

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

=====

PETITIONERS' BRIEF ON JURISDICTION

=====

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STATEMENT OF CASE AND FACTS

The Florida Department of Law Enforcement 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 Resha and to destroy his reputation for his political opposition to Tucker and her husband.

The falsified documents, fabricated during Tucker's suspension, portrayed the campaign against Resha as the work of an underling acting against Tucker's wishes. If accepted as authentic, the documents could have (a) saved Tucker's job, and (b) caused Resha to lose a civil suit he had pending against her.

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

During discovery in the civil suit, Resha learned that Tucker had obtained a sealing, on October 3, 1991, of her criminal court file and the FDLE documents and physical evidence. The sealed materials are essential to Resha's suit against Tucker.

Upon Resha's motion, Circuit Judge N. Sanders Sauls ordered only temporary and restricted access to the FDLE materials, but no access at all to the court file.

Resha petitioned the First District Court of Appeal, seeking

permanent access to all the files, and citing his rights as a citizen to access to public records of official misconduct, his right to evidence as a litigant, his rights as a victim of crime, and Tucker's ineligibility for the sealing. Tucker cross-petitioned, seeking to quash Resha's temporary access to the FDLE files.

On May 22, 1992, the First District Court of Appeal determined that Resha should have no access at all, temporary or permanent, to any of the contested files of FDLE or the court. The trial court decision was quashed to the extent that it deviated from the original sealing.

Resha sought rehearing and rehearing en banc on June 8, 1992. Both were denied on June 30, 1992. Resha undertook timely petition for review in this Court on July 27, 1992.

Resha won a substantial jury verdict against Tucker on his state law claims on May 29, 1992. His federal law counts, the ones for which he needs the sealed court files, remain in abeyance, awaiting a ruling from the First District Court of Appeal on Tucker's claim of immunity from suit based on her status as a government official.

SUMMARY OF THE ARGUMENT

The district court decision violates the well-settled principle that records of official misconduct committed by high government officials must be available to the general public so

that citizens and voters may monitor the conduct of their officials and the expenditure of their tax dollars. The decision also violates the principle that circuit judges may unseal criminal records so long as they do not abuse their discretion or depart from the requirements of law in doing so.

The decision construes the access to courts provision of the state constitution as not encompassing the right to compulsory process to secure documents and evidence from sealed files that may be necessary to vindicate a plaintiff's rights against the offender in a civil suit. The decision further holds that the sealing of Respondent's criminal record was not a "crucial stage" of a criminal proceeding of which a victim is entitled to notice and that the Petitioner is not a victim within the meaning of the victims' rights provision of the constitution.

The district court ruling expressly and directly conflicts with numerous decision of this Court and other district courts (a) in wrongly assigning the burden of proof on a party seeking to unseal a criminal record rather than the party seeking to maintain closure; (b) in ignoring the special policies mandating extraordinary openness of records concerning official misconduct; and (c) in applying to a freshly sealed record a presumption of correctness that was meant to apply only to records sealed for many years.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has both original and discretionary

jurisdiction to review this case.

Original jurisdiction lies to review a an order excluding the press or public from access to any judicial record. Rule 9.100(d), Fla. R. APP. P., and Article V, § (3)(b)(7), Fla. Const. (all writs).

Discretionary jurisdiction lies in this case to review decisions of the district court that expressly construe provisions of the state or federal constitution, expressly affect a class of state or constitutional officers, expressly conflict with the rulings of other district courts, and expressly conflict with rulings of the Florida Supreme Court. Rule 9.030(a)(2)(A)(ii), (iii), and (iv); also Article V, § (3)(b)(3), Fla. Const.

ARGUMENT

I. THE DISTRICT COURT DECISION EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

A. THE DECISION AFFECTS THE CLASS OF STATE OR CONSTITUTIONAL OFFICERS WITH SEALED CRIMINAL RECORDS INVOLVING OFFICIAL MISCONDUCT.

