THE FLORIDA SUPREME COURT

FLOYD CLEMENTS,

Petitioner,

vs. CASE NO: 96,670

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The case against the Defendant was initially opened on July 23, 1991, based upon sworn video taped interview of the child victim, and an examination of her by a pediatrician. (TR-194). On May 5, 1992, the State filed a two (2) count Information charging the Defendant with sexual battery upon a child of less than twelve (12) years. (TR192-193). On September 7, 1994, the State filed an amended Information alleging fifty (50) counts of sexual battery upon a child less than twelve (12) years, (TR241-254), together with its statement of particulars. (TR255-256). On December 27, 1994, the State amended its statement of particulars. (TR282-283).

On June 19, 1995, the State filed its second amended Information reducing the Counts from fifty (50) to twenty eight (28). (TR304-310). On June 20, 1995, the State once again amended its statement of particulars. (TR313-315). On November 20, 1996, the State filed its third amended Information once again reducing the counts from twenty eight (28) to ten (10). (TR344-346). On October 17, 1997, the state once again amended its statement of particulars. (TR410-411).

On January 9, 1998, the Jury returned a verdict convicting the Defendant on all ten (10) counts alleged in the third amended Information. (TR485-493).

On January 20, 1998, the Defendant filed, Motion for New Trial, Motion for Arrest of Judgment, and Renewed Motion for

Judgement of Acquittal. (TR498-524). On February 6, 1998, the trial Judge denied all of the Defendant's post-trial motions. (TR525-526).

On March 16, 1998, the Defendant was adjudicated guilty by the Court and sentenced to serve two (2) consecutive life sentences. (TR537). On April 7, 1998, the Defendant filed his amended Notice of Appeal to the Fifth District. (TR547-548). The Fifth District Court affirmed in **Clements v. State**, 742 So2d 338, (Fla.5th DCA 1999).

The state requested and the Trial Judge agreed to a mandatory partial closure of the Court room during the child victim's testimony pursuant to Section 918.16 Florida Statutes. (T615-620). The Defendant objected to the closure on the basis of the Defendant's right to a public trial. (T615). The Defendant requested a hearing by the Court to consider the necessity of closure or other reasonable alternatives. (T616). The Court was of the opinion that the Defendant had no standing to assert his constitutional right to a public trial because, "the statute says it is mandatory." (T617)

SUMMARY OF ARGUMENT

The primary issue at trial and on appeal was the trial court's closure of the courtroom during the testimony of the child

victim pursuant to Section 918.16 Florida Statutes without providing the Defendant with a requested hearing to determine if the State had a compelling governmental interest justifying partial closure under the statute. There is no factual dispute that the Defendant vigoriously objected to the Court's partial closure of the courtroom without benefit of a hearing.

On July 30, 1999, the Fifth District Court of Appeal (5th DCA) issued a decision which discussed the trial court's partial closure of the courtroom during the child victim's testimony. The 5th DCA agreed with the trial judge's interpretation that Section 918.16 is mandatory, and that the lower court was correct in denying the Defendant a right to a hearing to determine the necessity of a partial exclusion or to consider alternative methods of closure so as to preserve the Defendant's constitutional right to a public trial.

In reaching this decision the 5th DCA was compelled to distinguish the instant case from the decision set forth in

Pritchett v. State, 566 S.2d 6 (Fla 2d DCA), review dismissed, 570 So.2d 1306 (Fla.1990) and **Thornton v. State**, 585 S.2d 1189 (Fla. 2d DCA 1991) which held that Section 918.16 was constitutional, but that the application of Section 918.16 was unconstitutional, under the decisions of the United States Supreme Court in **Globe Newspaper Co. v. Superior Court**, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) and **Waller v. Georgia**, 467 U.S. 39, 104 S.Ct. 2210, 81

L.Ed.2d (1984), because the Trial Judge, over the objection of the Defendant, failed to provide the Defendant a hearing to make findings to justify the closure. The 5th DCA distinguished its holding from that of **Pritchett** and **Thornton** upon the basis that in **Pritchett** and **Thornton** the trial court closed the courtroom to everyone, whereas in **Clements** there was only a partial closure. The universal thread that runs through the eyes of the instant case, and those of **Pritchett** and **Thornton** is that in none of the cases was the Defendant's requested hearing on the issue of closure granted, i.e. a hearing to determine less stringent alternatives to closure or partial closure.

