IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY KOVALESKI, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. SC09-536

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

The following abbreviations will be used in this brief:

"R"	Record proper, contained in volumes of the record on appeal which are bound at the top ("Preface"), followed by the appropriate volume and page numbers
"T"	Transcript of the proceedings on retrial, 2006, in the lower tribunal, contained in six volumes of the record on appeal ("Hearings on motions, docket calls, voir dire and jury selection, trial and sentencing " [2003-2004], Volumes 1-6), followed by the appropriate volume and page numbers
"TT"	Transcript of proceedings surrounding Appellant's first trial in the lower tribunal, consisting of five volumes of the record on appeal ("First appearance, hearings on motions, docket calls, voir dire and jury Selection, trial and sentencing" [1998], Volumes 1-5), followed by the appropriate volume and page numbers
SR	Supplemental record, consisting of pleadings, transcript of hearing, and orders on Appellant's third and fourth motions to correct sentencing error, transferred to this cause from Case No. 4D0 ("Preface" pages1126 *et. seq.*)

STATEMENT OF THE CASE

Petitioner was informed against for committing one or more lewd and lascivious acts upon J.L., a minor under the age of sixteen, between November 15, 1997, and January 29, 1999, when J.l.'s sex organ penetrated or had union with Petitioner's mouth (Count I) and for committing a lewd and lascivious act in the presence of J.l., a minor less than sixteen years of age, also between November 15, 1997, and January 29, 1999 (R1/8, 39-40, 49-50).

Petitioner's first trial ended with the jury's verdicts finding him guilty as charged of both counts (R1/51). He was adjudged guilty of those offenses (R1/66-67) and sentenced, consistent with the recommended guidelines sentence (R1/62-63), to concurrent terms of 138.3 months in prison followed by three years sex offender probation on each count (R1/68-71, 72-76, 78-83).

On direct appeal, the Fourth District Court of Appeal reversed Petitioner's convictions on the grounds that he was denied a public trial when the trial court closed the courtroom during the alleged victim's testimony without the required hearing (R3/421-422). Kovaleski v. State, 854 So. 2d 282 (Fla. 4th DCA 2003).

Petitioner's retrial ended when the jury returned its verdicts again finding him guilty of each crime as charged (R5/936). On February 17, 2006, Petitioner was adjudged guilty of those offenses (R5/944-945). The trial court sentenced Petitioner

to serve consecutive terms of fifteen years imprisonment on each count (R5/946-949, 950-954)

On appeal from this conviction and sentence, the Fourth District Court of Appeal affirmed Petitioner's convictions, rejecting his arguments that the trial court committed error in refusing to allow Petitioner to cross examine J.l. about a prior accusation, later withdrawn, that he had made against someone else. Its decision was largely based on its conclusion that Petitioner's failure to proffer the testimony he sought to introduce precluded the appellate court from addressing the issue. The Court also held that Section 918.16 (2), Fla. Stat., required the trial court to partially close the courtroom to everyone but the victim's family and the press even without any inquiry into the need for such closure. The decision became final with the District Court's denial of Petitioner's motion for rehearing on February 20, 2011.

Petitioner timely filed his notice seeking this Court's discretionary review on January 10, 2011. This Court accepted the instant case for review in an order dated August 2, 2011.

STATEMENT OF THE FACTS

J.L. was 15 years old in 1996 when he met Appellant and his wife, Missy (T4/727). When he and his mother fell out, J.L. moved in with Appellant, his wife and their three children (T4/730-731). Appellant became responsible for getting J.L. to school (T4/730).

