No.

IN THE SUPREME COURT OF THE UNITED STATES

DONOVAN JONATHAN TILLMAN, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the state court, contrary to rulings of this Court and of the supreme and intermediate appellate courts of other states, violate the Public Trial Clause by excluding Petitioner's mother from the courtroom during his pretrial evidentiary hearing and his trial.

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Petitioner Donovan Jonathan Tillman respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of the State of Florida, Fourth District, in this case.

OPINION BELOW

The decision of the Fourth District is reported, along with its decision denying rehearing, as *Tillman v. State*, 247 So. 3d 523 (Fla. 4th DCA 2017) (App. A). The order of the state supreme court denying review (App. B) is not reported officially, but may be found as *Tillman*

v. State, SC18-1058, 2020 WL 7310686 (Fla. Dec. 11, 2020).

JURISDICTION

The Fourth District affirmed Petitioner's convictions and sentences on August 23, 2017, and denied rehearing on May 30, 2018. App. A. The state supreme court denied discretionary review on December 11, 2020. App. B. This Court has jurisdiction under 28 U.S.C. 1257(a), the state courts having deprived Petitioner of rights under the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial … .

Section 1 of the Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law … .

Florida Rule of Criminal Procedure 3.220(b)(1)(A) requires, among other things, that the prosecutor file a list of "all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes," broken

into three categories:

> (i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify, and (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.
>
> (ii) Category B. All witnesses not listed in either Category A or Category C.
>
> (iii) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense.

STATEMENT

Petitioner was charged by information in the Seventeenth Judicial Circuit of Florida (Broward County) with four counts of sexual battery and two counts of lewd or lascivious molestation of a minor (Petitioner's six-your-old male cousin) by a person under the age of eighteen. R 3-5. (The heading of the information also mentioned a Count VII, but there

was no Count VII alleged in the body of the information.)

Several days before Petitioner's trial, the court conducted an evidentiary hearing on various issues, including the admissibility of collateral bad act evidence and of hearsay statements of the alleged victim, and a motion to suppress statements made by Petitioner. During the testimony of the first witness at the hearing, there was a pause to discuss whether members of Petitioner's family would be allowed in the courtroom. The judge said anyone who was going to testify could not be present. Defense counsel said she would not ask Petitioner's stepfather to come in, but his mother should be allowed in because she was not going to testify to anything. T 12-13.

The assistant state attorney then sought to exclude Petitioner's mother from the courtroom:

> [PROSECUTOR]: I'd ask she not be in here. I believe she's a witness. I don't expect her to testify, but I think she's listed as a witness.
>
> [PUBLIC DEFENDER]: Are you calling her?
>
> [PROSECUTOR]: If she's listed. I'm not going to tell you who I'm calling and who I'm not calling. Quite frankly, Judge, I don't know who I'm calling and not calling. It depends on the Court's rulings in these proceedings.

> [PUBLIC DEFENDER]: She's listed as a C witness.[1]
>
> [PROSECUTOR]: I'd object to B or C witnesses.
>
> [PUBLIC DEFENDER]: She was mentioned in the police report not to be called, couldn't depose her. She can't be called as a witness and she's his mother.
>
> [PROSECUTOR]: That's legally not true, to say a C witness cannot be called as a witness. As it stands now, sure, we have the ability to change that status before trial, based on the Court's ruling. I mean, this is—this is—
>
> [PUBLIC DEFENDER]: If a C witness is going to be called, they became an A or B witness and obviously we don't need to depose her, but we don't intend on calling her. She's obviously still listed as a C witness.
>
> THE COURT: The State's position is they are potentially going to call her. That was the only reason.

T1 13-14.

Defense counsel said the mother would only know things by hearsay, and the prosecutor replied:

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[1] Under Florida criminal rule 3.220(b)(1)(A), the prosecution must furnish a list of all persons with information that "may" be relevant. Under this rule, "C" witnesses are:

> All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense.

Fla. R. Crim. P. 3.220(b)(1)(A)(iii).