The decision of the 5th DCA in **Clements** expressly and directly conflicts with the decision of the 2nd DCA in **Pritchett** and **Thornton**. The decisions of the 2nd DCA in applying the mandate set

forth in the United States Supreme Court's decisions in **Globe** and **Waller**, held that a Trial Court's closure of the courtroom during a child victim's testimony without providing a Defendant the right to a hearing to explore alternative methods to closure was a denial of Defendant's right to a public trial and an unconstitutional application of Section 918.16. The lenchpin in the decisions by the 2nd DCA is that a Defendant has a right to a hearing on the issue of closure of a courtroom during the testimony of a child victim in order to protect his constitutional right to a public trial. That this right is inviolate even under the partial closure

rule prescribed in Section 918.16. The constitutional litmus test in the application of Section 918.16 is the inherent right of the Defendant to a hearing as a prerequisite to a total or partial closure of the courtroom during the testimony of a child victim in order to preserve Defendant's right to a public trial.

The trial Judge's denial of **Clements'** contemporaneous request for a hearing to comply with the **Waller** prerequisites was a violation of Clement's right to a public trial under the Sixth and Fourteenth Amendments to the Federal Constitution and Article I, Section 16, of the Florida Constitution, therefore, this Court should quash the decision of the 5th DCA in **Clements** and approve the

decision of the 2nd DCA in **Pritchett** and **Thornton**, and grant Clements a new trial.

POINT I

QUESTION PRESENTED

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 Sd.2d 6 (Fla. 2d DCA) Review dismissed, 570 So.2d 1306 (Fla. 1990) and **THORNTON V. STATE**, 585 So.2d 1189 (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 STATUTE

ARGUMENT

PREAMBLE

In a state criminal prosecution the Defendant is guaranteed a public trial by the Sixth and Fourteenth Amendments to the Federal Constitution and Article 1, Section 16 of the Florida Constitution.

The Courts have expressed the purpose of the public trial guaranty is to prelude any attempt to use the courts as a vehicle

of persecution or unjust conviction, to disincline perjury, and to encourage the public perception and perpetuate confidence in the Judicial System. In addition to the Defendant's right to a public trial, the constitutional right of the press and general public to be present at criminal trials was established by the Supreme Court

in **Richmond Newspapers, Inc., v. Virginia**, (1980) 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814, in which the Court found the right to attend criminal trials to be intrinsic in the guaranties of the First Amendment.[1] In **Globe Newspaper Co. v. Superior Court for County of Norfolk**, (1982) 457 U.S. 596, 73 L.Ed. 248, 102 S.Ct. 2613, the Court ruled that the right of access to criminal trials is not absolute, but the circumstances under which the press and public can be barred are limited.[2] This right has also been extended to the selection of a Jury by the United States Supreme Court in **Press-Enterprise Co. v. Superior Court of California**, (1984) 464 U.S. 501, 78 L.Ed.2d 629, 104 S.Ct. 819. The Court traced the evolution of the Jury trial both here and in England and

[1]The Richmond Court held that a trial Judge's Order closing a murder trial to both the public and press at the Defendant's request, was violative of the First and Fourteenth Amendments.

[2]The court held unconstitutional a Massachusetts statute providing for closure of the general public from trial of specified sexual offenses involving a minor victim, under which a trial court had ordered exclusion of the press and public from the courtroom during the trial of a Defendant charged with rape of three minor girls.

concluded they had been “presumptively open”. During its development, the process of selecting a Jury had presumptively been a public one except for good cause shown. This openness enhances both the basic fairness of the criminal trial, and the appearance of fairness that is essential to nurture public confidence in the Judicial system. The openness thus “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to the public confidence in the system”. (78 L.Ed. 629, at 637). Although closed proceedings are not absolutely precluded, the Court explained, they must be rare, and permitted only where it is shown that closure outweighs the value of openness. The Court instructs that the presumption of openness may only be overcome by an overriding interest based on findings closure is essential to preserve higher values and is narrowly tailored to serve that interest.