J.L. testified that sometime after Thanksgiving, he and Missy had sex in the Appellant's bedroom while Appellant watched (T4/731-732). J.L. said that Appellant then had sex with Missy in J.L.'s presence (T4/733-734). According to J.L., the same thing happened a couple of nights later (T4/734) and again a week or a week and a half later (T4/735-736). Finally, J.L. saw Appellant, J.L., and Missy were in a hot tub. J.L. said he saw Appellant and Missy have sex while Missy performed oral sex on J.L. before Appellant took J.L.'s penis in his mouth (T4/738). J.L. then performed oral sex on Appellant (T4/739). J.L. said that he loved Missy and thought she loved him (T4/739). The two had sex twice in Appellant's absence (T4/741). Appellant would have been mad if he had known this so the couple kept it from him (T4/762). But their affair ended when he walked in on her having sex with Appellant's nephew (T4/740, 757). J.L. was upset and moved out of the house (T4/740). He was also upset with Appellant for calling a truant officer when J.L. refused to go to school (T4/755). J.L. reported Appellant and Missy to the police three days after moving out (T4/741).

Missy Hawthorne, Appellant's wife, had divorced him and remarried at the time of Appellant's second trial (T4/776). According to her, her affair with J.L. began sometime in November, 1996, before Thanksgiving when she, Appellant, and J.l. were in the hot tub and then proceeded to Appellant's bedroom where she performed oral sex on J.L. while having sex with Appellant and then she performed oral sex on Appellant while J.L. had sex with her (T4/778). Then Appellant had oral sex on J.L. while she watched (T4/778). Missy said that she and J.L. had sex three times in Appellant's presence and Appellant performed oral sex on J.L. twice (T4/779).

J.L. told Missy that he loved her, and she told him that she loved him (T5/835). Missy admitted that J.L. surprised her when she was having sex with Appellant's nephew, who was less than eighteen years old (T5/826-827).

After Missy was arrested, the police asked her to wear a recording device and speak with Appellant about having sexual intercourse with J.L. (T4/780). The recording of this conversation was introduced into evidence (T4/782). During the recorded conversation, Appellant told Missy to just deny everything (T4/792). He was the one that the police were really after (T4/795). "We've got the letters. The boy was in love with you. We tried to help him" (T4/797). Appellant asked Missy if she thought that he would "admit to sucking a dick to anyone?" (T4/798).

As a result of her actions in this case, Missy pled guilty to and was convicted of one count of performing a lewd act on a child, with the understanding that she would

testify against Appellant and that she would be sentenced to between twelve and 35 months incarceration (T4/775, 5/831). Despite her admissions to other sex acts with minors,[1] the State also agreed that she would not be charged with any other offenses (T5/827). Missy was ultimately sentenced to one year in jail followed by probation (T5/832). She was not sent to prison and had already served her term by the time of the retrial, although she was still on probation (T5/832-833). Had all of her scoreable offenses been included in her sentencing guidelines scoresheet, her recommended sentence would have been some 308 months in prison (T5/834).

Teresa [Blanton] Luna, Missy's sister (T5/843) testified that after being arrested, Appellant told her that Missy fantasized about having sex with two men. The first incident happened in the bedroom after the couple was in the hot tub with J.L. Then J.L. performed oral sex on Appellant and Appellant then performed oral sex on J.L. (T5/843). Appellant agreed that Missy had sex with both of them (T845).

Appellant testified in his own behalf that J.L. was placed in his custody after J.L.'s mother had disciplinary problems with him and could not get him to go to school (T5/882-883). Appellant categorically denied having three-way sex with Missy and J.L. (T5/886). He denied performing oral sex on J.L. (T5/887). He knew that J.L. had

[1] Missy admitted that she also had sex with Brian McKee (T5/817). The State's objection to testimony that McKee was fifteen or sixteen years old (T4/820) was sustained (T5/825).

fallen in love with Missy (T5/896). J.L. was mad at Appellant because Appellant was trying to make him go to school and had reported his truancies and curfew violations to the Department of Juvenile Justice (T5/890, 893-894, 897).

Appellant testified that Missy's mother had physically abused his children (T5/889), and he and Missy were in a dispute about their custody (T5/890). Appellant found out during a dependency investigation that Missy had had sex with his nephew (T5/890). He told Missy that he was going to "cover up for my wife's activity" by denying everything and placing the blame on J.L.'s love for her (T5/910).

Appellant stated that Maritza Anderson, a pregnant fourteen-year-old girl, also stayed at his house (T5/884), but not at the same time as J.L. Maritza Anderson testified that Appellant took care of her when she was fourteen, pregnant, and homeless (T5/928). "Basically, he was my father" (T5/929).

