IN THE SUPREME COURT OF FLORIDA

FLOYD CLEMENTS,
Appellant,

vs. CASE NO.: SC96,670

STATE OF FLORIDA,
Appellee.
_____/

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) ON THE MERITS ON BEHALF OF PETITIONER

On Appeal from the Fifth District Court of Appeal

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STATEMENT OF INTEREST OF AMICUS CURIAE: FACDL

FACDL is a statewide organization of about 1,200 criminal defense lawyers. A primary purpose of FACDL is to protect the fair and constitutional rights of criminal Defendants and all other Florida citizens. The issue in this case is whether the trial court improperly closed part of the trial pursuant to Section 918.16, Florida Statutes; the issue is whether this closure violated the right to a public trial under the Florida and United States Constitutions. Some of the persons excluded from the trial were lawyers. Therefore, FACDL has an interest in the outcome of this case.

CERTIFICATION OF TYPE SIZE AND FONT

Appellant certifies the type size and font used in this brief is Courier 12.

STATEMENT OF THE CASE AND FACTS

FACDL adopts the statement of the case and facts in Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

This court should quash the opinion of the Fifth District Court of Appeal. Section 918.16, Florida Statutes is unconstitutional on its face because it does not require a consideration of the balancing factors enunciated in Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) and Press - Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The Fifth District Court of Appeal below held that Section 918.16 did not require such a balancing test.

Section 918.16, as construed, violated the separation of powers doctrine. Section 918.16 adjudicates constitutional rights by legislative fiat; Section 918.16 does not permit a court to consider the constitutional factors mandated by the United States Supreme Court. Only the courts have the authority to interpret and apply constitutional guarantees. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 2d 60 (1803). Section 918.16 prohibits a court from adjudicating the rights of the public, a witness and a criminal defendant under the Sixth Amendment to the United States Constitution. See Williams V. State, 736 So.2d 699 (Fla. 4th DCA 1999). Therefore, Section 916.18 violates the doctrine of separation of powers under Article II Section 3 of the Florida

Constitution and violates Petitioner’s right to a public trial under the Sixth Amendment to the United States Constitution.

I.

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN CLEMENTS V. STATE, 742 So.2D 338 (Fla. 5th DCA 1999), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN PRITCHETT V. STATE, 566 So.2D 6 (Fla. 2d DCA) Review dismissed, 570 So.2d 1306 (Fla. 1990) and THORNTON V. STATE, 585 So.2d 1889 (Fla. 2d DCA 1991), ON THE ISSUE OF A DEFENDANT'S RIGHT TO HAVE A REQUESTED HEARING BEFORE THE TRIAL JUDGE ORDERS A PARTIAL CLOSURE OF THE COURTROOM DURING A CHILD VICTIM'S TESTIMONY PURSUANT TO SECTION 918.16 FLORIDA STATUTES.

A. The decision in Clements v. State, 742 So.2d 338 (Fla. 5th DCA 1999) renders Section 918.16, Florida Statutes unconstitutional on its face.

1. The decision below.

The Fifth District Court of Appeal in Clements v. State, decided that a trial court need not conduct the four-factor inquiry of Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) if there is a partial closure entered pursuant to Section 918.16, Florida Statutes. The Fifth District Court of Appeal also noted that Section 918.16 contained a compelling state interest in protecting younger children while testifying about a sexual offense and Section 918.16 was narrowly drawn to ensure that a Defendant's right to an open trial is protected - there is a partial closure only during the limited time a child under 16 years of age testifies about a sexual offense. The Clements court further noted

only those with no direct interest in the case are excluded - the press, as the eyes and ears of the public, may remain.

In Waller v. Georgia, supra, and Press - Enterprise Co. V. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) the United States Supreme Court held that any closure of a trial is subject to a four part test: 1) party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced 2) the closure must be no broader than necessary to protect that interest 3) the trial court must consider reasonable alternatives to closure 4) it must make findings adequate to support the closure. The court below also cited Douglas v. Wainwright, 739 F. 2d 531 (11th Cir 1984), cert. denied, 469 U.S. 1208, 105 S. Ct. 1170, 84 L. Ed. 2d 321 (1985) for the proposition that if there is a partial closure then there need only be a substantial rather than compelling reason for closure and the court must look to particular safeguards to see if the Defendant still received the safeguards of the public trial guarantee.

