The Natural Parents of J.B. vs Florida Dept. of Children & Family Services

THE NEXT CASE ON THE COURT'S CALENDAR IS THE NATURAL PARENTS OF J.B. VERSUS THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES.

MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT. THIS COURT'S DECISION IN THE DEMPSY BARRON CASE, AT 531 SO.2D, IN THE YEAR 1988, I THINK, REALLY SETS THE STAGE FOR THE DECISION IN THIS CASE, IN AN ANSWER TO THE CERTIFIED QUESTION. IN THE BARRON CASE, A CIVIL CASE INVOLVING DISSOLUTION OF MARRIAGE, THE COURT SAID THERE IS A PRESUMPTION OF OPENNESS IN CIVIL AND CRIMINAL PROCEEDINGS IN FLORIDA COURTS.

MAY I STOP YOU JUST FOR A MOMENT THERE. THE BARRON CASE, DID THAT INVOLVE THE STATUTE OF THE LEGISLATURE, EXPRESSLY CLOSING THE PROCEEDINGS, AND IF NOT, SHOULD OUR CONSIDERATION BE ANY DIFFERENT IN ANALYZING THE CONSTITUTIONALITY OF THE STATUTE?

IT DID NOT, JUSTICE PARIENTE, AND, IN FACT, IN THE BARRON CASE, THE ONLY AREAS OF THE BARRON CASE THAT, I THINK, THAT LEAVE THE DOOR OPEN TO A COUNTERARGUMENT IS THAT THE BARRON CASE MENTIONED THAT THE LEGISLATURE HAD NOT ADDRESSED CLOSING DIVORCE CASES AND MENTIONED, IN PASSING, THE FACT THAT, WHERE THE LEGISLATURE HAD ACTED, INCLUDING IN THESE KINDS OF CASES, THAT THERE WAS SOMETHING IN THE STATUTE BOOKS. IT DIDN'T DECIDE WHETHER OR NOT THE CLOSURE, UNDER THIS STATUTE, 39.804, WAS CONSTITUTIONAL, BUT THE DIFFERENCE IS, HERE, YOU START WITH A PRESUMPTION OF OPENNESS. IT IS TRUE THE LEGISLATURE HAS SAID THAT WE WANT TO CLOSE THESE PROCEEDINGS, BUT IT, STILL, HAS TO BE MEASURED AGAINST THE CONSTITUTIONAL STANDARDS, AND THE TEST IS NARROWLY TAILORED. IF, INDEED, IT WAS A NARROWLY NARROWLY-TAILORED STATUTE, IT WOULD LEAVE THE DOOR OPEN FOR A COURT TO DECIDE WHETHER OR NOT IT WAS PROPOSED, IN A GIVEN CIRCUMSTANCE, TO CLOSE THESE PROCEEDINGS, BUT MERELY BECAUSE THE LEGISLATURE HAS MADE A BLANKET RULE, SAYING ALL OF THESE PROCEEDINGS ARE CLOSED, DOES NOT ANSWER THE QUESTION. INDEED, THE LEGISLATIVE ENACTMENTS SHOW, IRONICALLY, THAT DEPENDENCY PROCEEDINGS, WHICH OFTENTIMES PROCEED TERMINATION OF PARENTAL RIGHT PROCEEDINGS, THAT THEY ARE OPEN, SO HERE YOU HAVE A SITUATION WHERE A DEPENDENCY PROCEEDINGS, WHICH WOULD INVOLVE THE SAME KIND OF FACTS ARE OPEN, AND PARENTAL TERMINATION PROCEEDINGS ARE CLOSED. IT SIMPLY DOESN'T MAKE ANY SENSE. BUT YOU START, JUSTICE QUINCE, I AM SORRY.

OFTEN, AFTER TERMINATION OF PARENTAL RIGHTS, THE DEPARTMENT, THEN, TRIES TO HAVE THE CHILD PERMANENTLY ADOPTED, ET CETERA. AND SINCE, YOU KNOW, THERE SHOULD BE SOME SIMILAR, I THINK, KINDS OF CONSIDERATIONS FOR A TERMINATION OF PARENTAL RIGHTS CASE AND ADOPTION CASES. IS THERE ANY KIND OF ANALOGY THAT CAN BE MADE? I MEAN, WE DO, IN FACT, CLOSE ADOPTION PROCEEDINGS, DON'T WE?

WE DO, AND THE DECISION AT HYT SPEAKS TO THE CLOSURE OF ADOPTION PROCEEDINGS, BUT THE ANALOGY IS NOT A GOOD ONE, JUSTICE QUINCE. THE DIFFERENCE HERE IS, IN THE TERMINATION PROCEEDINGS, THE STATE IS THE MOVING PARTY. THE STATE IS TRYING TO EFFECT ONE OF THE MOST FUNDAMENTAL RIGHTS, UNDER THE UNITED STATES AND THE FLORIDA CONSTITUTIONS, THE RIGHT TO FAMILIAL ASSOCIATION. ADOPTION AND HYT SAYS THIS, ADOPTIONS ARE QUALITATIVELY DIFFERENT FROM OTHER PROCEEDINGS. THE STATE, OF COURSE,

IS NOT A PARTY IN THE ADOPTION CASE.

BUT ISN'T THE BEST INTEREST OF THE CHILD SORT OF THE PARAMOUNT CONSIDERATION, IN BOTH OF THESE KINDS OF PROCEEDINGS?

IT IS, AND THAT PLANT REMARKS THE BEST INTEREST -- AND THAT MANTRA, THE BEST INTEREST OF THE CHILD, OF COURSE, HAS BEEN ARGUED OF THE STATE, BUT THE BEST INTEREST OF THE CHILD MAY BE TO STAY WITH THE PARENT, AND INDEED, IN PARENT TERMINATION PROCEEDINGS, THREE OF THE FOUR STANDARDS TO BE USED ARE RELATED TO THE ABILITY OF THE PARENTS TO CARE FOR THE CHILD, THE LOVE AND AFFECTION WITHIN THE HOME, AND SO WHEN YOU SAY BEST INTEREST OF THE CHILD, THAT IS THE STANDARD, BUT, OF COURSE, THE STANDARD, ALSO, INVOLVES THE INTEREST OF THE PARENTS AND THE SUPREME COURT IN THE MLB CASE, JUSTICE GINSBURG, THE MLB CASE, MADE IT QUITE CLEAR THAT THIS IS ONE OF THE MOST IMPORTANT OF ALL OF THE FUNDAMENTAL RIGHTS WE HAVE, AND SO UNLIKE ADOPTION, THIS IS THE CASE STATE VERSUS PARENTS, NO MATTER HOW THE CASE IS STYLED, IT IS STATE VERSUS PARENTS. WE ARE GOING TO TAKE AWAY YOUR CHILDREN, BECAUSE WE DON'T THINK YOU HAVE BEEN A GOOD PARENT.

SO YOU ARE, REALLY, GOING BACK TO YOUR INITIAL ARGUMENT. YOU ARE SAYING THAT THERE IS A PRESUMPTION THAT ALL ACTIONS ARE OPEN, AND IT MAKES NO DIFFERENCE, HERE, WHETHER THIS IS A CRIMINAL ACTION OR A CIVIL ACTION. IN ITS ESSENCE. BUT THAT, REALLY, YOU DON'T BUY INTO THE FACT THAT THIS IS A CIVIL ACTION?