The United States Supreme in **Waller v. Georgia,** (1984) 467 U.S. 39, 1045 S.Ct. 2210, 81 L.Ed. 31, in which the Court ruled that under a Defendant’s Sixth Amendment right to a public trial, any closure of a suppression hearing over the objection of the accused must meet the following tests: the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternative’s to closing the hearing; and it must make findings

adequate to support the closure. The Court also agreed with "consistent view of the lower federal courts that the Defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee."

THE TRIAL

The state requested and the Trial Judge agreed to a mandatory closure of the court room during the testimony of the fourteen (14) year old victim. The Defendant objected to the closure and requested a hearing to determine the, "necessity and alternative methods" before ordering closure. The State's request, the Defendant's objection and the Court's ruling is set forth as follows:

> THE COURT: Mr. Ciener, do you wish to be heard regarding the State's request to clear the courtroom while the victim testifies?
>
> MR. CIENER: Defense objects.
>
> THE COURT: What is the basis of your objection?
>
> MR. CIENER: The constitution of the United States and the State of Florida due process.
>
> The right confrontation, the right of all its citizens to be in a courtroom at any time there is a public hearing; the right of the press or anyone else to enter or leave at any time and all of the case law under the rules.
>
> THE COURT: Miss Lynch, you are relying on which statute?

> MS. LYNCH: Let me just find it. I think it's under Chapter 914.
>
> Maybe it's not 914. 918 point 16.

THE COURT: All right. It's clear who is allowed to be in. That means the attorneys and their secretaries are allowed to be in, the immediate family and guardians are allowed to be present, officers of the Court, jurors, and newspaper reporters and broadcasters and court reporters; and at the request of the victim, the victim and witness advocate designated by the State Attorney's office.

MR. CIENER: The defense would object to anyone being excluded from this courtroom without a hearing by the Court of necessity and alternative methods being considered by the Court.

MS. LYNCH: Judge, the State's position is he doesn't have the standing.

THE COURT: Right. You don't have the standing. The statute says it is mandatory. It says shall.

MR. CIENER: The defense objects.

THE COURT: I note your objection.

So at the time of the child - - the alleged child victim being presented as a witness if anyone is in the courtroom that does not fall into the category of a party to the case, and immediate family or guardian of the child, attorney or secretary that is involved with this case, an officer of the Court, a juror that is assigned to this case or selected in this case, newspaper reporters, broadcasters, court reporters.

Is the victim requesting that a witness advocate be present?

MS. LYNCH: Yes, Judge. We have two people from our office, Nancy Neiman, and Debbie Backer, and Miss Allawas may be present too. Those are the only ones from our office.

I would ask that anybody else, obviously, the news media, and members of the public

defender’s office there are some other people out here, I don’t know who they are.

MR. CIENER: You’re saying they can come or they cannot come?

MS. LYNCH: Not

THE COURT: All the people I named - -

MR. CIENER: The other lawyers can’t be here?

MS. LYNCH: No they’re not parties to it.

MR. CIENER: Can Miss Allawas be here?

THE COURT: Lawyers in his office can be present.

MS. LYNCH: Oh, yeah, I’m not objecting to anybody from his office I don’t have problem with.

There are members of the public defenders office that are present that do not work for Mr. Ciener.

MR. CIENER: I can take a day if necessary, but we object to all of that.

MS LYNCH: He doesn’t have standing to object.

MR. CIENER: If I have standing which I clearly

believe I do, I object.

MS. LYNCH: She is going to be the first witness. We are going to have opening statements, and obviously for opening that is fine.

THE COURT: That is fine. If you don’t fall into that category in the courtroom at this time the victim is called to testify, you need to exit the courtroom.

MR. CIENER: We have a problem Judge, because is the Court ordering the bailiffs to seal the doors to be sure that no one comes in while

the child is testifying?

MS. LYNCH: Yes.

MR. CIENER: I that correct that the bailiffs understand that they're under an order to do that to not let anyone come in?