Maritza knew J.L. from when the two of them were younger (T5/928). But she did not stay at Appellant's house at the same time that J.L. was living there (T5/933). After J.L. left to live in Live Oak, Maritza asked him if it was true that he and Appellant had sex (T5/931). "He said he didn't have sex with Tony, he had sex with Missy" (T5/931). "Missy was having sex with all the young boys that were around the house," but Appellant was "Absolutely not" involved (T5/931).

In rebuttal, J.L. testified that although he and Maritza had been "pretty good friends" since they were both fourteen, he had never talked with her about Appellant

performing oral sex on J.L. or the facts of this case (T5/955-956). The trial court sustained the State's objection to Appellant questioning J.L. about prior accusations of sexual misconduct he had made against someone else but had later withdrawn (T5/956).

SUMMARY OF THE ARGUMENT

1. The United States Supreme Court has consistently declined to distinguish between partial and complete closures of trial in reviewing challenges based on the right to a public trial. It has also rejected statutes which purport to grant a blanket right to closure in the absence of any particularized inquiry. The decisions of state and federal courts refusing to diminish the constitutional protection where a trial is partially closed are thus the better reasoned and should be followed. Because the courtroom at Petitioner's second trial was partially closed over Petitioner's objection without conducting any hearing, Petitioner's conviction must likewise be reversed and this cause remanded for a new trial.

2. Where the substance of excluded testimony is clear from the context of the questions, a proffer is not required in order to preserve the issue for appeal.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CLOSING APPELLANT'S TRIAL TO ALL BUT FAMILY AND PRESS BASED SOLELY ON SECTION , WITHOUT CONDUCTING ANY INQUIRY INTO THE NEED FOR CLOSURE AS REQUIRED IN *WALLER V. GEORGIA*, 467 U.S. 39 1992).

Accused persons are guaranteed the right to public trial under the Sixth Amendment of the United States Constitution, as well as Article I, Section 16 of the Florida Constitution. The right reflects our belief that "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Waller v. Georgia, 467 U.S. 39, 46 n. 4, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1992). "The central aim of a criminal proceeding [is] to try the accused fairly" and a public trial serves the purpose of "ensuring that judge and prosecutor carry out their duties responsibly. . . , encourag[ing] witnesses to come forward and discourag[ing] perjury." *Id.* 467 U.S. at 46. The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis. *See* Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Waller, 467 U.S. at 49-50 n. 9.

The United States Supreme Court recognized in Waller that the defendant's Sixth Amendment right may give way when other rights or interests are involved

which are essential to the fair administration of justice. However,

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Waller, 467 U.S. at 44. Waller therefore established a four-part test for use by the trial court in determining whether closure of a trial is constitutionally justified: (1) the party seeking closure must state an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than is necessary to protect compelling State interests; (3) the trial judge must consider reasonable alternatives to closure; and (4) the trial judge must make findings adequate to support the closure. Waller, 467 U.S. at 48

At Petitioner's first trial, the trial court partially closed[2] the courtroom during the

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[2] As summarized in Lena v. State, 901 So. 2d 227, 229 n. 1 (Fla. 3d DCA 2005):

> Under the case law, a total closure of the courtroom is one in which only the actual trial participants remain: judge, jury, essential personnel, parties, lawyers, and the witness who is testifying. *See Douglas v. Wainwright*, 739 F.2d 531, 532 (11th Cir.1984).
>
> A partial closure is one in which some spectators are allowed, in addition to the trial participants. *See Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir.2001).
>
> Section 918.16 is a partial closure statute because it allows additional spectators to remain: newspaper reporters,

testimony of the alleged victim, J.L. Although Section 918.16, Fla. Stat. (1999),[3] did not apply because the victim was over the age of sixteen, the trial court ordered the closure without conducting any kind of hearing. After determining that Petitioner had made a sufficient objection to the procedure, the Fourth District Court of Appeal held that under Waller, the trial court reversibly erred in failing to conduct a hearing and make the required findings supporting its closure of the trial. Kovaleski v. State, 854 So. 2d 282, 284 (Fla. 4th DCA 2003). The Court in that decision noted that in Pritchett v. State, 566 So. 2d 6 (Fla. 2d DCA 1990), the appellate court had "suggested that a Waller inquiry is required even in partial closure cases." 854 So. 2d at 284, n.1.