IT OBVIOUSLY IS A CIVIL ACTION, BUT ON THIS CONTINUUM, JUSTICE WELLS, BETWEEN PURE CIVIL AND CRIMINAL, THIS ONE FALLS MUCH CLOSER TO THE CRIMINAL SIDE, ALTHOUGH YOU DON'T HAVE TO CALL IT A CRIMINAL CASE BUT WHAT IS IT? IT IS A CASE WHERE THE STATE IS THE MOVING PARTY, AND YOU ARE DEALING WITH THE MOST FUNDAMENTAL OF CONSTITUTIONAL RIGHTS, THE RIGHT TO HAVE AND RAISE YOUR FAMILY. I THINK IT IS PRETTY IRONIC THAT YOU CAN GO TO JAIL FOR A DAY, AND YOU HAVE A RIGHT TO PAUB LICK TRIAL, BUT YOU CAN LOSE YOUR CHILDREN FOR THE REST OF YOUR LIFE --

ISN'T IT IMPORTANT THAT WE KIND OF SETTLE ON WHERE THIS INDICATES CASE FALLS IN THE SPECTRUM, BECAUSE WE, ALSO, HAVE, AS JUSTICE PARIENTE HAD A THRESHOLD QUESTION HERE, IS THAT WE ARE, ALSO, DEALING WITH ACT OF THE LEGISLATURE, WHICH HAS SOME PRESUMPTIONS OF ITS OWN, AS TO WHETHER IT IS CONSTITUTIONAL OR NOT, AS THE FOURTH DISTRICT POINTED OUT, AND SO THEREFORE, ISN'T WHERE THIS CASE -- THIS TYPE OF CASE FALLS ON THE SPECTRUM IMPORTANT, AS TO THE POWER OF THE LEGISLATURE TO ACT IN THIS FIELD, TO CLOSE THESE PROCEEDINGS?

IT IS IMPORTANT, JUSTICE WELLS, AND I WOULD HAVE TO SAY THAT, ON THE SPECTRUM, IT FALLS CLOSER TO THE CRIMINAL SIDE. IT IS A CIVIL CASE, BUT IF ONE LOOKS AT THIS CONTINUUM, YOU HAVE TO SAY IT FALLS CLOSER TO THE CRIMINAL SIDE, ALTHOUGH I DON'T WANT TO USE THOSE TERMS AND LEAD THE COURT TO THINK THAT I AM SAYING THIS IS A CRIMINAL CASE. IT ISN'T. IT IS A CIVIL CASE.

BUT IF IT WERE, ISN'T THAT, AS FAR AS IN THE CONSTITUTIONAL OR COMPETING CONSTITUTIONAL VALUES THAT WE ARE TALKING ABOUT, AND HERE AGAIN, YOU ARE ATTACKING THE CONSTITUTIONALITY OF AN ACT, IF IT WERE A CRIMINAL PROCEEDING, WHETHER WE MAKE THAT DECISION OR NOT, THE SIXTH AMENDMENT SAYS THAT CRIMINAL PROCEEDINGS SHALL BE PUBLIC TRIALS, SO THAT IS NOT A -- THAT HAS BEEN A CONSTITUTIONAL VALUE AND CONSTITUTIONAL AMENDMENT, SINCE THE BEGINNING OF THIS REPUBLIC, BUT SINCE WE ARE, NOW, HERE, ON AN ADMITTEDLY CIVIL PROCEEDING, WHAT CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY THIS PROCEEDING, BY THE ACT OF THIS LEGISLATURE? ARE YOU ADVOCATING ON BEHALF OF THE RIGHT OF FREE PRESS, THE FIRST AMENDMENT? IS THAT WHAT -- SINCE IT IS NOT A SIXTH

AMENDMENT ISSUE, IS IT A FIRST-AMENDMENT ISSUE?

IT IS A FIRST-AMENDMENT ISSUE, ARTICLE I, SECTION FOUR OF THE FLORIDA CONSTITUTION. ITS FIRST AMENDMENT PROVISIONS. ITS ARTICLE I SECTION, I THINK IT IS SIX OF THE FLORIDA CONSTITUTION, THE DUE PROCESS ASPECT, AND ARTICLE I, SECTION 24, PUBLIC RECORDS ARE OPEN, BUT WHAT IS IT BASICALLY? IT IS A FIRST AMENDMENT ISSUE. THE PUBLIC HAS A RIGHT TO KNOW. THAT IS WHAT THESE CASES ARE ALL PREMISED UPON, AND THE NOTION IS THAT OPENNESS OF PUBLIC PROCEEDINGS MAKES PEOPLE REASSURED ABOUT THE INTEGRITY OF THOSE PROCEEDINGS, AND SO WHERE DOES THIS FIT? THIS IS A CIVIL CASE, BUT YOU KNOW, THE BURDEN OF PROOF, SANTOSKY VERSUS KRAMER, IT IS NOT A CIVIL CASE OF THE ORDINARY STRIPE. IT IS CERTAINLY NOT AN ADOPTION CASE.

IF IT IS A FIRST-AMENDMENT ISSUE, WHAT DOES THE STATE NEED TO SHOW TO UPHOLD THE CONSTITUTIONALITY?

A NARROWLY-TAILORED STATUTE AND UPHOLD THE PUBLIC INTEREST. THAT IS THE CASE. IT IS NOT NARROWLY TAILORED. WE ARE NOT SAYING THAT ALL DPR PROCEEDINGS ARE TO BE OPEN. WHAT WE ARE SAYING IS THAT THE JUDGE HAS TO HAVE THE DISCRETION AND THE ABILITY TO DECIDE IN WHICH CASES SOME OF THE PROCEEDINGS OR IF, INDEED, ALL OF THE PROCEEDINGS MAY NEED TO BE CLOSED, THE JUDGE WOULD HAVE THAT DISCRETION.

I FIND IT IRONIC IN THIS CASE, AND I THINK JUDGE FARMER COMMENTED ON IT, IN HIS OPINION FOR THE FOURTH DISTRICT, THAT YOUR CLIENTS, WHEN IT WAS A DEPENDENCY PROCEEDINGS, WHICH, AS YOU STATE, THE LEGISLATURE SAYS IT CAN BE OPEN, THAT YOUR CLIENTS SOUGHT TO CLOSE THE PROCEEDINGS, THEN WHEN IT TURNS INTO A TERMINATION, WHERE THERE IS THE STATUTE THAT SAYS IT SHOULD BE CLOSED, YOUR CLIENTS FIGHT THE CONSTITUTIONALITY. IS THERE ANYTHING IN THE RECORD THAT WOULD EXPLAIN THE LOGIC BEHIND THAT CHANGE IN POSITION?

THE FEAR OF A STAR CHAMBER PROCEEDING. THE CLIENTS, BEGINNING WITH A DEPENDENCY PROCEEDING, ASKED THAT IT BE CLOSED, AND THE IRONY CUTS IN FAVOR OF OUR ARGUMENT, AND THE COURT SAYS I CAN'T CLOSE, IT BECAUSE IT IS PRESUMPTIVELY OPEN, AND THEN AS THE CASE PROGRESSES, THE CLIENTS SAY WE WOULD LIKE ALL OF THIS TO BE OUT. IT IS ALREADY OUT. IT IS ALREADY IN THE PUBLIC. WE DON'T WANT TO BE THE VICTIMS OF A STAR CHAMBER PROCEEDING. LET THE PUBLIC KNOW WHAT IS GOING ON, AND THAT IS, REALLY, THE PRUGES BEHIND OPEN COURTS. THESE -- THE PRESUMPTION BEHIND OPEN COURTS. THESE ARE SERIOUS MATTERS. IF THE TPR PROCEEDING IS MERELY A FREIGHT TRAIN THAT IS GOING TO THE STATION OF DEPRIVING PARENTAL RIGHTS, THEN THERE IS NOT MUCH TO SAY ABOUT IT, BUT IF IT IS, AS THE STATUTES SET OUT, AN ADVERSARY PROCEEDING IN WHICH FUNDAMENTAL AND IMPORTANT RIGHTS ARE BEING DECIDED, THEN THE PUBLIC IS SERVED BY HAVING THESE BE OPEN AND KNOWN, BUT, OF COURSE --

IN THIS CASE WAS THERE ACTUALLY DEPENDENCY PROCEEDINGS, WHERE THE CHILDREN WERE ACTUALLY FOUND DEPENDENT, AND A CASE PLAN WAS INSTITUTED? ALL THAT?

