears at § 943.058, Fla. Stat. (1991). The most recent amendment took effect on July 1, 1992. Chapter 92-73, Laws of Florida. The new version would not have allowed sealing of the criminal records of Respondent Tucker maintained by the executive branch because she was sentenced under Chapter 839, Fla. Stat., dealing with offenses by public officers and employees.

of the First Amendment to the U.S. Constitution and by the common law as articulated by the U.S. Supreme Court and by this Court. The decision under review represents a departure from those requirements. The holdings of the First District are plain error as a matter of law.

A. THE FIRST DISTRICT COURT APPLIED THE WRONG STANDARD TO TUCKER'S RECORDS.

The District Court held that Resha, as moving party, labored under a burden of proving "good cause" for unsealing Tucker's criminal file. "Good cause," in the District Court's estimation, consists of a showing that the sealing order was obtained by fraud or perjury on the part of the defendant, or through mistake or inadvertence on the part of the trial court, or "maybe" that the beneficiary of the sealing failed to profit from the act of judicial grace as evidenced by later criminal convictions. Resha v. Tucker, 600 So.2d 16, 18 (Fla. 1st DCA 1992). Not only did Resha fail to meet that test, according to the court below, he also failed to demonstrate under "any test" a basis for unsealing, even in part, Tucker's records. Id.

In so holding, the court below relied upon Russell I and Russell II. As will be shown infra, both of these cases represent a dramatic departure from previous case law. Moreover, even Russell I could not support the result the District Court reached in Resha.

1. Tucker's Sealing Fails The Federal Test.

The U.S. Supreme Court has recognized a common law right of access to judicial proceedings and records for at least 45 years:

> A trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. Harney, 331 U.S. 367, 374 (1947).

Nor is it true, as the court below suggests, that this right of access is confined to live courtroom proceedings rather than judicial records:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.

Nixon v. Warner Communications, 435 U.S. 589, 597 (1978).

The ancient common law right of access to judicial records and proceedings was constitutionalized in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), in which, despite the lack of a majority opinion, seven justices recognized that the right of access is embodied in the First Amendment. Id. at 558-581 (plurality opinion); Id. at 584-598 (Brennan and Marshall JJ., concurring); Id. at 598-601 (Stewart, J., concurring); Id. at 601-604 (Blackmun, J. concurring).

The Court's familiar First Amendment strict scrutiny test found perhaps its earliest expression regarding judicial proceedings in Globe Newspaper Co. v. Superior Court, 457 U.S. 596

(1982):

> where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-7.

Press-Enterprise v. Superior Court (Press-Enterprise I), 464 U.S. 501 (1984), established the First Amendment presumption of openness that must now be the starting point of any closure determination:

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 510.

The present standard arose from Press-Enterprise v. Superior Court (Press-Enterprise 11) 478 U.S. 1 (1986). Under this three-prong test, access to judicial records may be denied only if (1) closure serves a compelling interest; (2) there is a "substantial probability" that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest. Moreover, the court may not base a closure decision on conclusory assertions, but must make specific, on-the-record factual findings.

Id. at 13-14.[3] Obviously, as with any strict scrutiny test, the burden necessarily falls upon the party seeking closure.

As the order sealing Tucker's records in the instant case (App. F) plainly shows, no such findings were made. The only findings in the order are that she has no adjudication of guilt in prior cases, no adjudication of guilt in this case, and no prior sealing. Neither Tucker, the trial court, nor the appeals court has asserted or even suggested a compelling interest in sealing these records. The only reason offered in support of the sealing over the entire course of these proceedings was presented orally at the hearing on Resha's motion to unseal the records. There, one of Tucker's lawyers and the judge who sealed the records made reference to Tucker's need to have the records sealed so she could qualify for a position in the U.S. Coast Guard by lawfully denying her intercourse with the criminal justice system. App. B, at 18, 22, 27, 37, 40-41. As is shown infra, the constitution allows exceedingly few compelling interests that may override the right of access to court records, and this reason would not pass the test even had it been properly asserted.

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[3] The three-prong formulation is not explicitly enumerated in Press-Enterprise II itself, yet the verbatim language used here has come to be accepted in federal and Florida courts as the three-prong test of Press-Enterprise II. Washinston Post v. Robinson, 935 F.2d 282, 290 (D.C. Cir. 1991); Oregonian Publishins Co. v. U.S. District Court, 920 F.2d 1462, 1466 (9th Cir. 1990); In Re Washington Post Co., 807 F.2d 383, 392 (4th Cir. 1986); Russell v. Miami Herald Publishins Co., 570 So. 2d 979, 983 (Fla. 2d DCA 1990).

Having thus failed the first prong of the test by not including specific written findings of a compelling interest for closure, Tucker's sealing falls short of the threshold for even applying the second prong. A nonexistent compelling interest can not possibly be harmed by opening the records. As for the third prong, the total and permanent sealing mandated by the appeals court is the most restrictive alternative possible, not the least.

2. Tucker's Sealing Fails The Florida Test.

A party seeking closure of a criminal record or proceeding under Florida law faces an even more stringent standard than the one required by the First Amendment. Florida has its own three-prong test, under which sealing will be granted only if (1) closure is necessary to prevent a serious and imminent threat to the administration of justice; (2) no alternatives are available, other than a change of venue, which would protect a defendant's right to a fair trial; 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, 6 (Fla. 1982).[4] Moreover, the judge applying the three-prong test must operate under some strict guidelines: notice must be given to the public that a motion for closure of a record or

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[4] The underpinnings of this test and its even more stringent predecessor are explained in Bundy v. State, 455 So. 2d 330, 337-9 (Fla. 1984). A slightly more relaxed standard for civil court records and proceedings is set forth in Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988).

proceeding is to be heard; those seeking closure must bear the burden of proving the closure necessary; and the court must make findings of fact and conclusions of law so that an appellate court may review the reasoning. Id. at 8-9.

Tucker's sealing meets none of the three prongs of the Florida test, nor any of the guidelines for application of the test. A "serious and imminent threat to the administration of justice" is even more rare an occurrence than the "compelling interest" required by the First Amendment. In this case, Tucker had already served her sentence before the sealing occurred, so keeping the record open could not pose any threat to the administration of justice, let alone a serious and imminent one. Tucker was sentenced on a nolo contendere plea more than a year before the sealing, so having the record open could not possibly interfere with her right to a fair trial. She could not satisfy the third prong because she had no right that could be protected by sealing the record. Additionally, the court gave no public notice and made no findings of fact or law to support the sealing.

