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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,910

Dempsey J. Barron,

Petitioner,

v.

Florida Freedom Newspapers, Inc.,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF
THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF OF AMICI CURIAE THE MIAMI HERALD PUBLISHING COMPANY AND THE TIMES PUBLISHING COMPANY

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INTRODUCTION

Amici Curiae The Miami Herald Publishing Company and The Times Publishing Company file this answer brief in support of respondent Florida Freedom Newspapers, Inc.

STATEMENT OF THE CASE AND FACTS

On January 28, 1986, Laverne Barron, then wife of State Senator Dempsey J. Barron, filed a petition for dissolution of marriage in the Bay County Circuit Court. The petition was not filed under seal nor was any attempt to seal the file made at that time.

Late in September, reporters for respondent Florida Freedom Newspapers, Inc. sought to review the file in the ongoing dissolution proceeding. At that time, the reporters were informed that on September 9, 1986, the entire file had been sealed and that all future judicial proceedings in the case would likewise be closed. A.1. Neither Florida Freedom Newspapers nor any other member of the press was notified prior to the closure.

Upon learning of the closure, Florida Freedom Newspapers immediately obtained a copy of the trial court's blanket closure order. The September 9 order, entered without prior notice or a hearing, closed the file in its entirety, including that portion which had been open to the public during the seven months prior to entry of the order.

The order mandated that all further proceedings "be conducted in private." A. 1. No reasons for the closure were given.

Florida Freedom Newspapers promptly moved to intervene, seeking to set aside the trial court's closure order. A. 2-6. Oral argument was heard on October 13, 1986 and on October 15, 1986, the trial court entered an order granting Florida Freedom Newspapers leave to intervene but denying the motion to set aside. A. 7-9. The court cryptically alluded to "a cogent reason" for closure but declined to reveal it "so as not to breach the confidentiality sought to be protected." Id.

On October 16, 1986, Florida Freedom Newspapers moved to stay the dissolution proceeding, which motion was denied on October 17, 1986.

On October 24, 1986, Florida Freedom Newspapers filed a petition for review of the trial court's order denying access pursuant to Rule 9.100(d), Florida Rules of Appellate Procedure, and again requested a stay of the dissolution proceedings. Florida Freedom Newspapers further requested that the First District order the trial court to transmit the sealed file to the appellate court for its review inasmuch as the trial court had declined to do so voluntarily. A. 10-16. Barron filed a cross-petition for review on November 3, 1986, and on November 9, 1986, the First District Court of Appeal granted the motion for stay.

On March 6, 1987, the First District issued a brief order affirming the trial court's denial of access, 2-1, and vacating the stay. A.17. The court indicated that its opinion would follow. Accordingly, the trial of the dissolution went forward in private. The only public record of the dissolution is the final judgment which appears in the official record book. A. 18-20.

On April 15, 1987, subsequent to its preliminary ruling, the First District ordered the trial court to transfer certain portions of the sealed file to it for its review. A. 21. Following this review, the First District issued its final opinion and, with a reference to the contents of the sealed file, receded from its earlier order and reversed the trial court, 3-0. A. 22-30. The First District recognized, as has this Court and the United States Supreme Court, that our system of civil justice is presumptively open to public scrutiny:

> There is no private litigation in the courts of Florida. All proceedings before the trial judge are public proceedings. In some instances, otherwise open proceedings are closed because some information relevant to the proceedings should not be publicly disclosed. To close a proceeding before the trial judge, other than for reasons of confidentiality enumerated by the legislature where public policy is presumed to exist, the court must have a compelling justification based

> upon a clearly discernible public policy that cannot be served by any means other than closure.

A. at 23.

The First District, having had the opportunity to review the sealed file, did "not find the facts upon which the trial court based [its] finding to be sufficiently compelling to require the proceedings be conducted in private." A. 25. Thus, the court noted:

> This information is of a nature that it would be relevant to many other types of civil proceedings, such as worker's compensation cases, personal injury cases, or possibly insurance coverage disputes. If this information was sufficiently compelling to close this proceeding, it would follow that it would be sufficiently compelling to close those other types of proceedings as well. We cannot accept, nor do we believe the trial court would, that these other types of proceedings could be closed based upon the information sought to be kept private in this case.

A. 26 n.8. Barron's motion for rehearing in the First District was denied on July 1, 1987. A. 31. Thereafter, Barron invoked this Court's discretionary jurisdiction and this Court granted review.

SUMMARY OF ARGUMENT

Barron argues that he has a constitutional right to privacy in civil judicial records and proceedings whereas the press and public have no countervailing constitutional right of access. In fact, the converse is true.