THERE WAS, JUSTICE QUINCE. THERE WAS A DEPENDENCY PROCEEDING BEFORE.

AND THEN WHAT PERIOD OF TIME ELAPSED, BETWEEN THE DEPENDENCY PROCEEDINGS AND THE CHILD, THE CHILDREN OR CHILD BEING FOUND DEPENDENT AND THE TERMINATION PROCEEDING?

WELL, THE TERM -- I DON'T REMEMBER THE DATE IN WHICH THE TERMINATION PETITION WAS FILED, BUT SOME TIME LAPSEED AND THERE HAS NEVER, YET, BEEN A TERMINATION PROCEEDING.

SOME MONTHS OR YEARS?

AT LEAST MONTHS.

AND WAS THERE DIFFERENT EVIDENCE TO BE PRESENTED AT THE TERMINATION PROCEEDINGS, ADDITIONAL EVIDENCE THAT WAS BEYOND WHAT WAS PRESENTED AT THE DEPENDENCY?

YES. I AM SURE THERE WOULD BE ADDITIONAL EVIDENCE AT THE TERMINATION PROCEEDING. I THINK THAT, WHEN ONE LOOKS AT HYT, THE ADOPTION CASE, THE TWO CASES THAT I THINK FORM THE BOOK ENDS FOR THIS ARGUMENT ARE THE BARRON CASE, ON ONE SIDE, AND THE HYT CASE, AND IN THE HYT CASE, THE COURT SAID THAT THE CLOSURE OF ADOPTION CASES REFLECTS A POLICY THAT RECOGNIZES THAT ADOPTION PROCEEDINGS ARE QUALITATIVELY DIFFERENT N TYPICAL LITIGATION, THE COURTS HAVE THE DUTYTY TO RESOLVE THE COMPETING INTERESTS OF THE PARTIES, AND THAT IS THIS CASE. IN THIS CASE THERE ARE COMPETING INTERESTS OF THE PARTIES. IT MAY BE COUCHED IN BEST INTEREST OF THE CHILD, BUT OBVIOUSLY THERE ARE COMPETING INTERESTS HERE, FOR THE PARENTS TO BE THREATENED WITH LOSS OF THEIR PARENTAL RIGHTS.

I GATHER THAT YOU ARE CONCEDING THAT COMPELLING STATE INTEREST AND THE PRONG THAT YOU ARE ACTUALLY RELYING UPON HIS THE NARROWLY -- TAILORED. AM I CORRECT THERE?

IT IS.

HOW WOULD YOU DISTINGUISH THIS, REALLY, FROM THE LEGISLATURE FINDING A COMPELLING STATE INTEREST AND PUTTING A CAP ON PUNITIVE DAMAGES? THAT IS PRETTY BROAD. HERE THE STATE IS SAYING THAT, IN THE INTEREST OF CHILDREN AND THE GARRISH TYPE OF THINGS THAT CAN GO ON IN THESE PROCEEDINGS AND THE ANIMOSITY BETWEEN THE STATE AND THE PARENTS AND SO FORTH, IT IS BETTER TO HAVE THESE CLOSED, ALL OF THESE PROCEEDINGS, NOT ON A ONE-ON-ONE OR A PIECEMEAL OR INDIVIDUAL CASE BASIS? WHY DOESN'T THAT MEET TEST?

THE DISTINCTION, JUSTICE SHAW, IS THERE IS NO CONSTITUTIONAL RIGHT TO PUNITIVE DAMAGES, BUT THERE IS A CONSTITUTIONAL RIGHT TO HAVE AND LIVE WITH AND ASSOCIATE WITH ONE'S FAMILY, AND THAT IS THE STARTING POINT FOR THIS CASE, THE IMPORTANCE OF THE RIGHT THAT IS INVOLVED, AND THEN THE IMPORTANCE OF THE PUBLIC, BEING ALLOWED TO BE AWARE OF HOW THAT RIGHT IS BEING AFFECTED. INDEED THE WHOLE BASIS OF THE PRESUMPTION OF THE OPENNESS OF COURTS IS SO THAT THE PUBLIC CAN TRUST THAT PROCESS, AND TO CLOSE THE COURTS, AND A PER SE CLOSE YOUR, AND THAT IS WHAT WE ARE TALKING ABOUT, HERE, AND THAT IS WHY THIS IS A NARROWLY-TAILORED ARGUMENT THAT WE ARE MAKING, BUT THE PER SE CLOSE YOUR RUNS COMPLETELY COUNTERTO THE NOTION OF PUBLIC TRUST AND CONFIDENCE IN JUDICIAL PROCEEDINGS.

CAN YOU COME UP WITH ANY LOGICAL REASON, AND I WILL ASK THIS TO THE STATE, FOR WHY IT IS THAT, IN THE INITIAL STAGES OF THE DEPENDENCY PROCEEDING AND THE SHELTER PROCEEDING, THAT THE LEGISLATURE, IN ITS DECISION, CHOSE TO SAY THAT IT IS OPEN, UNLESS IT CAN BE CLOSED, AND THEN WHEN IT MOVES INTO TERMINATION, IT SHOULD BE CLOSED? CAN YOU EXPLAIN ANYTHING, FROM WHAT YOU UNDERSTAND ABOUT THE PENDENCY AND TERMINATION PROCEEDINGS THAT WOULD EXPLAIN THE LOGICAL BASIS FOR THAT DISTINCTION?

I CANNOT, JUSTICE PARIENTE, AND I LOOK FORWARD TO THE ANSWER FROM THE STATE, AS TO THAT QUESTION.

I WAS THINKING THAT, REALLY, ESPECIALLY IN THE INITIAL STAGES, WHERE THE STATE IS SEEKING SHELTER, THAT THAT MIGHT BE THE KIND OF PROCEEDING THAT REALLY SHOULD BE CLOSED, AND THAT ONCE THE DECISION HAS BEEN MADE TO MOVE INTO TERMINATION, I WOULD ASSUME IT WOULD ALMOST BE REVERSED, BUT MAYBE I AM MISSING SOMETHING.

TO ME IT IS AN IRONY IN THE STATUTORY SCHEME, THAT, AS I SAID EARLIER, IT CUTS IN FAVOR OF OUR ARGUMENT.

HAS THE LEGISLATURE CHOSEN TO HAVE PUBLIC HEARINGS ON THIS AND CONCLUDED FROM THOSE PUBLIC HEARINGS THAT IT IS IN THE BEST INTEREST OF ALL CONCERNED, THAT THESE HEARINGS BE CLOSED, WOULD THAT MAKE ANY DIFFERENCE?

NO, JUSTICE SHAW, IT WOULD NOT. THE TEST IS NOT WHAT THE PUBLIC HEARINGS SHOW OR WHAT THE PUBLIC MAY THINK IS BEST. THE TEST IS WHAT THE CONSTITUTION COMMANDS AND WHAT HISTORY COMMANDS, AND HISTORY COMMANDS OPENNESS. THERE IS AN INTERESTING ARTICLE THAT WE HAVE QUOTED, IN OUR BRIEF, AN ARTICLE THAT UCLA LAW REVIEW IN 1998, WHICH TALKS ABOUT HISTORICALLY THE CHANCE OR I COURTS PERFORMED -- THE CHANCERY COURTS PERFORMED THIS ROLE, AND HISTORICALLY THAT EVIDENCE WAS TAKEN IN OPEN COURTS.

I GUESS MY POINT IS THAT HOW DO WE DETERMINE WHETHER THE LEGISLATURE'S DETERMINATION THAT THIS IS A NARROWLY-LY TAILORED AS WE CAN -- AS NARROWLY-TAILORED AS WE CAN MAKE IT, TO MEET THE PUBLIC ON ITS FACE? HOW CAN WE SIT HERE AND MAKE THAT DETERMINATION?

