# Supreme Court of Florida

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No. SC09-536

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**ANTHONY KOVALESKI,**
Petitioner,

vs.

**STATE OF FLORIDA,**
Respondent.

[October 25, 2012]

PERRY, J.

Anthony Kovaleski seeks review of the decision of the Fourth District Court of Appeal in Kovaleski v. State, 1 So. 3d 254 (Fla. 4th DCA 2009), on the ground that it expressly and directly conflicts with a decision of the Third District Court of Appeal, Alonso v. State, 821 So. 2d 423 (Fla. 3d DCA 2002).[1] We have

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1. Kovaleski also sought this Court's review based on express and direct conflict with a decision of the Second District Court of Appeal, Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988). As conceded by Kovaleski, this Court's decision in Pantoja v. State, 59 So. 3d 1092 (Fla.), cert. denied, 132 S. Ct. 496 (2011), which held that a victim may not be cross-examined about an alleged prior false accusation that did not result in a criminal conviction, resolves the conflict between Kovaleski and Jaggers. Accordingly, we decline to grant jurisdiction on this ground and decline to address Kovaleski's claim that the Fourth District erred in finding that such elicited testimony was not preserved for review.

jurisdiction. See art. V, § 3(b)(3), Fla. Const. For the reasons expressed below, we approve the decision of the Fourth District in Kovaleski, but upon different reasoning. We disapprove the decision of the Third District in Alonso to any extent it could be read as inconsistent with this opinion.

## FACTS AND PROCEDURAL HISTORY

Anthony Kovaleski was convicted by a jury of two counts of lewd and lascivious acts on a minor. At Kovaleski's first trial in 1998, the trial court partially closed the courtroom during the testimony of the victim, J.L., pursuant to section 918.16, Florida Statutes (1997), which allowed for partial closure of the courtroom during the testimony of a victim who was under the age of sixteen concerning a sex offense. On appeal, the Fourth District held that the trial court erred in closing the courtroom after it became clear that J.L. was not under the age of sixteen and in failing to make findings in support of closing the trial as required by Waller v. Georgia, 467 U.S. 39, 48 (1984). See Kovaleski v. State, 854 So. 2d 282, 284 (Fla. 4th DCA 2003). Thus, the Fourth District reversed and remanded for a new trial. Id. at 284.

At Kovaleski's second trial in 2006, the trial court partially closed the courtroom during the testimony of the victim pursuant to section 918.16(2), Florida Statutes (2001), which provided for partial closure of the courtroom during the testimony of a victim of a sex offense upon the victim's request regardless of the

victim's age. Kovaleski was again convicted of two counts of lewd and lascivious acts on a minor. On appeal, the Fourth District addressed whether: (1) J.L. could be cross-examined about a prior false accusation of sexual misconduct against another person; (2) the trial court erred in ordering partial closure of the courtroom when the victim testified; and (3) Kovaleski was subjected to vindictive sentencing when, after retrial, he was sentenced to two consecutive sentences of fifteen years each. Kovaleski, 1 So. 3d at 256-58. The Fourth District concluded that Waller was inapplicable to partial closures, the trial court erred in not giving Kovaleski credit for time served on each of his consecutive sentences after retrial, and the additional claims raised by Kovaleski were without merit. Id. at 257-58. Thus, the Fourth District affirmed Kovaleski's convictions, and remanded the cause for resentencing. Id.

On review here, Kovaleski claims that the Fourth District erred in finding that the trial court did not err in partially closing the courtroom during the victim's testimony.

## ANALYSIS

Kovaleski contends that the trial court's closure during J.L.'s testimony pursuant to section 918.16(2) violated his right to a public trial under the Sixth Amendment to the United States Constitution and article I, section 16 of the Florida Constitution. Specifically, Kovaleski asserts that a partial closure pursuant

to section 918.16(2) runs afoul of the United States Supreme Court's decision in Waller, which sets out requirements that must be satisfied before the presumption of openness may be overcome: (1) the party seeking to close the hearing must advance an overriding interest that is likely 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. 467 U.S. at 48.

Section 918.16(2) provides for partial closure of a trial during the testimony of victims at a sex offense trial:

> (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 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.

§ 918.16(2), Fla. Stat. (2001).[2]

We find that section 918.16(2) acceptably embraces the requirements set forth in Waller.[3] Pursuant to the statute, the courtroom is partially closed not

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2. Section 918.16(2) has remained the same since 2001.

3. See Fla. S. Comm. on Judiciary, CS for SB 198 (1999) Staff Analysis 2 (Jan. 20, 1999) (on file with comm.) (contemplating the requirements of Waller in

automatically but only upon the request of the victim. C.f. Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 607-09 (1982) (automatic mandatory exclusion of the press and public from the courtroom with no particularized finding is constitutionally infirm as not narrowly tailored to the State's compelling interest of protecting the testifying victim). Because the partial closure pursuant to section 918.16(2) occurs only at the request of the testifying victim, protecting the victim upon his or her request is a compelling interest of the State, satisfying the first prong of Waller.

As to the second prong of Waller, because of the number of people including members of the press who are explicitly allowed to remain in the courtroom, and because the partial closure is only during the victim's testimony, the partial closure is narrowly tailored to the interest of protecting the victim. Regarding the third prong of Waller, we find that allowing the parties enumerated in section 918.16(2) to remain in the courtroom during the victim's testimony and only providing the partial closure during the victim's testimony provides for the most reasonable alternative to closing the courtroom during a trial. Finally, as to the fourth prong of Waller, we caution trial courts to ensure that the statute is in fact applicable to

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analyzing the bill which amended section 918.16(2), Fla. Stat. (1997), as set forth above).

the case before them and is properly applied. Reflecting such determinations in the record will allow for proper appellate review.

For the reasons expressed above, we find that Kovaleski was not denied his right to a public trial. We therefore approve the decision of the Fourth District Court of Appeal in Kovaleski, but upon different reasoning, and disapprove the decision of the Third District Court of Appeal in Alonso, to any extent it could be read as inconsistent with our decision.

It is so ordered.

LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.
POLSTON, C.J. and CANADY, J., concur in result.
PARIENTE, J., concurs in result only with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring in result only.

While I agree with approving the result reached by the Fourth District that Kovaleski is not entitled to relief, I also agree with the Third District in Alonso that under the facts and circumstances of that case, the automatic application of the statute resulted in a constitutional violation of the defendant's right to a public trial. As explained by the United States Supreme Court, "it is clear that the circumstances of the particular case may affect the significance of the interest."

Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 608 (1982).

In this case, the defendant said only that he was objecting for the record, without further explanation. The defendant did not at that time or during appellate proceedings in the Fourth District or this Court point to any individuals who were improperly excluded. Therefore, in my view, the application of section 918.16, Florida Statutes (2001), did not result in any demonstrated constitutional violation in this case.

The facts of Alonso demonstrate why the one-size-fits-all approach adopted by the majority, in which the statute negates any need for an individualized inquiry, may create constitutional problems and why the Third District's decision in Alonso v. State, 821 So. 2d 423 (Fla. 3d DCA 2002), is clearly distinguishable from this case. First, the defendant in Alonso made a specific objection to the courtroom closure on constitutional grounds, id. at 425, whereas the defendant here made no such specific objection. Second, the defendant in Alonso objected to the exclusion of certain individuals, including his cousin. Id. The defendant's "immediate family" allowed under the statute would have included his wife, from whom he was separated, and his parents, who could not attend the trial, but not his cousin, the individual he considered to be a father figure. Id. Third, the witnesses

testifying in Alonso while the courtroom was closed were not victims, id., unlike in the instant case.

The Third District in Alonso correctly reasoned on the record before it that "[t]he trial court itself expressed doubts about whether the courtroom should be closed under the circumstances of [that] case. In the absence of the necessary findings justifying the closure, we must order a new trial." Id. at 426 (emphasis added). Further illustrating the necessity of a case-by-case evaluation and findings by the trial court as to whether the courtroom should be closed, the Third District also observed that "[o]n the facts of [that] case, we see no viable argument for closing the courtroom during the testimony of the teenaged witnesses, who were fourteen and twelve at the time of trial. They were not victims. They simply recounted what happened when the victim came to their apartment, including what the victim told them." Id. at 427 (emphasis added). Accordingly, the Third District concluded: "We see no overriding interest served by closing the hearing during their testimony." Id.