Under Section 918.16, the court does not make the Waller inquiry nor the inquiry enunciated in Douglas v. Wainwright, *supra*. Section 918.16 establishes by fiat a closure in all cases involving a witness under 16 years of age (or mentally retarded) regardless of the individual circumstances of each case. Section 918.16 does not require a balancing test of the competing interests. Section

918.16 assumes the presence of certain factors in all cases and orders a partial closure in all of those cases.

Although there may be a compelling interest to protect some witnesses under 16, Section 918.16 allows for no consideration of the experiences and maturity of individual witnesses. Section 918.16 does not require an individualized review of each case. FACDL questions whether there is, as applied, a compelling interest in partial closure under Section 918.16. The general interest must be to save embarrassment for a young witness who is testifying about sensitive sexual matters. However, Section 918.16 permits the press and other designated individuals to be present. If some other members of the public are also present, is some undefinable additional possible embarrassment a compelling or substantial interest? Is the number of person in the courtroom a part of the interest? Is the identity of the persons a part of the interest? Section 918.16 excludes some members of the public without any individual consideration of these questions.

The decision in Waller and its progeny do apply to this case. The decision in Waller reviewed the federal constitutional rights of the public and the criminal Defendant. Consequently, the issue in this case is whether the Florida Legislature can adjudicate these rights in a statute which does not allow for the necessary test to weigh and balance the competing factors.

2. Section 918.16, as construed by the Fifth District Court of Appeal, is unconstitutional on its face.

FACDL realizes that the facial constitutionality of Section 918.16 was not an issue raised below. However, the decision of the Fifth District Court of Appeal renders Section 918.16 facially unconstitutional because the court below did not require a consideration of the factors delineated in Waller.

This court has the discretion to consider all issue(s) which are attendant to the basis for the court's discretionary jurisdiction. Angrant v. Key, 657 So.2d 1146 (Fla. 1995); Savoie v. State, 422 So.2d 308 (Fla. 1982). Florida courts have held an appellate court may consider for the first time a facial challenge to the constitutionality of a statute. See Trushin v. State, 425 So.2d 1126 (Fla. 1982); Wilburn v. State, 23 Fla. Law Weekly D1544, (Fla. 4th DCA June 24, 1998); Taccariello v. State, 664 So.2d 1118 (Fla. 4th DCA 1995). This court cannot fairly adjudicate this case without a consideration of whether Section 918.16 is facially constitutional, as construed by the decision below. The decision below stated there was no need to conduct the four part test outlined in Waller. Therefore, the issue in this case is whether Section 918.16 comports with the constitutional standards outlined in Waller.

Florida courts have also developed a test for the trial court to determine if a closure is appropriate and have applied the

Waller standards. See Williams v. State, 736 So.2d 699 (Fla. 4th DCA 1999); Florida Publishing Co. v. State, 706 So.2d 54 (Fla. 1st DCA 1998). Section 918.16 does not comport with the standards enunciated in Waller. There is no judicial weighing of the various factors and competing interests to achieve a public trial as weighed against any other compelling interest. Section 918.16 requires no such consideration; it also does not allow any such weighing process.

Section 918.16 does not permit a closure, it requires a closure. Section 918.16 states: in the trial of any case, civil or criminal, when any person under the age of 16 or any person with mental retardation as defined in Section 393.063(41) is testifying concerning any sex offense, the court shall (e.g.) clear the courtroom of all persons except parties to the case and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and at the request of the victim, victim or witness advocates designated by the state attorney's office.

Section 918.16 is unconstitutional because it does not require the weighing/balancing test required by the cases discussed above. The Sixth Amendment guarantees a public trial, not a trial of just the parties and their family or advocates. Although Section 918.16 does allow the media to attend, the public should have an equal right to attend. Why should the public have to rely upon the

press/media to inform it about a trial? What if the media decides not to publish/broadcast information about a trial. What if the media broadcasts only a thirty (30) second (as is usually the case) sound-bite about a case. The presence of the media in a trial may be an inadequate substitute for the rights of the public - citizens who want to see a trial first hand.

The right of a public trial is precisely for those persons who do not have a personal or direct interest in the case. The public's interest in a trial is not just the outcome of a particular case but an interest in the democratic process: the fair administration of justice by the courts. Even if this court upholds the decision below, it should disapprove of the language about the "idly curious". Is an interest in the work of a court or a trial just idle curiosity? The opinion below suggests, without proof or logic, that a spectator to a trial without a personal interest in the outcome is merely an idle and curious bystander. This language in the decision below significantly belittles and demeans the public's right to attend a trial.

3. Section 918.16 violates the doctrine of separation of powers - it attempts to adjudicate constitutional rights by legislative fiat without a consideration of individual rights and circumstances.

Section 918.16 adjudicates the relative rights of the public, a criminal defendant and a witness by legislative decree and fiat.

Section 918.16 does not permit a constitutional balancing test to ensure the rights of the public, a witness and the criminal defendant. Instead, Section 918.16 states that in all cases involving certain witnesses the trial court must exclude certain witnesses. Section 918.16 substitutes a legislative decree for a judicial adjudication of constitutional rights.

Only courts may interpret and adjudicate constitutional rights. Since Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), courts have interpreted the Constitution and statutes and adjudicated constitutional and statutory rights. See Department of Agriculture and Consumers Services v. Bonanno, 568 So.2d 24, 33 (Fla. 1990); Adams v. Housing Authority, 60 So.2d 663 (Fla. 1952). This court should not allow the Legislature to adjudicate constitutional rights without any judicial consideration of the various factors, as enunciated by the United States and Florida Supreme Courts, which ensure and protect constitutional rights and any competing interests.

This court should consider, by analogy, Section 90.803(23), Florida Statutes. 90.803(23), Florida Statutes established a new hearsay exception. However, the Legislature created various factors for the court to weight to ensure no violation of the constitutional right to confrontation. See Perez v. State, 536 So.2d 206 (Fla. 1988). In this case, Section 918.16 establishes no such factors to ensure that there is no violation of constitutional

rights. By analogy, if the Legislative used the approach in this case in Section 90.803(23), Section 90.803(23) would have simply permitted the use of hearsay in child sexual battery cases without any adjudicatory factors to guarantee reliability and to ensure no violation of confrontation rights. In Perez, *supra*, this court held the ultimate decision concerning the admission of child hearsay was for the courts; Section 90.803(23) was not an exhaustive list of the factors for consideration. The court could consider any other relevant forms.

Section 918.16 does not even permit a consideration of the relevant constitutional factors. Consequently, Section 918.16 violates the separation of powers doctrine under Article II Section 3 of the Florida Constitution and impermissibly intrudes upon the courts' authority to interpret the Constitution and adjudicate issues of constitutional and statutory interpretation and application.

4. The nature of the error and the appropriate remedy.

If this court finds that Section 918.16 is unconstitutional, then this court must remand for a new trial. In the decision below, the Fifth District Court of Appeal decided the trial court did not commit error by the failure to conduct a Waller inquiry. If such an inquiry is necessary, then there is no way to determine if the error in this case was harmless. Although the trial court followed Section 918.16, defense trial counsel objected and asked

the court to hold a Waller hearing. The trial court failed to do so. Therefore, this court should remand this case for a new trial.

CONCLUSION

This court should quash the opinion of the Fifth District Court of Appeal. The court should declare Section 918.16 to be unconstitutional or construe it to require the trial court to conduct a hearing pursuant to Waller v. Georgia, *supra*. and Press - Enterprise Co. v. Superior Court of California, *supra*. This court should reverse the conviction in this case and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished U.S. Mail this _____ day of April, 2000, to: Joe Mitchell, Counsel for Petitioner, 930 S. Harbor City, #500, Melbourne, Florida 32901-1967 and Rebecca Wall, Assistant Attorney General, Attorney General's Office, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118-3958.

Attorney