THE COURT: If I've entered an order that say that the courtroom is sealed, people are not to be coming in and out of the courtroom

MR. CIENER: Judge, we object and move for a mistrial.

MS. LYNCH: It only pertains to the victim.

THE COURT: How could I grant a mistrial at this point? Nothing happened. What is your objection to that Mr. Ciener?

MR. CIENER: The objection is that an order by the Court in advance that a member of the public or any other human being standing outside of this court room cannot enter while a child is testifying.

Without the correct, proper hearings we object.

THE COURT: Your objection is overruled.

MS. CIENER: I understand.

THE COURT: I'm just curious as to where the mistrial comes in since nothing started. We haven't done anything.

I've overruled your objection so you don't have grounds for a mistrial. (T615-620)

. . .

MS. LYNCH: Yes Judge.

I think there are individuals who are present though, I ask to leave for purposes of the defense lawyer's testimony.

THE COURT: I expect this testimony will probably take the rest of this afternoon so you are welcome to stay outside if you want but you can't be in the courtroom for this testimony.

MR. CIENER: We again object assuming that I have standing on all of the grounds previously raised, now that it has comes to fruition. (Spectators leave the courtroom)

MR. CIENER: May the record reflect that at least four lawyers and private citizens have now left the courtroom.

THE COURT: Record may so reflect.

MR. CIENER: Thank you, Your Honor.

MR. JENNINGS: Is there any problem?

THE COURT: You are the Assistant State Attorney from the prosecutor's office.

MS. LYNCH: Mr. Jennings is fin.

THE COURT: And Mr. Ciener's staff – more than one member of his staff is here.

MS.LYNCH: I have no objection for any one from Mr. Ciener's office.

THE COURT: We have news media present.

Bring the jurors in please. (T688-689)

THE DECISION OF THE 5TH DCA

Judge Goshorn, in speaking for the Clement's court below, made a pivotal distinction between a total closure and a partial closure which he deftly used to factor out the four-factor inquiry mandated by the **Waller**, Court. As a stepping stone in reaching his conclusion, Judge Goshorn turned to the decision of Eleventh

Circuit in **Douglas v. Wainwright**, 739 F.2d 531 (11 Cir. 1984), cert. denied, 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 22 (1985), upholding its prior decision in **Douglas v. Wainwright**, 714 F.2d 1532, 1546 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984), "that the impact of the partial closure (the press, Defendant's family members, and the witnesses were allowed to remain) did not reach the level of a total closure, and thus "only a 'substantial' rather than

'compelling' reason for the closure was necessary". A reference to the first **Waller**, factor. (**Clements** at 341). The Fifth District then leaped to the conclusion that because Section 918.16 Florida Statutes only mandates a "partial closure", that only requires a constitutional "compelling" reason to justify closure - the four-factor **Waller** inquiry is not required. Thus, the trial Judge's decision to follow the dictates of Section 918.16 without providing the Defendant with a requested hearing was not error.

The Fifth District's interpretation of **Douglas** is misplaced. The **Douglas** court was confronted with three public trial issues: (1) Defendant's right to a Public Trial, (2) The reason for the exclusion, and, (3) The need for a hearing and findings.

Douglas' trial attorney only made a general objection to the partial closure of the courtroom during the testimony of Atkins, the prosecutor's key and only witness to the crime.

Douglas' trial attorney "failed to object in the trial court to the absence of a hearing or findings." 714 F.2d at 1546.

The constitutional concern of the **Douglas** panel was: Did the partial closure of the courtroom infringe upon **Douglas'** right to a public trial?