Judicial proceedings in Florida are presumptively open to the public. Contrary to Barron's suggestion, the foundation of this presumptive right of access is both constitutional and common law in origin. The constitutional right, secured by the Florida and federal constitutions, is adjudicated under a well established and familiar test which requires balancing of competing interests on a case-by-case basis. Indeed, with but a single exception cited by Barron, every court to consider the question has held that civil litigation is presumptively open to public scrutiny.

Litigants such as Barron are well protected by this traditional balancing of interests. The qualified right of access permits trial courts to consider privacy interests, but there is no constitutional right to privacy which mandates closure of civil judicial records and proceedings. No case cited by Barron recognizes such an extraordinary privacy right and, indeed, many cases hold directly to the contrary.

The marital relationship is of enormous public importance. Its regulation has been the proper subject of

government since time immemorial. That Florida courts continue to do justice in the dissolution of marriages, the allocation of spousal property, and the care and custody of children is a matter of legitimate public concern, particularly where one litigant wields enormous political power. The practice in Florida has always been that dissolution proceedings are presumptively open. There is no basis for receding from this unbroken tradition of access.

Finally, it is clear that the First District properly applied this Court's three-part test set forth in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 6 (Fla. 1982), and its decision should be affirmed. The court properly reviewed the sealed records de novo and found that Barron had not satisfied his burden of demonstrating "compelling reasons" for the blanket closure ordered by the trial court.

ARGUMENT

I. The Press and Public Enjoy A Constitutional And Common Law Right of Access To Civil Judicial Records and Proceedings.

Barron argues that although the press enjoys a qualified constitutional right of access to criminal records and proceedings, that right does not encompass civil matters. Barron Br. at 8-14. He is simply incorrect. Every

court to consider the question has recognized a First Amendment or common law right of access to judicial records and proceedings in civil cases. Public access is as essential to the integrity of our system of civil justice as it is to that of the criminal justice system. Thus, in Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), a civil case, the United States Supreme Court stated:

> 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.

Id. at 374. Maintaining our system of civil justice open to public scrutiny is as important to us today as it was to the Supreme Court more than forty years ago.

A. This Court Has Consistently Recognized A Presumptive Right Of Access To Both Criminal And Civil Judicial Records And Proceedings.

Barron's position violates the express language and implicit logic of this Court's decision in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1977), the case in which this Court first analyzed the public character of judicial proceedings in Florida. The McIntosh

Court analyzed the First Amendment right of access to judicial information in the broadest terms. "Freedom of the press is not and has never been a private property right . . . . It is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis". 340 So.2d at 910. Thus, "to prevent star-chamber injustice the public should generally have unrestricted access to all proceedings." Id. at 910 (emphasis added). Public access to all information and all proceedings is essential to a self-governing society, a fact which led this Court to observe that "the public and press have a right to know what goes on in a courtroom whether the proceedings be criminal or civil.[1/] Id. at 908. Barron's argument ignores these fundamental principles articulated by this Court over a decade ago.

In Miami Herald Publishing Co. v. Lewis, this Court established the closure standard applied by the First

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1/ Barron attempts to distort the fact that most access cases arise in a criminal context by converting this phenomenon into a rule of law excluding the public from civil cases. The simple reason for this phenomenon, amici suggest, is that criminal cases often occasion the difficult balancing of Sixth Amendment rights and First Amendment interests. By contrast, civil cases infrequently present countervailing constitutional interests which would require balancing First Amendment rights.

District sub judice. The Court based Lewis on a number of grounds: this Court's long history of support for open government; the state's commitment to the same; electronic access to judicial proceedings (civil as well as criminal); the public nature of judicial proceedings; free and informed political debate; public scrutiny as a check on corrupt practices and as a means of assuring the citizens that judicial proceedings are conducted fairly to all concerned. Id. at 6-7. The broad policy reasons leading to the three-part Lewis test apply as readily to civil proceedings as to criminal prosecutions.

B. The Federal Courts Have Consistently Affirmed the Presumptive Right of Access To Civil Judicial Records and Proceedings.

