

THE FLORIDA SUPREME COURT

FLOYD CLEMENTS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO: 96,670

_____ /

PETITIONER'S REPLY BRIEF

JOE M. MITCHELL, JR.
Florida Bar Id: 112343
930 S. Harbor City Blvd.
Suite 500
Melbourne, Fl 32901
407/729-6749

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO:</u>
AUTHORITIES CITED	ii
CERTIFICATE OF FONT SIZE AND STYLE	iii
ARGUMENT	
POINT I	1

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

CONCLUSION	10
CERTIFICATE OF SERVICE	10

AUTHORITIES CITED

	PAGE(S)
<u>Campbell-Eley v. State</u> , 25 Fla.L.Weekly D849, (Fla. 4 th DCA 2000)	5
<u>Clements v. State</u> , 742 So.2d 338 Fla 5 th DCA 1999)	1
<u>Douglas v. Wainwright</u> , 714 F.2d 1531 (11 Cir. 1983) vacated and remanded 468 U.S. 1206, 104 S.Ct. 3575, 82 L.Ed.2d 874(1984)	8

<u>Globe Newspaper Co. v. Superior Court</u> , 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982)	9
<u>Metaxotos v. State</u> , 25 Fla.L.Weekly D927 (Fla 4 th DCA 2000)	5
<u>Pritchett v. State</u> , 566 S0.2d 6 (Fla 2dDCA) reviewed dismissed, 570 So.2d 136 (Fla. 1990)	1,10
<u>Thornton v. State</u> , 585 So.2d 1189 (Fla. 2d DCA 1991)	1,5,6,10
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	1,2,3,4,6,9
<u>Williams v. State</u> , 736 So.2d 699 (Fla. 4 th DCA 1999)	4
Section 918.16 Fla. Stat.	2,5,6,7,8,9

-ii-

CERTIFICATE OF FONT SIZE AND STYLE

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

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 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), 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

In its brief, the State concedes that **Waller v. Georgia**, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d (1984), four prerequisites

are required to be met before a Trial Judge orders a "total" or "partial" closure of the courtroom during the testimony of a child sexual victim. The State set forth this four-factor inquiry imposed under Waller as: (1) The party seeking to close the courtroom must advance an overriding interest that likely is 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. (Emphasis supplied) Waller at 48.

The State makes an argument that the legislature in creating Section 918.16, Florida Statutes satisfied the first two Waller prerequisites. However, under the third and fourth imposed requirements the Trial Court, not the Florida Legislature, is required to conduct a requested hearing to consider other reasonable alternatives to support closure and then the trial court is required to set forth its findings supporting closure in order to provide the Defendant with a record from which to appeal the trial court's decision. The legislature could amend Section 918.16 through doomsday and never be able to incorporate wording that would satisfy these two-factors other than by setting forth these prerequisites in the statute itself, i.e. that the Trial Judge, upon the request of the Defendant, is required to have a hearing and set forth its findings.

The Defendant fully appreciates that the legislature in enacting Section 918.16 Fla. Stat. (1999) crafted a well intended law designed to protect a child sexual victim from overexposure while giving trial testimony in a criminal case, to ostensibly avoid embarrassing or traumatizing the child victim. However, it is a nostrum in disguise. In its prophylactic protection of the victim it denuded the Defendant and a certain class of the public of their respective constitutional right to have and attend a public trial.

Furthermore, does it really protect a child victim? It can be effectively argued that a child sexual victim by testifying in an open Court can finally put closure on the horrifying experience the sexual predator forced or foisted upon him or her. The child victim's testimony may be their act of exoneration from the shame and despair the sexual predator has caused her to physically and mentally endure. Each child sexual victim comes to Court to testify as a distinct individual with his or her own specific psychological problems generated by the sexual encounter. What may be a cleansing for one child victim may not be for another. It is the Trial Judge, and not the legislature, that should determine on a case by case basis what would be in the best interest of the child victim, and then balance that interest with the constitutional rights of the Defendant and the public entitlement to a public trial. **Waller**, and its progeny, set forth

a reasonable application of prerequisites whereby the rights of all concerned people can be balanced and all alternatives weighed.

The Fourth District Court of Appeal in three recent opinions have applied the Waller pre-requisites to the "partial" closure of the courtroom during voir dire examination. In Williams v. State, 736 So.2d 699 (Fla. 4th DCA, 1999), the Court held:

The trial court's total exclusion from the courtroom during voir dire of members of the public, including Williams' family members, absent a most compelling justification, compels reversal of Williams' judgment. The instant case is unlike each of those cited in *Douglas* because here the closure was total rather than partial, and the exclusion of the public and family members was not narrowly limited in scope to a legitimate purpose.

Application of the *Waller* prerequisites supports reversal. As to the first *Waller* prerequisite, the "overriding interest that is likely to be prejudiced" apparently concerned overcrowding or safety in the courtroom, although no interest was expressly stated by the trial court. Applying the second prerequisite, the trial court's total closure of the courtroom was broader than necessary to protect that interest in that it appears three chairs could have been set up in the back of the courtroom to accommodate Williams' family without any serious breach of safety measures. At no point was it made clear that placing three chairs in the back of the courtroom would jeopardize public safety. As to the third *Waller* prerequisites, reasonable alternatives to total closure of the courtroom were not considered, rather each of Williams' suggestions was rejected without much consideration. Finally, no requisite findings adequate to support the closure were made. The record contains no findings from which this court is able to determine that the public safety or welfare would have been

compromised had Williams' three family members been allowed to sit in the back of the courtroom during voir dire.

