IN THE SUPREME COURT
OF FLORIDA

DEMPSEY J. BARRON,

Petitioner,

vs. CASE NO. 70,910

FLORIDA FREEDOM NEWSPAPERS, INC.,

Respondent.
_____/

BRIEF OF AMICUS CURIAE, TALLAHASSEE DEMOCRAT, INC. IN SUPPORT OF RESPONDENT

ON REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

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STATEMENT OF THE CASE AND FACTS

Tallahassee Democrat, Inc. ("the Democrat")[1] adopts the statement of facts contained in the responsive brief filed by Respondent Florida Freedom Newspapers. For convenience, a summary of the facts is included below. Copies of the First District opinion, Florida Freedom Newspapers, Inc. v. Sirmons, 508 So.2d 462 (Fla. 1st DCA 1987), as well as the trial court's September 9, 1986, and October 15, 1986 Orders are included in the Appendix accompanying this Brief.[2]

Ms. Louverne Barron filed her Petition for Dissolution on January 28, 1986. Some seven months later on September 9, the trial court issued an Order sealing the entire file and closing all further proceedings.

The September 9 Order is a one-half page Order sealing the divorce file and closing all further proceedings, citing as authority Article 1, § 23 of the Constitution of the State of Florida (right of privacy) and Sentinel Communications Co. v. Smith, 493 So.2d 1048 (Fla. 5th DCA 1986). (A-6). No explicit reasons for closure were given.

The media was not given any prior notice regarding the September 9 closure Order. Sometime in late September, Florida Freedom Newspapers first discovered the proceedings were closed

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[1]The Democrat is the owner and publisher of the Tallahassee Democrat, a newspaper of daily circulation in the North Florida Panhandle, including Bay County, and is vitally interested in the issues raised by the trial court's Orders placing certain restrictions on the fundamental right of access to judicial proceedings.

[2]References to the Amicus' attached Appendix will be as follows: "(A 1)."

and filed motions to intervene and to unseal the file and open further proceedings to the public. After an October 13 hearing, the trial court entered its October 15 three-page Order allowing intervention, but denying the Motion to Set Aside the September 9 closure Order.[3] In that October 15 Order, the trial court applied common law principles and purported to balance the right of the public to attend judicial proceedings versus the court's power to protect the judicial rights of the parties to the proceeding. (A 7). The court held it possessed the discretionary inherent power to exclude the public and press from any judicial proceedings to protect the rights of the litigants, but only if there were cogent reasons for doing so. (A 8). The court then stated there was a cogent reason, but failed to identify the reason stating:

> However, this court finds itself in the further dilemma of if it states the exact reason for closing the file, as required by the intervenor, then in fact, the court has done away with the reason to keep the file sealed. The court does note for the record that the motion filed requesting closure of the proceeding and sealing the file does state with specificity and supporting documents the information upon which the court's closure order is based. This information is such that it is uniquely private to the individual involved and there is a statutory basis upon which to base the non-disclosure of the information from the public. The Public Records Act does not apply to this information

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[3]On October 16, Florida Freedom Newspapers also moved the trial court to stay further proceedings pending appeal. After a hearing, the trial court denied the request on October 17. Florida Freedom Newspapers, in its Petition, asked the First District Court to immediately stay the proceedings pending appeal and that Court granted a stay in a November 9, 1986 Order. As noted below, the Court later lifted the stay.

> and the fact that the individual is a "public official" has no effect on the release of this information absent the individual's consent. The court has searched for a way to state the "reason" in such a manner so as not to breach the confidentiality sought to be protected. For example, one can say "trade secrets" without getting into detail of what trade secrets are or involve. Unfortunately, no such way is available in this case.

(A 8).[4] The court therefore denied the request to reopen the file and open further proceedings to the public. (A 9).[5]

Nowhere in the trial court's Orders is there any consideration of the First Amendment, the applicable burden of proof, Senator Barron's public official and public figure status, any discussion as to why the entire proceeding must be closed as opposed to some limited portion, or any application of the "three-pronged" test which must be met before ordering closure.

On appeal, the First District panel, in a March 6, 1987 one-page 1987 Order first summarily affirmed the trial court and vacated its previously entered stay. The Order stated that an opinion would follow. Following that, the trial court completed the divorce case in closed proceedings. However, on June 1,

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[4]The above quote is as amended by the trial court's October 20, 1986 Order of Clarification correcting certain typographical errors. (A 10).

[5]Subsequently, on October 16, Florida Freedom Newspapers moved the trial court to transmit the entire sealed file to First District Court for purposes of appellate review. On October 17 the trial court denied the request. Additionally, Florida Freedom Newspapers requested the First District to order that the sealed file be transmitted to it for review purposes. The First District granted that motion and received and reviewed the records at issue. 508 So.2d at 464-65.

1987, the First District panel issued its opinion reversing its previous Order, and reversing the trial court's orders of closure. Florida Freedom Newspapers, Inc. v. Sirmons, 508 So.2d 462 (Fla. 1st DCA 1987). Judge Barfield reasoned that there is no "private civil litigation" in Florida. Article I, Section 23 of the Florida Constitution did not create such a right but instead "the privacy right precludes governmental intrusion into private ... proceedings before the trial judge." Id. at 463. The Court applied Florida's "three-pronged" test, Id. at 464, and further held that to close proceedings there must be a "compelling justification based upon a clearly discernible public policy that cannot be served by any means other than closure." Id. at 463. The opinion revealed that the information sought to be kept closed:

> ... is of a somewhat general nature and not specifically tied to a domestic relations case. The information is not related to the marital relationship nor its breakup, to the welfare of the children, nor to the marital property. The party affected suggests it is related to present and future financial support.

Id. at 464-65. The court found that the facts relied on by the trial court were not sufficiently compelling to justify closure and thus ordered that the public be permitted access to the court file and transcript of the trial proceedings. Id. at 464-65.

Judge Barfield wrote the main opinion in which Judge Ervin concurred. Judge Nimmons wrote a separate opinion concurring in the result only. He felt that privacy should be weighed as a significant factor in civil cases, particularly where the public interest is not involved, and he questioned application of the "three-pronged" test in civil cases. Id. at 465, 466. He

nevertheless agreed that even after weighing privacy rights, the grounds presented for closure were insufficient to overcome the heavy common law presumption in favor of access. Id. at 466. Senator Barron's Motion for Rehearing was denied on July 1, 1987.

Senator Barron then filed his Notice to invoke the discretionary jurisdiction of this Court, and this Court accepted jurisdiction on November 25, 1987.

SUMMARY OF ARGUMENT

This case deals with the press and public's fundamental right of access to judicial proceedings involving a prominent, elected public official and public figure, Senator Dempsey Barron. For numerous reasons, the Orders of the trial court sealing the entire file and closing all further proceedings to the public constitute a clear abuse of discretion. The First District was eminently correct in reversing the trial court.

First, in weighing the competing interests at stake, the trial court failed to apply the First Amendment to the Constitution of the United States ("First Amendment") and the fundamental interests underlying that Amendment. This resulted in a failure to apply the required heightened level of strict scrutiny to the closure motion, which would allow closure only for the most cogent and compelling of reasons.

Second, whether applying the First Amendment or long established precepts of common law, the trial court failed to require that the party moving for closure sustain the heavy burden of proof and make the required evidentiary showing prior to ordering closure. Here, there is no indication that the trial court applied the appropriate evidentiary burden.