Resha's principal argument below was that sealed criminal records involving crimes by government employees acting in their official capacity are qualitatively different from the sealed criminal records of private individuals whose records are of lesser public interest and importance. The district court completely rejected this proposition, holding that such factors become

pertinent only when the sealed records pertain to judicial proceedings that were closed to the public. The district court thus eviscerated Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988), by limiting it to its facts, despite its status as a landmark ruling meant to provide guidance in a variety of circumstances.

Tucker was arrested and sentenced for a crime committed through exercise of her official powers, while she was on the state payroll, sitting in a government building, using state materials and equipment, all for the purpose of deceiving the governor and cabinet and persecuting a political opponent for exercise of his First Amendment rights. One can scarcely imagine a set of facts more squarely implicating the right of the citizens of a democracy to be informed of what their high officials were doing on the job and how tax dollars were spent.

Not only the common law, but the First Amendment requires the opening of files concerning misconduct in office by high officials. Barron, 531 So. 2d at 118; see also Press Enterprise v. Superior Court, 478 U.S. 1 (1986).

B. THE DECISION AFFECTS THE AUTHORITY OF CIRCUIT JUDGES TO UNSEAL CRIMINAL FILES.

By overturning even the partial and temporary unsealing ordered by the circuit court, the district court limits the authority of circuit judges, who are state constitutional officers. The district court established neither an abuse of discretion nor

a departure from law by the circuit court as a basis for voiding the discretionary act of that court. Absent such findings, the district court erred in overturning the partial unsealing. Gonzalez v. State, 565 So. 2d 410, 411 (Fla. 3d DCA 1990).

11. THE DISTRICT COURT RULING EXPRESSLY
CONSTRUES PROVISIONS OF THE STATE
CONSTITUTION.

A. THE RULING CONSTRUES ARTICLE I, § 21, ACCESS TO COURTS.

Resha contended that his state constitutional right of access to courts includes the right to use compulsory process to obtain the evidence necessary to prove his civil case. The court file on Tucker is absolutely necessary under § 90.610, Fla. Stat., to impeach her at trial. The original documents Tucker falsified are part of the sealed FDLE file and are absolutely necessary to Resha's civil case under § 90.953(2), Fla. Stat., as is physical evidence consisting of a typewriter ribbon, fingerprints, and handwriting tests. The district court held:

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

This holding is a simple factual error. Moreover, it articulates a unique standard for triggering a constitutional right. The notion that one seeking to exercise a constitutional right must demonstrate a compelling necessity and the unavailability of

alternatives is completely foreign to our system of jurisprudence.' As the only extant holding on this point of law,² the district court decision calls for review.

B. THE DISTRICT COURT HOLDING CONSTRUES ARTICLE I, § 16(b), RIGHTS OF VICTIMS.

Resha contends that the sealing of Tucker's criminal file is void ab initio because he was denied his right as a victim to be informed, to be present, and to be heard at the crucial stage of criminal proceedings when Tucker's file was sealed. The district court held that Resha had failed to demonstrate either that he is a victim or that sealing of a record is a crucial stage of a criminal proceeding under Article I, § 16(b). In point of fact, Resha did demonstrate that he is a victim of Tucker's crime. As for the other point, it hardly seems arguable that a sealing which actually enabled Tucker to wipe the slate clean and get another high government position with the U.S. Coast Guard is not a crucial stage of her criminal proceeding. Article I, § 16(b), is a recent addition to the constitution on which lower courts need the

¹ The district court has the law exactly backwards. Proof of a compelling interest and unavailability of alternatives is the standard a state actor must meet to violate a constitutional right, not the standard a citizen must meet to exercise one.

² In Sussex Mutual Insurance Company v. Ruiz, 508 So. 2d 424 (Fla. 3d DCA 1987), and Griss v. Cardonne, 546 So. 2d 1171 (Fla. 3d DCA 1989), the court held that § 943.058, Fla. Stat., makes sealed criminal files available only to the defendant, his attorney, and criminal justice agencies, not plaintiffs in civil suits arising from the same facts. These cases relied solely on the statute, with no consideration of a constitutional right to access to courts.

guidance of this Court.