> [PROSECUTOR]: Well, here's a simple hypothetical. And this is exactly why she's listed as a C witness, so I don't have to give this hypothetical, but, if the State felt on rebuttal that it was appropriate to call her as a witness, to rebut something that the defendant—that the defense put forth, or that the defendant said, when he testifies at his own trial, okay, how does that not cause a problem when she's heard the Child Hearsay hearing and Williams Rule hearing, which is basically the evidence in the whole trial?
>
> [PUBLIC DEFENDER]: Anything she knows about this case is hearsay.
>
> [PROSECUTOR]: Even if it's told to her by the defendant? I mean, she's his mother. And she—even if the defendant made statements to his own mom, she may not want to say them—
>
> [PUBLIC DEFENDER]: The State, hypothetically, could call Detective Scopa, who took his statement to rebut anything that he would testify to on the stand.
>
> [PROSECUTOR]: So, from my understanding, if I understand you correctly, allowing the mom to view this hearing, you want to dictate to the State the State's trial strategy on who they call? Judge, it just doesn't make any sense.

T1 15-16.

The court then ruled that the mother would not be allowed in the courtroom during the hearing:

> THE COURT: And I'll note the objection for the record. You're absolutely right, counsel. On another type of hearing it's an open courtroom, access to the Court. Everybody has a Constitutional Right to be in this

courtroom.

> The nature of this hearing, though, is why I'm not allowing her in, because we're—it's going to be Child Hearsay. All the evidence in the case is basically being presented today to the Court. She may be part, depending on my ruling, so she then will testify in trial and sit here and listen to the evidence.
>
> [SECOND PUBLIC DEFENDER]: She's heard all of this, Judge, as the mother of the child.
>
> THE COURT: This is completely different. This is under oath. We're seeing DVD's. I'm hearing argument. She hasn't done this.
>
> [PROSECUTOR]: Judge, for the record, I've asked the victim's father, also, because he wanted to provide emotional support for his family and the witnesses he cares about, I've asked him to leave, because there's a chance that he may testify.
>
> THE COURT: I've made a ruling. Okay.

T1 18-19.

Defense counsel corrected the trial court's apparent belief that the alleged victim would be testifying at the hearing, and again pointed out that the mother was listed as a C witness. The court stood by its ruling and the mother was not allowed in the courtroom. T1 19.

At trial, the prosecutor moved to bar Petitioner's parents during jury selection. T4 550-51. The defense again pointed out that they were listed as "C" witnesses and asked what they would testify to. The

prosecutor admitted that he did not know:

> [PUBLIC DEFENDER]: They are C witnesses. What are they testifying to?
>
> THE COURT: I don't know.
>
> [PROSECUTOR]: Yes, that's exactly my point. I don't know.

T4 554.

The defense said it did not object to exclusion of Petitioner's stepfather. T4 554. The judge asked if the stepfather would testify, and the prosecutor answered: "Their's [sic] potential of both. And again, it's the appearance of impropriety. It's the appearance. That's why it says that—" T4 556.

Defense counsel said, "even if the State attempted to call them, we'd object because they are C witnesses," and the prosecutor replied:

> [PROSECUTOR]: I'm not disagreeing with that, I'm not saying they are going to be called, but we're trusting a mother won't taint a pool.

T4 556.

The court said it would let them remain in the courtroom during jury selection. T1 557-58.

The prosecutor read its list of potential witnesses to the venire three times for the purpose of determining if any of them were known to

the jurors. All three times he did not name Petitioner's parents. T3 347-48, T4 507-508, T4 578-79,.