Although the United States Supreme Court has repeatedly noted that "historically both civil and criminal trials have been presumptively open,"[2/] it has not yet had

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2/ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n. 17 100 S.Ct. 2814, 2829 n. 17, 65 L.Ed.2d 973 (1980); Gannett Co. v. Depasquale, 443 U.S. 368, 386 n. 15 99 S.Ct. 2898, 2909 n. 17, 61 L.Ed.2d 608 (1979) ("For many centuries, both civil as well as criminal trials have traditionally been open to the public"); Press Enterprise Co. v. Superior Court, 464 U.S. 501, 516 (1984) ("Press-Enterprise I"); Craig v. Harney. See also In re Oliver, 333 U.S. 257, 278, 68 S.Ct. 499, 510, 92 L.Ed. 682 (1948) ("[N]o man's life, liberty or property [may] be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal.") (emphasis added).

occasion to address or define the full contours of the access right as it pertains to civil litigation. Numerous federal courts of appeals have done so, however, and every court to consider the question has held the qualified constitutional right of access applies with full force to all manner of civil judicial records and proceedings. E.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34 (C.D. Cal.), aff'd., 10 Media L. Rep. (BNA) 2430 (9th Cir.), cert. dismissed, 105 S.Ct. 768 (1984) (recognizing First Amendment right of access to documents filed during pretrial civil proceedings); Westmoreland v. CBS, 752 F.2d 16, 23 (2d Cir. 1984), cert. denied, 105 S.Ct. 3478 (1985) (recognizing First Amendment right to attend civil trials); Publicker Industries v. Cohen, 733 F.2d 1059, 1069-70 (3d Cir. 1984) (recognizing First Amendment right of access to civil trials); In the Matter of Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) (recognizing First Amendment right of access to pretrial civil proceedings and evidence introduced therein); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983) (recognizing First Amendment right of access to documents introduced in civil proceeding); see also Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983) (recognizing First Amendment right of access to civil trials relating to prison conditions and prisoner release). There is no reason to diverge from the uniform federal precedent.

C. The District Courts of Florida Have Routinely Held That Civil Judicial Records and Proceedings Are Presumptively Open.

The Florida district courts of appeal are, with one exception, in accord with the federal courts.[3/] In State ex rel. Gore Newspaper Co. v. Tyson, 313 So.2d 777 (Fla. 4th DCA 1975), overruled on other grounds, English v. McCrary, 348 So.2d 293 (Fla. 1977), the Fourth District ordered that a dissolution proceeding be open absent "the most cogent reasons" for closure. Id. at 783. The court held that the "public and press have a right to know what goes on in the courtroom whether the proceeding be criminal or civil." Id. at 785. The court declined to treat dissolution differently from any other judicial proceeding, examined the interests involved, and found the "personal preference" of the litigants for closure insufficient to override the "fundamental" societal interest served by open proceedings. Id. at 786.

The qualified right of access to civil proceedings was reaffirmed by the Fourth District in Goldberg v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986), a case involving access

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3/ The sole exception is Sentinel Communications Co. v. Smith, 493 So.2d 1048 (Fla. 5th DCA 1986). The First District acknowledged Smith, but declined to follow it.

to sealed records in a guardianship proceeding. Relying on Tyson, the court noted it was "now clearly established" that the access right applied to civil proceedings and that the court could only deny access for "the most cogent reasons." Id. at 1388 (citations omitted). After analyzing the reasons for closure given by the trial court, the Fourth District concluded they were insufficient to "override the public's right of access to the court proceedings and documents involved" and ordered the records unsealed. Id. at 1390.

The Third District Court of Appeal has also recognized the pubic right of access in the civil context. In Miami Herald Publishing Co. v. Collazo, 329 So.2d 333 (Fla. 3d DCA 1976), the court overturned a trial court order sealing a settlement agreement in a civil case because it found no "persuasive or cogent reasons" to justify closure. Id. at 338. There is no basis for abandoning this line of authority.

D. The Cases Cited By Barron are Inapposite.

The cases cited by Barron are not to the contrary. Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed 2d 570 (1978) and Belo Broadcasting v. Clark, 654 F.2d 423 (5th Cir. 1982), both relied on extensively by Barron, Barron Br. at 8, 14, 17, 24, 26, do not address the question of press access to civil records and proceedings.

In both cases, the courts "only held that the media had no special right to make aural copies of tapes placed in evidence at a criminal trial when the press already was provided with transcripts of the tapes at issue." United States v. Posner, 594 F.Supp. 930, 933 (S.D. Fla. 1984) (emphasis added).[4/] Thus, in Nixon and Belo the issue was not, as here, whether the press possessed a right of access to the information contained in certain records and proceedings, but only whether the press possessed a right to copy the information in a particular form. Indeed, as the Posner court noted, the information at issue in Nixon and Belo was well known. In contrast, the file and proceedings in this case are sealed and the information contained therein is unavailable from any other source.