The Fourth District reaffirmed its position in Williams in Campbell-Eley v. State, 25 Fla.L.Weekly D849, (Fla. 4th DCA 2000) and Metaxotos v. State, 25 Fla.L.Weekly, D927 (Fla. 4th DCA 2000).

In the Defendant's initial brief we hypothesized reasons why the child victim in this case may not have been traumatized by testifying in open court. The State, in its brief, gave reasons why the child victim may have been "angst" by testifying in an open court. Thus, the reason for having a hearing to permit the Trial Judge to make the determination of the necessity to have a closure or the extent of the closure is that each child sexual victim is unique.

Section 918.16 is a legislative miscreation. What is the Trial Judge to do if the child victim is so traumatized by the Court setting that the victim becomes speechless and is unable to testify? Under the mandate of Section 918.16 can the Trial Judge order a total closure to lessen the child victim's trauma? Or, is the Court bound to blindly follow the legislative edict at the child victim's expense?.

In Thornton v. State, 585 So.2d 1189 (Fla. 2d DCA 1991), the District Court criticized the Trial Judge's decision to order a "total" closure as not only a violation of the Waller four pre-requisites but failing to adhere to Section 918.16. The Court

stated:

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.

The stage is set for future appellate enforcement of Section 918.16 requiring the "partial" clearing of the courtroom when a child sexual victim testifies permitting only those persons authorized by the statute to remain.

If logic is to prevail, then the Trial Judge should be provided at the very least, bridled authority to conduct a hearing to determine if the four Waller prerequisites are satisfied before ordering a "total" or "partial" closure during a child sexual victim's testimony. The statute, as written, is a carte blanche effort by the legislature to extinguish any Judicial discretion by the Trial Judge to exclude or not exclude certain members of the public from witnessing the testimony of a child sexual victim in a criminal proceeding. The legislature in 1999, added subsection (2), to Section 918.16, that reads:

When the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, the court shall clear the courtroom of all persons upon the request of the victim, regardless of the victim's age or mental capacity, except that 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 may remain in the courtroom.

Although this section was added by the legislature after Clements' trial, under Section (2), the legislature has gone one step further and has extended its fiat as to what class of the public can be present when a child sex victim is testifying to include all victims of a sex offense who request that the "partial" closure of the courtroom be enforced under Section 918.16(2).

Under Section 918.16 there is no Judicial discretion. There is no hearing for the Trial Judge to consider other reasonable alternatives to protect the Defendant's right to a public trial. The legislature exclusively exercises its self proclaimed prerogative to mandate a "partial" closure of the courtroom during the testimony of the sex victim. Is this not a legislative encroachment upon the authority of the Judiciary to exercise Judicial discretion in criminal trials when a Defendant's constitutional rights are jeopardized?

The appeal for this type of legislation is that it establishes a rigid standard that is easy to administer. The evil is that in standardizing a procedural rule it is susceptible to trampling on constitutional rights of the citizens. As here, the legislature in its zeal to establish a standard to protect sexual victims during their trial testimony, were short sighted in the protection of the Defendant's and the public's constitutional right

to a public trial.

The State's argument that due to the fact Section 918.16 only requires a "partial" closure as opposed to a "total" closure the statute passes constitutional muster. This argument is misplaced. A "partial" closure, that only requires a "substantial" reason to support it, will satisfy a constitutional infringement attack under a Defendant's Sixth Amendment right to a public trial, only if the Defendant failed to object to the closure and requested a hearing to determine the necessity for the closure. The Defendant must be given the opportunity to be heard upon his request for a hearing and the Trial Judge is required to publish findings to support the closure ruling. In **Douglas v. Wainwright**, 714 F.2d 1531, 1545 (11th Cir. 1983), the Court stated "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". In **Globe Newspaper Co. v. Superior Court**, 457 U.S. 596, 609 n.25, 102 S.Ct. 2613 at 2622 n. 25, 73 L.Ed.2d 248, at 259 n.25 (1982), the Court stated: "Of course, for a case-by-case approach to be meaningful, representatives of the press and general public must be given an opportunity to be heard on the questions of their exclusion."

Both the Second and Fourth Districts clearly recognize that in Florida the **Waller** four prerequisites must be met before a

Trial Judge can order a "total" or "partial" closure of the courtroom and the Trial Judge is required to give the Defendant, the press and the public a hearing on the closure issue when requested by the aggrieved party. Waller is still alive in two (2) Florida District Courts where it has not yet become impaled by the legislative restrictions set out in Section 918.16.

CONCLUSION

For the foregoing reasons and authority presented Clements requests this Honorable Court to quash the decision of the 5th DCA in Clements, and affirm the decisions of the 2nd DCA in Pritchett and Thornton, on a finding that Section 918.16 is unconstitutional as applied in this case and/or the statute is unconstitutional on its face, and remand the Defendant's 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
May, 2000.

JOE M. MITCHELL, JR., ESQ.
Fla. Bar Id: 112343
930 S. Harbor City Blvd.
Suite 500
Melbourne, FL 32901
(407) 729-6749
Attorney for Petitioner