After jury selection and before opening statements, the judge ruled that the parents could not be present during the trial even though the prosecutor had not included them in the list of potential witnesses read to the jury:

> [PUBLIC DEFENDER]: Are we going to readdress the mother and the father?
>
> THE COURT: Yes. My ruling on that, we've heard it five times, I'm not allowing them in during the trial. They are listed as C witnesses. I'll note the objection for the record.
>
> [PROSECUTOR]: Thank you.
>
> THE COURT: I've heard sufficient argument from the lawyers on that heard from both sides, and the Court's position is that are not to be in.
>
> [PUBLIC DEFENDER]: If I can add, for the record, when the State was asked to call out the names of witnesses that might testify, he did not call out their names.
>
> [PROSECUTOR]: Judge, obviously, I've indicated, like the Court says, several times the rational [sic] behind it is for rebuttal, and they are possible rebuttal witnesses, depending on what happens during the trial, whether the defendant testifies or not testifies.
>
> I'm not asking the defense to tell me whether he'll testify or not, but that's going to play a hugh [sic] roll in it.

> THE COURT: Okay. The objection is noted though for the record by the defense.

T6 790-91. (The State has contended that the stepfather and the "father" referred to here are the same person, and the state appellate court seems to have agreed with that contention. Regardless, even though the defense agreed that the stepfather should not come in, the trial court inarguably excluded Petitioner's mother over objection.)

On the second day of trial testimony, the court said it would allow Petitioner's grandmother and great-grandmother into the courtroom. T7 880. At a later point, a friend of the mother was in the courtroom, and the prosecutor expressed concern that he might tell the excluded family members about the court proceedings. The court told the friend that it would not "allow anyone to go in and go out and tell everyone what's going on in the courtroom," and "I'm telling you, because I already told everyone, I'm telling you, you're not to leave this courtroom and go in and out during this testimony and discuss what's happening in this case." T7 1003-1004.

The jury found Petitioner guilty of all offenses as charged, and also convicted Petitioner of the uncharged Count VII (lewd or lascivious molestation). R 81-87.

The court adjudicated Petitioner guilty for the six charged crimes as well as the uncharged one, and imposed sentence for them. R 92, 108-29. (The conviction and sentence for the uncharged offense (Count VII) were struck on a post-trial motion to correct sentence under Florida Criminal Rule 3.800(b)(2), after which Petitioner was resentenced to a total of 373.5 months for the remaining crimes. SR1 (first supplemental record) 4-34, 51-65.)

On appeal to the Fourth District Court of Appeal, Petitioner argued, among other grounds, that the exclusion of his parents from the courtroom during the pretrial hearing and the trial violated the Public Trial Clauses of the state and federal constitutions under *Waller v. Georgia*, 467 U.S. 39 (1984), and *In re Oliver*, 333 U.S. 257, 271-72 (1948). App 10a-15a.

The Fourth District affirmed the convictions and sentences. Respecting the exclusion of the parents from the courtroom, it wrote:

> Appellant challenges his conviction and sentence for four counts of sexual battery and two counts of lewd or lascivious molestation of a minor by a person under the age of eighteen. He raises four main issues as to his conviction, and we affirm as to all, addressing three, as well as his sentence. First, he claims that the court abused its discretion in refusing to allow his mother to sit through the pretrial suppression hearing and trial

after the state invoked the rule of sequestration, because the state had listed the mother in discovery as a "Class C" witness who was not expected to be called.[1] We conclude that the court did not abuse its discretion, given the State's representation that the mother could be called as a rebuttal witness and the fact that this was a familial crime. … .

In his first issue, appellant claims that the court erred in excluding his mother from the courtroom. At the suppression hearing, and again at trial, appellant sought to have his mother remain in the courtroom. The prosecutor objected on the ground that the State might call the mother as a witness and invoked the rule of sequestration.[2] Noting that in the discovery request the mother was listed as a Class C witness, the defense objected to the mother's exclusion. Pursuant to rule 3.220(b), Florida Rules of Criminal Procedure, "Class C" witnesses are witnesses who perform ministerial functions or whom the prosecutor does not intend to call at trial, or whose knowledge is fully set out in a police report. Because the mother was neither a witness who performed ministerial functions nor whose knowledge was set out in a police report, the defense argued that the mother was a "witness" that the State did not intend to call at trial; therefore, sequestration should not apply to the mother. Nevertheless, the trial court excluded the mother from the hearing as well as from the trial.