BY LOOKING AT THE FACE OF THE STATUTE, WHICH, ON ITS FACE, MAKES CLEAR THAT IT IS NOT NARROWLY TAILORED. IT IS A PER SE RULE, AND MOVING FROM THERE TO BARRON AND THE BARRON SUPREME COURT CITATIONS AND THE MLB SUPREME COURT CASE, DEALING WITH PARENTAL TERMINATION RIGHTS, AND RECOGNIZING THAT THIS CONSTITUTIONAL RIGHT THAT IS AT STAKE IN THIS ADVERSARY PROCEEDING IN WHICH THE STATE IS THE MOVING PARTY, IS A RIGHT OF THE HIGHEST ORDER AND INVITES THE NOTION THAT YOU MUST MAKE THIS OPEN TO THE PUBLIC INAPPROPRIATE PROCEEDINGS. YOU CANNOT USE A PER SE RULE THAT ABSOLUTELY CLOSES IT. IT IS ANTI-THETICAL TO THE NOTIONS OF PUBLIC TRUST AND OPEN COURTS.

IF WE LEFT IT ON A CASE-BY-CASE BASIS, THEN PARENTS WHO DO NOT WANT THE GLARE OF THE PUBLIC AND THE PUBLICITY THAT WOULD CONCERN THEM, AS FAR AS IT TURNING INTO SOMETHING THAT IS MORE OF A MEDIA EVENT THAN IT IS AN ANALYSIS OF WHETHER THE CHILD'S BEST INTERESTS ARE BEING SERVED, THE COURT WOULD, REALLY, BE FACED WITH THIS VERY NARROW BARRON TEST, WHICH WOULD, AGAIN, PRESUME IT OPEN. DO YOU SEE THAT, OVERALL, AS BEING A GOOD PUBLIC POLICY FOR THESE KINDS OF PROCEEDINGS?

I THINK IT IS A GOOD PUBLIC POLICY, AND I THINK BARRON LAYS OUT THE GUIDELINES THAT THE COURT SHOULD USE, AND IT LEAVES IT TO THE DISCRETION TO THE WISE DISCRETION OF THE JUDGES WHO HAVE TO HEAR THESE CASES. THAT HAS BEEN THE WAY THESE MATTERS HAVE BEEN HANDLED FOR YEARS, AND THAT IS THE WAY THIS MATTER SHOULD BE HANDLED.

THANK YOU, MR. ROGOW. MR. FAHLBUSCH.

MAY IT PLEASE THE COURT. CHARLES FAHLBUSCH, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES IN THIS CASE.

DO YOU AGREE THAT WE FOLK OUST THAT PROBLEM?

NOT SOLELY, JUSTICE SHAW. FIRST OF ALL, THE FIRST PORTION OF PETITIONERS' ARGUMENT THAT THE CASE CLEARLY APPLIES TO PROCEEDINGS IN JUVENILES AND CHILDREN APPEARS TO BE SUBSTANTIALLY IN DOUBT. IT RESTS UPON PETITIONERS' ALLEGATION THAT BOTH CIVIL AND CRIMINAL TRIALS HAVE BEEN HISTORICAL OPEN PROCEEDINGS WITHIN THE UNITED STATES. HOWEVER THAT, IS NOT TRUE OF PROCEEDINGS INVOLVING CHILDREN AND JUVENILES. THERE IS NO SUCH TRADITION OF OPEN TRIALS IN SUCH PROCEEDINGS. THE OHIO SUPREME COURT HAS STATED, AND IN RE T. R., THE UNITED STATES SUPREME COURT HAS REPEATEDLY RECOGNIZED

THAT JUVENILE COURT PROCEEDINGS HAVE HISTORICALLY BEEN CLOSED TO THE PUBLIC. FURTHER, IT SEEMS CLEAR THAT PUBLIC ACCESS TO SUCH PROCEEDINGS DOES NOT NECESSARILY PLAY A POSITIVE ROLE IN THE JUVENILE COURT PROCESS.

THAT IS FOR THE SITUATION WHERE THE JUVENILE IS BE WILLING THE SUBJECT OF THE -- IS BEING THE SUBJECT OF THE CRIMINAL PROCEEDING?

THAT WAS A DELINQUENCY PROCEEDING, I BELIEVE.

DO YOU SEE A DIFFERENCE HERE, BECAUSE WHAT, AS I UNDERSTAND MR. ROGOW IS FOCUSING ON, IS THAT IN THIS SECOND STAGE OF THE PROCEEDING, THE FOCUS IS, REALLY, ON THE PARENTAL RIGHTS THAT ARE BEING TERMINATED, AND BECAUSE OF THAT, WE AFFORD, WE ACTUALLY AFFORD THE PARENTS' COUNSEL AND NOT, AT THIS STAGE, THE CHILD, SO THAT THE FOCUS, REALLY, IS ON THE PARENTS' RIGHTS. DOES THAT CHANGE THE FOCUS, AT ALL, FOR -- FROM A JUVENILE PROCEEDING?

CERTAINLY IT DOES MAKE IT DIFFERENT, JUSTICE, BUT THE FACT IS THAT DELINQUENCY PROCEEDINGS ARE EVEN MORE ANALOGY US TO THE CRIMINAL PROCEEDINGS THAT THE PETITIONERS HAVE BEEN RELYING ON, HERE, THAN TERMINATION OF PARENTAL RIGHTS FORM THE BEST INTEREST OF THE CHILD IS THE ABSOLUTE GUIDING OBJECT OF TERMINATION OF PARENTAL RIGHTS CASES.

BUT IN DELINQUENCY PROCEEDINGS, THE FOCUS IS ON THE CHILD THAT IS BEING ACCUSED OF MISCONDUCT, AND SO I AM NOT SURE THAT I UNDERSTAND YOUR ANALOGY HERE. THE FOCUS, HERE, THAT SOME RIGHTS, AND BY THE VERY NAME OF THE PROCEEDING, ITSELF, WE ARE TALKING ABOUT TERMINATION OF PARENTAL RIGHTS, SO THE FOCUS, HERE, IS ON THE PARENTS, AND WHETHER OR NOT WE ARE GOING TO TAKE AWAY THESE FUNDAMENTAL RIGHTS THAT THE PARENTS HAVE. IN A DELINQUENCY CASE, THE FOCUS IS ON A CHILD, BECAUSE OF SOME ALLEGED MISCONDUCT, AND WHETHER OR NOT, BECAUSE WE STILL WANT TO TRY TO REHABILITATE THAT CHILD, THAT WE WANT TO ADD, ALSO, THE AGGRAVATING CIRCUMSTANCE OF MAKING THAT VERY PUBLIC, WHICH IS ORDINARILY AN AGGRAVATING CIRCUMSTANCE TO HAS BEEN ILLTATION OR REBILL-- TO HABILITATION OR REHABILITATION, SO I AM HAVING TROUBLE WITH YOUR ANALOGY OF DELINQUENCY PROCEEDINGS. IS IT CORRECT -- HELP ME, IS IT CORRECT THAT DEPENDENCY PROCEEDINGS ARE OPEN TO THE PUBLIC?

GENERALLY, YES.

AREN'T DEPENDENCY PROCEEDINGS, DON'T WE ALL AGREE DEPENDENCY PROCEEDINGS ARE THE STARTING POINT IN THING THAT IS MAY, LATER, BE CONVERTED TO TERMINATION OF TERMINATION OF PARENTAL RIGHTS. ISN'T THAT THE CULTURE IN FLORIDA?

THAT IS CERTAINLY CORRECT, JUSTICE.