Third, the trial court did not appropriately consider and apply the first prong of Florida's strict scrutiny, three-pronged test which requires there be a clear and imminent threat to the administration of justice prior to ordering closure. Here, closure was entirely inappropriate because there could have been no showing of any serious and imminent threat to the

administration of justice sufficient to order closure. The public's fundamental right of access to civil judicial proceedings, especially regarding an elected and prominent public official such as Senator Barron, clearly outweighs any privacy interest Senator Barron could assert. A public official has a diminished privacy right and the public has a heightened interest in and right to information about elected public officials. These factors, in addition to the public's fundamental and precious right of access to judicial proceedings and to observe the dispensation of justice, require that these divorce proceedings be opened.

Fourth, the trial court did not appropriately consider the second prong of Florida's three-pronged test. Closure should be ordered only if no less restrictive alternatives are available. The instant Order is clearly unconstitutionally overbroad and not narrowly tailored to serve the interests sought to be protected since the entire file was sealed retroactively and prospectively without any apparent consideration of the necessity of same.

Fifth, the trial court erred in not following the third prong of the three-pronged test which requires a showing that closure will, in fact, achieve the court's intended protective purpose. That purpose here was apparently to protect confidential information "uniquely private to the individual involved." (A 8). Here that purpose will not be served since closure will cause public distrust and public speculation and rumors regarding the reasons for closure. Such speculation will range through the complete spectrum of issues which can possibly be raised in the most sordid of dissolution cases and will do more harm to the

individuals involved than an accurate and straightforward revelation of the true facts.

Finally, the trial court, in addition to the substantive errors discussed above, committed two basic procedural errors. It failed to specifically set forth in its Order sealing the file and closing further judicial proceedings, its explicit, cogent reasons for doing so. Thus, the First District was correct in requiring that the entire sealed record below be transmitted to it so that it could refer to the record and determine whether the trial court did in fact have compelling, overriding and "most cogent" reasons for ordering closure. Of course, in making its determination, this Court should also review the sealed records. In addition, the trial court's sealing Order is procedurally defective because the records were sealed and proceedings closed without prior notice to the media or prior opportunity to be heard. Such prior notice is clearly required by Florida law.

ARGUMENT

SENATOR BARRON'S DIVORCE PROCEEDINGS SHOULD BE OPENED TO THE PUBLIC

I. There is a First Amendment As Well As a Common Law Right of Access to Civil Judicial Proceedings Either of Which Mandate Application of the Strict Scrutiny Three-Pronged Test.

In overturning the trial court's closure order, the First District properly adopted the strict scrutiny three-pronged test set forth in various Florida cases.

The Democrat submits that the right of access involved in this case is bottomed on both fundamental First Amendment grounds as well as deeply entrenched principles of common law. Either of these grounds mandates utilization of the strict scrutiny three-pronged test in civil cases as well as criminal cases.

As will be shown in Point II, whether the right is based in common law or on constitutional grounds, and whether the three-pronged test, or some other form of balancing test is used, the result here is the same. This is because, as pointed out by Judge Nimmons of the First District below, 508 So.2d at 466, the grounds asserted for closure are insufficient to overcome the heavy common law presumption in favor of access, even after considering the privacy arguments raised by Senator Barron.

A. Civil As Well As Criminal Proceedings Are Presumptively Open.

Both First Amendment and common law precepts have been applied in Florida in considering the issue of the public's right to access to both civil and criminal cases. These decisions hold that closure of court records and proceedings may be ordered only

for the most compelling and cogent of reasons.[6] This Court has adopted a strict scrutiny three-pronged test, based on the importance of freedom of expression and the societal interest in openness of court proceedings, which must be met before access to judicial records or proceedings can be denied. Bundy v. State, 455 So.2d 330, 337 (Fla. 1984) (emphasis added). Bundy cited numerous cases, both criminal and civil for the above statement.[7] See also Miami Herald Pub. Co. v. Lewis, 426 So.2d 1, 8 (1982) (discussing the First Amendment and three-pronged test and holding there must be proof that there is a strict and inescapable necessity for closure); State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904, 908 (Fla. 1977) (applying the First Amendment and three-pronged test and stating the right of access applies to "all" judicial proceedings); State ex rel. Tallahassee Democrat v. Cooksey, 371 So.2d 207, 209-10 (Fla. 1st DCA 1979) (applying the First Amendment and stating there must be compelling reasons for closure).

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[6]Decisions cited in Senator Barron's Brief at 10-11 such as Seattle Times Co. v. Reinhart, 464 U.S. 20 (1984); Sentinel Communications v. Gridley, 510 So.2d 884 (Fla. 1987); and Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987), are all easily distinguishable. These all involve pretrial depositions or discovery as opposed to the instant case wherein actual trial proceedings and court filed documents are involved.

[7]See, e.g., Miami Herald Publishing Co. v. Chappell. 403 So.2d 1342 (Fla. 3d DCA 1981); Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980); Sentinel Star Co. v. Edwards, 387 So.2d 367 (Fla. 5th DCA 1980), review denied, 399 So.2d 1145 (Fla. 1981) (civil proceeding); Sentinel Star Co. v. Booth, 372 So.2d 100 (Fla. 2d DCA 1979); Miami Herald Publishing Co. v. State, 363 So.2d 603 (Fla. 4th DCA 1978); News-Press Publishing Co., Inc. v. State, 345 So.2d 865 (Fla. 2d DCA 1977); Miami Herald Publishing Co. v. Collazo, 329 So.2d 333 (Fla. 3d DCA), cert. denied, 342 So.2d 1100 (Fla. 1976) (civil proceeding).

These cases, and others, illustrate that there is a fundamental right of access based on First Amendment as well as common law considerations and that the fundamental rights apply equally to civil and criminal proceedings.[8]

This Court has indicated that the First Amendment right of access and the strict scrutiny standard applies to divorce proceedings. See State ex rel. English v. McCrary, 348 So.2d 293, 295, n. 1 (Fla. 1977) where the court, in dictum, addressed the power of a court in a divorce proceeding to close proceedings and seal files. The court stated, "any restriction on the public's right to know or the First Amendment right of freedom of the press would be subject to careful scrutiny by any appropriate procedure... . [S]uch questions involve basic constitutional rights ... ." (Emphasis added.)

Likewise, in State ex rel. Gore Newspaper Co. v. Tyson, 313 So.2d 777, 788 (Fla. 4th DCA 1975), the Fourth District emphasized the fundamental rights involved in access to a divorce file and stated that closure can be ordered only for the most cogent

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[8]That some of the cases involved "prior restraint" as opposed to restrictions based on the initial newsgathering function as involved here, is irrelevant. See Bundy, 455 So.2d at 337 stating "closure of judicial proceedings must meet the same strict judicial scrutiny as orders of prior restraint since the effect on the ability of the press to disseminate information about court proceedings is roughly the same." See also Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980) (distinction without difference); Miami Herald Publishing Co. v. State, 363 So.2d 603, 607 (Fla. 4th DCA 1978) (distinction one of form rather than substance).

reasons." Id. at 783.[9] In addition, see Goldberg v. Johnson, 485 So.2d 1386, 1388-89 (Fla. 4th DCA 1986) (civil proceeding applying the strict scrutiny three-pronged test and holding closure appropriate only for the most compelling and cogent reasons) and Tallahassee Democrat, Inc. v. Willis, 370 So.2d 867, 871 (Fla. 1st DCA 1979) (civil case noting that previous cases "appropriately emphasize the function of the First Amendment in requiring the exercise of great caution in the closing of court files or records. ...").

At the federal level, the United States Supreme Court has repeatedly held that the First Amendment, as well as long-established principles of common law, guarantee to the public and press a fundamental right of access to criminal trials and judicial proceedings. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980) (plurality opinion).