"The rule in Florida and elsewhere is that the trial judge is endowed with a sound judicial discretion to decide whether particular prospective witnesses should be excluded from the so-called sequestration of witnesses rule." *Spencer v. State*, 133 So. 2d 729, 731 (Fla. 1961). When a party requests that witnesses be excluded from trial under the sequestration rule, then generally, the trial court will exclude all prospective witnesses from the courtroom, in order to avoid the

witnesses' testimony being colored by what he or she hears from other testifying witnesses. *Id.*; *Goodman v. W. Coast Brace & Limb, Inc.,* 580 So. 2d 193, 194 (Fla. 2d DCA 1991). Where the trial court exercises its discretion in excluding a witness or allowing a witness to remain in the courtroom, it is the complaining party's burden to show an abuse of discretion which caused injury. *Spencer,* 133 So. 2d at 731.

We cannot say that under the rule the trial court abused its discretion in excluding appellant's mother. The prosecutor maintained that he might call the mother on rebuttal, depending upon whether the appellant testified and what he said. While the mother had no direct knowledge of the incidents, she was the sister of the victim's mother. The victim's mother had called appellant's mother when she discovered that her son was abused by appellant. Shortly after that call, appellant texted his aunt, expressing regret for the incidents. Thus, at the very least, the mother must have confronted her son about her sister's accusations. And what he said to her could have been very relevant to the prosecution. Because of the familial relationships involved, the trial court was within its discretion in determining that appellant's mother should be excluded from the courtroom so that her testimony, if necessary, would not be affected by what she might hear from other testifying witnesses, including her sister and the appellant, if he testified.

[1] Rule 3.220, Fla. R. Crim. P. defines the various categories of witnesses who may be called. Category C witnesses are all witnesses who perform ministerial functions or whom the prosecutor does not intend to call at trial, or whose knowledge is fully set out in a police report.

[2] In his brief he also claims his stepfather was also improperly excluded, but at trial he conceded that his

stepfather might be a witness and could be sequestered.

Tillman v. State, 247 So. 3d 523, 524–25 (Fla. 4th DCA 2017); app. 3a-5a. The court certified a question to the state supreme court regarding Petitioner's sentence. *Id*. 247 So. 3d at 572; app. 7a.

On rehearing the court addressed only the sentencing issue, and certified that its ruling on that issue conflicted with a decision of another Florida appellate court. *Id*. 247 So. 3d at 527-28; app. 7a-7b. Petitioner timely sought discretionary review in the state supreme court, reiterating his claim under the Public Trial Clause. App. 16a-18a. The supreme court denied review (App. B), and Petitioner now seeks certiorari review.

REASONS FOR GRANTING THE PETITION

REVIEW SHOULD BE GRANTED AS TO THE EXCLUSION OF THE DEFENDANT'S MOTHER FROM THE COURTROOM.

Under the Public Trial Clause, "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 U.S. 257, 271-72 (1948).

To enforce the Sixth Amendment right to a public trial, the Court has established the following standard adapted from the First

Amendment rule set out in *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984):

> … [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) (brackets added). *See also Presley v. Georgia*, 558 U.S. 209, 216 (2010) (applying *Waller* to exclusion of petitioner's uncle from courtroom during jury selection).

This rule requires the judge to make a number of case-specific judgments.

For instance, even if the trial court has found an overriding interest in closing any part of the proceeding, it is "still incumbent upon it to consider all reasonable alternatives to closure." *Presley*, 558 U.S. at 216. Applying this requirement to the closure of jury selection, the Court wrote in *Presley*: "The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that '[t]he process of juror selection is itself a matter of

importance, not simply to the adversaries but to the criminal justice system.'" *Id*. at 214 (quoting *Press-Enterprise*, 464 U.S. at 505).