Sentinel Star Co. v. Edwards, 387 So.2d 368 (Fla. 5th DCA 1980), is likewise incorrectly relied on by Barron. Barron Br. at 8, 10, 13. In Edwards, the Fifth District recognized a common law right of access to civil judicial proceedings and therefore reversed a trial court denial of access. Equally important, Edwards was decided prior to the

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4/ The Nixon Court specifically noted that in the case before it there was "no question of a truncated flow of information to the public." 435 U.S. at 609. Accord Belo, 654 F.2d at 427 ("Here, as in [Nixon], there were "no restrictions on press access to, or publication of any information in the public domain.").

United States Supreme Court's recognition of the constitutional access right in Richmond Newspapers, Inc. v. Virginia in 1980.

Barron's reliance on Seattle Times Co. v. Rhinehart, 467 U.S. 20 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), is similarly misplaced. Barron Br. at 10-11, 20-21. Barron implies that Seattle Times stands for the proposition that the access right does not extend to civil proceedings. In fact, Seattle Times does not even purport to address the standard for closure of civil court files or in-court proceedings, the question raised by this case. Seattle Times holds only that a protective order restricting public access to unfiled discovery materials in a case in which the press was a party litigant does not offend the First Amendment if it is based on a showing of "good cause" for closure. 467 U.S. at 37. Barron has not even met this standard.

II. This Court's Three-Part Lewis Test Permits Trial Courts to Properly Balance and Protect the Privacy Interests of Litigants On a Case-by-Case Basis Consistent With The First Amendment.

Barron claims an absolute federal and Florida constitutional right to have his dissolution proceedings conducted privately. He has no such right. Under this Court's decision in Lewis and the decision of the United States Supreme Court in Globe Newspaper Co. v. Superior

Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the right asserted by Barron is a factor to be considered by the trial court in determining whether compelling reasons exist to close a particular file or proceeding, but it is not necessarily determinative. Contrary to Barron's unfounded assertion, dissolution proceedings in Florida have historically been presumptively open to the press and public. Few judges have found circumstances sufficiently compelling to justify closure of any portion of a file, and the Florida Legislature in its statutory codification of the subject has never enacted legislation requiring that any such proceedings be confidential. Barron has completely misinterpreted the ambit of the constitutional right to privacy and its relation to the access right.

A. Blanket Closure of Civil Judicial Records and Proceedings to Protect Privacy Interests Violates The First Amendment.

In Globe Newspaper Co. v. Superior Court, the United States Supreme Court considered the constitutionality of a mandatory closure statute designed to safeguard a specific state interest -- the physical and psychological well-being of a minor sex crime victim required to testify about her ordeal. The Court ruled that while the interest of the minor victim was "a compelling one," it did "not justify a mandatory closure rule," since "the circumstances of the

particular case may affect the significance of the interest." Like this Court's decision in Lewis, Globe acknowledges the responsibility of trial courts to determine closure on a case-by-case basis in light of the facts and circumstances of each case. 457 U.S. at 607-08.

Similarly, in Press Enterprise I, 464 U.S. at 513, 104 S.Ct. at 825-26, 78 L.Ed.2d 629, the Court held the privacy interests of jurors in a special "death qualifying" voir dire insufficient to justify a blanket closure of the proceedings. Reversing the trial court's order of closure, the Court stated:

> Assuming that some jurors had protectible privacy interests in some of their answers, the trial judge provided no explanation as to why his broad order denying access to information at the voir dire was not limited to information that was actually sensitive and deserving of privacy protection.
>
> . . . .
>
> The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the jurors sought to be protected.

Barron's asserted privacy interests can be no more "cogent" than those deemed inadequate by the United States Supreme Court in Globe and Press-Enterprise I.

B. Dissolution Proceedings Have Historically Been Open To The Press and Public in Florida.

Barron's argument is grounded in the following fundamental premise:

> Closure of divorce files has been a traditional, accepted procedure in Florida courts, designed to protect the interests of litigants.

Barron Br. at 5. This premise is false.

Dissolution files and proceedings, like other civil matters, are presumptively open to the public as a matter of law in Florida.[5/] See generally Tyson. Indeed, the practitioner's manuals published by The Florida Bar and others do not even include a form of motion to seal. The publications of The Florida Bar consistently recognize the public character of dissolution proceedings. One such manual, published in 1976, states:

5/ Contrary to Barron's unfounded assertion that "thousands" of such cases are closed, Barron Br. at 6, in practice, closure is rare. To test Barron's assertion, counsel for amici interviewed Judge Richard Feder, Administrative Judge of the Family Division for the Eleventh Judicial Circuit. In five years of considering between 60 and 100 matrimonial cases per month, Judge Feder has sealed only one file, and conditioned access by the parties in two others. Clerks and practitioners consulted by counsel confirm that closure of dissolution proceedings is very rare indeed.