In Richmond Newspapers, 448 U.S. at 580 n. 17, the Court implied that the right of access applies to civil as well as criminal proceedings. Commentators have agreed, reasoning that the Court based its First Amendment right of access holdings in criminal cases on both historical and functional rationales and

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[9]This Court subsequently overruled Tyson on other grounds. See discussion herein note 14, below.

these rationales apply with equal force to civil judicial proceedings.[10]

Numerous federal circuit courts of appeals have also held that the First Amendment establishes a constitutional right of media access to civil trials. For instance, in Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3rd Cir. 1984) the Court held that the First Amendment embraces a right of access to civil trials to insure that the constitutionally protected discussion of governmental affairs is an informed one. Id. at 1070. As a First Amendment right it is to be accorded due process protection that other fundamental rights enjoy, including strict scrutiny review, i.e., denial of access must serve "an important governmental interest and that there is no less restrictive way to serve that ... interest." Id. The court stated there is a presumption in favor of openness and, therefore, a party seeking closure has the burden of proving that disclosure will work a clearly defined and serious injury to the party seeking closure. Id. at 1071. The Third Circuit thus joined numerous other circuits that have held

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[10]See, e.g., Comment, The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court, 51 U. Chi. L. Rev. 286, 287 (1984) (approving application to civil proceedings and arguing that interests are sufficiently compelling to overcome the press's right of access only where an open trial would destroy the right sought to be vindicated at trial or jeopardize the physical safety of witnesses or parties); Note, Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts, 58 Temp. L. Q. 159 (1985) (approving application to civil proceedings); and Note, A Constitutional Right of Access to Pretrial Documents: A Missed Opportunity in Reporters Committee for Freedom of the Press, 62 Ind. L. Rev. 735 (1987).

the First Amendment protects the public's and the media's right of access to civil trials.[11]

Accordingly, in Florida and elsewhere, there is a fundamental, constitutional right of access to judicial records and proceedings as well as a strong common law right, which is applicable to both civil and criminal cases. The trial court should have applied a heightened strict scrutiny to any attempt at closure, resulting in denial of any closure motions, except for the most cogent, compelling and overriding of reasons. There is no evidence the trial court applied a sufficiently stringent standard and the decision by the First District is clearly the only correct one.

B. Reasons Underlying Open Access.

Decisions discussed herein also illustrate the importance of, and rationale behind, the public's right to know. The open court concept "is an indispensable part of our system" and public access

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[11]The First, Third, Sixth, Seventh, Eighth and Eleventh Circuits have extended the constitutional right of access to civil judicial proceedings and documents. See In re Continental Ill. Sec. Litig., 732 F.2d 1302, 1308-16 (7th Cir. 1984) (First Amendment guarantees right of access to report of special litigation committee filed with court in shareholder's derivative action); In re Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983) (First Amendment guarantees right of access to civil contempt proceedings and transcripts); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178-80 (6th Cir. 1983) (First Amendment guarantees right of access to court record in injunctive action by company against agency), cert. denied, 465 U.S. 1100 (1984); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983) (First Amendment guarantees right of access to civil hearings in action challenging penal conditions); In re San Juan Star Co., 662 F.2d 108, 114-15 (1st Cir. 1981) (First Amendment guarantees right of access to pretrial discovery materials in civil rights action). Compare Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985).

"is as fundamental as the litigant's right to a fair trial." Tyson, 313 So.2d at 786. See also McIntosh, 340 So.2d at 910 (sacred right of each citizen to be informed); Miami Herald Pub. Co. v. Collazo, 329 So.2d 333 (Fla. 3rd DCA), cert. denied, 342 So.2d 1100 (Fla. 1976) (trial is public property).[12]

This Court has explained the rationale for open judicial proceedings as follows:

> Public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. Such access gives the assurance that the proceedings were conducted fairly to all concerned. ...[t]he people have a right to know what occurs in the courts.... [A] trial is a public event. What transpires in the courtroom is public property. Public access also serves as a check on corrupt practices by exposing the judicial process to public scrutiny, and protects the rights of the accused to a fair trial. Finally, because participating lawyers, witnesses and judges know their conduct will be subject to public scrutiny, it is fair to conclude that they will be more conscientious in the performance of their roles.

Miami Herald Pub. Co. v. Lewis, 426 So.2d 1, 6-7 (Fla. 1982). See also Tyson, 313 So.2d at 786 relying on Professor Wigmore and

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[12]The public has a compelling interest in the conduct of divorce proceedings. They call for heightened public scrutiny of the judicial process insofar as they make "extraordinary demands for compassion and sensitivity on the judge, the parties and the lawyers." State ex rel. English v. McCrary, 328 So.2d 257, 260 (Fla. 1st DCA 1976) (Smith, J. concurring in part), aff'd, 348 So.2d 293 (Fla. 1977). Additionally, the prevalence of divorce litigation and the fact that similar problems happen to a large number of people or their friends and family creates a heightened public interest. Tyson, 313 So.2d at 785; Posner v. Posner, 233 So.2d 381, 383 (Fla. 1970).

explaining the various reasons for and benefits of free public access to judicial proceedings.[13]

These are the reasons that the newspapers in the instant case desire access to Senator Barron's proceedings; not for spite, "snooping", or any scandalous purpose as alleged by Senator Barron. There is absolutely no evidence of such purposes. Instead, access is desired because of the higher duties involved to the public and the general administration of justice. The public's constitutional and fundamental common law right of access must be preserved except for overriding compelling reasons, especially when an elected, and prominent public official such as a state senator is involved. As stated in Tyson:

> To suggest an exclusion of the public and the press from a civil (or a criminal proceeding) on the ground that those who attend come only because of idle or morbid curiosity is a gossamer argument when measured against the necessity and reasons for having open proceedings. The motivation for the presence of the public and press ought not to be the determinative factor for exclusion no more so than the motivation for casting a vote in an election would serve as a factor in prohibiting the public from exercising the right to vote. It is not the public's reason for attending but rather the public's right to attend that is to be evaluated.

Tyson, 313 So.2d at 786 (emphasis in original). Further, as stated by the First District below:

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[13]In United States v. Smith, 776 F.2d 1104, 1109 n.2 (3rd Cir. 1985) the court identified six societal interests which functionally justified a strong presumption of access to criminal trials. The Third Circuit has found that these societal interests apply to civil trials. Publicker Industries. Inc. v. Cohen, 733 F.2d 1059 (3rd Cir. 1984). See also Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982).

> The potential exercise of poor judgment or bad taste by the media is not the issue before the courts in such cases. Preserving the independence and integrity of the judicial process through open and publicly scrutinized judicial proceedings is the issue.

Florida Freedom Newspapers, Inc., 508 So.2d at 464.

C. The Heavy Burden and the Three-Pronged Test.

This Court has made it abundantly clear that there is a "heavy burden" on the moving party to provide an evidentiary basis for the restriction on access and there is a presumption of openness that must be overcome. See, e.g., Miami Herald Pub. Co. v. Lewis, 426 So.2d 1, 7-8 (Fla. 1982); Goldberg v. Johnson, 485 So.2d 1386, 1388-89 (Fla. 4th DCA 1986).

As noted above, this Court has consistently emphasized the importance of freedom of expression and open judicial proceedings and has established a strict three-part test for sealing or closure of judicial proceedings. It must be proven that:

1. the measure limiting or denying access (closure or sealing of records or both) is necessary to prevent a serious and imminent threat to the administration of justice;

2. no less restrictive alternative measures are available which would mitigate the danger; and

3. the measure being considered will in fact achieve the court's protective purpose.

Bundy v. State, 455 So.2d 330, 337 (Fla. 1984), and cases cited; Lewis, 426 So.2d at 3.