Thus the holding of the First District Court of Appeal that Resha "failed to demonstrate under any test, a basis for unsealing, even in part, Tucker's records," Resha, 600 So. 2d at 18, is plain error. The only "test" Resha was required to meet was to move for unsealing, which he did. It was Tucker who failed to qualify for the sealing under "any test" known to federal or Florida law.

Resha's right to these records was greatly strengthened by

passage on November 3, 1992, of a referendum establishing Article I, § 24, Fla. Const., which guarantees public access to public records, specifically including judicial records. While the amendment retains the exemptions of existing rules of court, icluding the existing sealing rules, until those rules are repealed, the foregoing discussion has shown that one or both of the three prong tests must be satisfied even under the present rules. The new amendment adds force to that requirement.

3. The District Court Erred In Placing The Burden On Resha.

The First District Court of Appeal concluded:

> Resha failed to demonstrate a compelling necessity for these records and the unavailability or lack of other means of obtaining the information sought.

Resha, 600 So. 2d at 18.

In so holding, the court has the law exactly backwards. As shown supra, the presence of a compelling necessity and the lack of alternatives is the standard a governmental entity must satisfy to deny a constitutional right, not the standard a citizen must satisfy to exercise one. A person seeking to practice a particular religion, support a political candidate, or inspect and copy a court record need prove nothing to the government as a precondition for doing so. It is, without exception, the governmental actor seeking to restrict such behavior wha bears the burden of proof. "It is not the public's reason for attending but rather the public's risht to attend that is to be evaluated." State ex rel Gore Newspapers v. Tyson, 313 So. 2d 777, 786 (Fla. 4th DCA 1975).

Hence the fundamental error of the appeals court's contention, "as the moving party below, Resha bore the burden of proof," Resha, 600 So. 2d at 18. As noted above, this Court firmly established in Lewis, 426 So. 2d at 8, that the burden is always on the ones seeking to effect or maintain closure.

Notwithstanding the Lewis holding, in some instances the message did not get through. This Court then took considerable pains in Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988) to drive the point home, stating first,

> [B]oth the public and the 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.

Id. at 118. Next, this Court added,

> [T]he presumption of openness continues through the appellate review process, and the party seeking closure continues to have the burden to justify closure.

Id. Finally, this Court offered the following observation in invalidating a holding of the Fifth District:

> We also disapprove that portion placing the burden of proof on the challenging party rather than the party seeking closure.

Id. at 119.

The federal standard under the First Amendment is no different. Oregonian Publishing Co. v. U.S. District Court, 920 F.2d 1462, 1466-7 (9th Cir. 1990) (overturning denial of a motion to open a sealed criminal file because the trial court had placed the burden on the party seeking to open it); Globe Newspaper Co. v.

Pokaski, 868 F.2d 497, 507 (1st Cir. 1989) ("burden. . . would now fall on defendants, where it belongs.").

The burden placement established by this Court and the federal courts makes good practical sense as well as sound constitutional doctrine. The First District Court in this case and the Fifth District Court in Russell II have, despite Barron, insisted that the party seeking to open a sealed file meet an exacting evidentiary standard to justify opening a sealed record. This demand creates a juridical "Catch-22" in that most often the evidence needed to meet the burden will itself be inaccessible because it is in the sealed records. Thus only those who already know the contents and therefore don't need the files opened can qualify to open them. Such a result calls to mind this Court's observation in another judicial access case that, "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. 1977).

This Court anticipated the vicious circle described above and provided a path out of the conundrum by shifting the burden to the ones seeking to maintain the sealing:

> 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 order will generally have little or no knowledge of the specific grounds requiring closure.

Barron, 531 So. 2d at 118-9.

The appellate court below grounded its assignment of burden

wholly on the authority of Russell I and Russell II. Resha, 600 So. 2d at 18. The reliance on Russell I is whollymisplaced. That case explicitly adopted the three-prong test of Press-Enterprise II, noting that, without meeting that test, a sealing could not be constitutional. Russell I, 570 So. 2d at 982. However, that court fashioned an exception for criminal files sealed for "several years," entitling such longstanding sealings to a "presumption of correctness."[5] The court created a new test for long-sealed files, shifting the burden to the party seeking to open them. Id. at 983. In Tucker's case, however, the files had been sealed only since October 3, 1991, App. F, when Resha moved to open them on January 6, 1992, App. D, immediately upon learning of the sealing. Certainly, such a short period of time would not qualify for a grandfather exemption.

The reliance of the court below on Russell II is more congruent with that case's actual holding. However, in requiring the party seeking to open court records to show "good cause," the court in Russell 11, in turn, relied wholly upon Johnson v. State, 336 So. 2d 93 (Fla. 1976).[6] Though that portion of Johnson has

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[5] This too is error, as demonstrated infra. The Florida Second District Court of Appeal is without authority to promulgate exceptions to what it acknowledges to be a requirement of the First Amendment. The immediate point, however, is that even if the exception were valid, Tucker does not fall under it.

[6] Interestingly enough, the "good cause" requirement for opening sealed criminal files as articulated in Johnson was limited only to the records of those defendants who were ''first offenders (continued...)

never been formally superseded, its foundations have been eroded by later developments. It was decided before this Court handed down Lewis, Bundy, or Barron and before the U.S. Supreme Court rendered Richmond Newspapers, Globe Newspaper Co., Press-Enterprise I, or Press-Enterprise II. Certainly there is nothing talismanic about the sealed record of a completed criminal case that would entitle it to more secrecy than the weighty countervailing interests that have consistently been found insufficient to overcome the presumption of openness in Florida and federal courts these past twelve years. Moreover, the opinion in Johnson made no attempt to define "good cause" or offer an example of it. It said nothing about fraud, perjury, mistake, inadvertence, or multiple convictions, which are the factors the court below attributes to Russell I and Russell II as the elements of "good cause." Whatever that term may have meant in this context in 1976, it's meaning would necessarily have evolved as the law has developed.

4. Neither The District Court Nor Tucker Has Asserted A Cognizable Countervailing Interest In Secrecy That May Overcome the Common Law And First Amendment Presumption of Access To Court Records.