In *Presley*, "a lone observer" was in the courtroom before jury selection—the defendant's uncle. The judge told him he had to leave because prospective jurors were going to enter, and said he could return after jury selection ended later that day. Defense counsel objected to "the exclusion of the public from the courtroom," and asked for "some accommodation," but the court said there was no room and the uncle could not sit and intermingle with members of the jury. On motion for new trial, the defense presented evidence showing the venire could have been arranged to leave adequate room for the public. The court denied the motion. 558 U.S. at 210-11.

The state court of appeals upheld the conviction, and the state supreme court affirmed that ruling. *Id*. at 211.

On certiorari review, the Court wrote that the state supreme court had concluded, "despite our explicit statements to the contrary, that trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives." *Id*. at 214.

Rejecting this conclusion by the state court, the Court reiterated

the command in *Waller* that "the trial court must consider reasonable alternatives to closing the proceeding," and that *Press-Enterprise* contains the same requirement. *Presley*, 558 U.S. at 214. *See also Steadman v. State*, 360 S.W.3d 499, 505 (Tex. Crim. App. 2012) (under *Presley* and *Waller*, the burden of considering reasonable alternatives to closure "rests squarely upon the trial court itself, regardless of what party seeks the closure, and there is no burden on the defendant to proffer alternatives").

The Court wrote in *Press-Enterprise* that the value of an open trial "lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Id.* 464 U.S. at 508 (emphasis in original).

The exclusion of Petitioner's mother requires compliance with Waller.

In this case, the defendant's mother was excluded from the suppression hearing and the defendant's trial.

The highest courts of other states have ordered reversal of convictions where a defendant's family members or friends have been

excluded absent a concrete showing of necessity. *See People v. Nieves*, 683 N.E.2d 764 (N.Y. 1997) (ordering new trial because court barred defendant's wife and children during undercover officer's testimony absent evidence showing their presence would endanger officer); *People v. Mateo*, 536 N.E.2d 1146 (N.Y. 1989) (ordering new trial because of exclusion of defendant's family members and friends during testimony of state's main witness; trial court's sole reliance on information transmitted by the prosecutor was insufficient); *Longus v. State*, 7 A.3d 64 (Md. 2010) (ordering new trial because of exclusion of two friends of defendant during testimony of state's main witness; court erred in relying on generalized allegations of the prosecutor without evidentiary support); *State v. Ortiz*, 981 P.2d 1127 (Haw. 1999) (ordering new trial because of exclusion of defendant's family during trial based on allegation of jury intimidation where evidentiary hearing did not show there was intimidation); *State v. Torres*, 844 A.2d 155 (R.I. 2004) (ordering new trial because of exclusion of defendant's two sisters during jury selection due to lack of space; court erred by not considering any alternatives such as requesting larger courtroom).

The state court's reliance on the rule of witness sequestration is not a bar to relief.

The trial court excluded Petitioner's mother from the courtroom based on the prosecutor's assertion that she might become a witness in the case.

There can be no dispute about the fact that a legitimate invocation of the rule of sequestration may usually provide an overriding reason for exclusion. The *Waller* rule is broad enough to take that into account, provided that the court considers the nature of how the rule is being used, considers alternatives and makes case-specific findings as to the necessity of the exclusion. Upon Petitioner's objection and the prosecution's inability to point to anything that the mother would testify to, it was incumbent on the trial court to determine whether there was a genuine overriding reason for the exclusion, to consider alternatives and to make appropriate case-specific findings under *Waller*.

In *Addy v. State*, 849 S.W.2d 425, 429 (Tex. App. 1993), the court disapproved of the exclusions of six friends of the defendant from Addy's trial in circumstances similar to those in our case. The prosecutor requested that six spectators in the courtroom be sworn in and placed

under the rule of sequestration of witnesses. The defense objected that they were friends of the defendant without knowledge of the facts in the case. The prosecutor replied that there was "a great possibility" that he might call them as witnesses. *Id*. at 426-27.