> While the action is "in chancery," neither party, absent strong and compelling reasons, has a right to insist upon a private trial that would deny either the public or press to their right of access to this judicial proceeding. Miami Herald Publishing Company v. Collazo, 329 So.2d 333 (3d D.C.A. Fla. 1976), and State ex rel. Gore Newspaper Company v. Tyson, 313 So.2d 777 (4th D.C.A. Fla. 1975). But see State ex rel. English v. McCrary, 328 So.2d 257 (1st D.C.A. Fla. 1976).

Florida Dissolution of Marriage §9.2, at 313 (1976).

The current edition of the same manual provides:

> For a good discussion on the right of access of the public or press to judicial proceedings, see Bundy v. State, 455 So.2d 330 (Fla. 1984).

Florida Dissolution of Marriage §9.2, at S-9-3 (2d ed. 1985).

Important public policies underlie both the strong public right of access to dissolution proceedings and the deference this right receives in practice. The treatment of the marital relationship, the disposition of marital property, and the determination of child custody are matters of fundamental social importance and legitimate public concern. As the Tyson court stated:

> Marriage and dissolution proceedings are unique in the particularity that the state has a continuing interest in perpetuating the marital relationship as well as in regulating dissolution proceedings.

313 So.2d at 784.

Indeed, so great is the public interest in the marital relationship, it has been said that a dissolution actually involves three parties -- the husband, the wife and the state.[6/] See J. Carson, The Law of The Family, Marriage and Divorce in Florida 398 (1950) and authorities cited therein. This Court so stated over eighty years ago:

> It has been properly remarked that a divorce suit may be regarded as a civil suit between three distinct parties, the government, the plaintiff and defendant. It is the office of the government to protect the interests of the public, the welfare of the entire community whose interests are involved, and to see that public morals are protected; and the rights of this party should never be forgotten by the court.

Hancock v. Hancock, 55 Fla. 684, 45 So. 1020 (1908).

Barron's statement that "it can be assumed that the information obtained would be used to gratify private spite or promote public scandal" is clearly false. Barron Br. at 16. Dissolution of marriage is one of the most important and sensitive of proceedings entrusted to the courts. Public access to such proceedings is essential to protect the legitimate public interest in ensuring that these proceedings are fairly adjudicated. Particularly in cases where powerful governmental officials come before the judicial branch,

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6/ This is in stark contrast to Barron's assertion that the First Amendment right of access should not extend to civil dissolution proceedings because the "state" is not a party, as it is in criminal prosecutions. See Barron Br. at 32-33.

special privileges such as sealed files and secret, star-chamber proceedings are of deep concern to the citizens and bear great potential to discredit the courts. See Richmond Newspapers, 448 U.S. at 570, 100 S.Ct. at 2823-24, 65 L.Ed.2d 973 (access assures "the perception of fairness").

Barron implies that the Florida Legislature, by enacting the "no-fault" divorce law in 1971, somehow mandated that dissolution proceedings in Florida should be private. Barron Br. at 18-19. Quite the contrary is the case. The Florida Legislature has never enacted any legislation designating any part of dissolution proceedings "confidential". See Tyson, 313 So.2d at 784 ("[T]he legislature has significantly omitted from its enactments any pronouncements that dissolution proceedings should or may be conducted in private.").[1/]

1/ This is in direct contrast to adoption proceedings, which the Florida legislature has rendered confidential by statute. See § 63.162(1), Fla. Stat. As this Court stated in In re Adoption of H.Y.T., 458 So.2d 1127 (Fla. 1984):

> The Florida legislature has recognized an overriding public policy of protecting from harmful publicity parties to and the subject of adoption proceedings. This policy recognizes that adoption proceedings are qualitatively different from other judicial proceedings.

Id. at 1128. The Florida Legislature has recognized no similar policy requiring the confidentiality of dissolution proceedings, and, accordingly, has enacted no confidentiality provision to restrict public access to them. Amici also are skeptical that Section 63.162(1), Florida Statutes, passes federal constitutional muster under Globe.