Neither Tucker nor the appellate court offered anything to

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[6](...continued)
found innocent or of those persons against whom criminal proceedings are dismissed." 336 So. 2d at 95. Tucker fits into neither of those categories. She bargained for and accepted her sentence. This illustrates how, over about 15 years, a procedure aimed at protecting the job prospects of innocent persons wrongfully arrested has been transformed into a device for disguising a criminal conviction under the semantic fiction of "adjudication withheld."

suggest the presence of the "compelling interest" in closure required under Globe Newspaper Co. and Press-Enterprise II, nor the presence of the "serious and imminent threat to the administration of justice" required under Lewis and Bundy.

For the first time an appeal, Tucker's cross-review petition to the First District Court of Appeal claimed her sealing to be justified by a right of privacy under Article I, § 23, Fla. Const. The district court left that issue unaddressed in this case, though it had previously rejected exactlythat argument in Florida Freedom Newspapers v. Sirmons, 508 So. 2d 462, 463 (Fla. 1st DCA 1987). This Court stated in Barron, 531 So. 2d at 118, that the state constitutional right to privacy may warrant closure of some files in some cases, but hastened to add:

> However, 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.

Id.

Beyond any reasonable dispute, Tucker's position as executive director of the Florida Department of Revenue was a position of public trust and her arrest and sentencing directly concerned that position.

The federal standard is even less sympathetic to privacy claims. In Re New Yark Times Co., 828 F.2d 110, 115 (2d Cir. 1987), stands for the proposition that even a strict and explicit privacy provision enacted by Congress must yield to the First Amendment right of access to a court file. *Any* similar provision

of a state constitution would likewise be overridden.

Though the right of access under federal and Florida law is not absolute, Tucker has identified no particular feature of her case that warrants any special concern for privacy. She merely asserts a general right of privacy that would apply equally to every other criminal file. An interest in secrecy must be specific, not one that applies to a generic category of persona. Press-Enterprise I, 464 U.S. at 512.

The same holds true of Tucker's concern, as articulated by her former attorney and by the trial judge, App. B at 18, 22, 27, 37, 40-41, that opening her record could interfere with her employment. A criminal record does not help anyone get a job. Even so, "records cannot be sealed on the basis of general reputation and privacy interests." Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 507 n.18 (1st Cir. 1989).[7]

This principle is not foreign to Florida law:

> [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 caurt proceedings in this nation would be closed.

Goldberg v. Johnson, 485 So. 2d 1386, 1389 (Fla. 4th DCA 1986) (citation omitted). See also, Miami Herald Publishinu Co. v. Chappell, 403 So. 2d 1342, 1345 (Fla. 3d DCA 1981) (three-prong

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[7] The court in Pokaski acknowledged the possibility that an occasional defendant may present circumstances compelling enough to meat the test, but that "defendants rarely will be successful." 868 F.2d at 506 n.17.

test must be applied even when statute mandates confidentiality).

Without belittling the plight of those whose careers are hampered by the existence of a criminal record, one can observe that this does not rise to the level of more genuinely compelling interests that have, nevertheless, been found insufficient to warrant secrecy. In Re Washington Post Co., 807 F.2d 383, 391 (4th Cir. 1986) (First Amendment test applies to sealed court files containing classified information implicating national security); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (no general right of privacy for testimony of child victim of sexual assault); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (Sixth Amendment right to a fair trial must be weighed against First Amendment right of access); Bundy v. State, 455 So. 2d 330 (Fla. 1984) (same); Washinston Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) (prospect of physical danger to confidential drug informant); Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983) (access to trade secrets).

The foregoing are exceedingly weighty interests by any standard. Yet the courts have found them insufficient, at least in some circumstances, to withstand the presumption of open court records and proceedings. Though no attempt has been made in this case, it is at least theoretically possible to make an argument for a compelling interest in sealing certain criminal files so that those with such records may more easily rehabilitate themselves by

establishing careers, getting off welfare, turning away from future crimes, and so forth. Perhaps some instances would pass the tests of Press-Enterprise II or Lewis. It is scarcelypossible, however, that a political crime by a high government official could ever qualify.

5. The District Court Ignored The Special Status Of Public Officials And Governmental Issues In First Amendment And Florida Jurisprudence.

The First Amendment stands at its very apex when it protects the right to speak about governmental affairs and the public officials who conduct them. In this regard, the First Amendment is not only a shield, but a sword. From the beginning of this nation, the special status of this right has embraced not only protection against affirmative restraints on expression, but also the ability to secure the information necessary to monitor the conduct of government and make informed decisions as citizens and voters. James Madison framed the issue:

> Apopular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Quoted in Houchins v. KQED, Inc., 438 U.S. 1, 31 (1978) (Stevens, J., dissenting.)

To effectuate the dissemination af the maximum amount of information on governmental affairs, the law grants special advantages and immunities to public officials. Conversely, and

toward the same end, the law opens public officials to a level of scrutiny and criticism that private citizens do not have to endure.

Thus, under both federal and state law, public officials enjoy immunity from lawsuits for statements that would be actionable in defamation if uttered by private citizens. Barr v. Mateo, 360 U.S. 564 (1959); McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966). Public officials also enjoy immunity from personal liability for civil rights violations they commit in the scope of their duties. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The opposite side of the coin is that public officials must meet an extraordinarily stringent standard before being able to bring litigation over false and damaging comments made about them. New York Times v. Sullivan, 376 U.S. 254 (1964) (requiring proof of actual malice by clear and convincing evidence and de novo appellate review of jury findings of liability); Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (privileged commentary includes "anything which might touch on an official's fitness for office"); Ocala Star-Banner v. Damron, 401 U.S. 295, 300 (1971) (allegation of criminal misconduct against an official, no matter how remote in time, is protected speech).

Those who enjoy positions of public trust and access to the public treasury must sacrifice much of the privacy that applies to ordinary citizens. Perhaps most familiar in Florida law is Article 11, § 8, Fla. Const., requiring disclosure of personal and campaign finances of public officials, addressing conflicts of interest, and

establishing an ethics commission, In the same vein, the right of privacy at Article I, § 23 explicitly does not cover access to public records and meetings. The latest version of Florida's sealing law, § 943.059, Fla. Stat. (1992 Supp.), specifically excludes criminal records of official misconduct from eligibility far sealing, even if adjudication is withheld. In the wake of a major scandal involving a secret settlement providing payment of state money to settle a sexual harassment claim against a prominent legislator, the legislature adopted § 68.081(8)(a), Fla. Stat., prohibiting sealing of legal settlements involving public money.