In accordance with the strict scrutiny standard, the presumption of openness can only be overcome by an overriding compelling interest. An order must be based on the findings that

closure is essential to preserve higher values and must be narrowly tailored to serve those interests. Miami Herald Pub. Co. v. Morphonios, 467 So.2d 1026, 1029 (Fla. 3d DCA 1985); State ex rel. Tallahassee Democrat v. Cooksey, 371 So.2d 207, 210 (Fla. 1st DCA 1979). The power to seal records or close proceedings should be exercised cautiously and only for the most cogent reasons. Tyson, 313 So.2d at 782-83. There must be a strict and inescapable necessity for closure. Lewis, 426 So.2d at 8.

Petitioner argues that this test applies only to criminal cases. While the test originated in criminal cases, it is a flexible standard that is easily applied in a variety of contexts, including civil cases. This test provides an appropriate balance and should be clearly utilized and adopted by this Court for civil proceedings in which closure is sought.

One of the fatal flaws in Petitioner's position in this case is that there is a failure of any proof that the extraordinary relief requested is justified based on the record in this case. It should properly be the burden of the party seeking the closure of a judicial proceeding based on a claim of disclosural privacy to prove those facts which justify this extreme intrusion on the common law and constitutional right of access. Senator Barron maintains that Florida Freedom Newspapers "has offered no justification" for opening the files. Brief at 16. However, the burden is on the party attempting to close judicial proceedings and records to make an evidentiary showing, not mere legal argument, and thus prove that closure is appropriate and necessary. Bundy, 455 So.2d at 337; Lewis, 426 So.2d at 8; Federal

Trade Commission v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987). It is not incumbent upon the non-moving party to give reasons as to why the files should remain open. Other than lawyer argument and the in camera review of some documents, there is a dearth of evidence as to how Petitioner's right of privacy would be so grossly abused by an open judicial proceeding. This lack of evidence is further demonstrated by opinion of the appellate court below which had an opportunity to view and weigh the evidence that served as the basis for the trial court's "cogent" reason for closing the trial and determined that such evidence did not justify closure. Furthermore, the trial court gave no indication in any of its Orders that it had required the movant to meet the applicable "heavy burden" nor is there any indication that the court properly applied each part of Florida's strict scrutiny three-pronged test.

II. Application of the Three-Pronged Test Requires that the Proceedings Below Be Opened.

The First District below correctly applied the three-pronged test, 508 So.2d at 464, and held that to close a proceeding there must be a "compelling justification based upon a clearly discernable public policy that cannot be served by any means other than closure." Id. at 463.

A. Prong One: There Was No Showing Closure Was Necessary to Prevent a Serious, Imminent Threat to the Administration of Justice.

Even ignoring the "heavy burden" required to be met, closure in the instant case was entirely inappropriate. It was not shown that there was any serious and imminent threat to the administration of justice sufficient to order closure. The public's fundamental right of access to civil judicial proceedings, especially regarding an elected public official such as Senator Barron, clearly outweighs any privacy interests of Senator Barron or others that could possibly be at issue in the dissolution action below.

(i) Similar Divorce and Civil Cases.

Numerous authorities address public access to divorce and other civil proceedings involving public officials or public figures, and illustrate the proper balancing of the competing interests at hand. These cases demonstrate that Senator Barron's divorce proceedings and records should never have been closed.

The leading Florida case is the Fourth District's opinion in State ex rel. Gore Newspapers Co. v. Tyson, 313 So.2d 777 (Fla. 4th

DCA 1975).[14] The court granted a writ of prohibition against a trial judge who was conducting a closed trial in a divorce action pending between public figure and entertainer Jackie Gleason and his wife. Because the Gleasons had advanced no theory upon which it could be argued that they would not be afforded a fair trial if the public and press were present or that the administration of justice would be furthered by exclusion, the Fourth District held that the trial court had abused its discretion in closing the proceedings. Tyson, 313 So.2d at 786-88. The court balanced several factors. For instance, the court noted the importance of and numerous reasons for the fundamental right of access to all judicial proceedings. Id. at 785-86, 788. The court emphasized the uniqueness of marriage and dissolution proceedings and the state interest in regulating same. Id. at 784. As to the public figure status of Gleason versus his right of privacy, the court reasoned:

> Indeed, whenever litigants utilize the judicial processes they place themselves in the position where the details of their difficulties will invariably be made public. . . . The right to one's privacy may be secondary to public access to the courts not only by virtue of utilization of the judicial tribunal, but by an additional consideration--that the individuals involved in the proceeding are public figures whose

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[14]This Court in State ex rel. English v. McCrary, 348 So.2d 293 (Fla. 1977) overruled Tyson only so far as Tyson held that a writ of prohibition was available to challenge a judge's exclusionary orders. Id. at 299. McCrary, likewise, concerned a newspaper's attempt to obtain access to divorce proceedings. Id. at 295. This Court, while denying the prohibition as a means of redress, did not mention the Tyson's court's discussion of public trials, and thus did not overrule that portion of the decision.

> lives and activities may be deemed to be a matter of public interest. It has been generally recognized that a person who by his accomplishment, fame or mode of life or by adopting a profession or calling which gives the public legitimate interest in his doings, affairs and character may be said to be a public personage and thereby relinquishes at least a part of his right to privacy.

Id. at 784 (emphasis added) (citations omitted).[15]

Other Florida civil cases, though not involving divorce, illustrate the appropriate balancing of competing interests in sensitive civil proceedings. For instance, in Goldberg v. Johnson, 485 So.2d 1386 (Fla. 4th DCA 1986), the court in considering freedom of expression and applying Florida's strict three-pronged test held that the right of access outweighed the constitutional right of privacy. The trial court had sealed the records on the grounds that sealing was necessary to protect a minor litigant from harassment by the media. The guardians opposed the unsealing on the grounds of the constitutional right to privacy, feeling that it would be injurious to the minor's welfare and would subject the minor to further harassment by the media which had covered the minor's personal affairs as a beneficiary of a large estate. The Court held that the power to exclude should be exercised cautiously and only for the most cogent and compelling

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[15]Similarly In re Pulitzer, 8 Med. L. Rptr. 2277 (Fla. 15th Cir. Ct. 1982), involved the divorce of Herbert Pulitzer, Jr., and Roxanne Pulitzer. The husband moved to seal the wife's deposition which contained matters relating to the personal details and lifestyle of the parties, persons not parties and also to the children of the parties. The circuit court held that the husband had failed in his heavy burden to meet the three-pronged test noting that the husband's desire to protect the privacy of the parties, including their two young children was laudable, but insufficient to preclude public access. Id. at 2279.

reasons. The litigant's preference that the public not be apprised of the details of his litigation was not grounds for closure:

> Were it otherwise, we suggest that a large percentage of the court proceedings in this nation would be closed. In addition, the guardian's perception of harassment in the media's reporting of court proceedings involving the guardianship does not rise to the level of an imminent threat to the administration of justice. As this court noted in Tyson, "the 'open court' concept is an indispensable part of our system of government and our way of life." Thus, barring some recognized exception, such as a threat to the administration of justice, or that the parties could not be accorded a fair trial if the public and press were present, it does not suffice to say that Goldberg has no legitimate interest in these records since "[i]t is not the public's reason for attending but rather the public's right to attend that is to be evaluated."

Goldberg, 485 So.2d at 1389 (emphasis partially added) (citations omitted). See also Miami Herald Pub. Co. v. Collazo, 329 So.2d 333 (Fla. 3rd DCA), cert. denied, 342 So.2d 1100 (Fla. 1976).