The system of "matrimonial practice and procedure" was recently analyzed by a commission appointed by this Court. In 1982, the Court created the Supreme Court Commission on Matrimonial Law (the "Commission"). It was charged with conducting a complete review and evaluation of, inter alia, "the procedure in matrimonial cases at each level in the judicial process." Report of The Supreme Court Matrimonial Law Commission 1 (1983). The Commission, chaired by Justice Ben Overton, did not recommend that dissolution proceedings be made confidential. Instead, the Commission recommended creation of a confidential "court-connected mediation system." Id. at 4. The assumption clearly underlying the Commission's proposal was that judicial dissolution proceedings were, and would continue to be, open to the public.

The Commission's recommendation is today reflected in Section 61.183, Florida Statutes. Thus, Barron's assertion that he "was compelled to go to court by the State of Florida in order to obtain release from the bonds of matrimony" is misleading. Barron Br. at 19-20. Barron was required to go to court to obtain a dissolution of marriage, but he could have chosen to participate in the court's confidential mediation process if he wished to reach a private, voluntary agreement. The First District specifically recognized this alternative. A. 26 n.4 ("The parties can resolve their domestic disputes privately and

only submit to the court for the legal dissolution of the marriage, in which case the only findings to be made by the trial court are that it has jurisdiction and that the marriage is irretrievably broken."). Once the decision was made to "utilize the judicial processes," however, the parties placed themselves "in the position where the details of their difficulties [would] invariably be made public." Tyson, 313 So.2d at 784 (emphasis added). See Jacova v. Southern Radio and Television Co., 83 So.2d 34 (Fla. 1955) ("Where one, whether willingly or not, becomes an actor in an occurrence of public or general interest, he emerges from his seclusion, and it is not an invasion of his 'right of privacy' to publish his photograph with an account of such occurrence.").

C. Barron Has No Constitutional Right To A Blanket Closure of Dissolution Records and Proceedings.

Barron claims both a Florida and a federal constitutional right to privacy in the sealed records and proceedings of his dissolution of marriage. Barron Br. at 22-25. In fact, neither the state nor the federal constitution grants Barron the right he claims.

The Florida Constitution. Florida's privacy provision, Article I, section 23, of the Florida Constitution, states:

> Right of privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

(Emphasis added).

Barron's suggestion that "Florida's constitutional right of privacy could very well indeed have been a response to the lack of sensitivity to the rights of others that is sometimes displayed by the unfettered exercise of First Amendment rights by the press" is nonsense. Not only is the provision directed solely at "governmental intrusion", it specifically affirms and preserves access to what otherwise are public records and proceedings. It is clear that the intent of the privacy provision was to restrict government's intrusion into the lives of citizens while protecting the constitutional right of citizens to monitor the processes of government.

The Federal Constitution. Barron's reliance on the federal Constitution is likewise in error.

He argues that two strands of the federal privacy right are implicated in this case: the right not to publicly disclose private facts, Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), and the right to make decisions concerning marriage,

procreation, and the like. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Barron apparently reasons that both rights are at issue here because the "private facts" he seeks not to "publicly disclose" arise in the context of a dissolution proceeding and relate to marriage. Barron Br. at 22-23.

In fact, the decision-making or autonomy right on which Barron relies is utterly inapposite here. That right protects an individual's ability to make certain personal decisions, such as whether to have an abortion, Roe v. Wade, or use birth control, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), without governmental intrusion. Here Barron has made and can make no claim that his autonomy to decide whether to seek and obtain a dissolution of his marriage was in any way burdened by the state.

To the degree a federal disclosural right of privacy is asserted, Barron must concede that this right cannot be the predicate for excluding whole classes of governmental proceedings from public scrutiny. See Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Whatever privacy interests Barron may possess are adequately protected by the three-part closure test adopted by this Court in

Lewis. See, e.g., Press Enterprise I, 464 U.S. at 513, 104 S.Ct. at 825-26, 78 L.Ed.2d 629.[8/]

III. The First District Court of Appeal Properly Applied The Three-Part Test Announced By This Court In Lewis To Unseal The Records And Proceedings In The Trial Court.

This Court should affirm the decision of the First District reversing the trial court's order of closure. As shown above, the press and public enjoy a qualified constitutional right of access to civil dissolution proceedings which far outweighs Barron's putative right of

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8/ As a state senator, Barron has a greatly reduced privacy interest. By "willingly enter[ing] into the public sphere," Barron sacrifices his right to privacy to the extent that the information at issue concerns his public life. Kapellas v. Kofman, 81 Cal.Rptr. 360, 459 P.2d 912, 922 (1969). "A politician running for public office, in effect offers his public and private life for perusal so far as it affects his bid for office." Stryker v. Republic Pictures Corp., 108 Cal.App.2d 191, 194, 238 P.2d 670, 672 (1951).