Most of the leading federal and Florida cases establishing rights of access to judicial proceedings and records have centered on the trials of private citizens and have stressed the need for openness so the public may monitor the conduct of the judiciary to preserve confidence in the system, to remove the temptations of judicial misconduct, and to improve the performance of the system. The particular facts of the cases were of no independent importance apart from being inextricably intertwined with the performance of the judicial system. See, e.g., Globe Newspaper Co., 457 U.S. at 603-10 and citations therein.[8]

Crimes in office by public officials are different. The

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[8] In this regard, greater right of access to criminal than to civil files is sometimes noted. An example appears in Barron, 531 So. 2d at 121: "I fully agree that the public has access to the evidence in criminal trials, because the public, in effect, is a party to criminal cases." (McDonald, J., dissenting).

requirement of openness must apply with maximum force because the public interest encompasses the conduct of the defendant as well as the conduct of the judicial system.

Tucker is an excellent example. She was arrested and sentenced for a crime committed in her official capacity as executive director of the Florida Department of Revenue. That post is the highest non-elected slot in the executive branch of Florida government. It is responsible for producing substantially all of the money that operates the three branches of Florida government. Her agency has unparalleled power to intrude into the affairs of individuals and businesses and she was abusing those powers to retaliate against a political opponent and to advance her own interests at the expense of the public. When Tucker committed the crime described in the sealed records, she was on the government payroll, in a government building, exercising the authority of a high official, using government equipment and materials, all for the purpose of violating a citizen's rights and benefitting herself.

If ever the public had a right to know about the conduct of its officials and the use of its tax dollars, this was the time. Yet the massive investigatory file of the Florida Department of Law Enforcement, the court file, and the prosecutor's file are sealed by court order. Anyone who wonders whether Tucker actually served her probation or paid her cost assessments has no means of finding out. Anyone who might have suffered similar misconduct at the

hands of the revenue department and needs these records is out of luck. Any legislative committee or citizens' group seeking to reform the system to prevent future abuses can draw no lessons from the records of this instance. Any historian or political scientist or legal scholar seeking to chronicle this major event in Florida government must work without any primary source material. And the unrepentant Tucker was able to lawfully deny that she was ever arrested or sentenced in order to obtain another high government position in another agency with law enforcement powers that are capable of abuse.

Perhaps the most bitter irony for Resha is that if FDLE had stopped short of arresting Tucker, the investigative files would be available to him for use in his civil suit. The extra egregiousness of Tucker's conduct has actually redounded to her benefit as a result of the sealing.

Appellant can find no comparable decision in any state or federal court. These exceptionally public events have vanished down an Orwellian memory hole as though they never happened. Worse yet, Tucker's sealed file now operates like the celestial phenomenon known to astronomers as a "black hole," sucking in everything in its vicinity. Thus the trial court's order of February 22, 1992, App. A, not only maintains the sealing of the original court file, but additionally seals all later filings in the case, specifically, those documenting the efforts of Resha to open the file. Not only is Tucker's file an official secret; it is

also an official secret that a judge made a controversial decision to maintain the seal.

A recurring theme in the cases on access to court records and proceedings is the concern of the reviewing courts for perceptions, correct or incorrect, that the integrity of the system may have been compromised by politically influential defendants.[9] The judge who sealed Tucker's file is known to be of high integrity and Resha does not allege in this action that a defendant without the considerable political influence of Tucker and her husband would have been treated differently. The point, however, is that, even if sealing were to be generally available to first offenders who plead nolo with adjudication withheld, Tucker should have been treated differently because the nature of her crime, as described above, lies at the very heart of the matters citizens have a right to know as voters and taxpayers.

Official misconduct involving performance of governmental duties occupies a unique place in the public's right to know about its government. New York Times v. U.S., 403 U.S. 713 (1971) (Pentagon Papers); Nixon v. Warner Communications, 435 U.S. 589 (1978) (Watergate tapes).

Recognition of this special class of information appears in the federal cases on sealed court files. Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) (criminal record of

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[9] One of the clearest expressions of this concern appears in Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983).

Washington, D. C., Mayor Marion Barry); In Re New York Times Co., 828 F.2d 110 (2d Cir. 1987) (criminal record of Congressman Mario Biaggi); In Re Washinaton Post Co., 807 F.2d 383 (4th Cir. 1986) (CIA agent compromised by Ghanian spy).

Such an analysis comports with this Court's holding in Barron, 531 So. 2d at 118, that a privacy claim would be negated by subject matter directly concerning a position of public trust held by the individual seeking closure.[10]

This principle has been consistently applied in one of our state's district courts. A Miami trial judge sealed the settlement agreement in a suit against a police department for an improper shooting, stating it was no one's business except the parties to the case. The district court opened the record, noting that the most common reason for closure, fair trial considerations, play no part in a completed case, and added this pertinent holding:

> [A]ppellants right to know the terms of the settlement agreement is particularly compelling here because of the nature of the issues being litigated, i.e., alleged police misconduct and improper police training involving a City of Miami police officer acting in his official capacity. These issues created a substantial monetary liability for the City of Miami and influence insurance rates for the future, which costs must be borne by the taxpayers. Moreover, the activities complained about are by their very nature newsworthy. It is particularly in matters such as these that freedom of communication should be kept open and that none of the real issues or

[10] The Court did stop short of reaching the issue of whether the public positions held by Dempsey Barron and Terri Jo Kennedy provided an additional basis for opening the records. Id. at 119. However, Barron's divorce records had little to do with his position as a senator.

facts become obscured.

Miami Herald Publishing Co. v. Collazo, 329 So. 2d 333, 338 (Fla. 3d DCA 1976).

Even more directly on point is the ruling of the same court, refusing to seal the criminal record of a fire fighter who had pled nolo contendere (with adjudication withheld) on a cocaine purchase charge. His position of public trust made him ineligible for the sealing, though the offense did not occur on the job:

> [T]he 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.