NOW, LET'S START WITH THE PROPOSITION, HOW DO YOU EXPLAIN THAT THE ENTIRE DEPENDENCY PROCEEDINGS CAN BE OPEN TO THE PUBLIC AND THAT THAT IS WHERE THESE THINGS, YOU KNOW, USUALLY START, AND THE ALLEGATIONS OF MISCONDUCT OR NEGLECT OR WHATEVER THAT MAY ULTIMATELY LEAD TO THE TERMINATION ARE COMPLETELY OPEN, SO THAT THAT CHAPTER IS VERY VISIBLE, OKAY, AND THEN WE HAVE THE TERMINATION PROCEEDINGS, WHICH ARE MORE OR LESS, AS YOU AND I APPRECIATE YOUR CANDOR, JUST AN EXTINCTION OF THE DEPENDANCY PROCEEDINGS -- AN EXTENSION OF THE DEPENDENCY PROCEEDINGS, THERE IS A NARROW THING THERE THAT ARE CLOSED, THEN IF A DECISION IS MADE TO CRIMINALLY PROSECUTE THE PARENTS, FOR ANY ALLEGED MISCONDUCT IN THESE, THAT THOSE ARE ALL OPEN. NOW, JUST ON A RATIONAL LEVEL, I WANT YOU TO GIVE ME YOUR BEST ANSWER TO HOW IS THAT JUSTIFIED? IF EVERYTHING IN THE FRONT END IS OPEN, EVERYTHING IN THE CRIMINAL PROCEEDINGS ARE OPEN, NOW, HOW DO WE JUSTIFY THIS LITTLE

PIECE OF IT, WHEN THE STATE IS TRYING TO TAKE AWAY THE PARENTAL RIGHTS OF THESE PEOPLE, THAT THOSE PROCEEDINGS ARE MANDATORILY PER SE CLOSED, WITHOUT ANY, YOU KNOW, CONSIDERATIONS OF FACTORS?

I JUSTIFY IT ON TWO BASES, JUSTICE ANSTEAD. FIRST, THE FACT IS THAT THERE ARE SUBSTANTIAL AMOUNTS OF EVIDENCE WHICH IS RELEVANT AND WOULD BE PRESENTED AT TPR PROCEEDINGS THAT WOULD NOT BE RELEVANT IN EITHER DEPENDENCY PROCEEDINGS OR CRIMINAL PROCEEDINGS, AND THIS KIND --

SUCH AS?

SUCH AS PSYCHIATRIC EVIDENCE CONCERNING THE CHILD. PSYCHOLOGICAL EVIDENCE CONCERNING THE CHILD. MEDICAL RECORDS CONCERNING THE CHILD. TO A SUBSTANTIAL EXTENT, THESE ARE PRECISELY THE KIND OF EVIDENCE THAT IS MOST LIKELY TO BE DESTRUCTIVE TO THE CHILD'S FUTURE DEVELOPMENT, IF IT IS PUBLICIZED, AND THIS IS THE KIND OF EVIDENCE THAT YOU ARE EXTREMELY LIKELY TO SEE --

WHY WOULDN'T THAT EVIDENCE BE RELEVANT IN THE DEPENDENCY CASES?

SOME OF IT CERTAINLY COULD BE, JUSTICE, BUT THE FACT IS THAT THE ESSENCE OF A DEPENDENCY CASE IS WHETHER OR NOT THE PARENTS ARE CAPABLE OF ADEQUATELY SUPERVISING THE CHILD, NOT WHETHER THE PARENTAL RELATIONSHIP NEEDS TO BE PERMANENTLY SEVERED, AND AS A RESULT, WHILE IT MIGHT BE RELEVANT, THERE ARE SUBSTANTIAL AMOUNTS OF IT WHICH WOULD NOT BE RELEVANT AND WOULD NOT BE NECESSARY, SINCE WHAT THE DEPARTMENT IS TALKING ABOUT IS THE CAPABILITY OF THE PARENTS TO SUPERVISE THE CHILD, RATHER THAN THE NECESSITY TO ENTIRELY TERMINATE THE RELATIONSHIP.

YOU ARE TELLING US THAT THE DEPARTMENT OF CHILDREN AND FAMILIES, IF THEY KNOW THAT THERE IS INFORMATION, THERE, ABOUT THE CHILD'S PSYCHOLOGICAL WELL-BEING OR THE FOCUS OR WHAT THE PARENTS HAVE DONE TO THE CHILD, THAT SOMEHOW THEY HOLD THAT BACK FROM THE COURT IN THE DEPENDENCY PORTION OF THE PROCEEDINGS?

NOT NECESSARILY, JUSTICE.

BUT ISN'T THAT -- I MEAN YOUR ARGUMENT THAT THERE COULD BE PARTS OF THE TERMINATION PROCEEDING WHERE EVIDENCE IS PRESENTED THAT WASN'T KNOWN IN THE DEPENDENCY PROCEEDING, THAT WOULD BE, ISN'T THAT EXACTLY WHAT COULD OCCUR, IF YOU HAD THIS ADDRESSED TO THE SOUND DISCRETION OF THE COURT? THIS IS NOW WE HAVE SOMETHING SO DAMAGING, THAT IF THIS WAS OUT, THAT THERE WOULD BE SOME OTHER HARM THAT WOULD OCCUR, AND THAT WOULD CAUSE THE COURT, THEN, TO CLOSE THAT PORTION OF THE PROCEEDINGS. ISN'T THAT, REALLY, THE WAY YOU DEAL WITH THAT PROBLEM, AS OPPOSED TO PRESUMPTIVELY SAY, WHEN WE GET INTO TERMINATION, WE HAVE A WHOLE DIFFERENT SET OF EVIDENCE THAT IS DIFFERENT FROM THE EVIDENCE THAT WAS PRESENTED IN THE DEPENDENCY? I MEAN, I HAVE NEVER, IN MY EXPERIENCE AT THE FOURTH DISTRICT, THAT WAS NEVER THE CASE, THAT THE SAME EVIDENCE THAT WAS USED IN THE DEPENDENCY IS WHAT WAS USED IN THE TERMINATION. I MEAN WHERE DO YOU GET -- WHERE DOES THAT COME FROM?

THAT APPEARS, WITH SIGNIFICANT EXTENT, NOT TO HAVE BEEN THE CASE, FOR EXAMPLE, IN THIS SITUATION.

BUT ISN'T THAT THE NORMAL RULE? THAT IS THE NORMAL RULE IS THAT ALL OF THE THINGS THAT HAVE HAPPENED, THE NEGLECT AND THE ABUSE AND ALL OF THOSE KINDS, FORM THE BASIS FOR THE DEPENDENCY PROCEEDINGS, AND, REALLY, THE TERMINATION PROCEEDINGS USUALLY ARE INITIATED OUT OF FRUSTRATION, THAT THIS POOR CHILD HAS BEEN IN A FOSTER

HOME OR MANY FOSTER HOMES OR WHATEVER, AND THE PARENTS HAVE SIMPLY SHOWN NO ABILITY TO SHAPE UP. ISN'T THAT SORT OF THE STANDARD CASE THAT GOES INTO TERMINATION?

IT FREQUENTLY HAPPENS, ALTHOUGH I AM NOT PREPARED TO STIPULATE THAT IT IS WHAT HAPPENS IN A VAST MAJORITY OF CASES, BUT AS JUDGE FARMER POINTED OUT IN THE FOURTH DISTRICT OPINION, THE TERMINATION PROCEEDINGS IS EVEN MORE LIKELY, POSSIBLY SUBSTANTIALLY MORE LIKELY TO RESULT IN THE PRESENTATION OF EVIDENCE THAT IS LIKELY TO BE DAMAGING OR DESTRUCTIVE TO THE CHILD IN THE FUTURE, THAN THE DEPENDENCY PROCEEDING WAS.

WHY DO WE RECOGNIZE ALL OF THESE OTHER RIGHTS? THAT IS THE RIGHT TO COUNSEL. WE HAVE A MUCH GREATER BURDEN OF PROOF. WHY DO WE DO THAT? IN TERMINATION CASES.

