ORIGINAL

THE FLORIDA SUPREME COURT

OCT 18 1999

FLOYD CLEMENTS,

Petitioner,

vs. CASE NO: 96,670

STATE OF FLORIDA,

Respondent.

_________________________/

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

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CERTIFICATE OF FONT SIZE AND STYLE

The undersigned hereby certifies the font used in this brief is Courier 12.

STATEMENT OF THE CASE AND FACTS

The case against the Petitioner(defendant) was initially opened on July 23, 1991, based upon a sworn video taped interview of a child victim and an examination of her by a Pediatrician.

On January 9, 1998, Defendant was convicted by a Jury of seven (7) counts of sexual battery upon a child less than twelve (12) years and three (3) counts of lewd acts upon a child. On March 16, 1998, the Defendant was adjudicated guilty by the Trial Judge and sentenced to serve two (2) consecutive life sentences.

The primary issues 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 So.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) 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 31 (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.** The universal thread that runs through the eyes of the instant case, **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.

In **Pritchett**, **Thornton** and **Clements** the prosecutor pursuant to Florida Statutes 918.16 asked that the courtroom be cleared before the child witness testified. **Pritchett** and **Thornton** hold that a hearing is necessary, Clements holds that no hearing is necessary.

Defendant filed a timely Motion for Rehearing, Motion for Rehearing En Banc and a Motion for Certification, all three (3) motions being denied on September 8, 1999. The Defendant has timely filed his Motion to Invoke the Discretionary Jurisdiction of this Honorable Court.

SUMMARY OF JURISDICTIONAL ARGUMENT

The decision of the 5th DCA expressly and directly conflicts with the decisions of the 2nd DCA in **Pritchett** and **Thornton** . These two (2) decisions, in applying the mandate set forth in the United States Supreme Court 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 pre-requisite 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.

Due to the expressed and direct conflict between the decision of the 5th DCA in Clements and the decisions of **Pritchett** and **Thornton**, and because the issue of closure without the benefit of a hearing and findings to justify a closure, has great and significant impact upon Circuit Judges sitting on sexual battery cases involving child victims throughout the State of Florida, discretionary jurisdiction should be granted. See, Cert. v, Section (b()(3); Fla.R.App.P 9.030(a)(2)(A)(iv).

ARGUMENT

THE 5TH DCA'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE 2ND DCA IN **PRITCHETT** AND **THORNTON**

Petitioner seeks discretionary review by this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution

which provides that the Florida Supreme Court may review a decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same questions of law." See also Fla.R.Ap.P. 9.030(a)(2)(A)(iv).

In this case, the decision of the 5th DCA expressly and directly conflicts with the decisions of the 2nd DCA in **Pritchett** and **Thornton**.

In **Pritchett**, the Defendant "argued that the court abridged his Sixth Amendment right to a public trial when it ordered the courtroom to be cleared of all spectators, pursuant to Section 918.16, Florida Statutes (1987)." Pritchett also "argued the statute was unconstitutional because it does not allow Judicial discretion or exceptions for closure." The 2nd DCA upheld the constitutionality of the statute, but agreed with Pritchett's contention "that the application of the statute was unconstitutional because the trial court failed to make any findings to justify closure. See **Waller v. Georgia,** 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)." **Globe v. Newspaper Co. v. Superior Court,** simply says anytime there is a closure there has to be a hearing. **Waller** simply sets forth the issues that have to

be addressed at the hearing before closure is allowed. The decision of the **Pritchett** Court, fully implements the constitutional pre-requisite to a total or partial closure of a courtroom as dictated in the Supreme Court decisions of **Globe** and **Waller.**

The 2nd DCA presented a compelling argument for its decision in granting Pritchett a new trial stating:

> 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.

In the instant case, the 5th DCA cited **Douglas v. Wainwright,** 714 F.2d 531 (11 Cir. 1983) cert. denied, 469 U.S. 1208 (1985) as authority for the proposition "that the impact of the partial closure (the press, Defendant's family members, and the witness were allowed to remain) did not reach the level of a total closure, and thus 'only a substantial' rather than 'compelling' reasons for closure was necessary."