III. THE DISTRICT COURT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH RULINGS OF THIS COURT AND OTHER DISTRICT COURTS.

A. THE DISTRICT COURT WRONGLY ASSIGNED THE BURDEN OF PROOF,

The district court held that Resha must bear the burden of showing good cause why Tucker's records should be unsealed. In so holding, the court relied upon Russell v. Times Publishins Co., 17 F.L.W. D417 (Fla. 5th DCA February 7, 1992), which is now under review by this Court as Case No. 79,496.

This holding squarely contradicts the rule stated by this Court in Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988). Lest there be any misunderstanding, this Court took the trouble to stress three times in the same opinion that the burden falls on the party seeking closure. Id. at 118-19. This Court had made similar rulings in Bundv v. State, 455 So. 2d 330 (Fla. 1984) and Miami Herald Publishins Co. v. Lewis, 426 So. 2d 1 (Fla. 1976), articulating a three-prong test which places a heavy burden on the party seeking closure.³ The ruling of the court below on the burden of proof also expressly and directly conflicts with Goldberg v. Johnson, 485 So. 2d 1386 (Fla. 4th DCA 1986) and, ironically, with its own prior holding in Florida Freedom Newspapers v.

³ In Bundy and Lewis the burden rested on the party seeking closure despite the presence of important countervailing interests such as a Sixth Amendment right to a fair trial. Tucker had already been sentenced before seeking the sealing and could claim no countervailing interest.

Sirmons, 508 So. 2d 462 (Fla. 1st DCA 1987).

B. THE DISTRICT COURT IGNORED THE SPECIAL STATUS OF PUBLIC OFFICIALS.

The district court made no allowance whatever for the fact that the acts giving rise to Tucker's criminal record occurred in connection with her position as a high public official. This Court in Barron held that, even in the presence of a countervailing constitutional privacy right

[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.

Barron, 531 So. 2d at 118.⁴

The district court's view of this matter conflicts with Gonzales v. State, 565 So. 2d 410 (Fla. 3d DCA 1990), in which the court held that a mere municipal firefighter, because of his government job, could not obtain sealing of his nolo contendere plea to cocaine charges.

C. THE DISTRICT COURT IGNORED THE PASSAGE-OF-TIME CRITERION,

The district court purported to follow Russell v. Miami Herald Publishing Co., 570 So. 2d 979 (Fla. 2d DCA 1990) in placing the burden on Resha. In point of fact, that court held the opposite, placing the strict scrutiny burden of Bundy and Press Enterprise v. Superior Court, 478 U.S. 1 (1986) upon the party seeking sealing. The court shifted the burden only for cases in which the records

⁴ The policy against **secrecy** applies with stronger reason to criminal records "because the public, in effect, is a party to criminal cases." Id. at 121 (McDonald, J. dissenting).

had been sealed "for several years," thereby lending the sealings a "presumption of correctness." Russell, at 983. Resha challenged Tucker's sealing within three months, immediately upon discovering it.⁵

CONCLUSION

For the foregoing reasons, the Court should exercise its jurisdiction to review this case.

Respectfully submitted,



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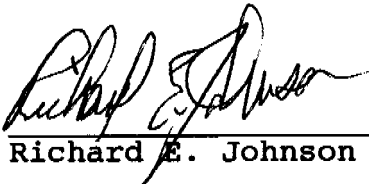
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Attorneys for Petitioner

⁵ The circuit court failed to give public notice of the sealing as required by State ex rel. Miami Herald v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976); Florida Freedom Newspapers v. Sirmons, 508 So. 2d 462, 464 n.7 (Fla. 1st DCA 1987); and State ex rel. Tallahassee Democrat v. Cooksey, 371 So. 2d 207, 209 (Fla. 1st DCA 1979).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by U.S. Mail this 6 day of August, 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; Brian Duffy, P.O. Drawer 229, Tallahassee, Florida 32302-0229; Honorable N. Sanders Sauls, Circuit Judge, Leon County Courthouse, Tallahassee, Florida 32301; Alison M. Steele and George K. Rahdert, 535 Central Avenue, St. Petersburg, Florida 33701; William C. Vose, State Attorney's Office, P.O. Box 1673, Orlando, Florida 32802; and Richard S. Blunt, 110 South Armenia Avenue, Tampa, Florida 33609.