In contrast, the legitimate public interest in the sealed records and proceedings is magnified when a public official such as Barron is involved. As this Court stated in Yorty v. Stone, 259 So.2d 146, 149 (Fla. 1972), in the case of a candidate for national office, "the public interest transcends the bounds of privacy accorded to an individual citizen." Public access is essential where information relating to a candidate's fitness is at issue:

> In choosing those who are to govern them, the public must, of course, be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office.

Kapellas, supra, at 922-923; see Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

privacy. Further, the First District properly applied the correct closure standard in reaching its conclusion.

The First District stated:

> We find no reason why the three-pronged test set forth in Miami Herald Publishing Company v. State, 363 So.2d 603 (Fla. 4th DCA 1978), will not work as well in civil cases, so long as the court continues to recognize that, if a reason has not been provided by the legislature, the interest to be protected must be one which arises from a compelling public purpose.

A.24-25 (footnote omitted). The standard announced in Miami Herald Publishing Co. v. State, and in large measure adopted by this Court in Miami Herald Publishing Co. v. Lewis, 426 So.2d at 3, 6, both criminal cases, is equally applicable to civil cases. See Section I, supra, and cased cited therein.

Barron objects specifically to several facets of the First District's analysis.

First, Barron argues that once a file has been sealed, the burden is on the party seeking access to show "good cause" why the file should be open. Barron Br. at 5. Accordingly, Barron contends that the First District erred in holding that Barron, as the party seeking closure, bore the burden of demonstrating compelling reasons for such closure.

Barron is incorrect. The decisions of this Court and the courts of appeal, recognize the presumptive right of access; the burden is on the party seeking closure to present evidence to override the right: "[O]ne who seeks to close a

proceeding or seal the record thereof . . . . must establish: (1) that closure is necessary to prevent a serious and imminent threat to the administration of justice; (2) that no alternative measure is available . . . .; and (3) that closure would be effective." Bundy v. State, 445 So.2d 330, 338 (Fla. 1984); Miami Herald Publishing Co. v. Lewis, 426 So.2d at 6; Goldberg v. Johnson, 485 So.2d at 1389. The party seeking closure must, at the least, present "cogent reasons" for denying access. Tyson, 313 So.2d at 783.

That a party litigant, such as Barron, may succeed in sealing a court file before members of the public become aware of the file or before the file's relevancy is discovered does not shift the burden of proof: the burden of proving that closure is necessary remains with the party opposing access. Goldberg, 485 So.2d at 1389. The circumstances of this case illustrate why. The Barron dissolution and all judicial records and proceedings in it were open to the public for seven months before it was sealed. For seven months, access was allowed and the press permitted to inspect filings and attend hearings. Then the case was sealed in its entirety without notice to the press, at which time the press promptly intervened to challenge the closure order. It is ludicrous for Barron to suggest that simply because he obtained an invalid closure order before

the press was permitted the opportunity to oppose it that the burden of demonstrating the need for closure/access should shift.

In addition, there is a practical reason to place the burden on the party seeking closure and to keep it there: only he or she is in a position to justify with particularity why closure is necessary because only he or she knows what is in the sealed file. Alternatively, it would be unfair to require a party seeking access to address with particularity the reasons for disclosure since, by definition, he or she does not know what is in the sealed file.

Second, Barron argues that the First District should have reviewed the order of the trial court solely for an abuse of discretion, and that it was improper for the First District to review the sealed file de novo. Barron Br. at 26-27. Barron relies particularly on this Court's decision in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), in which the Court recognized the broad discretion of trial courts to formulate relief in dissolution proceedings.

Again, Barron is in error. The First District properly reviewed the sealed file de novo to determine whether the trial court's closure order was supported by compelling reasons. As the United States Supreme Court has recognized in First Amendment cases involving the adjudication of "constitutional facts," an appellate court is

required to conduct "an independent examination of the evidence." Bose Corp. v. Consumers Union, 466 U.S. 485, 509, 104 S.Ct. 1949, 1964, 80 L.Ed.2d 502 (1984) (citing a range of First Amendment cases). The existence of "compelling" reasons for closure, like the existence of "actual malice," or the determination that a publication is "obscene," is a question of constitutional fact subject to de novo appellate review. In each of the closure cases to reach the United States Supreme Court, the Court conducted a searching de novo review of the factual predicate for excluding the public. Press-Enterprise Co. v. Superior Court, 106 S.Ct. 2735 (1986); Press-Enterprise I; Globe; Richmond Newspapers; Gannett Co. v. Depasquale. In every case except Gannett Co. v. Depasquale, the trial court's denial of access was reversed.