However, the **Douglas** court, in addressing the issue for the need for a hearing and findings, went on to articulate:

> 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)

The **Douglas** court went on to decide that the **Douglas**, had "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.

Pritchett and **Thornton** recognize the constitutional prerequisites for a Trial Judge to order closure of a courtroom during the testimony of a child victim, require (1) a hearing, under **Globe** , and, (2) specific standards to be met to justify closure under **Waller.** **Douglas**, makes it clear that these prerequisites apply in a Sixth Amendment setting where there is an issue of total or partial closure of the Courtroom.

In the event this Honorable Court determines it has

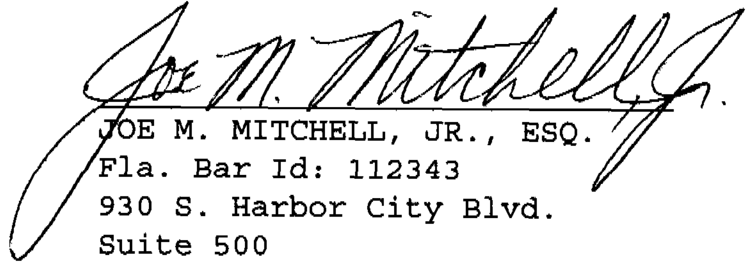
jurisdiction, the court will recognize the statewide significance of the issue of partial closure pursuant to Section 918.16, without conducting a requested hearing to determine a finding justifying closure, will have on the circuit court trial Judges throughout the state sitting on cases involving child victims in sexual battery cases. The contrasting decisions between the 5th DCA in the instant case and the decisions of the 2nd DCA in **Pritchett** and **Thornton** on this important constitutional issue, wound together by troublesome Federal Constitutional implications recognized in all three (3) appellate decisions, collectively make for a compelling reason for this Honorable Court to accept jurisdiction to address this important and far reaching constitutional and procedural issue.

CONCLUSION

This Honorable Court should grant discretionary jurisdiction because the decision of the 5th DCA in the instant case expressly and directly conflicts with the decisions of the 2nd DCA in **Pritchett** and **Thornton** on the same questions of law. Furthermore, the application of Section 918.16 in child sexual battery cases is a significant statewide Judicial issue in our criminal tribunals across the state. A Defendant's right to a public trial should not be arbitrarily abridged, and the issue as how to best accomplish this purpose in a child victim sexual

battery setting is ripe for determination by this Honorable Court. Therefore, for the reasons heretofore presented the Defendant respectfully requests this Honorable Court to exercise its discretionary jurisdiction in order to consider the merits of Defendant's argument.

Respectfully submitted,



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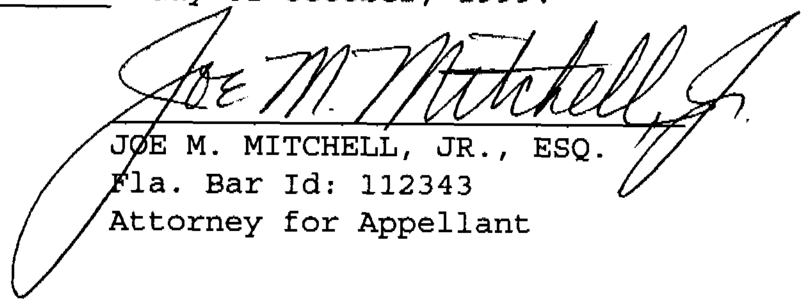
CERTIFICATE OF SERVICE

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,, this 15th day of October, 1999.



JOE M. MITCHELL, JR., ESQ.
Fla. Bar Id: 112343
Attorney for Appellant

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1999

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

FLOYD CLEMENTS,

Appellant,

v.

Case No. 98-963

STATE OF FLORIDA,

Appellee.

_______________________________________/

Opinion filed July 30, 1999

Appeal from the Circuit Court
for Brevard County,
Tonya B. Rainwater, Judge.

