IN THE SUPREME COURT OF FLORIDA

FLOYD CLEMENTS,

Petitioner,

v. Case No. 96,670

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S MERITS BRIEF

On Review from the District Court of Appeal
of the State of Florida
Fifth District

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

CERTIFICATE OF FONT

Undersigned counsel hereby certifies that the brief filed herein is produced in **COURIER NEW, 12 point**.

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SUMMARY OF ARGUMENTS

The Florida Legislature's decision more than twenty years ago to protect our children does not violate the Sixth Amendment. The statute finds the right balance between the Defendant's rights and protection of our children. It is limited in scope and application, and the protection it provides to children far exceeds the extremely slight, if any, infringement on the Defendant's rights.

Therefore, this Court should affirm the district court's decision, and hold that Section 918.16, Fla. Stat. (1999) is constitutional on its face and as applied.

ARGUMENT

POINT ON REVIEW

THE DISTRICT COURT CORRECTLY HELD THAT THE PARTIAL CLOSURE OF THE COURTROOM, ALLOWING THE MEDIA AND INTERESTED PERSONS TO REMAIN, AND NARROWING THE CLOSURE TO THE LIMITED TIME DURING WHICH THE CHILD VICTIM TESTIFIED, SATISFIED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL.

While the "right to access to criminal trials is of constitutional stature, it is not absolute." *Globe Newspaper Co. v. Superior Court for Norfolk County,* 457 U.S. 596 (1982). States have a compelling interest in "safeguarding the physical and psychological well-being of a minor". *Id*. at 607. This Court, more than 80 years ago, held that "[t]he exclusion by the court of all persons other than those interested in the case, where, from the character of the charge and the nature of the evidence, public morality would be injuriously affected, does not violate the constitutional right to a public trial." *Robertson v. State*, 64 Fla. 437, 60 So. 118 (1912). That same premise was re-affirmed by this Court many years later in *Douglas v. State*, 328 So. 2d 18 (Fla. 1976).

In the past, when trial courts ordered total closure of the courtroom during a trial, appellate courts have required trial courts to perform a balancing test patterned on the United States

Supreme Court's decision in *Waller v. Georgia*, 467 U.S. 39 (1984). *See Thornton v. State*, 585 So. 2d 1189 (Fla. 2d DCA 1991); *Pritchett v. State*, 566 So. 2d 6 (Fla. 2d DCA 1990). The *Waller* analysis listed four parts: 1) the party seeking to close the courtroom 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 closing the proceedings; and 4) the court must make findings adequate to support the closure. *Waller* at 48. The *Waller* analysis has been applied by courts as the proper method of balancing the rights of a defendant and the State's interest in protecting the physical and psychological well-being of a witness when there is a total closure of the courtroom.

Long before the *Waller* decision, however, the Florida Legislature had already made a similar determination. In 1977, the Legislature determined that the State has an overriding interest in protecting the well-being of children under the age of 16 who are called upon to testify concerning any sexual offense. *See* Chapter 77-312, §28, at 1338, Laws of Fla. Inherent in the statute[1] is the Legislature's analysis which parallels the *Waller* analysis. The Legislature determined that the State has a compelling interest in protecting child victims and witnesses, especially with regard to

[1]The statute was initially Section 917.29, but later became 918.16.

matters relating to sexual offenses. A victim of child sex abuse can so easily become victimized by the criminal justice system over and over during the many years it may take for a case to be final. Protecting children under 16 years old is clearly an interest that is likely to be prejudiced in a crowded courtroom. So, the first *Waller* element was met.

Next, the Legislature built into the statute the second element of *Waller* -- that the closure must be no broader than necessary to protect that interest. Here, the statute specifically allows for certain persons to remain in the courtroom even after the closure. The list of exceptions to the closure provides a balance between the State's interest and the interests of the public and defendant to a public trial. The list allows the "parties 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, Fla. Stat. (1999).

It is clear that the closure, which allows the family of both sides to remain, as well as all of the news media, is no broader than necessary. It excludes those who have no direct interest in the case, but allows for the news media to remain. That, in itself -- the continued presence of the news media -- acts to preserve the "public trial" nature of the proceedings even though it is closed

to others.

Further, the statute embraces the consideration of reasonable alternatives to closure by limiting the persons who are excluded. Prior to the statute, a trial court might exclude **all** persons from the courtroom. Or a court might allow the victim to somehow be hidden from view while testifying, thereby triggering issues surrounding the defendant's right of confrontation. Instead, the statute determined that the "reasonable alternative" to absolute closure or some other method is to close the courtroom partially. The statute, then identifies the limited group of victims/witnesses that can invoke the statute, and it limits the persons who must be excluded. In other words, the statute acts as the "reasonable alternative" that the *Waller* analysis requires.

Finally, the Legislature, by carefully designing the statute, precluded the necessity of separate findings when the trial court employees the statute, and complies with the letter of the law. When a closure is "by the book" according to the terms of §918.16, no separate findings by the trial court are required. They are already encompassed in the statute.

It seems clear, however, that if a trial court imposes a closure under any situation other than what is specified in §918.16, a trial court must apply the *Waller* analysis. For instance, if a trial court decided to clear the courtroom for a victim/witness who was 16 years old or more, the court would have

to make findings on the record to justify the closure. Similarly, if the trial court determined that it was necessary to exclude some of the persons identified by §918.16 as exempt from the closure, the trial judge would have to apply the *Waller* analysis. But a closure that is "by the book" according to the requirements of §918.16 simply does not violate a defendant's Sixth Amendment right.