Gonzalez v. State, 565 So. 2d 410, 411 (Fla. 3d DCA 1990).

The police officer and the fire fighter are mere rank and file employees, near the bottom of the totem pole of government officialdom. Tucker was near the top as executive director of the Florida Department of Revenue and went on to hold an important post as a commander in the U.S. Coast Guard.[11] Unlike the fire fighter, Tucker committed her offenses in the line of duty. Yet her record is sealed while those of the police officer and the fire fighter are subject to public scrutiny because of their government employment. The inequity is manifest.

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[11] Though the Coast Guard remains a branch of the armed forces, it is under the Department of Transportation rather than the Department of Defense and serves also as a law enforcement agency. 14 U.S.C. §§ 1 and 2.

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE TIME OF CLOSURE DETERMINES THE RIGHT OF ACCESS.

The First District Court of Appeal scorned Resha's reliance on Barron as a basis for opening Tucker's records:

> The public and press had access to the criminal proceedings against Katie Tucker. It was not until the conclusion of these proceedings that the sealing order was entered. Resha's reliance on Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988) is misplaced. In Barron, Dempsey Barron had sought and obtained closure of his divorce proceedings. Unlike Barron, the criminal proceedings against Katie Tucker were not closed to the public or press.

Resha, 600 So. 2d at 18.

Presumably, under this analysis, Senator Barron could have had his file sealed at the end of his divorce if the live proceedings had been open. No reason for the distinction is offered, no authority is cited, no policy basis is even hinted. One may parse Barron line by line in vain for anything remotely supporting such an interpretation. First, Barron applies specifically to records as well as proceedings, with no exemption for records of an open trial. 531 So. 2d at 114, 116. Second, Barron describes itself as a "definitive statement," Id. at 118, not a narrow holding limited to a specific, non-recurring factual scenario. Third, all the policy bases of Barron support an independent right of access to records quite apart from any need to compensate for a closed courtroom proceeding. Fourth, the district court assumes, without knowledge of the content of the sealed files, that the important proceedings against Tucker were conducted in open court rather than

just on paper.

Well over three-fourths of criminal convictions rest on pleas. The written plea agreement takes the place of the open trial. Oregonian Publishing Co. v. U.S. District Court, 920 F.2d 1462, 1465 (9th Cir. 1990). See also, In Re Washington Post Co., 807 F.2d 383, 389 (4th Cir. 1986) (right of access to records applies with same vigor as right to attend live proceedings because in many cases the documents are, in effect, the trial).

Whether or when Tucker completed her probation can not be determined without access to the sealed files, so one does not know how long the complete record remained open in the clerk's office before the sealing order. Maybe a few hours, maybe a few months, Either way, for at least some brief period, a certified copy of it could, at least theoretically, have been obtained, though only by inside information and a race to the courthouse.

Theoretical and haphazard as it may be, this brief access apparently motivated the Fifth District Court of Appeal to fashion from whole cloth its unique concept of "former public records" in Russell 11, 592 So. 2d at 809, an opinion heavily relied upon by the court below in this case. The entire concept of "former public records," records open as matter of law for some time prior to being sealed, begs the question by assuming what is to be proven. It is simply circular to reason that the documents are former public records because they are closed and they must remain closed because they are former public records. Yet this is the

tautological path followed in Russell II and relied upon in Resha.

The Third DCA had already rejected the theory embraced by the First DCA that an open trial can somehow redeem a sealed record. Collazo, 329 So. 2d at 338. More recently, the Third DCA rejected the claim that a file once open could subsequently be removed from the public domain. Lifecare International, Inc. v. Barad, 573 So. 2d 1044, 1046 (Fla. 3d DCA 1991).

The First DCA in Resha and the Fifth DCA in Russell 11 held that the right of access can be satisfied by providing a little window of opportunity at the live courtroom proceedings. The Second DCA in Russell I, though certainly not as curt and conclusory as the latter two opinions, also relies on an accident of timing, the age of the sealing order, to effect its forfeiture of the right of access to court records. All three opinions represent an alarming and significant rupture of established constitutional and common law.

1. The First District Court Failed To Recognize The Dutv To Give Public Notice Before Sealing A Court File.

The unprecedented degree of irreversibility accorded by the court below (and also by the courts in Russell I and Russell II) to post-trial criminal record sealings, if allowed to stand, would magnify the importance of challenging a records closure before it is accomplished. There would be virtually no cure, only prevention, Without notice that a closure is contemplated, a challenging party would have no way of opposing the sealing before

its completion. At that point the newly-minted "presumption of correctness" adopted in these three cases would render challenges futile in all but the most exceptional cases. Thus the importance of notice looms large for any member of the public or media with an interest in the proposed sealing.

Yet the court below ignored its own clear and explicit precedents requiring public notice pasted in a conspicuous place in the courthouse for at least 15 days to allow a motion for reconsideration. Florida Freedom Newspapers v. Sirmons, 508 So. 2d 462, 464 n.7 (Fla. 1st DCA 1987); State ex rel Tallahassee Democrat v. Cooksey, 371 So. 2d 207, 209 (Fla. 1st DCA 1979).

In analogous circumstances, this Court has required prior notice in Lewis, 426 So, 2d at 8, and in McIntosh, 340 So. 2d at 910, which would certainly seem to be binding in this case. No cases contradict such a conclusion and several support it. Sarasota Herald Tribune v. Holtzendorf, 507 So. 2d 667, 668 (Fla. 2d DCA 1987); Times Publishins Co. v. Penick, 433 So. 2d 1281 (Fla. 2d DCA 1983); Sentinel Star Co. v. Booth, 372 So. 2d 100, 102 (Fla. 2d DCA 1979).

Federal courts recognize prior public notice of an impending closure not merely as a common law procedure, but a requirement of constitutional stature. Washington Post V. Robinson, 935 F.2d at 288; Oregonian Publishins Co., 920 F.2d at 1466; U.S. v. Haller, 837 F.2d 84, 87 (2d Cir. 1988); In Re Washinaton Post, 807 F.2d at 390-91.

In Tucker's sealing, only the prosecutor, not the public or media, received any sort of notice. The trial judge stated that he "routinely will enter them [sealing orders] if the State Attorney has also reviewed it." App. B, 16-18. As it happens, the prosecutor who had originally not objected to sealing Tucker's records, upon learning of Resha's need for the files in his civil suit, appeared at the hearing on Resha's motion to open the records and spoke in favor of unsealing the files. App. B, 39-41. This illustrates how notice is not just an abstract right, but a practical need. Even minimal notice would have brought Resha into court, together with the prosecutor, to oppose the sealing.

The lack of notice provides an independent basis for vacating the sealing of Katie Tucker's records.

2. The District Court's Theory Of Short-Term Access Impermissibly Burdens The Public's Right To Know.

The conclusion of the opinion below (and its recent predecessors in Russell 1 and Russell 11) would not pass muster even had advance notice been given.

The court below held that the public's right to know is satisfied if the court proceedings, and presumably the case documents, are open while the case is active. The right of access to records of completed cases is triggered only if the case was closed to the press and public while it was in progress. Resha, 600 So. 2d at 18. The court views post-trial access as a remedy rather than a right. Under this theory of compensatory access,

wrongly attributed to Barron, it is not clear whether the documents must be available permanently or whether they can be re-sealed after some period of availability.

Under Russell 11, the mere act of post-trial judicial closure, for any reason, extinguishes the right of access unless the party seeking access meets the "good cause" burden. 592 So. 2d at 809.

Under Russell I, the stringent three-prong test of Press-Enterprise II must be applied to prospective sealings, but if records have been sealed for "several years," the closure is entitled to a "presumption of correctness" under which the burden shifts to the party seeking to open the records. Thus the Second District recognizes the normal First Amendment right of access but invents; a sort of waiver or laches whereby that right expires with regard to records long-sealed. The court cited no authority or rationale for an exemption based on the age of the sealing and did not explain by what power it could depart from a reading of the federal constitution by the U.S. Supreme Court that it acknowledged to be binding on the case before it. The only citation is to Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867 (Fla. 1st DCA 1979), for the proposition that there is no First Amendment right to open a court record properly sealed. This obviously begs the question. The entire point of the case is that the record could not have been properly sealed unless the three-prong test were

applied at the time of sealing.[12]

The rationale for denying access to records of a completed case is actually weaker, not stronger than the rationale for closing an active case. In a completed case, no countervailing Sixth Amendment right to a fair trial can be harmed by access; no child witness can be traumatized; trade secrets, national security secrets, and the identities of confidential informants can be redacted if not already revealed in open court. Essentially none of the generally recognized compelling interests for closure apply to the records of a completed case.

Granting access during trial but not after sentencing can not satisfy the purposes of access. Only a limited number of people can fit in any court room and only a limited number of people will be free to depart from the business of daily life at the time of any given trial. The mass media can cover only a tiny fraction of trials. The significance of a particular case may not be realized until long after it is concluded. Persons in distant locations or, indeed, persons not yet born may be the ones who eventually need the information. Their rights are no less than the rights of those who find it convenient to be observers in a court room on a certain day.

To the extent this right exists, it exists today for the

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[12] If the court's unstated point is that some of Russell's records were sealed before Press-Enterprise II was decided in 1986, no basis is stated for applying that decision prospectively only. In any case, Tucker's records were not sealed until 1991.

> 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.

Mokhiber v. Davis, 537 A.2d 1100, 1105 (D.C. 1988).

The First Amendment and common law policies underlying the right to know can not be effectively furthered by the small, time-bound window of access offered by the First District Court. If the public and the press are to monitor the functioning of the system and to make informed decisions on the selection and retention of judges or reforming and correcting the system, the records of yesterday's cases are no less important than the observation of today's cases. This is especially so where the misconduct of high officials is involved. As this brief is written, the Watergate prosecutions of the 1970s are the benchmark by which the public measures the Iran-Contra prosecutions of today. Just as surely, the case of Katie Tucker will once again become the focus of attention the next time a high Florida official is caught abusing power for political gain.

The principle can apply with equal force to less spectacular cases not yet known at the time of decision to constitute part of a larger pattern worthy of public scrutiny.

"Now you see it, now you don't" is a familiar expression, but it has never been a maxim of constitutional jurisprudence. The First Circuit rejected the notion in the course of invalidating

Massachusetts' counterpart to our state's criminal sealing enactments:

> Finally, Amicus asserts that, once access to judicial proceedings is permitted, it is irrelevant that "it may be difficult for any one person or any one newspaper to attend every judicial proceeding in the state." This concept of "now or never," "speak now or forever hold your peace" is a strict, harsh one, narrowly confining First Amendment interests in what might be a large problem of governance to a temporally immediate, discrete episode. . . . If the press is to fulfil 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 497, 504 (1st Cir. 1989).

An ironic result of placing a time bar on access to criminal records is that the defendant (or possibly even the defendant's estate or heirs) may successfully move for closure fifty years (or any time) after the trial, while the party seeking access must meet some unspecified deadline. Thus the right of access expires while the ability to extinguish that right is virtually eternal.

II. RESHA HAS RIGHTS TO TUCKER'S RECORDS BEYOND THE RIGHTS OF THE PRESS OR GENERAL PUBLIC.

The court below conclusorily rejected Resha's claims that denial of access to Tucker's records violates constitutional rights other than his First Amendment rights. The court erred in rejecting those claims.

A. RESHA'S RIGHT OF ACCESS TO COURTS UNDER THE STATE AND FEDERAL CONSTITUTION ENTITLES HIM TO TUCKER'S RECORDS.

One of the remaining untried claims in Resha's civil suit against Tucker is a count alleging a cover-up in which Tucker

falsified and altered various government documents in an effort to conceal her use of the Department of Revenue to retaliate against Resha.

To prove this claim, Resha must be able to subpoena the original falsified documents and various items of physical evidence that prove Tucker's guilt. These items include fingerprints and palm prints, graphite enhancements of signatures, handwriting tests, and a typewriter ribbon. All of this evidence is sealed by court order along with numerous sworn interviews of witnesses and lengthy investigative reports by FDLE agents.

The sealed criminal court files contain other information, not available elsewhere, showing Tucker's nolo plea and her sentencing, all of which she would lawfully deny if she could not be confronted at trial with certified copies.

Without this evidence, Tucker would probably win a directed verdict. The evidence would be available to Resha for presentation to the jury but for the sealing order, subject only to the normal objections that might arise at trial. Denial of access to this evidence prevents Resha from presenting his claim on this count -- a claim of sufficient validity to have survived a motion to dismiss, two motions for summary judgment, and an appeal. This is state action that precludes a litigant's access to court and is therefore a violation of Article I, § 21 of the state constitution and of the Fourteenth Amendment to the federal constitution.

In rejecting this contention, the court below found it

"without authority or evidentiary support." The part about evidentiary support is yet another "Catch-22" in that the evidence was in the sealed files and therefore could not be produced.[13] However, Tucker has not contested its existence so it should not be considered to be in dispute.

The court below relied on Griss v. Cardonne, 546 So. 2d 1171 (Fla. 3d DCA 1989) and Sussex Mutual Insurance Co. v. Ruiz, 508 So. 2d 424 (Fla. 3d DCA 1987), for the proposition that the desire to use a criminal file in a civil proceeding arising from the same occurrence is not adequate basis for unsealing. The former case relies wholly on the latter, and the latter case relies wholly on language in § 948.058(3), Fla. Stat. (1983), specifying who may have access to sealed criminal files. A constitutional right of access to courts, which would automatically trump the contrary language of the statute, was apparently not presented to, and certainly not decided by the courts in Griss and Sussex.

A mare recent decision from the same court partially unsealed records of a civil suit in order that they might be used in another civil suit. Lifecare International, Inc. v. Barad, 573 So. 2d 1044 (Fla. 3d DCA 1991). That case still did not reach the Constitutional access to courts issue.

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[13] The District Court's position in this regard contradicts the U.S. Supreme Court's holding in Nixon v. Warner Communications, 435 U.S. at 597, that unlike English practice, American litigants need not present proof of the need for the records as evidence in a civil suit.

Under the Fourteenth Amendment, the right of access to courts embraces the right to be free of governmental interference with the ability to obtain evidence necessary to vindicate one's rights in a civil suit. Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983). See also, Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989), cert. den., 496 U.S. 924 (1990); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). In depriving Resha of the evidence he needs in his civil suit, the sealing order violates his federal constitutional right of access to courts.

The court below faulted Resha for not having case citations in support of a state constitutional right to obtain needed evidence from a sealed file. That would be impossible because the question has never been answered. However, though no reported Florida cases have yet addressed a comparable right under Article I, § 21 of our state constitution, one may reasonably assume the state right in this regard to be even stronger than the federal right because access to courts is an explicit, black-letter right under the Florida Constitution, whereas it is only an implied right under the Fourteenth Amendment of the U.S. Constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992); In Re T.W., 551 So. 2d 1186 (Fla. 1989); Overland Construction Co. v. Sirmons, 369 So. 2d 573 (Fla. 1979).

The right to present a case in court is meaningless when the necessary evidence is placed out of reach by the sealing order of another judge of the same court. Article I, § 21 protects not only

the right to get into court, but the right to present a meaningful case. Travelers Insurance Co. v. Auricultural Delivery Service, 262 So. 2d 210 (Fla. 2d DCA 1972) (right to complete the record); Kirkland v. State, 185 So. 2d 5 (Fla. 2d DCA 1966) (right to challenge credibility and bias of adverse witnesses on cross examination); Bell v. State, 281 So. 2d 361 (Fla. 2d DCA 1973) (indigent's access to court right protects him fram being forced to reimburse state for costs of trial and appellate fee).

More recently this Court confronted the reality that a right of access to courts is meaningless without access to lawyers:

> While the physical courthouse doors remain open, this ever-increasing complexity in the law now has figuratively slammed those doors in the face of countless Floridians. Only those who can afford an attorney or who themselves are lawyers truly have unconstrained access to the powers of the courts, which are supposed to be open to all the people of this state.

In Re Amendments To Rules, 598 So. 2d 41, 55 (Fla. 1992) (Kogan, J., concurring and dissenting).

Even for those who have who do have lawyers, the doors are slammed in their faces when the courts deny them their evidence.

The court below has cited City of West Palm Beach v. Meredith, 473 So. 2d 759 (Fla. 4th DCA 1985), and Walton v. Turlinston, 444 So. 2d 1082 (Fla. 1st DCA 1984), presumably for the proposition that even though criminal files may be sealed, the facts contained therein are not sealed and may be proved in another proceeding by other means. This would be helpful to Resha if the evidence needed were merely the testimony of witnesses who could recount what they

saw.

In Resha's case, however, a principal issue is whether certain documents were altered and falsified. Such a case can simply not be made without the original documents and scientific test results that prove the case. All this is under seal at FDLE. Sections 90.952 and 90.953(2), Fla. Stat., require introduction of original documents, especially where authenticity is at issue. Photocopies and memories simply will not suffice. Williams v. State, 386 So. 2d 538 (Fla. 1980).

Also under seal is the court file, containing the only papers that may be certified for use in impeaching Tucker's testimony under § 90.610, Fla. Stat., or under § 90.107. Fulton v. State, 335 So. 2d 280 (Fla. 1976).

If the right of access to courts is to be anything more than words on paper, it must embrace the means to effectuate it.

B. THE SEALING OF TUCKER'S RECORDS IS VOID FOR BEING EFFECTED IN VIOLATION OF RESHA'S RIGHTS AS A VICTIM OF CRIME.

Resha was never notified that Tucker's records were going to be sealed and had no opportunity to be present or to be heard on the matter. The court below rejected the argument that this dereliction violated the victims' rights provision of Article I, § 16, Fla. Const. The court held, first, that Resha's claim to be a victim is "without authority," and, second, that he "has not cited any authority that a sealing proceeding is a crucial stage of a criminal proceeding within the meaning of the amendment." Resha,

600 So. 2d at 18.

The absence of authority in this context is a poor ground for rejecting Resha's contention. There is also no authority to the contrary. The reason is that the victims' rights provision of the constitution was not adopted until November, 1988. There have been very few cases on it and none on either of the issues identified by the court below. Interpretation of a new enactment should not be forgone far lack of prior interpretation. If courts refuse to enforce this new provision far lack of precedent, no precedent will ever develop.