Joe M. Mitchell, Jr., Melbourne,
for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Rebecca Roark Wall,
Assistant Attorney General, Daytona Beach,
for Appellee.

GOSHORN, J.

Floyd Clements appeals the judgment and sentences imposed after the jury found him guilty of seven counts of sexual battery on a child under 12 and three counts of lewd acts upon a child. On appeal, Clements argues that the trial court committed reversible error in a number of instances. While we disagree with his contentions, we find one issue, the trial court's partial closure of the courtroom while the child victim testified, merits discussion.

Pursuant to section 918.16, Florida Statutes (1997)[1] the State asked that the courtroom be cleared before the victim, who was fourteen years old at the time of trial, testified. Defense counsel objected and asked the trial court to hold a hearing to determine the necessity of exclusion and consider alternative methods so as to preserve Clements' constitutional rights.[2] The trial court read section 918.16 as mandatory and overruled the objection. Defense counsel unsuccessfully moved for mistrial. The court ordered that all persons not permitted by section 918.16 leave the courtroom.

On appeal, Clements asserts that 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 1189 (Fla. 2d DCA 1991) mandate reversal. In Pritchett, the trial court cleared the courtroom of all spectators, without any analysis whether complete closure was warranted. The Second District reversed because of the trial court's failure to make findings to justify the closure:

> Both the Sixth Amendment to the United States Constitution

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[1]Section 918.16 provides:

> *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 s. 393.063(41) is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause 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.

[2]The Sixth Amendment, created for the benefit of defendants, guarantees that defendants enjoy "the right to a speedy and public trial." Waller v. Georgia, 467 U.S. 39, 46 (1984). "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979).

> 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 allowing 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 [v. Georgia, 467 U.S. 39 (1984)]. 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 proceedings; and fourth, the court must make findings adequate to support the closure. Waller, 467 U.S. at 47, 104 S.Ct. at 2215.

Pritchett, 566 So. 2d at 7. Thornton was factually almost identical to Pritchett. Again, the trial court closed the courtroom to everyone without making the Waller four-factor inquiry and without regard to the persons allowed to remain in the courtroom pursuant to section 918.16, and again the appellate court reversed.

Thornton and Pritchett are easily distinguishable from the instant case. Unlike Thornton and Pritchett, where the trial judges swept the courtroom of all spectators without regard to section 918.16's list of persons permitted to remain in attendance, here the trial court followed section 918.16 and simply excluded the idly curious. The exclusion affected very few persons, as shown by defense counsel's statement in the record that "at least four lawyers and private citizens have now left the courtroom." However, the fact that the state court cases are distinguishable does not end the inquiry. Further analysis is appropriate

to determine whether a partial closure in the absence of any consideration of alternatives or the necessity of closure under the facts of the case requires reversal.

In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the trial court applied a Massachusetts statute which provided for the exclusion of everyone except those with a direct interest from trials of sex abuse charges where the victim was under the age of 18. A newspaper objected on First Amendment grounds (not Sixth Amendment as is involved here).[3] The Supreme Court held that to justify any type of closure, the trial court must find "that the denial of [the right of access to the court] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Id. at 607 (citations omitted).

Two years later, the Supreme Court addressed the courtroom closure issue under the Sixth Amendment. In Waller v. Georgia, 467 U.S. 39 (1984), the defendants were charged with violating racketeering laws and moved to suppress certain wire tap evidence. At the suppression hearing, the court excluded everyone except the parties, lawyers, witnesses, and court personnel. The Supreme Court held that the complete closure of the courtroom over defendants' objections during the seven-day suppression hearing violated the Sixth Amendment.[4] The court wrote:

> In sum, we hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused

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[3]The difference is immaterial, however, as the Court later wrote that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Waller v. Georgia, 467 U.S. 39, 46 (1984).

[4]The "sensitive" government material was brought out in only 2 ½ hours of the seven day trial.

> must meet the tests set out in Press-Enterprise [Co. v. Superior Court of California, 464 U.S. 501 (1984)] and its predecessors.
>
> * * *
>
> Under Press-Enterprise, 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 alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 47-48.

Waller addressed the total closure of a hearing, not a partial closure such as in the instant case. The Eleventh Circuit has applied a more lenient test to partial closures. In Douglas v. Wainwright, 739 F.2d 531 (11 Cir. 1984), cert. denied, 469 U.S. 1208 (1985), the court upheld its prior decision (which the Supreme Court had vacated for reconsideration in light of Waller) that the impact of the partial closure (the press, defendant's family members, and the witness 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. Id. at 533 (citations omitted). Where there has been only a partial closure, the court "must look to the particular circumstances to see if the defendant still received the safeguards of the public trial guarantee." Id. at 432.

The problem Clements sees in the instant case is that the trial court did not test the closure request in any manner – it simply ordered closure without consideration of whether there was even a substantial reason for the closure (per Douglas), let alone the other Waller factors. We do not view the trial court's decision to follow the statute, without

independent inquiry, as error. We hold that the four-factor inquiry of Waller is not imposed on cases where the partial closure order is entered pursuant to section 918.16, Florida Statutes.[5]

The Legislature, by enacting section 918.16, has found that there is a compelling state interest in protecting younger children or any person with mental retardation while testifying concerning a sexual offense. Accordingly, section 918.16 is narrowly drawn to ensure that a defendant's right to an open trial is protected. It requires partial closure only during the limited time in which a child under sixteen years of age or a mentally retarded person is to testify about a sex offense. The spectators who are temporarily excluded from the proceeding are only those with no direct interest in the case. The press, as the eyes and ears of the public, is allowed to remain. As the public's proxy, the presence of the press preserves a defendant's constitutional right to a public trial. Per section 918.16, Florida Statutes, which, we note, Clements has not challenged as unconstitutional, the idly curious were properly ordered from the courtroom.

AFFIRMED.

SHARP, W., J., and ORFINGER, M., Senior Judge, concur.

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[5]In Globe, the United States Supreme Court listed a number of state statutes which it distinguished from that under consideration in Globe. The Court recognized that section 918.16, Florida Statutes, provides "for mandatory exclusion of general public but not press during testimony of minor victims." 457 U.S. at 609 n.22. The Court wrote, "Of course, we intimate no view regarding the constitutionality of these state statutes." Id.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

FLOYD CLEMENTS,
Appellant,

v. CASE NO. 98-963

STATE OF FLORIDA,
Appellee.

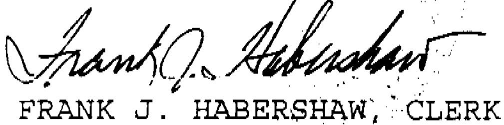
_______________________/

DATE: September 8, 1999

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, Appellant's MOTION FOR REHEARING EN BANC, and Appellant's MOTION FOR CERTIFICATION, filed August 9, 1999, are denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.



FRANK J. HABERSHAW, CLERK

cc: Joe M. Mitchell, Jr., Esq.
Office of the Attorney General, Daytona Beach

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

FLOYD CLEMENTS,
Appellant,

v. CASE NO. 98-963

STATE OF FLORIDA,
Appellee.

_______________________/

DATE: September 8, 1999

BY ORDER OF THE COURT:

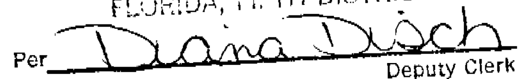
ORDERED that Appellant's MOTION FOR REHEARING, Appellant's MOTION FOR REHEARING EN BANC, and Appellant's MOTION FOR CERTIFICATION, filed August 9, 1999, are denied.

I hereby certify that the foregoing is [redacted] the original Court order.

FRANK J. HABERSHAW, CLERK

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.

FRANK J. HABERSHAW, CLERK
DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT

Per  Deputy Clerk

cc: Joe M. Mitchell, Jr., Esq.
Office of the Attorney General, Daytona Beach