At Petitioner's second trial, the trial court again ordered partial closure of the courtroom pursuant to Section 918.16 (2), Fla. Stat. (2001),[4] upon the State's request, over Petitioner's objection (T4/701).

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broadcasters, the parties' immediate families or guardians, and victim or witness advocates.

[3] ". . . .when any person under the age of 16 or any person with mental retardation. . . is testifying regarding 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, newspaper reporters, broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney's office."

[4] "(2) 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

> The statute is quite clear, I'm obligated if requested, which I've done on behalf of the victim, to clear the courtroom when he comes in to testify and while he's testifying, except parties to the cause, 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. So if you're not one of those persons that I just read off, when Mr. [L.] . . . comes in to testify, I'm going to have you all wait out here in the hallway while he's testifying. The law requires it. . . .

(T4/703). J.L. was 23 at the time of Petitioner's retrial.

Petitioner's second trial judge therefore committed precisely the same reversible error as his first trial judge. Yet the Fourth District Court of Appeal declined to apply the same sanction. Kovaleski v. State, 1 So. 3d 254 (Fla. 4th DCA 2009). This time, it aligned itself with the Fifth District Court of Appeal which, in Clements v. State, 742 So. 2d 338 (Fla. 5th DCA 1999) *review dismissed* 782 So. 2d 868 (Fla. 2001); *accord* Hobbs v. State, 820 So. 2d 347, 349 (Fla. 1st DCA 2002) *review dismissed* 863 So. 2d 167 (Fla. 2003), held that Waller is inapplicable to a partial court closure by operation of Section 918.16, Fla. Stat. Clements reasoned:

> 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

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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."

This section was enacted in Laws 1999 ch. 99-157 §1, effective July 1, 1999.

> 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.

Clements, 742 So.2d at 341-42 (emphasis added).

The Clements court based this conclusion on the "compelling state interest in protecting younger children or any person with mental retardation while testifying concerning a sexual offense." That factor, of course, cannot be a consideration in the instant case, where the alleged victim was 23 years old at the time of trial and there was no showing that he ever suffered any mental trauma whatsoever (other than that of any suitor rejected in love by the object of his desire) as a result of the events leading to Petitioner's conviction.

Clements' broad exclusion of Section 918.16-inspired trial closure from the protection of the Sixth Amendment has been explicitly rejected by the Third District Court of Appeal in Alonso v. State, 821 So. 2d 423 (Fla. 3d DCA 2002); *see also* Lena v. State, 901 So. 2d 227, 230 (Fla. 3d DCA 2005) ("where the excluded persons have

no alternative means to see or hear the testimony contemporaneously – this court has taken the position that the four-part *Waller* test must be satisfied").

Alonso recognized that the United States Supreme Court has held that the automatic application of a statute of this general type violates the United States Constitution. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982),[5] in which the United States Supreme Court stated:

> We agree with appellee that the first interest – safeguarding the physical and psychological well-being of a minor is a compelling one. But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the outcome of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, nature of the crime, the desires of the victim, and the interests of parents and relatives. [The statute], in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.

[5] Globe Newspaper involved a challenge by a newspaper under the First Amendment to an order partially closing a trial, rather than the Sixth Amendment right asserted in the instant case. As observed in Clements v. State, 742 So. 2d at 340 n. 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, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)."

457 U.S. at 608 (footnote omitted). Consequently, held the Supreme Court, requiring the trial court to determine whether closure is justified on a case-by-case basis ensures "that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest [footnote omitted]." *Id.* Indeed, "*a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional*." 457 U.S. at 611 n. 27 (emphasis added). *See also* Renkel v. State, 807 P.2d 1087, 1092 (Alaska 1991) (State conceded the unconstitutionality of its statute authorizing closure of trial where a child witness testifies, which had same infirmities as Massachusetts statute voided in Globe Newspaper Co., 457 U.S. 596).