As to any constitutional infringement of **Douglas**' right to a public trial, the **Douglas** panel pointed out that in **Douglas**, there was a partial closure, whereas in **Waller**, there was total closure. Thus,

> ... the *Douglas* panel found that the impact of the closure was 'not a kind presented when a proceeding is totally closed to the public,' 714 F.2d at 1544, and therefore only a "substantial" rather than "compelling" reason for the closure was necessary. Id. The panel further found that a substantial reason - protection of the witness from unnecessary insult to her dignity - existed that justified the partial closure. Id. At 1544-45.
>
> The **Douglas** court concluded:
>
> *Douglas* thus involved an application of the general sixth amendment public trial guarantee to the specific situation of partial closure, a situation not addressed in *Waller*. We do not read *Waller* as disapproving *Aaron's* adaptation of the general standards governing closures, standards on which *Douglas* and *Waller* are in accord,[2] to a case where only a

[2] As did the *Waller* Court, the *Douglas* panel found that "an opportunity to be heard and adequate findings are required where any closure of the trial is contemplated and the defendant objects and requests and opportunity to heard." 714. F.2d at 1546. See also *Waller*, - U.S. at -, 104 S.Ct. At 2213. The Defendant in *Douglas*, however, had failed to specifically object to the absence

> partial closure is involved and at least some access by the public is retained. Consequently, we reaffirm the denial of habeas relief on the public trial issue.

The **Douglas,** Court addressed the issue of Defendant's right to a hearing as follows:

> The Need for a Hearing and Findings: Appellant also contends that, even if no actual deprivation of the public trial right occurred, error of constitutional dimension was committed when the state court failed to hold a hearing on the exclusion order and articulate in findings the reason for the partial closure. The failure to give interested parties an opportunity to be heard and to state reasons for closure has rendered closure orders constitutionally infirm in the cases implicating the press' and public's right of access to criminal trials. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 609 n/25, 102 S.Ct. at 2622 n. 25; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581, 100 S.Ct. at 2829 (plurality opinion); id. at 598, 100 S.Ct. at 2840 & n. 5 (Stewart, J., concurring in judgement). *See also Newman v. Graddick, supra, 696 F.2d 796* at 801, 803. *Cf. Gannett Co. v. DePasquale,* 443 U.S. at 376, 99 S.Ct. at 2903 (where hearing held and findings made as to need for exclusion, no error in closing pretrial hearing to the press). Certainly these procedural safeguards are no less crucial when closure is challenged as a violation of the **defendant's sixth amendment right**. Accordingly, we hold that an opportunity to be heard and adequate findings are required where any closure of the trial is contemplated and the defendant objects and requests and opportunity to be heard. (Emphasis Supplied) Id. At 1545-1546, 714 F.2d 1532.

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of a hearing or findings resulting in procedural default. 714 F.2d at 1546; see also *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The **Douglas** court went on to decide that **Douglas**, "failed to object in the trial court to the absence of a hearing or "finding", and the Defendant's failure to object waived his right to present the issue in the habeas corpus proceeding. The **Douglas**, court made it clear that before any closure, complete or partial, there must be a hearing and adequate findings.

The Fifth District's assertion that Section 918.16 Fla. Statute (1977), which allows family members and the press to remain during the child victim's trial testimony, that ". . . the presence of the press preserves a Defendant's constitutional right to a public trial", is constitutionally infirm. In **Douglas**, supra, at 1542, the Eleventh Circuit disagreed with this conclusion stating:

> All that the public trial guarantee affords to the defendant is that the public be allowed to be present, not that public actually be present. See *Estes v. Texas*, 381 U.S. at 588-89 85 S.Ct. at 1662-63 (Harlan, J., concurring). Simply allowing the press to be present, however, does not serve the same purpose as allowing the public to be present, for the press is not the public, and the Sixth Amendment guarantees a public trial. It is only as a fiduciary for the public that the presence of the press mitigates against what otherwise would be a closed, non-public trial. Thus, in certain cases, the presence of the press has been held to safeguard the public trial right, the press serving as a fiduciary for the public, not because they were allowed to be present, but because they were present

> and reported the trial activities and informed the public of that which the public was unable to experience first-hand because of the closure order. *Aaron v. Capps*, 507 F.2d at

> 687-88. It does not follow logically that because the Sixth Amendment requires only that the public be allowed to be present that where the public is excluded but the press is allowed to remain the Sixth Amendment right is not infringed. If the press is not actually acting as a fiduciary for the public, then a partial closure is no different than an absolute closure, requiring a most "compelling interest" to justify it.