Commentators have also written that proceedings such as this should be open to the public. Comment, All Courts Shall be Open: The Public's Right to View Judicial Proceedings and Records, 52 Temple L. Q. 311, 332-33 (1979) (discussing divorce and anullment proceedings and noting that where no explicit statute or constitutional provision exists, the public's right to observe the proceedings should prevail and also indicating that humiliation and embarrassment are insufficient interests to outweigh the benefits of open trials); and Comment, The First Amendment Right of Access to Civil Trials After Globe Newspapers Co. v. Superior Court, 51 U.Chi.L.Rev. 286, 310-13 (1984) (majority of courts

have rejected view that privacy interests or preserving public morals justifies denying access to divorce proceedings; humiliation and embarrassment insufficient to outweigh benefits of open trials); see also Note, 58 Temp. L. Q. 159 (1985), cited at note 10, supra.

Likewise in C. L. v. Edson, 409 N.W.2d 417 (Wis. Ct. App. 1987), the media sought access to sealed settlement documents involving psychiatric patients who had been sexually abused during treatment. Id. at 1149. Applying a common law balancing test, and noting the heavy burden required to close proceedings, the court held that the public interest in disclosure outweighed any need for secrecy. The court stated that a private party gives up a certain expectation of privacy when commencing a civil suit, and further that the defendants were members of a highly regulated profession. The court stated that the assertion that public interests in protecting the privacy of individuals outweighs the need for public disclosure had "been rejected in numerous cases." Id. at 1150.

(ii) The Sentinel Case: Incorrect and Distinguishable.

The Fifth District, 2-1 decision in Sentinel Communications Co. v. Smith, 493 So.2d 1048 (Fla. 5th DCA 1986), was relied on by the trial judge in the instant case. Sentinel upheld the sealing of files in a long-closed domestic relations case. The First District below correctly refused to follow the decision. The case is wrongly decided and, in any event, distinguishable on its facts. The decision is based on the erroneous premise that there

can be "private civil litigation." Furthermore, the two concurring majority opinions in Sentinel cited a total of only two cases for authority and failed to mention or follow well-established law and guidelines in right of access cases. One of the concurring majority opinions noted that in attempting to unseal the records, "[n]o evidence whatsoever was adduced by petitioner [the newspaper] regarding the 'rights and interest of the public and the press.'" Id. at 1050. This statement illustrates how clearly that court misperceived the burden of proof. No evidence need be presented by the newspaper--that burden is on the movant. Sentinel also failed to mention or consider the compelling First Amendment interests at stake.

Judge Sharp's dissent properly noted that no evidence was presented to the trial judge concerning why it was necessary to continue a closure of the file and further correctly noted that the burden of proof to seal or close records or proceedings is on those parties seeking to exclude the public and that the trial court had neither understood nor followed the rules regarding burden of proof. The dissent also recognized the strong policy in Florida of open government and public access to judicial proceedings and records. Id. at 1051-52.

That the Sentinel decision is poorly reasoned and wrongly decided is also illustrated by the fact that the court affirmed the order sealing the record, even though the dissent noted that "[n]o reasons are recited in the judgment for sealing it; no evidence was taken to justify it; and no notice was given to ... any ... member of the news media that the file would be permanently

sealed." Id. at 1051. As discussed later in this brief, such procedures are clearly required under both Florida and federal law, and the court's failure to follow such procedures illustrates its misconception of the status of the law.

The court also held that the fact that the husband in Sentinel was a public official (a judge) did not distinguish it from other domestic cases, and the privacy rights were no more or less than in other domestic cases. The court thus indicated that there is not a diminished right of privacy or a heightened public right to know when a public official is involved. This holding is simply incorrect and poorly reasoned as illustrated by Tyson, Pulitzer, Collazo, supra, and other cases discussed below.

Sentinel, in any case, is distinguishable on its facts. First, the proceedings were already "long closed" and over, and thus the public's interest in and right to know was arguably not as compelling as the instant case (although this is not conceded). Second, the trial judge had made a finding that closure was necessary to protect the interests of the minor children. Id. at 1050 (Sharp, J. dissenting). There was no such finding in the instant case. In fact, the First District below stated the information sought to be protected by Senator Barron:

> ... is of a somewhat general nature and not specifically tied to a domestic relations case. The information is not related to marital relationship nor its breakup, to the welfare of the children, nor to the marital property. The party affected suggests it is related to present and future financial support.

Florida Freedom Newspapers, Inc., 508 So.2d at 464-65. Third, the divorce proceeding in Sentinel was never tried. Instead,

final judgment was based on the parties settlement agreement. No testimony or evidence was ever taken in the case and the file consisted solely of pleadings and some answers to deposition questions. Id. at 1051 (Sharp, J. dissenting). By comparison, the instant divorce proceedings were ongoing, discovery was proceeding and a final hearing had been tentatively scheduled.

Nevertheless, here, the trial court sealed not only the entire current file, but also all further proceedings. While there might be some basis for maintaining a seal on a long closed divorce proceeding involving minors which has been settled and where there are only pretrial depositions and allegations in pleadings, there is no such basis to seal a court file involving a public official wherein there are not only existing allegations, but also future evidence to be submitted as part of the actual court file and proceedings.[16]

(iii) Senator Barron's Alleged Privacy Interests Do Not Justify Closure.

In Point II (and various other portions) of his Brief, Senator Barron broadly argues that his right of privacy is paramount, omnipresent and overrides every common law and

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[16]In addition, although the Democrat cannot be sure of the specific information involved in the instant case since the trial court has failed to give any explicit reasons regarding the sealing of the file, it may be that the facts are not at all like the allegations involved in Sentinel. In Sentinel, the majority noted that the wife had made "certain allegations regarding family members and their problems which were never substantiated by any evidence." Id. at 1050 (Dauksch, J. concurring). Whatever problems were at issue in Sentinel may be much more serious and far reaching than those at issue here. This is supported by the First District's description of the information as quoted above.

constitutional principle of open judicial proceedings that exists. However, Petitioner makes these assertions without providing the Court any analysis of the nature, scope and limitations of this concept of privacy. When fully examined, it is clear that, to the extent there is any privacy interest at issue here, Petitioner has failed to demonstrate that he has any reasonable expectation of privacy or that any such interest outweighs the competing interests in open judicial proceeding that are at stake.

There is not, of course, any explicit federal constitutional right to privacy. Instead, such a right is found in the "penumbra" of various amendments such as the First, Fourth and Fifth. Griswold v. Connecticut, 381 U.S. 479 (1965). The concept of privacy as a matter of federal constitutional law is not well defined and has developed slowly. Whalen v. Roe, 429 U.S. 589, 599, n. 24 (1977); Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 Fla. St. L. Rev. 673, 677 (1978) (hereafter "Cope").

On the one hand, the U.S. Supreme Court has relied on the Constitution to prevent unwarranted governmental intrusion into private affairs. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Katz v. United States, 389 U.S. 347 (1967); Griswold, supra.

However, and more significantly, the U.S. Supreme Court has been considerably more reluctant to allow an assertion of a privacy interest to prevent public disclosure of information that someone felt to be private. Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (upholding the law making many of former

President Nixon's papers and tape recordings public); Whalen, supra (upholding a New York statute that required disclosure to the state of the name of the physician prescribing and the patient receiving certain classes of drugs); Paul v. Davis, 424 U.S. 693 (1976) (holding there was no cause of action for invasion of a constitutional right of privacy for public disclosure of a person's prior arrest for shoplifting).

Distinctions between various aspects of the concept of privacy have been acknowledged by this Court in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980), as follows:

> While there is no right of privacy explicitly enunciated in the Bill of Rights, the Supreme Court has construed the federal constitution to protect certain privacy interests. These protected interests can be said to comprise the federal constitutional right of privacy. This right of privacy cannot be characterized as a general right because its application has been strictly limited. It has been characterized as consisting of three protected interests: an individual's interest in being secure from unwarranted governmental surveillance and intrusion into his private affairs; a person's interest in decisional autonomy on personally intimate matters; and an individual's interest in protecting against the disclosure of personal matters.