The Second District Court of Appeal has also subsequently rejected Clements, stating in Whitson v. State, 791 So. 2d 544, 547 (Fla. 2d DCA 2001) that "in this district *Pritchett* requires a *Waller* inquiry regardless of whether the closure is total or partial." *See also* Roberts v. State, 816 So. 2d 1175 (Fla. 2d DCA 2002) (reversing conviction where trial court ordered partial closure of courtroom without making any *Waller* inquiry). The Second District Court of Appeal specifically concluded that

> A state statute cannot nullify a federal constitutional right. The statute can, however, indicate the status of a state constitutional right or guarantee. We think that *Waller* requires the performance of a judicial duty that cannot be obviated by merely relying upon a state statute.

Whitson, 791 So.2 d at 548.

As in Renkel, 807 P.2d 1087, the trial court below relied solely on the mandatory terms of Florida's statute to support its decision to partially close Petitioner's trial.[6] This was constitutionally impermissible: "Even if the closing was partial rather than total, the order had to be based on particularized findings. *Globe Newspaper Co.*, 457 U.S. at 607-08, 102 S.Ct. at 2620-21." Renkel, 807 P.2d at 1093. As in Renkel, the trial court made no particularized findings justifying the closure in the instant case: it relied solely on the terms of the statute. This it could not constitutionally do. As in Renkel, particularized findings, in accordance with the *Waller* test, were required.

Moreover, Clements is in error in applying a different standard to cases of partial rather than total closure of a trial. Since Waller, the United States Supreme Court has expressly declined an invitation to limit its holding in cases where the trial was closed during *voir dire*. Presley v. Georgia, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). In fact, the Court did not appear to consider that there was any distinction between total and partial closure for purposes of its constitutional analysis.

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[6] The Renkel court treated the exclusion of the press, disinterested spectators, and any of the defendant's friends or relatives as a "total" closure: "Except that a transcript could be made public upon request, it appears that none of the safeguards of an open trial were maintained. The closure in Renkel's case was, therefore, 'total' in the sense that it was closed to all spectators, and could be upheld only with the advancement of a compelling interest supported by findings in the record." 807 P.2d at 1093.

Despite the United States Supreme Court's strong statements regarding even partial closures of the courtroom to the public, some federal circuit courts of appeal have relaxed the first Waller requirement by requiring only that the State advance a "substantial reason" for closing the proceeding. United States v. Osborne, 68 F.3d 94, 98-99 (5th Cir. 1995); United States v. Farmer, 32 F.3d 369, 371 (8th Cir. 1994); Woods v. Kuhlmann, 977 F.2d 74, 76-77 (2d Cir. 1992); United States v. Sherlock, 962 F.3d 1349, 1356-57 (9th Cir. 1992); Nieto v. Sullivan, 879 F.3d 743, 753 (10th Cir. 1989); Douglas v. Wainwright, 739 F.3d 531, 532-33 (11th Cir. 1984) (*per curiam*).

A few state courts have joined these federal courts. Ex parte Eastwood, 980 So. 2d 367, 376 (Ala. 2007); State v. Drummond, 111 Ohio St.3d 14, 854 N.E.2d 1038, 1054 (2006); Feazell v. State, 111 Nev. 1446, 906 P.2d 727, 729 (1995). The clear majority of State courts, however, have not hesitated in holding, consistent with the pronouncements of the United States Supreme Court, that "a partial courtroom closure is governed by the same constitutional standards as a complete closure." Commonwealth v. Cohen, 456 Mass. 94, 921 N.E.2d 906, 921 (2010). *See also* Longus v. State, 416 Md. 433, 7 A.3d 64, 73 (2010) ("In our view, although a partial closure may not implicate the same secrecy issues for the public as a total closure, a partial closure does implicate the same fairness issues"); People v. Jones, 96 N.Y.2d 213, 726 N.Y.S.2d 608, 750 N.E.2d 524 (2001) ("nothing less than an overriding

interest can satisfy constitutional scrutiny"); State v. Mahkuk, 736 N.W.2d 675, 684-85 (Minn. 2007); State v. Ortiz, 91 Hawai'i 181, 981 P.2d1127, 1137 (1999); People v. Taylor, 244 Ill.App.3d 460, 183 Ill.Dec. 891, 612 N.E.2d 543, 548 (1993) *appeal denied* 152 Ill.2d 577, 190 Ill.Dec. 907, 622 N.E.2d 1224 (1993) ("overriding interest" test applies to both full and partial closures of trial proceedings).

