Floyd Clements vs State of Florida

NEXT CASE ON THE COURT'S DOCKET, CLEMENTS VERSUS STATE OF FLORIDA.

MR. MITCHELL.

MY NAME IS JOE MITCHELL. I AM CO-COUNSEL WITH MR. MILLER WHO, IS A REPRESENTATIVE FROM ACDL, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND HE WROTE AN AMICUS BRIEF ON THIS PARTICULAR ISSUE. I AM GOING TO USE ALL OF THE TIME FOR ORAL ARGUMENT. I REPRESENT FLOYD CLEMENTS. FLOYD CLEMENTS WAS TRIED, CHARGED, TRIED AND CONVICTED OF CHILD SEXUAL ABUSE IN BREVARD COUNTY. EARLY 1998. NOW, THE ISSUE BEFORE THIS COURT IS A SINGULAR, VERY STRAIGHTFORWARD ISSUE, AND THE ISSUE IS THIS. DURING THE TRIAL, THE CHILD VICTIM, CHILD SEXUAL ABUSE VICTIM, WAS CALLED TO TESTIFY, AND AS OCCURS IN MOST OF THESE SORT OF CASES, THE STATE ASKED THAT THE COURTROOM BE CLEARED, PURSUANT TO FLORIDA STATUTE 918.16. NORMALLY, AT LEAST IN A LOT OF THE CASES, THIS IS SORT OF A PER FUNKT OTHER THING -- PERFUNCTORY THING. THE STATE ASKED THAT THE COURT BE CLEARED AND THE COURT IS CLEARED AS A MATTER OF FACT, BUT IN THIS PARTICULAR CASE, THE DEFENSE ASKED THAT A HEARING BE HELD AND THAT FINDINGS BE MADE BEFORE ANY PERSON WHO WAS THERE TO WATCH THE TRIAL BE EXCLUDED. HE SPECIFICALLY SAID I ASK FOR A HEARING, AND I ASKED FOR FINDINGS, BEFORE ANY CLOTHES YOUR OR PARTIAL OR TOTAL, OCCURS IN THIS CASE. NOW, THE JUDGE AT THAT TIME LOOKED TO THE STATE ATTORNEY FOR SOME SPECIFIC ADVICE, AND THE STATE ATTORNEY ADVISED THE COURT THAT MR. CLEMENTS WITH NO STANDING ON THIS ISSUE, AND COURT WENT ALONG WITH THE DIRECTIONS GIVEN TO HER BY THE ASSISTANT STATE ATTORNEY AND SAID YOU DON'T HAVE ANY STANDING. THE STATUTE SAYS "SHALL". THE STATUTE IS MANDATORY, AND WHATEVER PEOPLE ARE SUPPOSED TO BE EXCLUDED, PER 918.16, WERE EXCLUDED FROM THE COURTROOM.

IT IS NOT, REALLY, A STANDING ISSUE. IT IS TALKINGING ABOUT A -- TALKING ABOUT A PUBLIC TRIAL. IT IS SAYING, BECAUSE THERE IS NO DISCRETION UNDER THE STATUTE THERE, IS NOTHING TO HEAR.

I BELIEVE THAT IS BASICALLY WHAT THE ASSISTANT STATE ATTORNEY WAS SAYING.

WHAT WOULD YOUR POSITION BE, IF THE JUDGE HAD SAID, OKAY, WE WILL HAVE A HEARING. WHAT KIND OF HEARING WOULD YOU -- WITH THIS SITUATION, WHERE YOU HAVE A CHILD VICTIM, WHO, OBVIOUSLY, THE INTENT OF THE STATUTE IS TO AVOID ANY UNNECESSARY EMBARRASSMENT. WOULDN'T THERE HAVE TO BE PSYCHOLOGISTS TO TESTIFY, OR WOULD IT BE ENOUGH FOR THE TRIAL JUDGE TO MAKE THE FINDINGS, UNDER WHAT WILLER? WHAT WOULD YOU EVEN -- UNDER WALLER? WHAT WOULD BE YOUR REASON?

IN OUR BRIEF, WE SPECULATED WHY THE COURT, THE TRIAL COURT SHOULD HAVE BEEN OPEN AND NOT ANYONE EXCLUDED FORM THE STATE SPECULATED, IN THEIR BRIEF, ON SOME OF THE REASONS WHY THE PROCEEDING SHOULD HAVE BEEN CLOSED, BUT THE BEST PERSON TO MAKE THE DETERMINATION, WHATEVER EITHER SIDE WANTED TO ARGUE, AT THE TIME THERE WAS A HEARING, YOU CAN PRESENT WHATEVER YOU WANT TO AND LET THE JUDGE MAKE A FINDING. NOW, YOU COULD GO TO THE SERIES OF CASES THAT WE CITED IN OUR BRIEF, AND BASICALLY I DON'T THINK THERE IS ANY DISAGREEMENT ABOUT THE CASES, BECAUSE THE FIFTH DCA CASE TALKS ABOUT GLOBE, WALLER, DOUGLAS, PRICHARD, AND ALL OF THESE CASES THAT TALK ABOUT A HEARING AND SO FORTH, SO I THINK THAT WHAT WOULD OCCUR WOULD BE BASICALLY

THE THINGS THAT ARE TALKED ABOUT IN WHAT WILLER. IS THERE ANY -- IN WALLER. IS THERE ANY --

FIRST OF ALL, THIS IS A DIFFERENT SITUATION THAN THOSE TWO SECOND DISTRICT CASES, BECAUSE IN THE SECOND DISTRICT CASES, THEY TOTALLY CLOSED THE HEARING. CORRECT?

WELL, YOUR

YOUR HONOR, I DON'T AGREE WITH THAT.

DID THEY TOTALLY CLOSE THE HEARING?

YES, SIR, BUT I DISAGREE WITH THE COURT THAT IT IS A TOTALLY DIFFERENT CONCEPT FOR THIS REASON. I KNOW THE OPINION IN THE FIFTH DISTRICT COURT OF APPEAL SAID IT IS DISTINGUISHABLE AND IT IS DIFFERENCE, BUT I SAY, BOTH IN PRICHARD AND IN THORNTON, THEY SAY IF THE HEARING WAS IMPORTANT AND THEY WERE NOT GOING TO REVERSE THOSE CASES, PURELY BECAUSE THEY MADE IT IN TOTAL VIOLATION OF 918.16, THEN THEY WOULD HAVE NEVER MENTIONED THE NECESSITY FOR A HEARING.

LET ME ASK YOU THIS. WHO, IN YOUR CASE, SPECIFICALLY, WAS EXCLUDEED, TO THE DETRIMENT OF YOUR CLIENT?

SAY THAT AGAIN.

WHO WAS EXCLUDED? WHAT PERSON?

SOME PEOPLE WHO WANTED TO BE THERE.

IS THAT PROFFERED?

THERE IS SOMETHING IN THE RECORD, YOUR HONOR, ON THE TRANSCRIPT OF THE DIALOGUE, BETWEEN THE DEFENSE ATTORNEY AND THE COURT, AND THE ASSISTANT STATE ATTORNEY, AND IT IS IN MY BRIEF, WHERE THE COURT IS NOTIFIED, BY THE DEFENSE ATTORNEY, MR. SEINE REFORM. HE SAYS THERE ARE PEOPLE BEING -- FROM MR. SEINER. HE SAYS THERE ARE PEOPLE BEING REMOVED FROM THIS COURTROOM. IS THAT THE TOTALITY OF WHAT IS IN THE RECORD? THERE ARE PEOPLE.