WE DO IT BECAUSE OF THE SIGNIFICANCE OF THE RIGHTS OF CONCERN, AROUND CERTAINLY THERE ISN'T ANY QUESTION THAT THE TERMINATION OF THE FAMILY RELATIONSHIP IS SIGNIFICANT. HOWEVER, THE FACT IS THAT THE PURPOSE OF THE PROCEEDING IS NOT TO PUNISH PARENTS. IT IS TO THE MANIFEST BEST INTEREST OF THE CHILD, AND, INDEED, GOING BACK TO THE ANALOGY WITH DELINQUENCY THAT WE WERE TALKING ABOUT, THERE WE HAVE A CASE WHERE POTENTIALLY THE ACTUAL PHYSICAL LIBERTY OF THE CHILD INVOLVED CAN BE TAKEN AWAY, AND DESPITE THAT FACT, IT APPEARS, AT LEAST, ACCORDING TO BOTH THE ROAD ISLAND AND THE VERMONT SUPREME COURTS AND DISCUSSIONS BY THE UNITED STATES SUPREME COURT, SUCH PROCEEDINGS MAY BE REQUIRED BY MANDATORY STATUTE TO BE CONFIDENTIAL. THEREFORE, WHAT WE ARE TALKING ABOUT, ACTUAL LIBERTY, THAT, CERTAINLY, WOULD BE MORE ANALOGY GUST TO A CRIMINAL CASE THAN TERMINATION OF PARENTAL RIGHTS CASES.

AREN'T WE, ALSO, INDULGING IN SOMETHING OF A CHARADE, HERE, ABOUT THE PRIVACY OF THESE PROCEEDINGS, AND THAT IS BECAUSE THEY ARE JUST AN EXTENSION OF THE DEPENDENCY, IN THE ORDINARILY -- IN THE ORDINARY CASE ACTION AND THEY GO ON TO APPEAL, FOR INSTANCE, AND WHETHER IT IS OPINION WRITTEN BY THE COURT OF APPEALS OR AN OPINION WRITTEN BY THIS COURT, IT IS VERY EASY TO KNOW WHAT THE DEPENDENCY WAS OR WHATEVER, EVEN IF THE INITIALS ARE USED IN THE CASE, IS IT NOT? BECAUSE IT IS BASICALLY AN EXTENSION OF THE SAME CASE, AND SO YOU CAN READ THE OPINION THAT DESCRIBES ALL THE FACTS AND CIRCUMSTANCES AND EVERYTHING IN A DISTRICT COURT OF APPEAL OPINION AND RELATE IT DIRECTLY, CAN YOU NOT?

WELL, YOU CAN FREQUENTLY TELL WHICH CASE IS BEING TALKED ABOUT, JUSTICE, BUT TO SAY THAT YOU CAN READ, IN THE APPELLATE OPINION, THE CONFIDENTIAL EVIDENCE WHICH WAS PRESENTED AT THE TERMINATION PROCEEDING, APPEARS NOT TO BE THE CASE, SO THAT THE PURPOSE OF THE MANDATORY CLOSE YOUR THAT THE LEGISLATURE HAS SAID IS THE PROPER POLICY, APPEARS TO BE MAINTAINED, EVEN THOUGH WE HAVE APPELLATE PROCEEDINGS AND APPELLATE OPINIONS CONCERNING THE SAME CASE.

SO WHY DON'T WE CLOSE DEPENDENCY PROCEEDINGS AND WHY DON'T WE CLOSE CRIMINAL TRIALS?

ACTUALLY WITH REGARD TO DEPENDENCY PROCEEDINGS, WE DID CLOSE DEPENDENCY PROCEEDINGS, UP UNTIL 1994, AND THAT WAS HELD SPECIFICALLY TO BE CONSTITUTIONAL. IN THE MAYOR CASE, THE SECOND DISTRICT REVIEW WAS DISMISSED. NOW, WITH REGARD TO THOSE, THE LEGISLATURE DECIDED THAT IT COULD OPEN UP AT LEAST SOME SIGNIFICANT PORTION OF IT, AND THE STATUTE WAS AMENDED IN 1994. NOW, WITH REGARD TO --

WHY WAS IT? IF IT WAS UPHELD, IT USED TO BE PER SE CLOSE YOUR IN DEPENDENCY. THE SECOND DECLARED THAT CONSTITUTIONAL. WHY WAS IT THAT THE LEGISLATURE DECIDED, THEN, TO PRESUMPTIVELY PUT DEPENDENCY PROCEEDINGS OPEN?

THE LEGISLATIVE HISTORY DOESN'T SPECIFICALLY TELL US, SO IT WOULD HAVE TO BE SPECULATIVE, BUT IT WOULD APPEAR THAT A POLICY DECISION COULD HAVE BEEN MADE THAT THE KINDS OF EVIDENCE LIKELY TO BE DAMAGING TO THE CHILD IN THE LONG-TERM WOULD BE MORE LIKELY TO BE PRESENTED DURING THE TERMINATION PHASE OF THE PROCEEDINGS THAN IT WOULD BE DURING THE DEPENDENCY PHASE.

HOW ABOUT THE SUPERVISION OF THE AGENCY INVOLVED? IN OTHER WORDS ISN'T IT COMMON KNOWLEDGE THAT A MAIN FACTOR DRIVING THE OPENNESS OF PROCEEDINGS IS TO BE SURE THAT WE LOOK AT THE GOVERNMENT AND SEE WHETHER THE GOVERNMENT IS DOING THE RIGHT THING? AND THAT THAT HAS A VERY POWERFUL EFFECT, AND ISN'T THAT AT WORK IN LOTS OF THESE PROCEEDINGS HERE? THAT IS THIS IS A WAY FOR THE PEOPLE TO CHECK THE WORK OF THEIR AGENCIES AND TO SEE WHETHER THEY ARE ABUSING OR NOT ABUSING OR WHATEVER? ISN'T IT A VERY GOOD WAY?

IT IS A GOOD WAY BUT CERTAINLY IT IS NOT THE ONLY WAY.

WHY SHOULDN'T IT BE A WAY HERE?

IT SHOULDN'T BE AWAY HERE, BECAUSE THE STATUTE CONCERNED IMPLEMENTS THE CONSTITUTIONAL RIGHT OF CHILDREN TO PRIVACY, UNDER ARTICLE I SECTION 23 OF THE FLORIDA CONSTITUTION, AND IT PROTECTS THE CHILD FROM THE REVELATION OF INFORMATION THAT IS ALMOST GUARANTEED TO BE A LONG-TERM DAMAGING TO THE CHILD.

ARE THERE CRIMINAL PENALTIES IF DISCLOSING WHAT WENT ON IN A TERMINATION?

NOT THAT I AM AWARE OF, JUDGE, BUT CERTAINLY CONTEMPT WOULD BE A POSSIBILITY. THE FACT IS THAT THE LEGISLATURE MADE A POLICY DECISION. IT APPEARS TO BE AN IMMINENTLY REASONABLE POLICY DECISION THAT THE LEGISLATURE, AFTER IT COULD FOLLOW THE LEGISLATIVE PROCESS, HERE, HEAR FROM ALL THE INTERESTS CONCERNED, HOLD HEARINGS FOR HOWEVER LONG IT WANTED, DECIDED THAT THE BEST WAY TO SOLVE THIS PROBLEM, THE CLASH BETWEEN THE ANGLO AMERICAN TRADITION FOR OPEN TRIALS AND THE NECESSITY FOR PROTECTING CHILDREN FROM THE REVELATION OF PRIVATE, PERSONAL AND DESTRUCTIVE INFORMATION.

JUSTICE WELLS HAS TRIED AND JUSTICE SHAW AND THEN YOU.

WOULD YOU ADDRESS MR. ROGOW'S ARGUMENT, AS TO WHY THIS ISN'T PAINTING WITH TOO BROAD A BRUSH HERE, AND THAT IT, REALLY, IS NOT NARROWLY TAILORED, SO THAT THE TRIAL JUDGE HAS ANY DISCRETION.