In Longus v. State, 416 Md. 433, 7 A.3d at 75, the Maryland appellate court concluded that "The 'overriding interest' test is the substantive core of the *Waller* standard."

> Although *Waller* addressed a total closure of a suppression hearing to the public, the defendant's interest in openness is nonetheless implicated in both a partial and a total closure. For this reason, we shall continue to apply the United States Supreme Court's substantive standard, as articulated in *Waller*, to partial closures as well as total closures.

Id. The Longus court, 7 A.3d at 75, further adopted the reasoning of Tinsley v. United States, 868 A.2d 867, 874 (D.C. 2005) that the distinction between a "substantial reason" and an "overriding reason" is not a particularly meaningful one because "a word like 'overriding' is really not a calibrated measure of the gravity of an interest; [rather] it reflects a conclusion that a particular interest. . . is sufficient to justify the degree of closure sought.' " Thus,

> the sensible course is for the judge to recognize that open trials are strongly favored, to require persuasive evidence of serious risk to an important interest in ordering any closure, and to realize that the more extensive the closure requested,

> the greater must be the gravity of the required interest.

Tinsley v. United States, 868 at 874; Longus, 7 A.3d at 75-76. In conclusion, the Longus court emphasized:

> In our view, the problem with a adopting a "substantial reason" test is that any less stringent or relaxed standard fails to adquately protect the defendant's interest in an open trial. The *Waller* test, in requiring an overriding interest, demands by definition that the State's interest in closure outweighs the burden on the defendant's right to an open trial. By maintaining the *Waller* standard of overriding interest, we ensure that the interest advanced in favor of closure will outweigh the defendant's right to openness in every closure, whether full, temporary, or partial. Further, by applying the *Waller* standard to partial courtroom closures, we guarantee courtroom closures comport with the requirements of the Sixth Amendment, as announced by the United States Supreme Court in *Waller*, and ensure that Maryland courts comply with the constitutionally mandated standard.

Finally, in Presley v. Georgia, 130 S.Ct. at 724-725, the Supreme Court demonstrated the importance it gave to the protection of the right to a public trial when it rejected the State's argument that trial courts need not consider any alternatives to closure absent an opposing party's proffer of some alternatives. The Court emphasized its prior decisions, which it said had made clear that "trial courts are required to consider alternatives to closure even when they are not offered by the parties." The Court pointed out, for instance, that in Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), "neither the

defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceeding confidential. [Citation omitted.] The Court, nevertheless, found it was error to close the courtroom. [Citation omitted]." 130 S.Ct. at 725.

Thus, the United States Supreme Court has consistently declined to distinguish between partial and complete closures of trial in reviewing challenges based on the due process right to a public trial. It has also rejected statutes which purport to grant a blanket right to closure in the absence of any particularized inquiry. The decisions of state and federal courts refusing to diminish the constitutional protections where a trial is partially closed are therefore the better reasoned and should be followed. Consequently, because the courtroom at Petitioner's second trial was, exactly like the courtroom at his first trial, partially closed over Petitioner's objection, without conducting any kind of Waller hearing, Petitioner's most recent conviction must likewise be reversed and this cause remanded for a new trial.

POINT II

A PROFFER IS UNNECESSARY TO PRESERVE THE EXCLUSION OF EVIDENCE FOR REVIEW WHERE THE SUBSTANCE OF THE EXCLUDED TESTIMONY IS APPARENT FROM THE CONTEXT.