THERE ARE PEOPLE WHO WANT TO BE HERE, I GUESS, AND THEY ARE BEING REMOVED FROM THIS COURTROOM. AND THEN, FURTHER, HE SAYS, MR. SEINER, THE DEFENSE ATTORNEY, SAYS, IN THE RECORD, YOUR HONOR, I WOULD LIKE THE RECORD TO REFLECT THAT THERE IS A BAILIFF STANDING AT THE DOOR, AT THE BACK OF THIS COURTROOM, NOT ALLOWING PEOPLE TO ENTER, WHO WOULD LIKE TO ENTER. NOW, OF COURSE, THERE IS NOTHING THE RECORD THAT WOULD INDICATE THERE WAS ANYONE TRYING TO GET IN, BUT THE POINT IS SOME PEOPLE WHO WERE THERE WHO WANTED TO BE THERE WERE EXCLUDED. AND OTHER PEOPLE WHO MIGHT HAVE WANTED TO COME IN COULDN'T COME IN, BECAUSE THE BAILIFF WAS STANDING AT THE DOOR.

THE PEOPLE

THE PEOPLE THAT WERE LISTED IN THE STATUTE, THEY WERE ALL THERE, THE PRESS --

YES, YOUR HONOR. I DON'T BELIEVE THERE WAS ANY QUESTION THAT THIS WAS PARTIAL -- BY, THE ATTORNEY GENERAL'S BRIEF SAYS A TEXTBOOK 918.16 --

IT WAS DONE IN ACCORDANCE WITH THE STATUTE.

YES, YOUR HONOR.

WHY ISN'T THAT A SIGNIFICANT FACTOR, FOR US TO CONSIDER? AND THAT IS THE FACT THAT, FOR INSTANCE, THE PRESS WAS THERE. YOU KNOW, AS A MATTER OF FACT, OR EXPERIENCE, OR HISTORY OR WHATEVER, WHAT WE HAVE SEEN IS MOST OF THE CLASHES THAT HAVE OCCURRED WITH REFERENCE TO CLOSED COURTROOMS HAVE OCCURRED IN THE CONTEXT OF THE PRESS COMING FORWARD AND SAYING THIS SHOULD BE A PUBLIC TRIAL. WE SHOULD BE PRESENT, AND THE DEFENDANT, ALSO, CLAIMING, UNDER THAT, AND SO THE PRESS, AS THE REPRESENTATIVE OF THE PEOPLE, HAS ENSURED THAT IT IS NOT A SECRET PROCEEDING, AND SO WHILE, YOU KNOW, NOTHING IS ABSOLUTE, IN ANY OF THE CONTEXT, WOULD YOU AT LEAST AGREE THAT THAT IS THE LEAST A SUBSTANTIAL FACTOR THAT WE SHOULD CONSIDER, AND THAT IS THAT THIS WAS NOT A SECRET PROCEEDING.

IT WASN'T A SECRET PROCEEDING, YOUR HONOR.

THAT THE PRESS WAS THERE AT THAT PROCEEDING. IT WAS NOT EXCLUDED.

LET ME SAY THIS. I DON'T KNOW IF THE PRESS WAS THERE OR NOT.

I THINK, UNDER THE -- UNDER THE STATUTE, THE PRESS IS PERMITTED TO BE THERE. THE PRESS IS NOT EXCLUDED. IS THAT CORRECT?

THAT IS TRUE. IN THIS PARTICULAR CASE, IF THE PRESS HAD WANTED TO BE THERE, THEY COULD BE THERE. IF THEY -- BECAUSE THE ORDER, THE JUDGE'S EXCLUSION OR CLOSE YOUR ONLY WAS A PARTIAL. WHATEVER THE STATUTE SAID, THAT IS WHO SHE EXCLUDED. SO IN THAT SENSE, IT IS DIFFERENT FROM PRICHARD AND THORNTON, BUT THE POINT THAT I MAKE IS, WHEN GLOBE FIRST CAME DOWN THE PIKE RESPECT AND WE STARTED TALKING ABOUT CLOSE YOUR AND HEARINGS AND SO FORTH -- CLOSE YOUR AND HEARINGS AND SO FORTH -- CLOSER AND HEARINGS AND SO FORTH, WHAT GLOBE SAID, AND I WOULD LIKE TO QUOTE FROM GLOBE, IF I MIGHT, WHAT GLOBE SAID WAS WE AGREE WITH THE APPELLEE, WHO IS THE STATE OF MASSACHUSETTS. NOW, IN GLOBE, WHAT YOU ARE DEALING WITH IS A STATUTE THAT MANDATORILY SAID THAT IT WAS A TOTAL CLOSE YOUR. IF THERE WAS A TRIAL INVOLVING A CHILD SEXUAL ABUSE VICTIM. IT WASN'T A PARTIAL CLOSE YOUR, LIKE WE HAVE HERE, SO IT WAS DIFFERENT IN THAT SENSE. WE AGREE WITH THE 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 CLOSE YOUR RULE, WHICH IS WHAT WE HAVE HERE. IT IS A PARTIAL CLOSURE BUT A MANDATORY CLOSURE RULE, FOR THE REASON THE SPECIFICS OF THE CASE MAY DETERMINE AN INTREST. A TRIAL COURT CAN DETERMINE ON, A CASE-BY-CASE BASIS, WHETHER THE CLOSURE IS NECESSARY, TO PROTECT THE INTEREST OF A MINOR CHILD, AND IN ANSWER TO YOUR INQUIRY, YOUR HONOR, IT IS RELATED TO THE VICTIM'S AGE, PSYCHOLOGICAL MATURITY AND UNDERSTANDING, THE NATURE OF THE CRIME, THE DESIRES OF THE VICTIM AND THE INTEREST OF THE PARENTS AND RELATIVES. THEN LATER, IN FOOTNOTE 20 OF THAT UNITED STATES SUPREME COURT OPINION 1982, "INDEED, THE PLURALITY OPINION IN RICHMOND NEWSPAPERS SUGGESTED THAT INDIVIDUALIZED DETERMINATIONS ARE ALWAYS," AND THAT IS THEIR EMPHASIS" REQUIRED BEFORE THE RIGHT OF ACCESS MAY BE DENIED. ABSENT AN OVERRIDING INTEREST, ARTICULATED IN FINDINGS, THE TRIAL OF A CRIMINAL CASE MUST BE OPEN TO THE PUBLIC. THEY MAKE NO DISTINCTION, IN THAT TERMINOLOGY, AS TO A PARTIAL CLOSE YOUR OR A TOTAL CLOSE YOUR. NOW, AFTER READING THAT AND SAYING, WELL, THAT WAS A FIRST AMENDMENT CASE. THAT WAS A TOTAL CLOSE YOUR. THAT WAS A CASE INVOLVING THE FIRST AMENDMENT, AND SO FORTH. IF THERE IS ANY QUESTION ABOUT HAVING TO HAVE HEARINGS IN THOSE SORT OF CASES, THEN THE NEXT CASE THAT GETS DECIDED IS A CASE THAT CAME OUT OF FLORIDA BUT WAVED ITS WAY THROUGH THE -- BUT WEAVED ITS WAY THROUGH THE FEDERAL SYSTEM, DOUGLAS VERSUS WAINWRIGHT, AND THEY DO DISCUSS, IN DOUGLAS VERSUS WAINWRIGHT, THE STANDARD OF PROOF BETWEEN AN ABSOLUTE CLOSURE AND A TOTAL CLOSE YOUR, AND OBVIOUSLY IT MUST HAVE BEEN A TOTAL