CERTAINLY, JUSTICE. TWO REASONS. FIRST, THE UNDERPINNING OF MR. ROGOW'S ARGUMENT IS THAT THE FIRST AMENDMENT APPLIES TO PROCEEDINGS INVOLVING CHILDREN AND JUVENILES, AND THAT WOULD APPEAR TO BE AN UNTOWARD ASSUMPTION, GIVEN THAT THE UNITED STATES SUPREME COURT AND VIRTUALLY ALL OF THE STATE SUPREME COURTS WHICH HAVE DEALT WITH THE ISSUE, INDICATE THAT THAT IS NOT TRUE IN PROCEEDINGS INVOLVING CHILDREN AND JUVENILES. BUT SECONDLY, EVEN IF IT WERE TRUE, THE THERE -- THERE IS NO QUESTION HERE THAT THERE IS A COMPELLING STATE INTEREST AND THAT AN EXTREMELY REASONABLE WAY, PERHAPS THE ONLY WAY TO ENSURE PROTECTION OF CHILDREN FROM THE REVELATION OF DESTRUCTIVE INFORMATION IS A MANDATORY CLOSE YOUR. WE KNOW, FOR EXAMPLE, THAT, IF WE HAVE A SITUATION WHERE THE JUDGE CAN DISCRETIONARY OPEN, THEN THE CHILDREN, THE PARENTS OF THE CHILDREN, RATHER, HAVE A MOTIVATION, SUBSTANTIAL MOTIVATION, TO THROW OUT AS MUCH EMBARRASSING AND PERSONAL INFORMATION DURING THE DEPENDENCY PHASE OF THE PROCEEDINGS AS THEY POSSIBLY CAN, SO THAT THEY CAN ARGUE, JUST AS THE PARENTS DID IN THIS CASE, THAT, WELL, THERE IS NO SENSE IN CLOSING THE TERMINATION, BECAUSE WE HAVE ALREADY PUBLICIZED EVERYTHING THAT YOU ARE GOING TO GET OUT

DURING THE TERMINATION PHASE. OBVIOUSLY THE MANDATORY CLOSE YOUR OF TERMINATION IS DESIGNED TO PROTECT CHILDREN FROM THE REVELATION OF THIS INFORMATION, NOT ONLY DURING THE TERMINATION PHASE BUT DURING THE DEPENDENCY PHASE, AS WELL, AND WHAT MIGHT WELL BE NARROWLY TAILORED TO PROTECT CHILDREN'S INTERESTS, AT NARROWLY TAILORED AS MR. ROGOW FEELS THAT STATUTES ARE REQUIRED TO BE. ALSO --

JUSTICE SHAW.

HE ANSWERED MY QUESTION.

ALSO THERE IS SUBSTANTIAL AMOUNTS OF RELEVANT INFORMATION WHICH IS UNLIKELY TO BE PRESENTED AND WHICH THE COURT MAY NEVER KNOW ABOUT IN THE TERMINATION PROCEEDINGS, IF THE POSSIBILITY OF OPENNESS EXISTS THERE. THE CHILD, THE CHILD'S GUARDIAN, THE CHILD'S ATTORNEY ALL ARE EXTREMELY UNLIKELY, FOR EXAMPLE, TO WAIVE PRIVILEGE WITH REGARD TO PSYCHOLOGICAL, PSYCHIATRIC, MEDICAL INFORMATION. THE PRESENTATION OF WHICH MAY WELL BE IN THE CHILD'S BEST INTEREST, BUT THE PUBLICATION OF WHICH IS NOT. THIS IS A KIND OF --

YOU SAID, EARLIER, THAT THERE WERE TWO REASONS WHY IT IS GOOD TO HAVE TERMINATION OF PREBT ALTO-OF PARENTAL RIGHTS CASES CLOSED AND NOT -- OF PARENTAL RIGHTS CASES CLOSED AND NOT DEPENDENCY, ONE OF WHICH YOU SAID WAS KIND OF EVIDENCE THAT MAY COME IN. WHAT IS THE SECOND REASON THAT WE SHOULD CONTINUE TO HAVE TERMINATION OF PARENTAL RIGHTS CASES CLOSED?

THE SECOND REASON WAS THAT THIS -- IT PREVENTS THE KIND OF MOTIVATION THAT I WAS TALKING ABOUT, JUSTICE QUINCE, WHERE, IF THEY ARE POTENTIALLY OPEN, THEN WE FIND THE KIND OF ARGUMENT THAT THE PARENTS MADE IN THIS CASE. WE HAVE ALREADY PUBLICIZED OR AT LEAST THERE THE HAS BEEN PUBLICIZED SO MUCH PERSONAL INFORMATION ABOUT OUR CHILD DURING THE DEPENDENCY CASE, THAT THERE REALLY ISN'T ANY PARTICULAR SENSE IN CLOSING THE TERMINATION PROCEEDINGS. NOW, THIS IS AN ISSUE WHICH THIS COURT DEALT WITH SPECIFICALLY IN HYT AND SAID THIS IS IMPROPER, TO PLACE THE BURDEN ON THE CHILD TO PROTECT THE CHILD'S OWN PRIVATE INFORMATION, WHERE THIS INFORMATION IS IN A POSITION TO BE TURNED INTO ESSENTIALLY A MEDIA CIRCUS, PRIOR TO THE TIME THAT THE ADOPTION PROCEEDINGS EXISTED.

LET ME ASK YOU A PRACTICAL QUESTION HERE. IN THESE PROCEEDINGS, IS THERE A GUARDIAN AD LITEM APPOINTED FOR THE CHILD, OR IS THE STATE --

YES, THERE WAS, JUSTICE.

SO THEORETICALLY, IF THERE IS SOME INFORMATION THAT IS LIKELY TO BE DAMAGING TO THE CHILD, A GUARDIAN AD LITEM IS THERE TO PROTECT A CHILD'S INTEREST AND COULD, IN FACT, FILE SOME MOTION TO CLOSE THE PROCEEDINGS.

THAT WOULD BE TRUE. AS A MATTER OF FACT, THE GUARDIAN AD LITEM IN THIS CASE DID SUPPORT CLOSE YOUR, BUT I WOULD, ALSO, LIKE TO POINT OUT THAT THE GUARDIAN AD LITEM IS LIKELY TO NEVER KNOW ABOUT THIS KIND OF INFORMATION, IF THE POSSIBILITY OF OPENING THE PROCEDURE EXISTS, BECAUSE THE MOTIVATION FOR THE CHILD, IF THE CHILD KNOWS THAT POSSIBILITY EXISTS, IS -- WOULD BE TO JUST NOT REVEAL IT AT ALL.

I AM STILL HAVING A PROBLEM, I THINK, STILL, TO ME, AT LEAST, IT WOULD BE ON STRONGER GROUND, IF THE LEGISLATURE HAD JUST KEPT AND SAID THEY ARE ALL CLOSED, AND I AM STILL HAVING PROBLEM WITH THIS IDEA THAT SOMEHOW WHAT IS BEING ENCOURAGED, THAT IN THE DEPENDENCY PROCEEDING THE DEPARTMENT OF CHILDREN AND FAMILIES WOULD SORT OF HAVE TO, UNDER YOUR THEORY, WOULD HAVE TO HOLD BACK DAMAGING INFORMATION, BECAUSE

THAT DAMAGING INFORMATION WILL GET OUT TO THE PUBLIC AND TO THE CHILD, AND SO THEY WILL HAVE TO HOLD IT BACK ALL DURING THE DEPENDENCY, BUT ISN'T THAT EXACTLY WHEN THAT INFORMATION IS NEEDED TO ASSESS WHETHER THERE IS GOING TO BE CONVERTED IMMEDIATELY INTO A TERMINATION, WHETHER THE CHILD IS GOING TO BE TAKEN INTO SHELTER, WHAT THE CASE PLAN IS GOING TO BE? DON'T WE NEED ALL THAT INFORMATION AT THAT STAGE?