THE CONFLICT

This same issue was before the court in **Pritchett v. State,** 566 So.2d 6 (Fla 2nd DCA 1990). Pritchett was convicted and sentenced for capital sexual battery. As in the instant case, the state requested that the court room be cleared pursuant to Section 918.16 Florida Statutes, during the testimony of the minor victim. Pritchett objected on the basis to do so would deny him his right to a public trial. The Court granted, without a hearing, the state's request for closure.

On appeal the second district reversed the sentence and Judgement of the trial court and remanded the case for a new trial. The Court held:

> Both the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution provide the accused with

> the right to a public trial. While we recognize that the right of access in a criminal trial is not absolute, the circumstances allow closure are limited. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). In order to justify any type of closure, whether the closure is total or partial, the court must find "that a denial of such right is necessitated by a compelling

> governmental interest and is narrowly tailored to serve that interest." 457 U.S. at 607, 102 S.Ct. At 2620.
>
> The appropriate analysis to follow to determine whether a particular case warrants closure is set forth in *Waller*. There are four prerequisites that must be satisfied before the presumption of openness may be overcome. First, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; second, the closure must be no broader than necessary to protect that interest; third, the trial court must consider reasonable alternatives to closing the proceeding; and, fourth, the court must make findings adequate to support the closure. *Waller*, 467 U.S. at 47, 104 S.Ct. At 2215. Id. 7.

It is noteworthy that in this case the child victim told many different people, Susan Wickell, Dr. Knappenberger, Dr. Mora, the Defendant's attorney and numerous prosecutors on at least twenty (20) different occasions, since the case was first opened on July 25, 1991, all people that she did not know, about the sexual advances the Defendant made upon her without any apparent

trauma or ongoing embarrassment. On the basis of the record, and specifically the testimony of the child victim, it is impossible to find any "overriding interest" that would have been prejudiced. The Trial Judge's summary denial of the Defendant's right to a public trial without any findings to support it fails to pass constitutional muster.

In **Thornton v. State,** 585 So.2d 1189 (Fla. 2nd DCA 1991) the Court was once again faced with the sole issue: was the trial

court's closures of the court room during a minor victim's testimony a denial of the Defendant's right to a public trial. The Court responded:

> This court in *Pritchett v. State*, 566 So.2d 6 (Fla. 2nd DCA), review dismissed, 570 So.2d 1306 (Fla. 1990), held that before a trial court orders closure it must satisfy the four prerequisites enunciated in *Waller v. Georgia,* 467 U.S. 39 104, S.Ct. 2210, 81 L.Ed.2d 31 (1984). First, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; second, the closure must be no broader than necessary to protect that interest; third, the trial court must consider reasonable alternatives to closing the proceedings, and fourth, the court must make findings adequate to support the closure. *Waller*.
>
> The trial court in this case failed to apply the *Waller* prerequisites and apparently did not adhere to section 918.16 when it cleared

> the courtroom of even those individuals authorized under the statute to be present. This was error and requires reversal for a new trial. *Pritchett*; see *Wheeler v. State*, 344 So.2d 244 (Fla. 1977), We reverse the judgment and sentence and remand for a new trial. Id. 1190.

In **Globe Newspaper Co. v. Superior Court,** 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) the Court was called upon to construe a Massachusetts statute which provided for exclusion of the general public from trials of sex-offense victims under the age of eighteen (18). The Court crystalized its opinion in the following footnote:

> "We emphasize that our holding is a narrow one: That a rule of mandatory closure

> respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional." Id. 2216, 2217.

Subsequently, in **Waller v. Georgia**, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) the Supreme Court was to review a Defendant's Sixth Amendment rights as affecting a closure of a suppression hearing over the objection of the accused. The Court responded:

> ... Under *Press Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudice, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closures
>
> . . .
>
> Here, however, the State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing.[FN7] The court did ***2217** not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure, in camera if necessary, and closing only those parts of the hearing that jeopardized ***49** not the interests advanced. [FN8] As it turned out, of course, the closure

> was far more extensive than necessary. The tapes lasted only 2 ½ hours of the 7-day hearing, and few of them mentioned or involved parties not then before the court. 104 S.Ct. 2210, 2215.

The Trial Judge could and should have made a determination if closure was necessary to protect the welfare of the minor victim. This case had received a great amount of media coverage over the passage of nearly seven (7) years that it was in the Court system. The victim in this case was no longer a young

child but a teenager of fourteen (14) years. She had an above average I.Q. and a good understanding of the proceedings. The victim had discussed her testimony with many strangers without apparent harm. The victim was never provided the opportunity to even express her desire to have the public excluded. Section 918.16 Florida Statutes, mandates closure even if the victim does not seek the exclusion of the general public, and would not suffer any injury by their presence. If the Trial Judge had taken the opportunity to hear testimony on the issue, closure might well have been deemed unnecessary. In balancing the Defendant's Sixth Amendment right to a public trial against the State's asserted interest, at the very constitutional minimum the Defendant should be entitled to a hearing to proffer an adequate predicate that can be reviewed by the Appellate Court thus assuring the Defendant's right to a public trial.

In **Douglas** 714 F.2d 1532, 1546, the Court in footnote 16,

provides instruction to trial Judges who are faced with a closure issue where there is no objection made stating:

> We emphasize that even in the absence of a specific objection or a request for a hearing and finding the better course for the state court to follow is *sua sponte* to hold the hearing and make findings. Such findings should include the reason for the closure, the

> number of persons excluded and the number allowed to remain, and the presence or absence of the press. This procedure will facilitate both direct and federal habeas review.

Had the trial Judge not been mislead by the legislative mandate encompassed in Section 918.16, and had she held a hearing that permitted Clements' attorney to make inquiries directed at the **Waller** four-prong prerequisites, Clements may not have been denied a constitutionally guaranteed public trial.

CONCLUSION

The instant case is unlike **Douglas** because here Clements made a request for a hearing and findings to insure that the partial exclusion of the public was no broader than necessary to protect the state's interest or to explore other available reasonable alternatives, whereas in **Douglas** the Defendant failed to make any request for a hearing thus depriving the trial Judge of the opportunity to correct any error in excluding the public from the trial.

In passing Section 918.16 the Florida Legislature failed to provide the Defendant with his due process right to a hearing prior to the trial Judge excising the Defendant of his right to a constitutionally guaranteed public trial by arbitrarily partially closing the courtroom during a child victim's testimony as mandated by Section 918.16. The requirement that the trial Judge give the Defendant a hearing when requested and make findings to support either a total or partial closure has found approval in all of the Highest Courts of the Country. The proper procedure requires that before ordering closure during a child victim's testimony, the trial Court is required to consider the utility of alternatives to closure, and prior to ordering closure, establish an overriding

interest justifying closure articulated with enough specificity in the findings that a reviewing Court can determine whether the closure order was properly entered. The failure of the trial Judge to perform this duty upon Clements' request does not pass constitutional muster.

Although Section 918.16 would probably fail to pass constitutional scrutiny on its face, it certainly is constitutionally infirm as the trial Judge applied it to Clements. The 5th DCA failed to recognize this constitutional issue in its opinion affirming the trail Court's action in partially closing the courtroom without providing the Clements with his requested hearing. This failure cannot be reconciled based upon the fact there was a "partial closure". The right to a requested hearing and findings by the trial Judge is a Judicial prerequisite in either a partial or total closure.

In **Douglas** the Court was concerned if the Defendant's right of a public trial was infringed by the trial Judge ordering a "partial closure", and the constitutional standard to be applied in reviewing the closure. The **Douglas** court did not consider the Defendant's contention that the trial court failed to provide a hearing and make findings supporting the closure, because **Douglas**

failed to request a hearing and by so doing forfeited that right.

It is submitted that based upon the foregoing arguments that this Honorable Court should quash the decision of the 5th DCA

in **Clements**, and affirm the decisions of the 2nd DCA in **Pritchett** and **Thornton**, and remand the case to the trial court for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Rebecca Wall, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, JAMES T. MILLER, ESQ., 233 E. Bay Street, Suite 920, Jacksonville, Florida, 32202-3456, this _____ day of April, 2000.

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