Barron's reliance on Canakaris is simply misplaced. In that case, this Court held only that the trial court has broad discretionary authority to do equity between the parties and has various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, [and the like]." Id. at 1202. Clearly, the Canakaris Court's discussion of the trial court's discretion in dissolution proceedings was addressed to the issues of custody and property unique to dissolution. No constitutional issues were raised and public access was never addressed.

Finally, the First District properly refused to maintain the blanket closure order entered by the trial court. Even if, as Barron now contends, Barron Br. at 21, he has a privacy in certain records in the sealed file, it was improper for the trial court to close the entire file and all proceedings.[9/] Closure must be "narrowly tailored" to protect legitimate interests; a blanket closure order is inadequate. Globe, 457 U.S. at 608-09 & n.22, 102 S.Ct. at 2621 & n.22, 73 L.Ed.2d 248. Certainly, where as here, a portion of the file has been open to the public for months, it is error to seal the entire file. See United States v. Posner, 594 F.Supp. at 936 ("Thus, once certain information is in the public domain, as it is here, the entitlement to privacy is lost."). The First District properly considered Barron's privacy interest within the analytical structure of the three-part Lewis test and held that it did not justify the blanket closure of the dissolution file and proceedings.

9/ Barron intimates in his brief that there are medical records in the sealed file which are the true source of his concern. He states: "This Court may take notice of the fact that the documents that are under seal are records to which Senator Barron has a privacy interest. United States v. Westinghouse Electric Corporation, 638 F.2d 570 (3d Cir. 1980)." Barron Br. at 21. The case he cites, Westinghouse, addresses the confidentiality of medical records.

Even if there are otherwise confidential medical records in the file, however, closure would not be justified. Where otherwise confidential records are introduced or filed in a public court proceeding, their confidentiality is lost. Miami Herald Publishing Co. v. Chappell.

IV. Florida Freedom Newspapers Properly Sought And Was Granted Review Of The Trial Court's Closure Order Pursuant To Florida Rule of Appellate Procedure 9.100(d)

The First District Court of Appeal clearly had jurisdiction to consider a petition to review an order excluding the press under Rule 9.100(d), Florida Rules of Appellate Procedure. See Sarasota Herald Tribune v. Holtzendorf, 507 So.2d 667 (Fla. 2d DCA 1987); Goldberg v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986); Miami Herald Publishing Co. v. Morphonios, 467 So.2d 1026 (Fla. 3d DCA 1985); Times Publishing Co. v. Patterson, 451 So.2d 888 (Fla. 2d DCA 1984); Times Publishing Co. v. Penick, 433 So.2d 1281 (Fla. 2d DCA 1983); Miami Herald Publishing Co. v. Chappell, 403 So.2d 1342 (Fla. 3d DCA 1981); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979).

Florida Rule of Appellate Procedure 9.100(d)(1) clearly states that the press has a right to file an expedited petition where it has been denied access to judicial proceedings or judicial records:

> **(d) Exception; Orders Excluding Press or Public.**
>
> (1) A petition for review of an order excluding the press or public from access to any proceeding, any part of a proceeding, or any judicial records, if the proceedings or records are not required by law to be confidential, shall

> be filed in the court as soon as practicable following rendition of the order to be reviewed, if written, or announcement of the order to be reviewed, if oral. A copy shall be furnished to the person (or chairperson of the collegial administrative agency) issuing the order, and to the parties to the proceeding.

Fla.R.App.P. 9.100(d).

Ironically, the appellate procedural rule which Barron disavows arose from a factually indistinguishable case. Rule 9.100(d) was adopted "in recognition of the decision in English v. McCrary". Committee Notes, 1977 Revision to Rule 9.100(d). In English v. McCrary, this Court overruled a case involving access to divorce proceedings and court records (Tyson) on the grounds that closure could not be tested by writ of prohibition. Rule 9.100(d) was adopted to fill the gap created by the English decision and provide a procedural remedy for denials of access.

CONCLUSION

Accordingly, the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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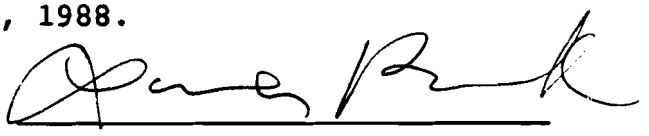
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to File Answer Brief of Amici Curiae The Miami Herald Publishing Company and The Times Publishing Company has been furnished by mail to Sharon Lee Stedman, 11 East Pine Street, P.O. Box 1873, Orlando, Florida 32802, this 25th day of January, 1988.

By: 

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