Later in the trial, defense counsel sought to have the prosecutor testify under oath as to why the persons had been excluded. Without being put under oath, the prosecutor said that the persons might become witnesses depending on the defense presented, and also said there was a security issue because of the prosecution's use of an informant. The judge noted that a member of the defendant's family was apparently present for the trial, and said it would take up the matter later. At the conclusion of the testimony, counsel again raised the issue and the prosecutor mentioned the security issue and the possibility that the persons might become witnesses depending on the defense presentation. *Id*. at 427-28.

The appellate court found a violation of the Sixth Amendment. As to the state's reliance on the witness exclusion rule it wrote that automatic exclusion of persons based on a mere claim that they may be witnesses gives the prosecution "unlimited power to control who stayed

in the courtroom":

> Here, the trial judge never made findings to justify removing appellant's friends from the courtroom. The State claims that the mandatory language of Tex.R.Crim.Evid. 613, the "exclusion of witnesses rule," permits it to identify any spectator as a witness and have that person removed from the courtroom. We disagree. If this were true, the prosecution would have unlimited power to control who stayed in the courtroom during trial by merely invoking the provisions of the "exclusion of witnesses rule" to those it considered undesirable as spectators. Such authority would allow a state rule of evidence to take precedence over rights guaranteed by the United States and Texas Constitutions. Moreover, it is well settled that state rules of criminal evidence are subordinate to the United States and Texas constitutional provisions. Tex.R.Crim.Evid. 101(c).
>
> The barring of only some members of the public from the courtroom does not necessarily mean that an accused has been denied a public trial. That determination turns on the particular circumstances of the case. *Levine v. United States,* 362 U.S. 610, 616–17, 80 S.Ct. 1038, 1042–43, 4 L.Ed.2d 989 (1960). Courts have differed over the propriety of excluding certain persons from criminal trials. *Aaron v. Capps,* 507 F.2d 685, 686 (5th Cir.1975). The guidelines of this right to a public trial are unclear. However, "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives, and counsel present, regardless with what offense he may be charged." *In re Oliver,* 333 U.S. 257, 271–72, 68 S.Ct. 499, 506–07, 92 L.Ed. 682 (1948).

Id. 849 S.W.2d at 429 (emphasis added).

The court concluded that there was "no compelling reason" to

exclude the defendant's friends, and noted: "The trial court took this action under the 'exclusion of witnesses rule' knowing that the State had no knowledge as to who they were or what, if anything, they knew about the facts of the case." *Ibid.* (emphasis added).

The Maryland Court of Appeals agreed with *Addy* analysis under somewhat different circumstances in *Tharp v. State*, 763 A.2d 151 (Md. 2000). Tharp was alleged to have committed a murder with Sellers. Sellers was tried first and Tharp's attorney tried to attend the trial. The attorney had been listed as a potential witness by Sellers, apparently for reasons related to Tharp's refusal to testify at Sellers's trial. Although Sellers's attorney sought to waive the witness-exclusion rule as to Tharp's lawyer, the court barred him from Sellers's trial on the basis of the rule. *Id.* at 154-56.

Tharp later moved to dismiss his own case on the ground that his lawyer had been barred from the Sellers trial, arguing that his exclusion was a strategic ploy by the prosecutor. The trial court rejected Tharp's argument, and Tharp appealed his subsequent conviction. *Id.* 156-58

The Court of Appeals wrote that the rule of sequestration of

witnesses is valid, but that judges should not "turn a blind eye, in the absence of an objection, to obviously questionable situations or apparent shams, e.g., a party placing a member of the press on a witness list to exclude him or her from a courtroom, a defendant placing a prosecutor or the victim or members of the victim's family on the list to exclude such persons, and the like." *Id.* at 161-62. In this regard, it generally agreed with the approach taken by the court in *Addy*. *Id.* at 162-64.