CLOSURE AT SOME TIME IN THE TRIAL, BECAUSE THERE WOULD BE NO NEED TO TALK ABOUT IT, IF IT WAS NEVER AN ISSUE, BUT THEN, TOWARD THE END OF THAT OPINION, THEY GO TO SUBSECTION D, A BIG SUBSECTION, AND THE HEADING AT THAT SUBSECTION IS "THE NEED FOR A HEARING AND FINDINGS". AND I QUOTE, ONCE AGAIN, "THE FAILURE TO GIVE INTERESTED PARTIES AN OPPORTUNITY TO BE HEARD AND TO STATE REASONS FOR CLOSURE HAS RENDERED CLOSURE, AND IT DOESN'T SAY TOTAL OR PARTIAL --" CLOSE YOUR ORDERS CONSTITUTING AND FIRM TO THE CASE ACCESS TO THE PUBLIC OF A TRIAL. AND THEN, TO QUOTE FURTHER, ACCORDINGLY, WE HOLD THAT AN OPPORTUNITY TO BE HEARD AND ADEQUATE FINDINGS ARE REQUIRED, WHERE ANY CLOTHES CLOSURE OF THE TRIAL IS NECESSARY WITH THE OPPORTUNITY FOR THE DEFENDANT TO BE HEARD.

DON'T WE HAVE A HEARING, AND HAVING DETERMINED AT THAT HEARING, THAT THERE WERE GOOD REASONS IN ALL OF THESE PARTICULAR CATEGORY OF CASES, TO HAVE A PARTIAL CLOSURE, AND TO HAVE ATTEMPTED, AT LEAST, TO STRIKE A BALANCE IN THE STATUTE. THAT IS OF ALLOWING SOME ACCESS AND, YOU KNOW, AND ONLY HAVING A PARTIAL CLOSURE, BUT OF HAVING ALREADY MADE A LEGISLATIVE DETERMINATION, JUST AS YOU MIGHT HAVE A JUDICIAL DETERMINATION, IF YOU ACTUALLY HAD A HEARING, AND SO WE COME DOWN TO, AND THIS IS, REALLY, PROBABLY, WHAT YOU ARE ARGUING, ANYWAY, AS TO WHETHER OR NOT THE LEGISLATURE HAS STRUCK A PROPER BALANCE, CONSTITUTIONALLY, IN A STATUTE THAT APPEARS TO BE MANDATORY, IN TERMS OF HAVING A PARTIAL CLOSURE OF A HEARING. ISN'T THAT WHERE WE END UP THEN, THAT WE HAVE GOT TO DETERMINE, THE STATUTE CLEARLY READS, IN MANDATORY TERMS, DOES IT NOT?

IT DOES.

SO, I MEAN, THE LEGISLATURE HAS MADE THE DECISION. THE QUESTION, THEN, BECOMES WHETHER THEY HAVE STRUCK A PROPER BALANCE AT THEIR -- AFTER THEIR HEARING, AND SO HOW ABOUT HELPING US WITH THAT? WHY ISN'T THAT A REASONABLE BALANCE?

IN TERMS OF ALL OF THE CASES, YOUR HONOR, SAY YOU HAVE TO HAVE A HEARING.

BUT THAT COMES BACK TO THE LEGISLATURE. DO YOU AGREE THIS IS A MANDATORY -- THAT THE LEGISLATURE HASN'T LEFT ANY ROOM FOR HEARINGS OR DISCRETIONARY CALLS?

ON ITS FACE. OKAY.

OKAY. ZOO -- IS THAT -- SO IS THAT IT? IN OTHER WORDS ARE YOU SAYING THAT THE LEGISLATURE COULD NEVER STRIKE A BALANCE?

I DON'T THINK THE LEGISLATURE COULD CONSIDER ALL THE CIRCUMSTANCES IT WOULD COME UP IN ALL OF THE INDIVIDUALIZED CASES, AND WITHOUT TRYING TO BE SILLY. OKAY. IF THE JUDGE, IN THIS CASE, HAD SAID THIS TO MR. SEIN ERROR SAID IN ALL OTHER CASES, YES, I -- TO MR. SEINER, OR SAID IN ALL OTHER CASES, YES, I KNOW YOU WEREN'T HEARD AND YOU DIDN'T GET TO TELL THE LEGISLATURE ABOUT ALL OF THE UNIQUE FACTS AND CIRCUMSTANCES ABOUT YOUR CASE, BUT YOU HAVE HAD A HEARING. IT WAS HELD IN THE LEGISLATURE IN 1977, AND THERE WILL BE NO MORE HEARINGS. AND I DON'T THING THAT ANY PIECE OF LEGISLATION CAN BE WRITTEN TO WHERE IT WOULD TAKE CARE OF ALL OF THE UNIQUE FACTS AND CIRCUMSTANCES THAT COME UP IN THESE CASES, SO THE ANSWER TO YOUR QUESTION IS I DON'T THINK THAT THE STATUTE STRIKES ANY KIND OF BALANCE AT ALL.

WHAT ABOUT THE BALANCE OF, FIRST OF ALL, SAYING, NO, WE ARE NOT GOING TO VIOLATE ANY RULE ABOUT NOT HAVING SECRET TRIALS, ON OR TESTIMONY? THIS IS GOING TO BE PUBLIC, IN THE SENSE THAT WE ARE GOING TO BE CERTAIN THAT THE PRESS HAS ACCESS TO --

THE UNITED STATES SUPREME COURT --

AND OTHERS, YOU KNOW, HAVE ACCESS TO THIS, SO WE ARE GOING TO TRY TO BE CERTAIN THAT THIS IS NOT A SECRET PROCEEDING, BECAUSE WE REALIZE THAT THAT IS JUST GOING WAY TOO FAR. AND THEN, ON THE OTHER SIDE, WE ARE GOING TO SAY THERE IS THIS CATEGORY OF WITNESS -- WITNESSES THAT WE ARE SO CONCERNED ABOUT THAT WE ARE GOING TO MAKE THAT A NARROW CATEGORY OF WITNESS, AND A NARROW CATEGORY OF CASES, I.E. THE KIND OF CASE THAT YOU KNOW, WE HAVE HERE, SO THAT ON THE ONE HAND, WE THINK WE HAVE DEALT WITH THE MOST SENSITIVE KINDS OF CASES AND WITNESSES THAT DO NEED PROTECTION, AS A MATTER OF OUR LEGISLATIVE FINDINGS, AND ON THE OTHER HAND, WE ARE NOT GOING TO HAVE A TOTAL CLOSURE, BECAUSE WE KNOW THAT THAT WOULD PROBABLY VIOLATE THE CONSTITUTION. NOW, ISN'T THAT -- ISN'T DOESN'T THAT SEEM TO BE THE BALANCE THAT HAS BEEN STRUCK HERE?