The Legislature has the authority, and the duty, to protect children who have been the victims or witnesses of sexual crimes, who are called upon to come forward and publicly describe the acts which the defendant committed. The statute is designed to enable and encourage those children who have evidence to present to the court to come forward with some assurance that the very court which compels their presence will protect them. So, the statute acts to protect those children while protecting the defendant's and the public's right to a public trial. It is no broader than necessary to protect the multiple interests involved. It is a fair balance between protecting the innocent children who have been victimized and the constitutional rights of the accused.

The trial court correctly employed that statute in the instant case. The child victim was only six and seven when the Defendant repeatedly sexually abused her. When she was seven, she told someone about the abuse, and the Defendant was charged. For reasons well beyond the control of the young victim, the case did

not come to trial for several years. At the time of trial, the young victim was barely 14 when she was finally called on to testify about that abuse.

Testifying about such sexually explicit and intimate acts committed on her and by her might have been even **harder** for the child to testify at 14 than at 7 years old. At 14, the child was faced with the well-documented and universally felt angst that a typical teenager faces. Coming to terms with sexuality and sexual matters can be traumatic enough for a normal teenager in the ordinary course of life. When that teenager is put on the witness stand to speak in detail about sex acts which the Defendant performed on her and had her perform on him, it is hard to imagine that there would not be a tremendous amount of trauma.

Perhaps the child did repeat many times over the several years it took to get to trial the details of the sex acts the Defendant performed on her. But there is a substantial difference between telling a trained counselor or investigator in a private room, and telling a room full of strangers. A courtroom setting is intimidating in and of itself without any additional circumstances. Even the most experienced trial attorney feels that anxiety and nervousness when sitting in the witness box. It must certainly be almost overwhelming to a young child.

In the instant case, the trial court applied the clear language of the statute which requires the court to close the

courtroom during that child's testimony. The court properly excluded all persons who were not delineated in the statute, which amounted to just four spectators. As soon as the child completed her testimony, the courtroom was opened to all spectators again. (T.914). There was no violation of the Defendant's Sixth Amendment right to a public trial.

Since the *Waller* decision, appellate courts throughout the country have made a distinction between a **total** closure and a **partial** closure of the courtroom or proceeding. *U.S. v. DeLuca*, 137 F.3d 24 (1st Cir. 1998); *Ayala v. Speckard*, 131 F.3d 62 (2nd Cir. 1997); *U.S. v. Brazel*, 102 F.3d 1120 (11 Cir. 1997); *Woods v. Kuhlmann*, 977 F.2d 74 (2nd Cir. 1992); *U.S. v. Sherlock*, 962 F.2d 1349 (11th Cir. 1989); *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983); *Davis v. Reynolds*, 890 F.2d 1105 (10th cir. 1989); *U.S. v. Sherlock*, 865 F.2d 1069 (9th Cir. 1989).

These courts have consistently applied a lesser test when analyzing cases of partial closure. Instead of requiring the State to show a "compelling" reason, a partial closure only requires a showing of "substantial" reason. The First Circuit Court of Appeals most recently observed that "[t]hese courts essentially conclude that a less stringent standard is warranted in the 'partial' closure context provided the essential purposes of the 'public trial' guarantee are served and the constitutional rights of defendants are adequately protected. (internal cites omitted)

As yet, no (federal) court of appeals has held otherwise." *DeLuca* at 33. One appellate court even pointed to the U.S. Supreme Court's opinion in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) to show that there is a clear distinction between total and partial closure of a courtroom. *See Sherlock*, 865 F.2d at 1076 ("In *Press-Enterprise* itself, the Court alluded to the distinction between total and partial closures by stating that when limited closure is ordered, 'the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time.'"). In short, reviewing courts see a clear difference between total closure and partial closure.

The instant statute provides only a partial closure. The statute limits the circumstances under which the trial court can make a statutory closure – only when the witness is under 16 years of age or is mentally retarded, and the witness is testifying about a sex offense. §918.16, Fla. Stat. (1999). That very limited situation is not the only parameter for the partial closure. The closure is limited further by exempting 1) the parties, 2) the immediate family (or guardian) of the parties, 3) attorneys for the parties and their staff, 4) officers of the court, 5) jurors, 6) newspaper reporters or broadcasters, 7) court reporters, and 8) the victim or witness advocate (if the witness asks for one). These categories of exempt persons form a strict limitation on the

closure.

It is also these categories of exemptions that provide the Sixth Amendment's guarantee of a public trial. The news media is always exempt to closure under the statute. The defendant's family is also exempt from closure. Officers of the court and all other courtroom personnel, as well as the court reporter, also provide the assurance of a fair and public trial. The court reporter makes it possible for the public to review the testimony and evidence presented during the witness' testimony. The only limitation on the public aspect of the trial is the ability of spectators to observe the witness as she testifies. There is no closure or sealing of the evidence or testimony.

This minor limitation for the very narrow time during which the witness is testifying, creates no hardship or deprivation of constitutional rights. The defendant has full right of confrontation of the witness. He has the watchful eye of the media and his own family. He has the presence and services of his attorney's staff. He is deprived of nothing.

The Florida Legislature's decision more than twenty years ago to protect our children does not violate the Sixth Amendment. The statute finds the right balance between the Defendant's rights and protection of our children. It is limited in scope and application, and the protection it provides to children far exceeds the extremely slight, if any, infringement on the Defendant's rights.

Therefore, this Court should affirm the district court's decision, and hold that Section 918.16, Fla. Stat. (1999) is constitutional on its face and as applied.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully asks this court to uphold the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Merits Brief has been furnished by U.S. mail to **Joe M. Mitchell, Jr.**, attorney for Petitioner, at 930 S. Harbor City Blvd., Suite 500, Melbourne, FL 32901, this _____ day of May, 2000.

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APPENDIX

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INDEX TO APPENDIX

INSTRUMENT: