IN THE SUPREME COURT OF FLORIDA

FLOYD CLEMENTS,

Petitioner,

v. Case No. 96,670

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S JURISDICTIONAL BRIEF

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

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CERTIFICATE OF FONT

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

Rebecca Roark Wall
Of Counsel

SUMMARY OF ARGUMENT

This court should not exercise its discretionary jurisdiction in this case. There is no express and direct conflict contained in the Fifth District Court's opinion. There is nothing more than a factual difference between this case and the other factually distinguishable cases cited by Petitioner. There is no conflict among the districts and this Court, and therefore, this Court should deny review.

ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD NOT EXERCISE DISCRETIONARY JURISDICTION IN THIS CASE BECAUSE NO GROUNDS EXIST FOR SUCH JURISDICTION.

This Court's jurisdiction is defined by Article V of the Florida Constitution (1991). Article V, §3(b) expressly sets out this Court's jurisdiction, describing every situation in which this Court has or may take jurisdiction. Art. V, §3(b), Fla. Const. (1991). That jurisdiction is also set out in Fla.R.App.P. 9.030(a).

While Petitioner has attempted to invoke this Court's jurisdiction based on "express and direct conflict", this case fails to qualify on that ground. In 1980, Article V was amended to limit the Florida Supreme Court's discretionary jurisdiction in cases involving conflict. Rule 9.030 was likewise revised to incorporate the constitutional amendment. The Committee Notes to Rule 9.030, in discussing the 1980 amendment, make it clear that the amendment was intended to reduce the "burgeoning caseload" that the Court handles.

The Committee Note, referring to conflict cases, states that "[t]hese cases comprised the overwhelming bulk of the Court's caseload and gave rise to an intricate body of case law interpreting the requirements for discretionary conflict review."

For this reason, Article V and Rule 9.030 were amended to require a showing of an "express" as well as a "direct" conflict in order to invoke jurisdiction.

In the instant case, while Petitioner includes in his claim that there is "express" conflict, he fails to point to any such expression of conflict by the Fifth District in its opinion. Instead, he points to two district court cases which are factually distinguishable from the instant case, and claims that they conflict with the outcome of the Fifth District Court's opinion. That is not "express and direct" conflict under Article V, §3 or Rule 9.030.

Furthermore, the written opinion of the Fifth District Court of Appeal filed in this case on July 30, 1999 shows no express and direct conflict with any other court. (See attached opinion). Clearly, nowhere in the opinion does the District Court express that there is conflict between its decision and any other court. Nor does the opinion cite to any case which is in direct conflict with either the Fifth District Court's ruling or the issue presented. To the contrary, the very cases which Petitioner cites as conflicting were cited by the Fifth District in its opinion. They were explained and analyzed, and they were clearly distinguished by the district court. The court, in its opinion, states:

> *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'.

Clements v. State, 24 Fla.L.Weekly D1799 (Fla. 5th DCA July 30, 1999). The Fifth District Court's reasoned opinion shows no conflict.

When determining whether to exercise discretionary jurisdiction, this Court must look to the four corners of the opinions to find that conflict. *Reaves v. State*, 485 So.2d 829 (Fla. 1986). This Court has stated that "[c]onflict between decisions must be express and direct, i.e., it **must appear within the four corners of the majority decision.** Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." (emphasis added) *Id.* at 830.

When examining the four corners of the instant decision and the cases cited as conflicting, there appears no express or direct conflict. The cases merely illustrate that there are factual distinctions between the cases which are significant enough to produce different outcomes. That does not amount to conflict -- either direct or express.

This court, long ago, very clearly delineated the limitation on its jurisdiction which was narrowed by the 1980 constitutional amendment. In *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980), this Court stated:

> The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that **expressly** and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." *Webster's Third New International Dictionary*, (1961 ed. unabr.).

(emphasis in original) *Id.* at 1359. This court further added that "[i]t is conflict of **decisions**, not conflict of **opinions** or **reasons** that supplies jurisdiction for review by certiorari." (emphasis in original) *Id.*

It is evident on the face of the published opinion that there is no "express" conflict. Similarly, there is no "direct" conflict created by the court's analysis of *Thornton v. State*, 585 So. 2d 1189 (Fla. 2d DCA 1991) and *Pritchett v. State*, 566 So. 2d 6 (Fla. 2d DCA 1990). Both the constitution and Rule 9.030 require that the "express and direct" conflict be obvious. Since neither is present here, this court should decline to take jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully asks this honorable court to deny jurisdiction in this matter.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished by U.S. mail to **Joe M. Mitchell**, attorney for Petitioner, at 930 S. Harbor City Blvd., Suite 500, Melbourne, FL 32901, this 4th day of November, 1999.

Rebecca Roark Wall
Rebecca Roark Wall
Of Counsel

IN THE SUPREME COURT OF FLORIDA

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APPENDIX

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INSTRUMENT:

Floyd CLEMENTS, Appellant,
v.
STATE of Florida, Appellee.

No. 98-963.

District Court of Appeal of Florida,
Fifth District.

July 30, 1999.

Defendant was convicted in the Circuit Court, Brevard County, Tonya B. Rainwater, J., of sexual battery on a child under 12 and lewd acts upon a child, and he appealed. The District Court of Appeal, Goshorn, J., held that partial closure of courtroom during time child victim testified did not require reversal.

Affirmed.

[1] CRIMINAL LAW ⚿577.4
110k577.4
Sixth Amendment, created for the benefit of defendants, guarantees that defendants enjoy the right to a speedy and public trial. U.S.C.A. Const.Amend. 6.

[1] CRIMINAL LAW ⚿635
110k635
Sixth Amendment, created for the benefit of defendants, guarantees that defendants enjoy the right to a speedy and public trial. U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW ⚿635
110k635
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. U.S.C.A. Const.Amend. 6.

[3] CRIMINAL LAW ⚿635
110k635
Partial closure of courtroom during time child victim testified in sex offense prosecution did not require reversal, even though trial judge did not test closure request in any manner, as four-factor inquiry of Waller was not imposed on cases where partial closure was entered pursuant to statutory provision that allowed courtroom to be cleared in sex offense cases during testimony of person under age 16 or person with mental retardation; there was compelling state interest in protecting younger children or any person with mental retardation while testifying concerning sexual offense, statute was narrowly drawn to ensure that defendant's right to open trial was protected, it required partial closure only during limited time, spectators who were temporarily excluded from proceeding were only those with no direct interest in case, and press was allowed to remain, preserving defendant's constitutional right to public trial. U.S.C.A. Const.Amend. 6; West's F.S.A. § 918.16.

[4] CRIMINAL LAW ⚿635
110k635
Where there has been only a partial closure of a hearing, the trial court must look to the particular circumstances to see if the defendant still received the safeguards of the public trial guarantee. U.S.C.A. Const.Amend. 6.

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.

*1 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.

[1][2] Pursuant to section 918.16, Florida Statutes (1997) [FN1] 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. [FN2] 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.

[3] 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 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, 104 S.Ct. 2210, 81 L.Ed.2d 31 (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.

*2 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, 102 S.Ct. 2613, 73 L.Ed.2d 248 (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). [FN3] 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, 102 S.Ct. 2613 (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, 104 S.Ct. 2210, 81 L.Ed.2d 31 (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. [FN4] The court wrote:

> In sum, we hold that under the Sixth Amendment

any closure of a suppression hearing over the objections of the accused must meet the tests set out in Press-Enterprise [Co. v. Superior Court of California, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)] and its predecessors.

* * *

***3** 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, 104 S.Ct. 2210.

[4] 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, 105 S.Ct. 1170, 84 L.Ed.2d 321 (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 532.

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. [FN5]

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.

***4** AFFIRMED.

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

FN1. 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.

FN2. 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, 104 S.Ct. 2210, 81 L.Ed.2d 31 (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, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

FN3. 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, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

FN4. The "sensitive" government material was brought out in only 2 1/2 hours of the seven day trial.

FN5. 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, 102 S.Ct. 2613. The Court wrote, "Of course, we intimate no view regarding the constitutionality of these state statutes." Id.

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