MAYBE ATTEMPTED TO BE. OKAY. BUT I REFER BACK TO GLOBE, TO ANSWER YOUR QUESTION. BUT AS COMPELLING AS THAT INTEREST MAY BE, PROTECTING MINOR CHILDREN, IT DOES NOT JUSTIFY A MANDATORY CLOSURE.

AGAIN, WE ARE TALKING ABOUT, REALLY, A MANDATORY TOTAL CLOSURE, ARE WE NOT?

RIGHT. BUT THE LANGUAGE, AS KBERPTED BY THE OTHER CASES THAT FOLLOW, I.E. DOUGLAS -- BUT THE LANGUAGE, AS INTERPRETED BY THE OTHER CASES THAT FOLLOW, I.E. DOUGLAS AND UNITED STATES SUPREME COURT, TALK ABOUT ANY CLOTHES YOUR, PARTIAL, TOTAL -- ANY CLOTHES YOUR -- ANY CLOSURE, TOTAL, PARTIAL, WHATEVER, ANY CLOSURE, TOTAL, WHATEVER, YOU HAVE TO HAVE A HEARING. THERE WAS NO HEARING HERE. THERE WERE NO FINDINGS, AND THEREFORE THERE WAS A VIOLATION OF THE SIXTH AMENDMENT. I BELIEVE I AM IN MY REBUTTAL TIME, SO I WILL SAVE WHATEVER TIME I HAVE LEFT. THANK YOU.

MAY IT PLEASE THE COURT. I AM REBECCA WALL, ATTORNEY, AND I REPRESENT THE STATE HERE TODAY. THIS IS NUT SHE WOULD. WHAT THE COURT IS BEING ASKED TO -- IS NUT SHELLED. WHAT THE COURT IS ASKED TO DO HERE IS TO EXAMINE TWO LEGITIMATE BUT COMPETING INTERESTS AND DETERMINE WHETHER THE LEGISLATURE IN THIS CASE, BECAUSE THERE IS A STATUTE INVOLVED, HAS FOUND THE APPROPRIATE AND LAWFULLY PLACE IN BETWEEN THOSE TWO COMPETING INTERESTS.

ISN'T -- AREN'T WE DEALING, THOUGH, HERE, AND WHY THIS IS NOT LIKE ANY OTHER STATUTE, WITH A -- AN INFRINGEMENT ON THE SIXTH AMENDMENT RIGHTS. NOW, LET ME JUST -- DO YOU AGREE THAT WE ARE DEALING, HERE, NOT WITH FIRST AMENDMENT BUT WITH THE SIXTH AMENDMENT?

I AGREE WITH THAT.

SO THAT ANY PUBLIC, ANY MEMBER OF THE PUBLIC THAT IS EXCLUDED FROM A TRIAL, THERE IS A POTENTIAL SIXTH AMENDMENT VIOLATION. CORRECT?

CERTAINLY TRIGGERS THE SIXTH AMENDMENT RIGHTS.

SO I GUESS WHAT I AM HAVING TROUBLE WITH IS UNDERSTANDING HOW CAN THE LEGISLATURE MAKE THAT DETERMINATION AND, AGAIN, IN TERMS OF STRIKING THE BALANCE, LET ME GIVE YOU JUST TWO QUICK HYPOTHETICALS. IN ONE CASE, THE WHOLE COURTROOM IS FILLED, AND EVERY PERSON IN THAT COURTROOM IS EITHER A MEMBER OF THE PRESS -- WE HAVE SUCH A HIGH PROFILE CASE THAT IT IS PRESS FROM ALL OVER THE WORLD, SO THE WHOLE COURTROOM IS THE PRESS, THE VICTIM'S FAMILY, AND WE EXCLUDE ONE MEMBER OF THE PUBLIC WHO WE FIND OUT IS JUST NOT -- IS NOT ONE OF THOSE CATEGORIES, AND THEN IN THE OTHER CASE, WE HAVE GOT THE REVERSE. UNDER THIS STATUTE, BECAUSE IT READS IN MANDATORY TERMS, WHAT HAPPENS? I MEAN, IN OTHER WORDS, YOU HAVE A SITUATION WHERE THE JUDGE MIGHT SAY WAIT A SECOND. COME ON. THERE IS NO COMPELLING INTEREST TO EXCLUDE THAT ONE

PERSON BACK THERE, WHO ISN'T REALLY A MEMBER OF THE PRESS BUT MAYBE IS A LAW STUDENT AND IS TRYING TO UNDERSTAND THIS FOR PURSES OF A -- FOR PURPOSES OF SOMETHING THAT HE OR SHE IS LEARNING, AND THERE IS NO DISCRETION THERE. ISN'T THAT THE PROBLEM, BECAUSE IT IS, REALLY, A JUDICIAL, WHEN WE ARE TRYING TO STRIKE THE BALANCE, IT IS THE JUDICIARY THAT NEEDS, IN THE END, WITH DEFERENCE TO WHAT THE LEGISLATURE IS TRYING TO DO AND WHAT IS COMMON SENSE, BE THE ONE TO MAKE THE FINDINGS. AND THAT -- WHICH IS HARDLY A VERY BURDENSOME THING, YOU KNOW, TO HAVE TO HAVE HAPTHEN THESE SITUATIONS?

I THINK THAT PRESUMES, THOUGH THAT, IT IS NOT A BURDENSOME THING, AND I DON'T WANT TO TAKE THAT POSITION THAT IT IS NOT A BURDENSOME THING, SO THAT PART ASIDE, LET'S ADDRESS THE COMPELLING, YOU KNOW, WHAT IS THE COMPELLING REASON FOR SENDING ONE PERSON OUT? I THINK IT IS IMPORTANT, FIRST, TO DISCUSS THE DIFFERENCE BETWEEN THE PARTIAL AND THE FULL, AND A COMPLETE, ABSOLUTE CLOSURE, BECAUSE THE CASES, ALL, DEAL WITH THAT, AND THE STANDARD DISCUSSED, IT IS A DIFFERENT STANDARD FOR THE TWO. THERE NEEDS TO BE, INSTEAD AFTER PARTIAL, COMPELLING REASON FOR THE CLOSURE, THERE IS A SUBSTANTIAL REASON.

THAT IS YOUR ANSWER. THE U.S. SUPREME COURT HAS NOT MADE THAT DISTINCTION. CORRECT?

I DON'T KNOW THAT THAT IS NECESSARILY --

I MEAN -- CERTAINLY THERE HAVE BEEN DISCUSSIONS IN ALL OF THE CASES THAT DEAL WITH PARTIAL CLOSURES. I DON'T THINK THE U.S. SUPREME COURT HAS HAD TO DEAL WITH THE PARTIAL CLOSURE ON THAT STANDPOINT.

THE SUPREME COURT HASN'T MADE THAT STATEMENT.

RIGHT. SO IN THOSE CASES BEFORE THE U.S. SUPREME COURT HAVE BEEN COMPLETE CLOSURES, SO WE ARE LOOKING AT NOT THE COMPELLING, AND I ONLY SAY THAT, JUST TO KEEP THE FOCUS WHERE IT NEEDS TO BE IN THIS PARTICULAR CASE OR WHERE THE STATE ARGUES IT NEEDS TO BE. THIS WAS A PARTIAL CLOSURE, NOT ONLY A PARTIAL CLOSURE, MEANING ONLY CERTAIN PEOPLE WERE EXCLUDED. IT WAS A TEMPORARY CLOSURE. IT WAS ONLY DURING ONE WITNESSES'S TESTIMONY. IT -- WITNESS'S TESTIMONY. IT WASN'T FOR THE WHOLE PROCEEDING. IT WAS A LIMITED CLOSURE FOR THE PEOPLE THAT WERE EXCLUDED. IT WAS A LIMITED CLOSURE IN THAT PORTION OF THE TRIAL THAT WAS NOT ALLOWED TO BE VIEWED BY THOSE PARTICULAR PEOPLE. THIS WAS, IN NO WAY, A SECRET PROCEEDING. NOW, WHETHER THE PRESS WAS OR WAS NOT PRESENT IS NOT RELEVANT TO WHETHER THE STATUTE CORRECT STATUTE OR NOT. IN THIS PARTICULAR CASE, I VENTURE TO SAY THAT MR. SEINER, WHO WAS NO SHRINKING VIOLET, HIMSELF, COULD VERY EASILY POINTED OUT THERE IS NOBODY FROM THE PRESS HERE, AND BASED ON THAT, WE WANT TO CHALLENGE. HE NEVER MADE ANY CHALLENGE LIKE. THAT I DON'T KNOW THAT THAT WOULD NECESSARILY TRIGGER THE WAHLER HEARING.

ONCE HE DIDN'T GET THIS HEARING, HE COULD POINT OUT ALL OF THE THINGS IN THE RECORD, BUT HE WAS ASKING FOR A HEARING.

HE WAS CLEARLY ASKING FOR A HEARING.

SO HE PRESERVED THAT.

THAT'S TRUE.

AND AT THIS POINT, WHEN WE ARE DEALING WITH A VIOLATION OR POTENTIAL VIOLATION OF THE SIXTH AMENDMENT, WE ARE NOT SUPPOSED TO LOOK TO HOW WAS THE DEFENDANT SPECIFICALLY PREJUDICED BY THAT ACTION. DO YOU AGREE WITH THAT?

I THINK THERE HIS CASE SUPPORT TO SHOW THAT, IN PARTIAL CLOSURE CASES, THAT THERE, PERHAPS, CAN BE A HARMLESS ERROR ANALYSIS. THAT, IN PARTIAL CLOSURE CASES, WE ARE NOT LOOKING AT THE SAME -- AT A STRUCTURAL DEFECT, LIKE A TOTAL CLOSURE, LIKE THE TOTAL CLOSURE CASES DO, AND BECAUSE IT IS NOT A STRUCTURAL DEFECT, BECAUSE IT IS AN ABSOLUTE DEPRIVATION OF THE CONSTITUTIONAL RIGHT, THEN WE CAN DO A HARMLESS ERROR ANALYSIS. THAT IS NOT WHAT I, AT THIS POINT, I AM ASKING THE COURT TO DO, BECAUSE I DON'T THINK WE NEED TO EVEN GET TO THAT POINT.

ISN'T, I GUESS WHEN YOU SAY IT IS A PARTIAL CLOSURE, IT IS, STILL, A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL. IS THAT WHAT YOU ARE SAY SOMETHING.

I AM SAYING THAT A PARTIAL CLOSURE IS NOT, PER SE OR NECESSARILY A VIOLATION OF A DEFENDANT'S RIGHT TO A PUBLIC TRIAL. SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL. AND NUMEROUS CASES HAVE POINTED TO THAT, THAT THAT IS WHY, UNDER WAHLER, IT WOULD, EVEN, BE ALLOWED WITH A HEARING, AND IDENTIFYING SPECIFIC THINGS ON THE RECORD. IF THAT, IF ANY EXCLUSION WAS A VIOLATION, THEN WAHLER WOULDN'T BE CORRECT. MY POSITION IS THAT THERE ARE CIRCUMSTANCES, EVEN UNDER THIS STATUTE, WHERE A WAHLER HEARING, INDEED, WOULD BE APPROPRIATE, AND THAT WOULD BE IF A JUDGE DID NOT FOLLOW THE STATUTE, AND THE STATE WANTED TO OR ASKED THE COURT TO EXCLUDE MEMBERS PRESENT IN THE COURTROOM THAT ARE DELINEATED EXEMPTED FROM BEING EXCLUDED, IN THE STATUTE. FOR INSTANCE THE MEDIA, A FAMILY MEMBER OF THE DEFENDANT, OR ANY OF THE PEOPLE THAT ARE DESIGNATED IN THE STATUTE. ONCE THAT WOULD BE TRIGGERED, YES, THAT WOULD BE -- THAT WOULD NOT GO WITHOUT -- OUTSIDE OF THE CONFINES OF STATUTE, AND THEREFORE, IN ORDER FOR THE JUDGE TO GO OUTSIDE THE BOUNDARIES OF THE STATUTE, THERE WOULD BE A NEED TO HAVE A WAHLER HEARING.

YOU SAY, IN REGARD TO THAT, THAT THE JUDGE WOULD HAVE TO FIND A SUBSTANTIAL INTEREST. YOU WOULD STILL MAKE THAT DISTINCTION?

YES. THAT THERE WOULD STILL AND PARTIAL CLOSURE, UNLESS, INDEED, STAT STATE WAS ASKING FOR HE HAVE -- THE STATE WAS ASKING FOR EVERYONE TO BE CLOSED, AND THAT GOES TO A TOTAL CLOSURE. I THINK THAT WAS TO THE QUESTION ASKED BY JUSTICE QUINCE, AND THAT IS WHAT IS THIS HEARING GOING TO BE ABOUT? ONCE WAHLER WOULD BE TRIGGERED BY A REQUEST TO EXCLUDE SPECIFIC MEMBERS THAT ARE PRESENT THAT ARE ALREADY IDENTIFIED IN THE STATUTE AS BEING ABLE TO STAY, THAT, THEN, DEFINES WHAT THE HEARING IS ABOUT.

WHY SHOULD THERE BE A BURDEN, THOUGH, TO TRIGGER THE REQUEST FOR THE HEARING, TO HAVE TO KNOW WHO IS IN THE AUDIENCE, FOR INSTANCE, AND WHO IS BEING EXCLUDED AND WHO IS NOT OR WHATEVER? WHY WOULDN'T THE BETTER PRACTICE BE, BECAUSE WE ARE TALKING ABOUT VERY IMPORTANT RIGHTS, HERE, THAT THERE ALWAYS BE A HEARING? FOR INSTANCE, IN SOME CASES, AND LET'S TALK ABOUT THIS RIGHT OF A PUBLIC TRIAL, OKAY, THERE IS A LOT -- THERE IS A LOT TO BE SAID THAT THE RIGHT TO THE PUBLIC TRIAL IS, INDEED, SO THAT THERE WILL BE PEOPLE IN THE COURTROOM, AND THAT THE JURY AND THE WITNESSES AND THAT EVERYBODY ELSE WILL BE AWARE THAT THERE ARE PEOPLE IN THE COURTROOM, WATCHING WHAT THEY ARE DOING. AND HOW THEY ARE CARRYING OUT THEIR DUTIES AND RESPONSIBILITIES. SO INDEED, IN THIS RIGHT TO A PUBLIC TRIAL, THERE IS A AWFUL LOT TO THAT. OVER THE YEARS, WE HAVE PROGRESSED, TO WHERE LOTS OF TIMES COURTS JUST SAY, WELL, THE PRESS IS THE REPRESENTATIVE OF THE PUBLIC, BUT SURELY WHEN THIS RIGHT WAS ORIGINALLY GIVEN, IT WAS THE RIGHT FOR PEOPLE TO BE IN THAT COURTROOM, AND THERE IS A AWFUL LOT, UNDERLYING THAT RIGHT, THAT HAVE TO DO WITH THAT. IN THIS CASE, FOR INSTANCE, FOR ALL WE KNOW, WITH THE ORDER HERE, IT AMOUNTED TO A TOTAL CLOSURE. THAT IS THERE WEREN'T ANY PEOPLE IN THE COURTROOM! SO THE JUDGE AND THE PROSECUTOR AND DEFENSE LAWYER AND THE JURY AND THE WITNESS AND EVERYBODY COULD IGNORE THE ASPECT OF A PUBLIC TRIAL THAT WE ORDINARILY GUARANTEE THE DEFENDANT A PUBLIC TRIAL

FOR, AND THEY COULD DO WHATEVER THEY WANTED TO DO, IN VIOLATION OF THEIR DUTIES, FOR INSTANCE, OR THERE IS THE POTENTIAL FOR THAT. WHY WOULDN'T THE BETTER PRACTICE, BE, THEN, THAT THERE BE A HEARING, AND THEN THAT WE FIND OUT WHAT THE SCOOP IS, YOU KNOW, BASED ON THAT HEARING, AND FOR INSTANCE, THAT WE HAVE AN EXTRA CONCERN, IF IT DOES END UP, PURSUANT TO THAT ORDER AND THAT STATUTE, NOBODY IS IN THE COURTROOM WATCHING, YOU KNOW, AT THAT TIME? I WOULD ARGUE THAT, THE REASON WHY IT IS NOT A BETTER PROCEEDING PROCEDURE TO DO THAT -- A BETTER PROCEDURE TO DO THAT GOES RIGHT BACK TO THE FACT THAT THE LEGISLATURE MADE A DETERMINATION THAT, IN THIS PARTICULAR SITUATION, THAT THERE ARE OTHER CONCERNS, ALBEIT COMPETING CONCERNS SO FROM THE VERY BEGINNING, THE LEGISLATURE LOOKED AT THIS COMPETING INTEREST AND DECIDED, WELL, OKAY, WE ARE GOING TO TAKE CARE OF SOME OF THAT,, TO BEGIN WITH. WE ARE GOING TO IDENTIFY A CUTOFF LEVEL OF WHAT WE ARE GOING TO CALL A CHILD THAT WE WANT TO PROTECT UNDER 16 YEARS OF AGE. THE LEGISLATURE HAS BEEN ABLE TO DO THAT IN MANY, MANY, MANY SITUATIONS, AND AND TO BE ONLY TO -- TO BE ABLE TO LEGITIMATELY DO THAT, THE LEGISLATURE, IN PROTECTING AGAINST THE SECRECY OF A TRIAL, IN PROMOTING OPENING THE TRIAL TO THE PUBLIC THROUGH THE MEDIA, NOW, WHETHER THE MEDIA IS PRESENT AT ANY TRIAL, REALLY, IT BEGS THE QUESTION. THE QUESTION IS WHETHER, BY THE SAME TOKEN, I THINK, YOU WILL FIND, I BELIEVE IT WAS DOUGLAS, THAT DOUGLAS VERSUS WAYNE BRIGHT WRIGHT, IN THE 11 -- WAINWRIGHT, IN THE ELEVENTH CIRCUIT, THAT POINTED OUT, THAT, IF THE COURTROOM IS TOO CROWDED AND AN INDIVIDUAL CAN'T GET INTO THE COURTROOM THAT, IS NOT A SIXTH AMENDMENT DEPRIVATION OF THE INDIVIDUAL WANTING TO WATCH, AND THERE ARE CIRCUMSTANCES WHERE EVERYBODY WHO WANTS TO SEE A TRIAL ISN'T GOING TO BE ABLE TO. THERE ARE, ALSO, CIRCUMSTANCES THAT NOBODY IS INTERESTED IN A TRIAL AND IT IS GOING TO BE AN EMPTY COURTROOM. THAT DOESN'T TRIGGER SIXTH AMENDMENT RIGHT PROTECTION TO -- OF A PUBLIC TRIAL.

YOU ARE SORT OF TALKING ABOUT THE EXTREMES OR WHATEVER, AND I AM TALKING ABOUT THE USUAL WAY THAT THIS IS CARRIED OUT IS THE FACT THAT THERE MAY BE A GROUP OF SENIOR CITIZENS, FOR INSTANCE, THAT COME TO THE COURTHOUSE, AND THEY, REALLY, SORT OF FILL IN THE BLANK OF WHAT THAT PUBLIC TRIAL IS, BECAUSE THEY JUST COME AND WATCH. TO SEE HOW THE COURTS WORK OR SOMETHING LIKE THAT. OR THERE ARE OTHER COURT EMPLOYEES THAT COME IN FROM TIME TO TIME. OR LAWYERS OR WHOEVER. AND THEY MAKE UP THAT, QUOTE, PUBLIC, BUT THEY MAKE UP SOMETHING VERY IMPORTANT, EVERY TIME THEY DO THAT, BECAUSE THEY ARE THE PEOPLE THAT ARE THERE WATCHING, BUT IF WE HAVE THIS THING WHERE THERE IS NO PRESS THERE AND EVERYBODY ELSE IS EXCLUDED AND WE DON'T, EVEN, HAVE A RECORD, BECAUSE THERE WASN'T A HEARING THAT TELLS US ABOUT THAT --

BUT WE DO HAVE A RECORD OF THE PROCEEDINGS, ITSELF, THAT KEEP IT FROM BEING A SECRET PROCEEDING, THAN IS THE COURT REPORT HER THAT DOCUMENTS IT, AS A PUBLIC RECORD, PUBLIC DOCUMENT. THE TRANSCRIPT OF ANY OF THESE PROCEEDINGS --

NOT WHILE IT IS GOING ON. NOT WHILE THAT WITNESS IS TESTIFYING AND THAT JURY IS LISTENING.

TRUE. ALTHOUGH I WOULD ARGUE THAT THERE ARE CERTAINLY SAME TIME CAPABILITIES IN SOME OF THE COURTROOMS. THE POINT OF THE STATUTE ISN'T TO KEEP TESTIMONY OF THIS CHILD SECRET. IT IS NOT SECRET TESTIMONY. IT CAN BE KNOWN. THEY COULD TRANSMIT -- THEY COULD PUT A SPEAKER OUT IN THE HALLWAY AND PEOPLE COULD LISTEN TO IT OUT IN THE HALLWAY. THAT IS NOT THE FOCUS. IT ISN'T SECRET TESTIMONY. THE DEFENSE ATTORNEY, THE DEFENDANT'S FAMILIES COULD GO OUT ON BREAK AND TELL ANYBODY WHO DID NOT, WASN'T PRESENT IN THE COURTROOM, EXACTLY WHAT THIS WITNESS SAID.

BUT THE FOCUS IS, IS IT NOT, IN ESSENCE TO KEEP THE PUBLIC OUT OF THE COURTROOM?

NO. THE FOCUS IS TO PREVENT THE CHILD, WHO WAS THRUST INTO A POSITION OF HAVING TO GIVE INTIMATE DETAILS, BECAUSE THE CHILD IS AN INNOCENT VICTIM OF THE CRIMINAL ACTIONS OF THE DEFENDANT, TO MIGHT NOTMIZE -- TO MINIMIZE, AS MUCH AS POSSIBLE, PHYSICAL, EMOTIONAL, PSYCHOLOGICAL TRAUMA TO THAT CHILD, BY HAVING TO FACE --

ISN'T THE CATEGORY OF THE PEOPLE THAT HAVE BEEN SELECTED TO NOT BE THERE WHILE THE CHILD IS TESTIFYING, THIS CATEGORY OF THE GENERAL PUBLIC, THE EXCEPTION OF EVERYTHING?

THAT IS TRUE. THAT IS TRUE. IT IS THE GENERAL PUBLIC. THE DISINTERESTED PARTIES THAT DON'T HAVE A VESTED INTEREST IN THE OUTCOME OF THE CASE, AND IN AN OVERALL KEY SENSE, YES, THESE ARE THE PUBLIC THAT WE TALK ABOUT, BUT THE QUESTION THAT WAS ASKED --

BUT HOW IS -- IF THE OBIS TO PREVENT EMBARRASSMENT AND YOU HAVE GOT A FULL PRESS CORPS THERE, INCLUDING POTENTIAL PRESS THAT IS KNOWN TO EXPLOIT SITUATIONS LIKE THIS, HOW CAN -- THE EMBARRASSMENT IS GOING TO BE THERE, BECAUSE OF THAT VERY FACT, AND THAT IS -- SO WE ARE, REALLY, NOT -- ALTHOUGH THE LEGISLATIVE GOAL IS CERTAINLY LAUDIBLE, IN TERMS OF THERE NOT BEING AN INDIVIDUALIZED CONCERN IN EVERY CASE, WE MAY HAVE JUDGES JUST ROTELY SAYING YOU GO OUT AND THE PRESS STAYS IN, AND MAYBE THAT IS NOT RIGHT IN THE GIVEN SITUATION. MAYBE THERE IS MORE THAT HAS GOT TO BE DONE, AND YET THIS STATUTE DOESN'T DISCUSS THAT BALANCE.

I AGREE. THERE MIGHT BE CIRCUMSTANCES THAT MORE MIGHT NEED TO BE DONE. FIRST OF ALL, I THINK IT IS IMPORTANT TO NOTE THAT THE FACT THAT THE WITNESS MUST GET UP AND TESTIFY IS GOING TO BE DIFFICULT AND HUMILIATING, FOR ANY VICTIM OF A CRIME, I THINK THAT IS TRUE. WE, AS ATTORNEYS, WHO ARE SCHOOLED AND PRACTICED IN WHAT WE DO ARE NERVOUS GOING BEFORE A COURT. THERE IS NERVEESNESS AND EMBARRASSMENT, SO, YES, THERE IS. NOW, WHETHER MORE WOULD NEED TO BE DONE TO PROTECT THAT CHILD, I THINK THE STATUTE ALLOWS THE COURT TO GO FURTHER.

WELL, DOES THE STATUTE -- THE STATUTE REFERS NOT ONLY TO THE PRESS BUT TO BROADCASTERS. WHAT IS THE STATE'S POSITION ON WHETHER A BROADCASTER IS ALLOWED TO HAVE A CAMERA IN THE COURTROOM FOR THAT TESTIMONY OR, UNDER THE RULES OF JUDICIAL ADMINISTRATION, BROADCAST IT ON COURT TV?

I WOULD SAY THAT THAT, THAT THE STATUTE WOULD ALLOW THAT. THE STATUTE, IT IS DESIGNED TO FACILITATE, AND THAT IS SUCH A WEAK WORD. I MEAN IT REALLY DOESN'T APPLY, BUT TO PROTECT THE CHILD AT THE TIME THE CHILD IS TESTIFYING. TO MINIMIZE THE TRAUMA. IT IS NOT TO KEEP THE TESTIMONY SECRET. IT IS TO -- SO IT SEEMS TO ME, IF THAT IS THE CASE, AND YOU CAN, IN FACT, HAVE LIVE BROADCAST, WHAT IS THE POINT OF THE STATUTE? IT SEEMS TO ME THE STATUTE, REALLY, DOESN'T SERVE ANY PURPOSE THEN.

IT CERTAINLY SERVES THE PURPOSE OF ALLOWING THE CHILD OR MINIMIZING THE TRAUMA TO THE CHILD AT THE TIME THE CHILD GOES IN TO TESTIFY. YOU KNOW, IT IS ONE THING TO SIT IN AN INTERVIEW ROOM, WITH THE CHILD PROTECTION TEAM MEMBER OR AN ATTORNEY OR AN INVESTIGATOR AND TALK ONE-ON-ONE. THAT IS DIFFICULT ENOUGH. TO SIT IN A COURT WITH A MICROPHONE AND DO IT TO ANYBODY WHO MIGHT WANT TO COME IN AND LISTEN --

BUT IT IS BEING BROADCAST TO MILLIONS OF PEOPLE. THAT ISN'T GOING TO BE TRAUMA?

WELL, I MEAN --

IF THAT IS THE CASE THAT, A BROADCASTER, CAN, IN FACT, BRING IN THE CAMERA, AND HAVE IT ON, SIMULTANEOUSLY ON TV, IT SEEMS TO ME THAT THAT DEFEATS YOUR ARGUMENT, THAT WE SHOULDN'T HAVE ANY KIND OF HEARING ABOUT THIS STATUTE.

JUSTICE QUINCE, I WOULD SAY, THAT IN THE SITUATION THAT WOULD ADD TO TRAUMATIZING THE CHILD. THEN, INDEED, WAHLER, IF THE STATE ASKS THE COURT TO EXCLUDE THE TELEVISION CAMERA, BECAUSE THE PRESENCE OF THE CAMERA AND THE WAY IT WAS BEING DONE WOULD FURTHER TRAUMATIZE THE CHILD, THAT, THEN, INDEED, WOULD TRIGGER WAHLER, AND WOULD REQUIRE A HEARING FOR THE JUDGE TO EXCLUDE EITHER THE CAMERAMAN OR THE MEDIA, IN GENERAL, AND SO THE STATE'S POSITION ISN'T THAT WAHLER WOULD NEVER COME INTO PLAY WITH THE STATUTE. THIS STATUTE IS THE BEGINNING POINT TO PROTECT THE CHILD, AND IF THE CHILD NEEDS FURTHER PROTECTION, BECAUSE THE STATUTE WOULDN'T, REALLY, DO THE JOB, THEN THE COURT HAS DISCRETION TO DO THAT, BUT MUST HAVE A HEARING.

THEN THE CONVERSE HAS TO BE TRUE, ALSO, THAT IF THE DEFENSE SAYS, LOOK, THIS CHILD HAS ALREADY TESTIFIED OR TALKED TO ANY NUMBER OF PEOPLE ABOUT THIS CASE, SO THERE IS NO REASON WHY THIS CHILD IS GOING TO BE ANYMORE TRAUMATIZED BY TESTIFYING HERE IN THIS COURTROOM, THEN, WHY ISN'T THE DEFENSE BILINGS KBOOILTHSED TO A HEARING TO SAY -- KBILTHSED TO A HEARING TO SAY THAT?