379 So.2d at 636 (emphasis added).

The concept of privacy has also developed along a "parallel track" as a matter of common law. Cope at 680. The Restatement has divided this tort concept into four categories:

> (a) unreasonable intrusion upon the seclusion of another; or
>
> (b) appropriation of the other's name or likeness; or

(c) unreasonable publicity given to the other's private life; or

(d) publicity that unreasonably places the other in a false light before the public.

Restatement, Second, Torts §652A.

The Restatement also provides some insight into another aspect of the right of privacy. Earlier in this Brief, there was a discussion of the role that a person's status (public versus private figure) plays in the issue of access. Likewise, status is a factor to be considered in determining the scope of the right to disclosural privacy. Public figures, such as Senator Barron (who is also a public official), subject themselves to greater public scrutiny and thus have a diminished right or expectation of privacy in various aspects of their lives. This is because public figures and public officials have greater access to channels of communication. New York Times v. Sullivan, 376 U.S. 254 (1964). As such, their voluntary participation in the events of our time opens various aspects of their lives to the public. This may also include aspects of life that the public person might choose not to reveal.[17] The Restatement provides further guidance:

e. Voluntary public figures. One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or

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[17]Certainly, recent events regarding public officials such as Senator Gary Hart and Supreme Court nominee Joseph Ginsburg demonstrate the timeliness of this issue. Whether or not one always approves of the manner in which the press investigates and handles a difficult story involving the personal life of a public person, it is hard to overstate the importance of access to information about people in positions of public trust.

> activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. . . .Thus an actor, a prize fighter or a public officer has no cause of action when his appearances or activities in that capacity are recorded, pictured or commented upon in the press. In such a case, however, the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.
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> . . .
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> g. News. Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, . . .
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> . . .
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> h. Private facts. Permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life. . . .

Restatement, Second, Torts §652D (emphasis added).

Both federal and state courts have held that the public interest in supporting public disclosure for elected officials outweighs constitutional privacy interests in financial matters.

Thus, required financial disclosure for elected officials is constitutional. See, e.g., Plante v. Gonzalez, 575 F.2d 1119, 1134-36 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (action challenging financial disclosure laws brought by Senator Barron and four other State Senators); Goldtran v. Askew. 334 So.2d 20 (Fla. 1976) (statute requiring public disclosure of the financial affairs of public officers is not unconstitutional on ground that it violates the constitutional right of privacy).[18]

In the instant case, the purported privacy interest at issue is that dealing with potential publicity to Senator Barron's private life, an interest also known as "public disclosure of private facts." Cope at 687. As is clear from Nixon, Whalen, and Paul, supra, this is the narrowest aspect of the right of privacy. This Court has agreed:

> The remaining privacy interest is the interest respondents argue applies to the present circumstances and prevents disclosure of the consultant's papers. That interest has been characterized as the individual's interest in avoiding public disclosure of personal matters and has been explicitly mentioned by the Supreme Court only twice, once in Whalen v. Roe and once in Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). This interest is the newest and the least defined.
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[18]A defendant's right of privacy did not outweigh First Amendment rights of the press to access the defendant's tax returns which had been admitted into evidence at a co-defendant's trial on charges of violating federal tax laws. United States v. Posner, 594 F.Supp. 930, 936 (S.D. Fla. 1984), aff'd, 764 F.2d 1535 (11th Cir. 1985).

> We conclude that a person's right of disclosural privacy is not as broad as the district court has held.

Shevin, 379 So.2d at 637-638.

The limitation placed on the notion of disclosural privacy is totally consistent with the precept that the free flow of information is paramount in an open society.

> Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Griswold v Connecticut, 381 U.S. 479, 482 (1965). In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969); see Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972) (citing cases).

Board of Education, Island Trees Union Free School District No. 26, et al., v. Pico, 457 U.S. 853, 866-867 (1982). See also First National Bank of Boston v. Belotti, 435 U.S. 765 (1978).

Petitioner also relies on Article I, Section 23 of the Florida Constitution for his privacy argument. In considering this section, this Court should keep the distinctions described above in mind because the right of disclosural privacy is not nearly as broad under the Florida Constitution as urged by Petitioner. Article I, Section 23 provides as follows:

> 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.

By its plain language, this right is directed more at the right to be free from unwarranted intrusion than at any right to disclosural privacy. This is particularly evident by virtue of the fact that this constitutional right in Florida is expressly made subject to the Public Records and Government-in-the-Sunshine Laws. The only exceptions to the Public Records and Sunshine Laws are those created by the Legislature. Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985); Wait v. Florida Power and Light Co., 372 So.2d 420 (Fla. 1979).[19] These statutes are very broad and allow for public disclosure of a wide variety of potentially sensitive matters such as personnel files, meetings of a police complaint review board and, until recent statutory amendments, even communications between attorney and client.

The limited nature of any right to disclosural privacy is further evidenced by the decisions of this and other Florida Courts that have dealt with the subject.

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[19]Throughout his Brief, Senator Barron's counsel continually and inexplicably cites cases that simply do not support the cited propositions. For instance, at p. 16 of the Brief counsel states that Florida Court's have not been reluctant to extend privacy rights when the requirements of the Public Records Act conflict with other statutory provisions protecting privacy interests citing Gadsden County Times, Inc., v. Willis, 377 So.2d 817 (Fla. 1st DCA 1979), and Yeste v. Miami Herald Publishing Company, 451 So.2d 491 (Fla. 3d DCA 1984). These cases clearly do not support that position; indeed that assertion is an incorrect statement of the law. Gadsden County Times simply held that the newspaper had failed to appropriately seek review regarding an administrative order holding that all actions for determination

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In Shevin v. Byron Harless Shaffer Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980), this Court dealt with the federal and state concepts of privacy in the course of reviewing a decision regarding public access to documents relating to applicants for a position of managing director for a public electric authority. In the course of deciding that such records were public despite the privacy interests asserted by various parties, this Court held that there was no federal or state privacy interest that justified the sealing of these records.

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of paternity should be sealed at the time of court filing. There was no substantive ruling regarding the legality of the Order and the decision certainly does not stand for the proposition stated by counsel for Senator Barron. Likewise, in Yeste the court refused to allow the newspaper to inspect the cause of death portion of a death certificate due to a statutory provision prohibiting disclosure of that information. The decision did not involve a determination that a family's right to privacy overcame the Public Records Law. Alice P. v. Miami Daily News, Inc., 440 So.2d 1300 (Fla. 3d DCA 1983), also does not stand for the proposition for which it is cited in Barron's Brief at 18. The court declared that certain portions of a license application for a lay midwife license were exempt from disclosure under the public records law by virtue of statutory provisions making certain information in the application confidential. The issue of a constitutional right of privacy in this information was specifically raised by the appellants but was just as specifically avoided by the court since the case was resolved on statutory grounds. As is clear from Neu, Wait and numerous other cases, the courts have not allowed nonstatutory privacy interests to override the Public Records and Sunshine laws.

Another glaring example of a citation not standing for the stated proposition is found on p. 18 of Petitioner's Brief where counsel cites Havanatur S.A. v. 747 Travel Agency, Inc., 463 So.2d 404 (Fla. 3d DCA 1985), for the proposition that the newspaper has not provided any legitimate interest in the proceedings and its only interest can be to "harass through public washing of dirty linen." Havanatur doesn't have anything to do with that statement. The decision is simply a very brief opinion affirming a trial court decision denying a motion to intervene that was filed during the final stages of litigation.

Petitioner cites Doe v. Sarasota Bradenton Florida Television Company, 436 So.2d 328 (Fla. 2d DCA 1983) for the proposition that Florida's constitutional right of privacy provides the means of protection of people wishing to be let alone. However, the facts and holding in Doe, while significantly different in certain respects from the instant case, actually demonstrates why the privacy interest asserted herein is not sufficient to overcome the presumption of openness that is inherent in our judicial system. In Doe, a rape victim's name and picture was broadcast on television after having been videotaped in court despite an agreement with the prosecutor that she would only testify if her name and photograph would not be published or displayed. The suit was filed against the television station by the victim seeking damages for invasion of privacy and intentional infliction of emotional distress. Citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court affirmed the trial court's dismissal of the actions for invasion of privacy. The appellate court affirmed despite its feeling that the press had overstepped certain boundaries of good taste in publishing the victim's picture and name. However, the court recognized and acknowledged the extremely important role that a free press is to play in an open and democratic society and recognized that such occasional excesses are one of the prices that we pay for liberty.

In the instant case, Petitioner has repeatedly accused the press of wishing to have access to this court file simply to harass or embarrass him. There is not one scintilla of evidence in this or any other record to justify that assertion. However,

even if such were the case, it is clear from the decision in Doe, and the cases cited therein, that such an argument is simply not relevant or sufficient to justify closure. See also Tyson, 313 So.2d at 786.

Petitioner also cites this Court's decision in Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985), for the proposition that the concept of privacy is rooted in the federal constitution. However, a different type of privacy interest was at issue in that case. In fact, the Court specifically noted that the concept of a privacy interest in avoiding the public disclosure of personal matters was not at issue. 477 So.2d at 546. This Court should also not lose sight of its holding in Winfield that the state's interest in that case outweighed the right of privacy asserted by the persons seeking to prevent disclosure of their bank records.

One important principle was discussed in Winfield that is applicable here. This Court recognized that before a right of privacy attaches, there must be a reasonable expectation of privacy. 477 So.2d at 544. Here, Petitioner had no reasonable expectation of privacy. Based on the long tradition of openness that has always been inherent in our judicial system, both as a matter of constitutional and common law, anyone making use of this system must expect the proceedings to be open unless there is some specific right of closure as in an adoption proceeding.

Applying the principles set forth above to the instant case clearly shows the correctness in the decision by the First

District Court of Appeal. The right of disclosural privacy urged by Petitioner has been consistently outweighed and rejected by numerous courts (including this one) that have been faced with the issue. The Democrat does not know the nature or content of the information the trial court relied on in closing the proceedings below. However, the First District Court of Appeal has pointed out that "[t]he information is of a somewhat general nature and not specifically tied to a domestic relations case." 508 So.2d at 464. If an assertion of a right of disclosural privacy is sufficient justification in this case to warrant the complete closure of this proceeding, then the next step will be the closure of a great many other types of civil proceedings. It is not unusual for a civil case to involve matters the parties would prefer not to have revealed. In a personal injury case, the details of a person's injury, the impact of an injury on a family, the loss of consortium and numerous other personal matters might be the type of information that a person would prefer not to have revealed in open court. However, our concept of openness in our judicial system is too important to justify closure of a case such as that in all but the most extreme circumstances.

Likewise, many tort cases, contract cases and other forms of civil litigation may involve the disclosure of personal financial information that many people would prefer not be made public. If information "not specifically tied to a domestic relations case" is used to justify the sealing of this entire proceeding, then the long established concept of open civil judicial proceedings

(whether as a matter of common or constitutional law) is placed in serious jeopardy any time a claim of a right of disclosural privacy is raised.

Petitioner's status must be taken into account in this case. Senator Barron is extremely well known as one of Florida's most prominent and important politicians. He has voluntarily thrust himself into the center of many important issues and placed himself in a position of public trust. In so doing, Petitioner must also accept the fact that aspects of his personal life are legitimate matters of public interest and concern. This is not simply a matter of some prurient interest of the press or the public as is suggested by Petitioner throughout his Brief. The dissolution of a marriage is not simply the breakup of a personal relationship; it involves the severance of economic and social ties as well. While Petitioner might prefer not to have some of these matters made public, his status subjects him to a higher level of scrutiny and a diminished expectation of privacy.

Thus, this case should not be confused with the run-of-the-mill dissolution case involving a narrowly drawn closure order protecting against publicity concerning testimony about intimate matters involving only private litigants. Senator Barron is a well-known public official. The constitutional right to privacy of any individual shrinks upon becoming a public figure, and grows even smaller when one becomes an elected public official. If the matters at issue in the proceedings at all relate to the Senator's duties or activities in his public capacity or the public's percep-

tion of the Senator's character and fitness for public office, the media must be given access. The public has a right to know regarding any matter that has the potential to reflect upon the suitability of continued public service by an elected official. This Court has previously stated:

> . . . one . . . who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that they may determine whether it squares with such a standard of integrity and correct morals as warrants their approval.

Kennett v. Barber, 159 Fla. 81, 31 So.2d 44, 46 (1947). See also Placuemines Parish Comm'n. v. Delta Dev. Co., 472 So.2d 560 (Al. 1985).

Another way to look at this issue is to point out that if a public figure, with a diminished expectation of privacy, is allowed to have his dissolution file completely sealed, then certainly any private figure, with a greater expectation of privacy, would be entitled to such relief. The next logical correlary is that all dissolution files and final hearings become closed judicial proceedings. The Legislature has not chosen to take this step based on any perception that the individual's right of privacy is paramount to traditional concepts of open judicial proceedings and this Court should not legislate in a manner that would lead to such a result.

In summary, the trial court erred when balancing the competing interest involved and ordering closure. Besides overlooking the strict scrutiny standard and the heavy burden of proof imposed on the party seeking closure, the trial court failed to consider the

overriding and compelling interests underlying the First Amendment; the public's heightened interest and right to know regarding divorce proceedings, especially regarding a prominent elected public official; and a public official's diminished right of privacy. Applying these factors and the competing interests at hand, there can be no serious, imminent threat to the administration of justice in this case. The lower court's decision to the contrary was clear error and that the proceedings and records below must be opened.

B. Prong Two: Overbreadth - Less Restrictive Alternative Measures Were Available.

Full closure can be ordered only if no less restrictive alternatives are available. Bundy v. State, 455 So.2d 330, 337 (Fla. 1984); State ex rel. Tallahassee Democrat v. Cooksey, 371 So.2d 207, 210 (Fla. 1st DCA 1979).

Ms. Barron filed the divorce action on January 28, 1986. For seven and one-half months the file was not sealed. The Court's Orders sealing the entire file, including all the matters that had previously been open are thus overbroad. In addition, they are overbroad in that they close all further proceedings, rather than just the part relating to the allegedly uniquely private information. There is no indication that any other alternatives were considered and rejected with reasons stated on the record. As noted earlier, it is the heavy burden of the party seeking closure to demonstrate that less restrictive alternatives do not exist or will not work. Such was not and has not been demonstrated here. The Orders simply are not "narrowly tailored" to serve the

interests sought to be protected and the decision by the First District was clearly correct.

C. Prong Three: Closure Will Not Achieve the Protective Purpose.

The trial court also erred in not applying the third prong of the three-pronged test, which requires a showing that closure will in fact achieve the court's protective purpose. The trial court's apparent purpose was to protect information "uniquely private to the individual involved." (A 8).

Here, closure will have just the opposite effect on the privacy and confidential interests of Senator Barron and others. Closure will cause public distrust and speculation about private matters. The Supreme Court has stated:

> It is reasonable to assume, that without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts.... Given these practical problems, it is far from clear that prior restraint on publication would have protected [defendant's] rights.