1. Resha Is A Victim Of Tucker's Crime.

In one sense the State is the official victim of every crime and is the only party permitted to undertake a criminal prosecution. In another sense, the person robbed, raped, extorted, or, as in this case, the person directly injured by the falsification of official records is a lawful victim. By creating a phony paper trail to support her version of events, Katie Tucker lent credence to her defamatory allegations against Donald Resha by creating the impression that those allegations had originated from sources other than herself. She also poisoned the well of evidence Resha could use in a civil suit to redress his injuries. These damages are direct, tangible, and unique to Resha, over and above the abstract and mostly theoretical injury suffered by citizens in general from falsification of a government document. Resha was mentioned in the falsified documents and his suit against Tucker

was pending at the point of the falsification.

The State Attorney failed to take these injuries into account in deciding not to designate Resha as a victim of the crime for which Tucker was arrested. Resha's status as victim should have been obvious from the wording of the statute under which Tucker's arrest was made. That statute makes it a crime to falsify official records to obtain a benefit for oneself or "to cause unlawful harm to another." § 839.25(1), Fla. Stat. (1989).

The prosecutor's office reasoned erroneously as follows:

> We did not regard Mr. Resha, the civil client, as the victim in the case. And the reason for that was that any harm visited upon Mr. Resha occurred through actions of Ms. Tucker prior to the point where these records were falsified. In other words, we viewed the State of Florida as the victim, not Mr. Resha in particular.

(App. B, 39.)

However, because of facts not known to the State attorney about Resha's civil suit at the time of the sealing, that office now supports unsealing the court file, provided that Tucker not be penalized for denying her criminal record during the period the file was officially sealed. (App. B, 39-41.)

The First District Court itself has recently rejected an effort to define "victim" so narrowly as to rob the word of meaning. Bellamy v. State, 594 So. 2d 337 (Fla. 1st DCA 1992) (designation of victim prior to conviction does not destroy presumption of innocence). The legal definition of "victim" generally comes into dispute when the injury is vicarious rather

than direct. Ocasio v. State, 586 So. 2d 1177 (Fla. 4th DCA 1991); Bureau of Crimes Compensation v. Traas, 421 So. 2d 50 (Fla. 2d DCA 1982). No such consideration exists in this case.

A collection of approximately 100 cases in which courts have grappled with the definition of "victim" is gathered under that heading in West's Words and Phrases, (1992 Cumulative Pocket Part). Petitioner can find nothing in that collection which would exclude him.

2. Sealing A Record Is A Crucial Stage Of A Criminal Proceeding.

The Florida Constitution affords certain procedural rights in criminal proceedings to victims of crime:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Article I, § 16(b), Fla. Const.

Section 960.001(d), Fla. Stat. (1991) lists some proceedings of which a victim is entitled to notice. Sealing is not listed, but the list does not purport to be exhaustive, and under the statutory doctrine of ejusdem generis, one must assume that sealing is similar enough to listed proceedings such as modification of sentence, release from custody, appellate review, and parole to be of the nature requiring notice. It is a post-trial procedure that usually terminates a case. The victim's presence and comments at

this point can nat interfere with any recognized right of the defendant.

The Uniform Law Commissioners recently drafted model victim rights legislation in an effort to standardize practices throughout the nation. Under this Uniform Victims of Crime Act, "the victim may be present at any court proceeding where a defendant has a right to attend." 78 A.B.A. J. 34 (November, 1992). This is a fair and efficient definition of "crucial stage," one that would guarantee Resha's right to notice and participation.

To Resha, Tucker's sealingwas certainly a crucial stage. Not only did it sabotage his civil suit, it also wiped the slate clean for Tucker so she could lawfully deny the existence of her criminal record. This opened the door for her to return to the world of power politics where she could carry on her vendetta against Resha and obtain a position in a law enforcement agency of the federal government.[14]

The ability of an offender to make these denials is a matter of concern to victims in general, particularly in those cases where the denial allows the purchase of firearms that otherwise would not be sold to the offender. Criminal firearms prosecutions have arisen from the federal government's refusal to honor this "license

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[14] A candidate for employment with a criminal justice agency is forbidden by § 943.058(6)(a), Fla. Stat. (1991), from using the right of denial conferred by the statute. The Coast Guard is a law enforcement agency under 14 U.S.C. § 2, but Tucker evidently denied her record to that agency anyway.

to lie" feature of Florida's sealing regimen. U.S. v. Jones, 910 F.2d 760 (11th Cir. 1990); U.S. v. Grinkiewicz, 873 F.2d 253 (11th Cir. 1989); U.S. v. Bruscantini, 761 F.2d 640 (11th Cir. 1985). Another notable feature of these cases is the insistence of the courts that a sentence, even to probation, is a "conviction," even on a nolo plea with adjudication withheld -- a point Tucker vigorously contested below in defending her entitlement to the sealing. The U.S. Supreme Court caustically dismissed the idea in the same context:

> It is also plain that one can not be placed an probation if the court does not deem him to be guilty of a crime.

Dickerson v. New Banner Institute, 460 U.S. 103, 113-14 (1983).

There ought not to be a dispute as to whether sealing the record is a crucial stage of a criminal proceeding under Article I, § 16(B) of our state constitution. It is the only stage that has the effect of nullifying all the other stages.[15] In that sense, it is the most crucial of them all.

CONCLUSION

For the foregoing reasons, Petitioner Resha requests that this Honorable Court declare the sealing of Katie Tucker's criminal record void as violative of the common law and First Amendment right of access to judicial records; violative of Resha's right of

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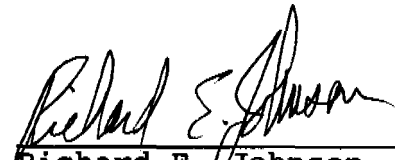
[15] An issue not raised below that the Court may consider sua sponte is whether these sealing practices are not really pardons in disguise. If so they violate separation of powers by intruding on the exclusive executive clemency prerogatives stated in Article IV, § 8, Fla. Const.

access to courts under the Fourteenth Amendment and under Article I, § 21 of the state constitution; and violative of Resha's rights as victim of crime under Article I, § 16(b) of the state constitution.

Reepectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by U.S. Mail this 9th day of November, 1992 to Neill G. Wade, State Attorney's Office, Leon County Courthouse, Tallahassee, Florida 32301; Michael R. Ramage, Florida Department of Law Enforcement, P.O. Box 1489, Tallahassee, Florida 32302; and Brian Duffy, P.O. Drawer 229, Tallahassee, Florida 32302-0229.

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