WE MAY OR MAY NOT, ALTHOUGH IT IS SOMEWHAT SPECULATIVE, BUT I WOULD LIKE TO POINT OUT THAT THIS IS NOT AN EQUAL PROTECTION ARGUMENT, IN THAT THE QUESTION IS NOT, WELL, CAN YOU OPEN DEPENDENCY AND CLOSE TERMINATION. IT IS WHETHER YOU CAN CONSTITUTIONALLY CLOSE TERMINATION PROCEEDINGS.

WHAT WE ARE LOOKING AT IS HOW CAN THERE BE A COMPELLING STATE INTEREST? THE MOMENT THE FOCUS OF THE PROCEEDINGS TURN FROM THE BEST INTEREST OF THE CHILD, PRIMARILY IN THE DEPENDENCY, TO FOCUS ON TERMINATING PARENTAL RIGHTS, WHICH IS A CONSTITUTIONALLY-PROTECTED RIGHT, IS WHEN WE DECIDE TO CLOSE THE PROCEEDING, WHEN WE ARE CHANGING THE FOCUS TO THE RIGHTS OF THE PARENT.

THE OVERALL PURPOSE, OF COURSE, CONTINUES TO BE THE MANIFEST BEST INTEREST OF THE CHILD, BUT THE ANALYSIS THAT JUDGE FARMER MADE IN THE DISTRICT COURT OPINION WOULD APPEAR TO BE APPLICABLE, WHERE HE POINTS OUT THAT WE ARE EVEN MORE LIKELY, DURING THE TERMINATION PHASE, TO SEE THE KIND OF EVIDENCE PRESENTED, WHICH IS LIKELY TO BE DAMAGING TO THE CHILD, AND THAT BEING THE CASE, THE LEGISLATURE MADE AN IMMINENTLY REASONABLE CHOICE, WHEN IT DETERMINED THE CLOSED TERMINATION OF PARENTAL RIGHTS PROCEEDINGS. THE FACT IS THAT PROCEEDINGS INVOLVING CHILDREN OR JUVENILES HAVE TRADITIONALLY BEEN CLOSED. THIS DOES THAT. IT IS IMMINENTLY REASONABLE, AND IT DOES PROMOTE AN ABSOLUTELY COMPELLING STATE INTEREST. THEREFORE THE STATUTE OUGHT TO BE FOUND CONSTITUTIONAL, BECAUSE THE BURDEN OF PROVING IT THAT IT IS UNCONSTITUTIONAL HASN'T BEEN MET BY THE PETITIONERS IN THIS CASE. THANK YOU.

THANK YOU, COUNSEL. REBUTTAL.

MR. FAHLBUSCH BEGAN WITH DECISIONS USED IN AN OHIO CASE, AND IN THAT WE ADDRESSED THE OHIO DECISION, AND I WANT TO READ ONE SENTENCE OF IT. CLOSE YOUR SHALL BE MADE ON THE TOTALITY OF THE CIRCUMSTANCE, ON A CASE-BY-CASE BASIS, AND THAT CLOSE IS IN OUR REPLY BRIEF. I STARTED WITH BARRON AND I WANT TO END WITH BARRON.

YOUR OPPOSITION IS SUGGESTING THAT, WHEN YOU ARE DEALING WITH JUVENILE TYPES OF PROCEEDINGS AND DEALING WITH CHILDREN, THAT WE ARE DEALING IN A DIFFERENT AREA AND YOU ARE AT A DIFFERENT STARTING PLACE, SO YOU ARE VIEWING IT WITH THE FOCUS ONLY FROM THE PARENTS' PERSPECTIVE, USING MLB, THE DUE PROCESS RIGHTS, TO RECOGNIZE THAT KIND OF RIGHT. AT WHAT STAGE, WHERE IS YOUR RESPONSE TO HIS INITIAL STATEMENT THAT YOU HAVE TO LOOK AT THIS FROM THE JUVENILE PERSPECTIVE AND WHAT HAS HAPPENED HISTORICALLY AND LEGALLY FROM THAT PERSPECTIVE?

I AM HAPPY TO LOOK AT IT THAT WAY, JUSTICE LEWIS, AS LONG AS IT IS A NARROWLY-TAILORED STATUTE THAT ALLOWS THE COURT DISCRETION TO ADDRESS THE COMPETING INTERESTS. I DON'T THINK IT MAKES ANY GREAT DIFFERENCE ABOUT WHAT HAS HAPPENED HISTORICALLY IN JUVENILE DELINQUENCY PROCEEDINGS, WHICH BEGAN IN 1899. THAT IS THE FIRST JUVENILE COURT IN THIS COUNTRY. THE TRUTH IS JUVENILE PROCEEDINGS ARE OPEN, TOO, UNDER THE STATUTES, AND SO THE PRESUMPTION HAS GROWN, OVER THE YEARS, INTO THE NEED FOR OPENNESS, SO I AM NOT TROUBLED, AT ALL, BY THE HISTORY. I THINK, ACTUALLY, HISTORY CUTS MORE IN OUR FAVOR, BUT I WANT TO GO BACK TO BARRON, AND THE END OF BARRON. THE END OF BARRON, JUSTICE BARKETT'S SPECIAL CONCURRENCE, IN WHICH SHE SAYS, TALKING ABOUT THE NEED FOR OPENNESS, THAT MAYBE IT WASN'T SO IMPORTANT TO HAVE OPENNESS IN A

DIVORCE PROCEEDING, BUT SHE SAYS THAT WHEN THE ISSUE DOES INVOLVE GOVERNMENT, INQUEST AND INQUEST AFFECTING THE GENERAL PUBLIC, THEN OPENNESS WOULD BE SOMETHING THAT WOULD BE CALLED FOR, AND THAT IS IN HER SPECIAL CONCURRENCE. SHE TALKS ABOUT THE INVOLVEMENT OF THE GOVERNMENT. AND JUSTICE McDONALD DISSENTING HAS A FOOTNOTE IN HIS ACCIDENT, AND HE SAYS I FULL -- IN HIS DISSENT, AND HE SAYS I FULLY AGREE THAT THE PUBLIC HAS ACCESS TO CRIMINAL CASES BECAUSE THE PUBLIC, IN EFFECT, IS A PARTY TO CRIMINAL CASES, AND HERE IS THE IMPORTANT SENTENCE, WHICH ADDRESSES EXACTLY WHAT WE ARE TALKING ABOUT HERE, SUCH A SITUATION MAY EXIST IN SOME TYPES OF CIVIL CASES, AND THAT IS THIS CASE. THIS IS A CIVIL CASE OF A SPECIAL NATURE. AND THE NEED FOR OPENNESS IS SUPPORTED BY BARRON AND THE DISCUSSION THE SUPREME COURT CASES ABOUT THE IMPORTANCE TO GENERAL PUBLIC OF HAVING THESE PROCEEDINGS OPEN, WITH THE DISCRETION IN THE TRIAL COURT, TO CLOSE PORTIONS OF IT, WHEN NECESSARY.

LET ME MAKE SURE ABOUT SOMETHING. YOU ARE SAYING AND TRYING TO UNDERSTAND WHERE THE STARTING POINT IS. IF WE PRESUME THAT ALL TRIALS ARE OPEN, CIVIL OR CRIMINAL, YOU DO AGREE, THOUGH, BECAUSE THE PRIMARY FOCUS OF THIS PROCEEDING, THE DEPENDENCY TERMINATION, PARENTAL RIGHTS, IS TO LOOK AT THE BEST INTEREST OF THE CHILD, THAT THAT SHOULD BE THE FOCUS OF THE COMPELLING STATE INTEREST.

THE BEST INTEREST OF THE CHILD IN MAKING THIS DECISION, YES, SHOULD BE THE FOCUS.

THANK YOU, COUNSEL. THANKS TO BOTH OF YOU FOR YOURANCES ANSWER. NEXT CASE ON THE COURT -- FOR YOUR ASSISTANCE.