Richard E. Johnson

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DONALD G. RESHA
Petitioner,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

v.

CASE NOS.: 92-914/945

KATIE D. TUCKER
Respondent.

CORRECTED COPY

pg. 1

Opinion filed May 22, 1992.

Petition for Writ of Certiorari, original jurisdiction.

Richard E. Johnson of Spriggs & Johnson and William A. Friedland,
Tallahassee, for Petitioner.

Brian S. Duffy, Tallahassee, for Respondent/Cross Petitioner.

SMITH, J,

In these consolidated cases, Katie Tucker and Donald Resha seek certiorari review of the same order of the circuit court, partially unsealing the criminal records of Katie Tucker. We grant Tucker's petition and quash the order of the circuit court.

Katie Tucker, who was the executive director of the Florida Department of Revenue, was suspended **as** the result of allegations that she had abused her authority by using the machinery of government to investigate her husband's former political opponent, Donald Resha. Ultimately, she pled nolo contendere to the charge of attempted official misconduct, a first degree misdemeanor, and was sentenced to probation and payment of costs, with adjudication of guilt withheld.

In the meantime, Donald Resha brought two civil suits in Leon County Circuit Court; in one, Katie Tucker is the defendant, and in the other she is allegedly a key adverse witness for both parties in a negligence action brought by Resha against the State of Florida. During discovery, Resha learned that Tucker had sought and obtained an order sealing her criminal records. He filed a motion to vacate the order in Tucker's sealed criminal proceeding. The trial court ruled that the files should remain sealed, except that the attorneys of record for Donald Resha could have access to the records, reports and evidence contained in the sealed files of the Florida Department of Law Enforcement and the Florida Department of Revenue. The order permitted the attorneys for Resha to use the contents of these files in connection with Resha's civil cases, without ruling on admissibility, but other use was prohibited.

Both parties seek review of the order - Resha contending that the trial court should have unsealed Tucker's entire record and Tucker contending that Resha failed to present

sufficient evidence to warrant the court's order partially unsealing her record.' We agree with Tucker that as the moving party below, Resha bore the burden of proof and he failed to demonstrate under any test,² a basis for unsealing, even in part, Tucker's records.

The **cases** suggest that good cause for unsealing could be shown by demonstrating that the party who sought and **obtained** the sealing order (in this case Katie Tucker) did so through fraud or perjury, or that the trial court entered the sealing order through mistake or inadvertence, or maybe even that the beneficiary of the sealing order has not profited from the act of judicial grace and has been subsequently convicted of other crimes. Russell v. Times Publishing Co., 17 F.L.W. D417 (Fla. 5th DCA February 7, 1992); and Russell v. Miami Herald Publishing Co., 570 So.2d 979 (Fla. 2d DCA 1990) (majority and concurring opinions).

Resha did not establish that Tucker committed fraud or perjury in obtaining the sealing order. His contention that **she** had an adjudication of guilt or conviction contrary to section

¹ **As** a practical matter, it appears that the court's order would substantially deprive Tucker of the benefit of the original closure order.

² See Russell v. Miami Herald Publishing Co., 570 So.2d 979 (Fla. 2d DCA 1990) **setting** forth a three-prong test for a moving party seeking to unseal records, and Russell v. Times Publishing Co., 17 F.L.W. D417 (Fla. 5th DCA February 7, 1992) suggesting **that** a party seeking to unseal court files must demonstrate good cause for doing so.