Nebraska Press Association v. Stuart, 427 U.S. 539, 567 (1976).

Similar considerations should be applied here. The rampant speculation as to why the files in proceedings in the instant case have been closed will undoubtedly range through the complete spectrum of issues which can be raised in the most sordid of dissolution cases even though such rumor and speculation may be totally unfounded. Such will do more harm to the parties than an accurate and straight-forward revelation of the true facts. In

addition, closure of a file that was completely open for more than seven months can't possibly achieve the protective purpose. Since the intended protective purpose was not achieved, the trial court erred in ordering closure and, once again, the appellate decision was eminently correct.

III. The Trial Court Erred Procedurally by Failing to Specifically Articulate Cogent Reasons for Restriction on Access and by Failing to Give the Media Prior Notice and Opportunity to be Heard.

In addition to the errors discussed above, the trial court committed two basic procedural errors which alone constitute an abuse of discretion and justified reversal.[20]

A trial court should specifically set forth in its order sealing a court file or closing judicial proceedings its reasons therefore so that the legality of the order can be reviewed. The basis for closing the proceedings or records can, and must, be sufficiently stated without divulging the information sought to be protected. See, e.g., Miami Herald Pub. Co. v. Lewis, 426 So.2d 1, 8-9 (Fla. 1982); Goldberg v. Johnson, 485 So.2d 1386, 1389 (Fla. 4th DCA 1986).

At a minimum this Court should require that in all cases involving a closure order, the public be informed of the basis for closure to the extent possible without compromising legitimately secret information. In the instant case, since the trial court refused to give the basis for closure, the public is unable to determine whether the trial court has in fact provided

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[20]As a First Amendment right, the right of access to civil trials is to be accorded the due process protection that other fundamental rights enjoy. Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1070 (3rd Cir. 1984); accord Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, (1982); Richmond Newspapers, Inc., 448 U.S. 555, 581, n. 18 (1980). Pursuant to the United States Supreme Court, Globe and Press Enterprise line of cases, federal courts have articulated precise procedures required in order to restrict access to civil hearings and court records. An exhaustive analysis of those federal procedures is contained in Note, Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts, 58 Temple L. Q. 159, 178-92 (1985).

a legally sufficient basis for closure to the extent possible and whether due process considerations have been taken into account by the trial court.

In the very least, the First District was correct in requiring that the entire sealed record below be transmitted to it so that it could "sufficiently refer to the record to apprise [itself] of the matters entitled to protection" and see if there is any entitlement to protection. See Sentinel Star Co. v. Edwards, 387 So.2d 367, 375, n. 12 (Fla. 5th DCA 1980), review denied, 399 So.2d 1145 (Fla. 1981); News-Press Pub. Co., Inc. v. State, 345 So.2d 865, 867 (Fla. 2d DCA 1977).

The Democrat would urge that under the standards set out in the cases discussed above, the reasons cited by the trial court are totally insufficient to warrant the sealing of the record in this case.

The trial court's Order is also fatally defective for another important reason. These judicial records were sealed without adequate notice" or prior opportunity to be heard. This is directly contrary to established law. Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983); In re Knight Pub. Co., 743 F.2d 231 (4th Cir. 1984); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982). In Miami Herald Pub. Co. v. Lewis, 426 So.2d 1 (Fla. 1982), this Court held:

> The news media has been the public surrogate on the issue of courtroom closure. Therefore, the news media must be given an opportunity to be heard on the question of closure prior to the court's decision. Implicit in the right of the members of the news media to be present and to be heard is the right to be

> notified that a motion for closure is under consideration.

Id. at 7. The Court held that notice must be given to at least one representative of the local news media when a motion for closure is filed and when it is heard by the court. Id. at 8. Although the Fourth District in Miami Herald v. State, 363 So.2d 603 (Fla. 4th DCA 1978) has found the same error there to have been cured by a later hearing, the court made a point of indicating that the ruling was limited to that case and was not to be regarded as precedential. Id. at 607.

A subsequent hearing held after the trial court has already made its decision to close proceedings is not sufficiently protective of the First Amendment and due process requirements. Such a subsequent hearing puts the media in the awkward position of telling the judge he made a mistake, and places the judge in a defensive posture of trying to find a way to sustain the order already entered. A hearing is required before the judge's mind is made up. Cf. Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1079 (3rd Cir. 1984) (stating court could temporarily preserve secrecy while it deliberated on question of confidentiality , and had not yet actually decided the question).

The Democrat is not suggesting that the clerk of the court call every newspaper and television and radio station every time it receives a motion to close a hearing or seal a record. However, notice of every such request or intent should be posted or published in a designated location that all interested persons have prior notice and an opportunity to be heard. Courts have suggested that notice of the sealing of a record should at least

be posted immediately after its closure to allow interested parties to move for reconsideration. State ex rel. Tallahassee Democrat v. Cooksey, 371 So.2d 207 (Fla. 1st DCA 1979). Nothing of this sort was ever done before these documents were sealed below. The records were sealed without prior notice or a chance for a hearing. This failure to provide notice or a hearing by itself constitutes error mandating affirmance of the decision by the First District Court of Appeal.

CONCLUSION

The precious right of public access to information has been consistently and strongly protected by the Courts. The closure Orders entered below have unconstitutionally and in derogation of established First Amendment and common law principles significantly limited the public's access to information. This Court should not allow orders of this type. The Orders sealing the court file and closing further proceedings below are clear legal error that cannot be tolerated if the public is to maintain its confidence in our judicial and political system. The First District's Opinion, reversing the trial court's closure Orders, should be AFFIRMED, and Senator Barron's divorce proceedings should be fully opened to the public.

DATED this 25th day of January, 1988.

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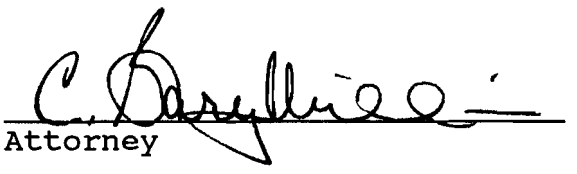
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amicus Brief and accompanying Appendix has been furnished by U.S. mail to Honorable Don T. Sirmons, Post Office Box 831, Panama City, Florida 32402; Honorable Robert A. Butterworth, Attorney General, State Capitol, Tallahassee, Florida 32301; Mr. M. A. Urquhart, Jr., Urquhart & Pittman, 314 Magnolia Avenue, Panama City, Florida 32401; Mr. Jerome Novey, Post Office Box 1855, Tallahassee, Florida 32302; Mr. Stan Trappe, 236 McKenzie Avenue, Panama City, Florida 32401; Mr. Gene Brown, Post Office Box 1109, Tallahassee, Florida 32302; Mr. L. Charles Hilton, Post Office Box 2462, Panama City, Florida 32402; Ms. Sharon Lee Stedman, Rumberger, Kirk, Caldwell, Cabaniss & Burke, 11 East Pine Street, Post Office Box 1873, Orlando, Florida 32802; Mr. Gerald Cope and Ms. Laura Besvinick, Greer, Homer, Cope & Bonner, Southeast Financial Center, Suite 4360, 200 South Biscayne Blvd., Miami, FL 33131; Mr. Richard J. Ovelmen, General Counsel, The Miami Herald Publishing Company, 1 Herald Plaza, Miami, FL 33101; Mr. Franklin A. Harrison, Post Office Box 1579, Panama City, Florida 32402; Mr. George Rahdert, 233 3rd Street, N., St. Petersburg, FL 33701; and Mr. Clay Coward and Mr. William George Mateer, Esq., 100 E. Robinson Street, Post Office Box 2854, Orlando, FL 32802, this 25th day of January, 1988.



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