During the State's presentation of rebuttal testimony by the alleged victim in this case, J.L., the defense sought to cross examine him about prior accusations of sexual misconduct he had made and withdrawn:

> Q Did you ever make an accusation about someone else having sex with you and later withdraw it?
>
> MR. WORKMAN [prosecutor]: Objection. Sidebar?
>
> THE COURT: Yes, sir.
>
> (Bench conference.)
>
> MR. WORKMAN: Judge, my objection is this is beyond the scope of (inaudible) testimony that I've elicited.
>
> THE COURT: Okay. Mr. Stone.
>
> MR. STONE [defense counsel]: Well, we're talking about his accusations, about him, whether or not he discussed it with someone and I'm not sure that they've had, you know, he's talked to other people about his sex relations in the past.
>
> THE COURT: All right. I'll sustain the objection. It's the brief direct testimony was to rebut Ms. Anderson's testimony. These other things, mind you, would be either improper impeachment and/or irrelevant and/or extrinsic evidence of a collateral matter. So I'll sustain the objection.

> You can ask him about what he testified as far as Maritza Anderson, not making those allegations.

(T5/956-957).

Petitioner concedes that, in Pantoja v. State, 59 So. 3d 1092 (Fla. 2011), this Court held that a witness cannot be impeached by instances of prior misconduct which do not result in a criminal conviction. *Id.* at 1097. Nor can the evidence be admitted as a specific instance of conduct to show that the victim was inclined to lie about sexual abuse. *Id.* at 1098. This Court relied on Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), to hold that the exclusion of attacks on a witness's general credibility, as opposed to his specific credibility, do not violate the defendant's right to due process and confrontation of witnesses, *id.* at 1099, at least absent evidence that the prior report was "demonstrably false," Hogan v. Hanks, 97 So. 3d 189, 192 (7th Cir. 1996), or that the accusation was made against the defendant in the case, *see* Pantoja, 59 So. 3d at 1100, or where the circumstances of the prior false accusation are so similar to the accusation in the defendant's case that due process would require cross examination about the prior incident. *See* Pantoja, 59 So. 3d at 1100 (Pariente, J., concurring). " Under *Davis* and its progeny, the Sixth Amendment only compels cross-examination if the examination aims to reveal the motive, bias or prejudice of a witness/accuser." Boggs v. Collins, 226 F.3d 728, 740 (6th Cir. 2000), quoted with

approval at Pantoja, 59 So.3d at 1099. *But see* Pantoja, 59 So.3d at 1101 (Canady, J., dissenting).

Thus, it appears that the trial court correctly excluded the cross examination about J.L.'s withdrawn report of sexual abuse on the merits. In rejecting Petitioner's claim of error on direct appeal, however, the Fourth District Court of Appeal found that it had not been preserved by a proffer. Kovaleski v. State, 1 So. 3d 254, 257 (Fla. 4th DCA 2009). In so holding, the District Court recognized Reaves v. State, 531 So. 2d 401 (Fla. 5th DCA 1988), holding that no proffer is required when the substance of the excluded evidence is apparent from the context in which it is offered. Section 90.104, Fla. Stat.[7] In Reaves, the defendant offered an entrapment defense at his trial for drug trafficking. In rebuttal, the State presented testimony about a prior drug transaction. The trial court denied the defendant's request to present surrebuttal testimony. On appeal, the appellate court rejected the State's argument that the error in refusing to permit surrebeuttal was not preserved because the defendant did not proffer

[7] "(1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:

". . . . (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked."

the evidence he proposed to adduce. It concluded that "the defendant's precluded surrebuttal testimony would have been necessarily limited to refuting the state's evidence tending to prove predisposition on the issue of entrapment. Thus, this court is not required to speculate as to the substance of the defendant's testimony." 531 So. 2d at 403.

Similarly, in O'Shea v. O'Shea, 585 So. 2d 405 (Fla. 1st DCA 1991), the husband and wife divorced, and the husband later sought primary custody of his child based on the wife's relationship with another man, which the husband contended was adversely affecting the child. The mother successfully objected to the husband's questioning of a former wife of the other man about his relationship with his own child and his ability to raise a child. On appeal, the State argued that the husband's failure to proffer the ex-wife's testimony precluded review. The appellate court rejected this argument, finding that

> It is clear the substance of the evidence sought was apparent from the context within which the questions were asked. It is also clear the trial court would limit the testimony of the former wives as a class. Proffer was unnecessary.