I THINK PARTLY WE GO BACK TO THE QUESTION WHAT IS THIS HEARING? DOES THE DEFENSE, THEN, BRING IN PSYCHOLOGISTS OR EXPERTS THAT WILL TESTIFY THAT, WHEN A CHILD IS A CERTAIN AGE --

LET'S NOT EVEN GO THAT FAR. IT COULD BE SOMETHING AS LIMITED AS SAYING, LOOK, THIS CHILD HAS, ALREADY, SPOKEN TO 14 PEOPLE ABOUT THIS. WHY WE DON'T NEED THIS KIND OF CLOSURE, BECAUSE TESTIFYING HERE, TODAY, IS NO MORE TRAUMATIC THAN WHAT THE CHILD HAS ALREADY DONE?

BECAUSE ONCE YOU BRING IT TO A LEVEL OF TRIGGERING A HEARING, A HEARING HAS GOT TO BE WHAT THE BOUNDARIES OF A HEARING HAVE GOT TO BE, RELEVANT TO THAT CONVERSATION. AND THE LEGISLATURE HAS DECIDED THAT, UP TO A CERTAIN POINT, THERE WON'T -- THERE DOESN'T NEED TO BE A HEARING, BECAUSE THE SIXTH AMENDMENT RIGHT OF THE DEFENDANT ISN'T VIOLATED. IT IS LIMITED BUT NOT COMPLETELY. IT IS NOT A COMPLETE CLOSURE, AND THEREFORE, UNDER CERTAIN CIRCUMSTANCES, WE ARE NOT GOING TO OPEN THIS CHILD UP TO MAKE THIS A FEATURE OF THE TRIAL. WE ARE NOT GOING TO TRY THE CHILD ON WHETHER SHE IS SOPHISTICATED OR EXPERIENCED, AND WHETHER TELLING IT TEN, 100 TIMES, TO SOMEONE, OVER THE COURSE, AND THIS PARTICULAR CASE, THE COURSE OF MANY YEARS, I WOULD VENTURE TO SAY THAT A CHILD WHO IS SEVEN MIGHT HAVE AN EASIER TIME TALKING ABOUT SEXUAL OFFENSES THAN A CHILD 14, WHO, NOW, HAS ALL OF THE ADOLESCENT QUALMS TO DEAL WITH AS WELL. IT IS NOT AN EASY ANSWER. IT IS A TOUGH QUESTION. THE LEGISLATURE CAME DOWN BETWEEN THESE COMPETING INTERESTS, AND TO GO FURTHER THAN THAT, THERE MUST BE A HEARING. OTHER THAN THAT, TO EXCLUDE ONLY THOSE THAT AREN'T MENTIONED IN THE STATUTE, THE STATUTE PROTECTS THE DEFENDANT'S SIXTH AMENDMENT RIGHTS.

THANK YOU. REBUTTAL.

FIRST OF ALL, TO CLEAR UP THIS ISSUE ABOUT SPECIFIC PREJUDICE IN BEING ABLE TO US TO HAVE TO PROVE PREJUDICE, WAHLER, IN HEAD NOTE SIX, SAYS THE DEFENDANT SHOULD NOT BE REQUIRED TO PROVE SPECIFIC PREJUDICE, IN ORDER TO OBTAIN RELIEF FOR VIOLATION OF PUBLIC TRIAL GUARANTEE.

YOU HAVEN'T ATTACKED THE CONSTITUTIONALITY OF THE STATUTE, BUT, BECAUSE THE STATUTE IS VERY CLEAR, THAT IT SPEAKS IN MANDATORY TERMS, WON'T WE HAVE TO REWRITE THE STATUTE, OR DECLARE IT UNCONSTITUTIONAL, IN ORDER TO RULE IN YOUR FAVOR?

WELL, IN THE TRIAL COURT, THE CONSTITUTIONALITY OF THE STATUTE WAS NEVER RAISED. THE ONLY ISSUE THAT WAS BROUGHT UP, THERE WAS HEARING AND FINDINGS. WE DIDN'T DISCUSS

CONSTITUTIONALITY OF THE STATUTE IN THE BRIEFS BEFORE THE FIFTH DISTRICT COURT OF APPEALS FORM THE ONLY TIME THAT THE ISSUE OF A CONSTITUTIONALITY HAS BEEN RAISED WAS IN MR. MILLER'S AMICUS BRIEF.

BUT HOW -- WHERE -- IF THE STATUTE IS MANDATORY, UNDER WHAT AUTHORITY COULD WE SAY THERE HAS GOT TO BE A HEARING, UNLESS WE ARE SAVING THE STATUTE FROM UNCONSTITUTIONALITY?

PRICHARD AND THORNTON, BOTH, SAY, THAT THE STATUTE IS CONSTITUTIONAL, BUT THEY, ALSO, SAY THAT YOU HAVE TO HAVE A HEARING. IN OTHER WORDS THEY SAY THAT THE STATUTE WAS UNCONSTITUTIONAL IN ITS APPLICATION IN THORN ONE AND PRICHARD, BUT IF YOU HAVE A HEARING, I PRESUME THE NEXT LOGICAL STEP IS THAT THE STATUTE IS CONSTITUTIONAL, SO FOR OUR PURPOSES HERE, TODAY, AT LEAST THE ISSUES THAT WERE RAISED BY US, WE ARE SAYING THE STATUTE IS OKAY, I GUESS. IF THERE IS A HEARING AND FINDINGS. THAT IS ALL WE ARE SAYING. NOW, MR. MILLER INDICATE HAD THAT THERE IS A ARGUMENT ABOUT CONSTITUTIONALITY. ONE THING, AS AN ASIDE, THAT I WOULD SAY, IS THIS. IS THAT THE ASSISTANT ATTORNEY GENERAL TALKED ABOUT HAVING A HEARING OVER AND ABOVE 918.16, IF THE STATE ASKS FOR IT OR UNDER SOME OTHER CIRCUMSTANCES. PRICHARD AND THORNTON, BOTH, WHICH ARE BOTH SECOND DCA CASES, SAY THAT, IN THAT PARTICULAR CASE, THE SECOND POINT, AS JUDGE WELLS WAS POINTING OUT, THEY INDICATED THAT, BECAUSE 918.16 WAS NOT STRICTLY FOLLOWED, THAT THEY WERE GOING TO REVERSE ON THAT GROUNDS ALONE, SO I WOULD SAY THAT THE EVIL, ONE OF THE EVILS OF 918.16 IS SEEMING TO LIMIT WHAT THE JUDGE CAN DO, NO MATTER WHAT THE CIRCUMSTANCES ARE, BECAUSE THERE ARE CIRCUMSTANCES WHERE A VICTIM WOULD SAY, WELL, FOR EXAMPLE, THAT MEMBER OF THE MEDIA OVER THERE, FROM THE AP, HE FRIGHTENS ME. I CAN'T TALK IN FRONT OF HIM. I AM SCARED. PLEASE EXCLUDE HIM. WELL, UNDER 918.16, THE JUDGE CAN'T DO THAT. ACCORDING TO PRICHARD AND THORNTON. NOW --.

MR. MITCHELL, I THINK YOUR TIME HAS EXPIRED. THANK YOU.

THANK YOU VERY MUCH.

WE WILL BE IN RECESS.

PLEASE RISE.