943.058(7)(b), Florida Statutes (1989) based upon the definition of "convicted" or "conviction" in section 287.133(b), Florida Statutes (1989), a statute **dealing** with the denial or revocation of the right to transact **business** with public entities if one has **been** convicted of a public entity crime, is meritless, and warrants no discussion.

Next, Resha's contention that the sealing **proceeding** **was** defective because **he**, as a "victim," was not present or permitted to be heard is without authority. First, **Resha has** not demonstrated that he **is** a victim for purposes of the recently enacted "rights of victims" amendment to the Florida Constitution, Article I, section 16(b). Further, 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's contention that he will be denied **access to the** courts if the records are not unsealed **is** equally without authority or evidentiary support. Resha **failed** to demonstrate a compelling necessity for these records and the unavailability **or** lack of other means of obtaining the information sought.

Finally, Resha's contention that the trial court's order **sealing** Tucker's record violates the public's right **to know** ignores the **facts** and circumstances of this case. 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.

Having otherwise failed to demonstrate a basis for unsealing Tucker's records, Resha is not entitled to have the records unsealed simply because of his status as a plaintiff in a civil action arising out of the same occurrence. Griss v. Cardonne 546 So.2d 1171 (Fla. 3d DCA 1989); Sussex Mutual Insurance Co. v. Ruiz, 508 So.2d 424 (Fla. 3d DCA 1987); City of West Palm Beach v. Meredith, 473 So.2d 759 (Fla. 4th DCA 1985); and Walton v. Turlington, 444 So.2d 1082 (Fla. 1st DCA 1984).

Katie Tucker's petition for writ of certiorari ~~is~~
GRANTED. Resha's petition for writ of certiorari is DENIED.

WRIT ISSUED.

ZEHMER AND WEBSTER, J.J., CONCUR.

a departure from law by the circuit court as a basis for voiding the discretionary act of that court. Absent such findings, the district court erred in overturning the partial unsealing. Gonzalez v. State, 565 So. 2d 410, 411 (Fla. 3d DCA 1990).

II. THE DISTRICT COURT RULING EXPRESSLY
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³ In Bundy and Lewis the burden rested on the party seeking closure despite the presence of important countervailing interests such as a Sixth Amendment right to a fair trial. Tucker had already been sentenced before seeking the sealing and could claim no countervailing interest.

Sirmons, 508 So. 2d 462 (Fla. 1st DCA 1987).

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The district court made no allowance whatever for the fact that the acts giving rise to Tucker's criminal record occurred in connection with her position as a high public official. This Court in Barron held that, even in the presence of a countervailing constitutional privacy right

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The district court's view of this matter conflicts with Gonzales v. State, 565 So. 2d 410 (Fla. 3d DCA 1990), in which the court held that a mere municipal firefighter, because of his government job, could not obtain sealing of his nolo contendere plea to cocaine charges.

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The district court purported to follow Russell v. Miami Herald Publishins Co., 570 So. 2d 979 (Fla. 2d DCA 1990) in placing the burden on Resha. In point of fact, that court held the opposite, placing the strict scrutiny burden of Bundy and Press Enterprise v. Superior Court, 478 U.S. 1 (1986) upon the party seeking sealing. The court shifted the burden only for cases in which the records

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had been sealed "for several years," thereby lending the sealings a "presumption of correctness." Russell, at 983. Resha challenged Tucker's sealing within three months, immediately upon discovering it.⁵

CONCLUSION

For the foregoing reasons, the Court should exercise its jurisdiction to review this case.

Respectfully submitted,



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Attorneys for Petitioner

⁵ The circuit court failed to give public notice of the sealing as required by State ex rel. Miami Herald v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976); Florida Freedom Newspapers v. Sirmons, 508 So. 2d 462, 464 n.7 (Fla. 1st DCA 1987); and State ex rel. Tallahassee Democrat v. Cooksey, 371 So. 2d 207, 209 (Fla. 1st DCA 1979).