585 So. 2d at 408. Because the questions about the other man's ability to provide a proper environment and his relationship with his own child were relevant to the issues in the case, the trial court committed reversible error in sustaining the wife's objections. *Id.* *See also*, Pacifico v. State, 642 So. 2d 1178, 1185 (Fla. 3d DCA 1989)

("Although a proffer was not made, we conclude the substance of the statements sought to be admitted was apparent from the context of the questions posed to appellant by his trial counsel").

Likewise, in G.A. v. State, 549 So. 2d 1203, 1204 (Fla. 3d DCA 1989), the trial court refused to allow the defendant to call his mother as a defense witness on the basis that she had been in the courtroom while her son testified. On appeal, the Court declined to find that the failure to proffer the mother's testimony prevented it from considering the issue:

> We are able, however, even in the absence of a proffer, to determine that the mother's testimony was relevant and material to the case. Since this case involves a classic one-on-one controversy, the juvenile's mother, allegedly having been a witness to and involved in the latter part of the altercation between the juvenile and the officer, could have testified as to whether the juvenile or the officer was the aggressor, and also could have corroborated either the juvenile's or the officer's testimony. Hence, her testimony as an eyewitness during any stage of the incident, would help clear the path for the trial court to determine just who was telling the truth.

In the instant case, the nature of the evidence Petitioner sought to include was even more readily apparent from the leading question posed by defense counsel: "Did you ever make an accusation about someone else having sex with you and later withdraw it?" The answer to this question could only have been yes.

The Fourth District Court of Appeal was thus at a minimum somewhat disingenuous when it nevertheless stated that "the record is silent as to whether the minor had ever made such an accusation or withdrawn it." Kovaleski, 1 So. 3d at 256. To the extent that the record is "silent," it is because the trial court sustained the State's objection to the question.

The State's objection to Appellant's cross examination on this issue was that the cross examination was "beyond the scope" (R5/956). This objection was not well-founded. Nelson v. State, 602 So. 2d 550, 552 (Fla. 2d DCA 1992), but the trial court sustained it. Importantly, the State did not object to Petitioner's questioning on the grounds of relevance or any other legal objection relating to its truth. The prosecutor below did not, therefore, contest the fact that the witness had made prior accusations, later withdrawn, against others. When proffer "would be useless ceremony, or the evidence is rejected as a class, or where the court indicates such an offer would be unavailing," it will not be required. O'Shea v. O'Shea, 585 So. 2d 405. This was the situation presented to Petitioner in the instant case.

As in Reaves, O'Shea, Pacifico, and G.A., then, because the question, in context, provided the substance of the evidence that Petitioner sought to produce, the issue was preserved for appeal.

Consequently, in disregarding the existing controlling precedent, the Fourth District Court of Appeal brought itself into conflict with those cases. Although it

appears that under Pantoja, the testimony about J.L.'s prior withdrawn report of sexual abuse was inadmissible absent evidence that it resulted in a conviction (which was *not* the basis for the trial court's ruling), the District Court's reliance on the lack of a proffer to support its decision affirming Petitioner's conviction is not moot. "Because this issue is capable of repetition, yet may evade review, we have the authority to retain jurisdiction and decide the issue on the merits under the public exception doctrine. *See Cook v. City of Jacksonville*, 823 So. 2d 86, 87 (Fla. 2002); *Gregory v. Rice*, 727 So. 2d 251 (Fla. 1999)." State v. Blair, 39 So. 3d 1190, 1191 at n. 1 (Fla. 2010). This Court should therefore correct the erroneous reasoning of the Fourth District to bring it into compliance with the decisions of the other district courts of appeal cited on this issue.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court should reverse the judgment and sentence below and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Katherine Y. McIntire, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by U.S. mail this _____ day of SEPTEMBER, 2011.

_____
Assistant Public Defender

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

Assistant Public Defender