The majority opinion broadly pronounces that the statute will always satisfy Waller. In my view, however, section 918.16 cannot obviate the need for an individualized inquiry before a partial courtroom closure where, like in Alonso, the defendant objects and points to specific individuals who were excluded from the

courtroom that interfere with his right to a public trial. In Waller, the United States Supreme Court set forth the requirements that must be met:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely 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 proceeding, and [4] it must make findings adequate to support the closure.

Waller v. Georgia, 467 U.S. 39, 48 (1984) (emphasis added). While the statute may generally satisfy the first two requirements of Waller, it cannot satisfy the third and fourth requirements. Simply put, the statute cannot satisfy the requirements for the trial court to consider reasonable alternatives and make specific findings in each case.

It should be noted that some courts have applied a less stringent standard to partial closures than the standard in Waller, requiring a "substantial reason" rather than an "overriding interest." See, e.g., Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992). The United States Supreme Court has never explicitly decided whether Waller is the standard to use when there is a partial closure, and the case law is far from uniform.[4] In my view, even under the lesser standard, there must be an

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4. Compare United States v. DeLuca, 137 F.3d 24, 33-34 (1st Cir. 1998) (applying "substantial reason" test to partial closures); United States v. Osborne, 68 F.3d 94, 99 (5th Cir. 1995) (same); United States v. Farmer, 32 F.3d 369, 371 (8th Cir. 1994) (same); Woods, 977 F.2d at 76 (same); United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989) (same); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989) (same); Douglas v. Wainwright, 739 F.2d 531, 533 (11th Cir. 1984) (same); Commonwealth v. Cohen, 921 N.E.2d 906, 921-22 (Mass. 2010)

individualized determination. See United States v. Galloway, 937 F.2d 542, 546 (10th Cir. 1991) ("recogniz[ing] that a different standard applies where the courtroom is only partially closed" but holding that "[n]evertheless, the trial court must make sufficient findings to allow the reviewing court to determine whether the partial closure was proper"); Cohen, 921 N.E.2d at 922-23 ("[E]ven in a partial closure context, the remaining Waller factors must be satisfied. . . . Closure by policy runs counter to the requirement that a court make a case-specific determination before a closure of any part of a criminal proceeding constitutionally may occur."); People v. Kline, 494 N.W.2d 756, 760 (Mich. Ct. App. 1992) (applying "substantial reason" test but stating that "the court failed to make findings on the record in support of its order as required by the United States Supreme Court").

In conclusion, the application of section 918.16 without conducting a Waller inquiry and making individualized findings can result in the unjustified exclusion of individuals or an overly broad closure of the courtroom. This was illustrated in Alonso, where there was no logical or justified reason for excluding the

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(same); State v. Drummond, 854 N.E.2d 1038, 1054 (Ohio 2006); People v. Kline, 494 N.W.2d 756, 759 (Mich. Ct. App. 1992); with English v. Artuz, 164 F.3d 105, 108-09 (2d Cir. 1998) (applying Waller's "overriding interest" test to partial closures); People v. Jones, 750 N.E.2d 524, 529 (N.Y. 2001) (same); State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) (same); State v. Ortiz, 981 P.2d 1127, 1137 (Haw. 1999) (same); People v. Taylor, 612 N.E.2d 543, 548-49 (Ill. App. Ct. 1993) (same).

defendant's cousin other than because the statute required it. I would therefore approve the Third District's decision in Alonso, which held that "[i]n order to implement the statute in a constitutional way, it is necessary to apply [the] four-part [Waller] constitutional test when closure of the courtroom is requested." Alonso, 821 So. 2d at 426. In this case, however, because the defendant never made a specific objection or even indicated who was excluded that interfered with his right to a public trial, I agree with approving the result reached by the Fourth District to affirm the conviction.

An Appeal from the Circuit Court in and for Indian River County,
Dan Lewis Vaughn, Judge - Case No. 4D06-1168

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