Hence, it wrote that the rule of sequestration is to be followed automatically unless there is "a clearly recognized exclusion, valid objection, or apparent or obvious anomaly that would trigger inquiry by a reasonable person." *Id.* at 164. It wrote that determination of the issue must comply with the Sixth Amendment and *Waller*.:

> To ensure that one party is not given an inordinate amount of power over the other party in the sequestration of witnesses and to ensure that a defendant is provided with a public trial, it is necessary to follow the mandates of Rule 5–615: to allow sequestration of witnesses on the witness list; to have the granting of the sequestration ordinarily be mandatory, unless there is a clearly recognized exclusion, valid objection, or apparent or obvious anomaly that would trigger inquiry by a reasonable person; and, to permit a party to take a potential witness off his or her witness list if the person is not going to testify and therefore should not be subject to sequestration. If Tharp's attorney effectively was removed from the witness list, he became a

> member of the public and findings would have to be made, as in the *Addy* case, before he could be banned from the courtroom. *See, e.g., Waller,* 467 U.S. at 48, 104 S.Ct. at 2216, 81 L.Ed.2d 31 (stating that for a party to have a hearing closed from part or all of the press or public, the party that wants to have the hearing closed must "advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure")… .

Id. at 164 (footnote omitted).

The court wrote further: "As a practical matter, there may be a difference between those placed on a witness list and those who actually testify. A party can place most anyone on a witness list-subject to a bad faith challenge—but only testimony based on factual knowledge, even expert opinion, is admissible." *Id*. at 165.

The Court of Appeals ruled that "the court erred in maintaining its resolve to bar [the attorney] from the courtroom." *Ibid*. It found that it was error to accept the prosecution's argument without taking note of the fact that the defense had effectively removed the lawyer from the witness list, and wrote that "the trial court fell prey to what we now warn against: giving the prosecution the 'unlimited power to control who stayed in the courtroom during trial by merely invoking the

provisions of the 'exclusion of witnesses rule' to those [the State] considered undesirable as spectators.'" *Id*. at 166 (quoting *Addy*; brackets in *Tharp*).

Nonetheless, the court ultimately found the Sixth Amendment violation in excluding the lawyer from the trial for Sellers was not a basis for reversing Tharp's conviction because there was no Sixth Amendment violation at Tharp's trial. *Id*. at 168.

In addition to *Addy* and *Tharp*, the Eighth Circuit has ruled that *Waller* applies to the exclusion of a potential witness over objection. In *United States v. Blanche,* 149 F.3d 763, 769–70 (8th Cir. 1998), the court upheld such an exclusion because the trial court complied with *Waller*.

> *Some state courts have held that the Public Trial Clause is not implicated at all by any use of the witness exclusion rule, but such decisions cannot be squared with the Sixth Amendment.*

Contrary to the foregoing cases, the Georgia Supreme Court upheld the exclusion of the defendant's father from his trial under the rule of witness sequestration, pointing to a number of decisions in favor of the proposition that "the rule of sequestration ordinarily does not even implicate the right to public trial, much less infringe upon it."

Nicely v. State, 733 S.E.2d 715, 720-21 (Ga. 2012).

Although several of the cases cited in *Nicely* were decided decades before *Waller* and hence have little relevance to the present discussion, and two others were not officially reported, *Nicely* did cite the following cases which authoritatively decided in their jurisdictions that *Waller* does not apply to the exclusion of persons claimed to be witnesses. In *People v. Taylor*, 612 N.E.2d 543, 548 (Ill. App. Ct. 1993), the defense listed two members of the defendant's family as potential witnesses and the appellate court wrote that it regarded their exclusion from the trial "not as an action by the State which is directed at defendant's Sixth Amendment right to a public trial, but rather as an act of the parties to exercise a long-standing trial right in criminal cases to request the exclusion of witnesses from the courtroom as part of the usual trial process." *Id*. at 548. Further, *State v. Culkin,* 35 P.3d 233 (Haw. 2001), stated as to the exclusion of the defendant's father as a potential rebuttal witness: "the right to a public trial is not implicated by the exclusion of a potential witness pursuant to the witness exclusionary rule." *Id.* at 259. *See also State v. Ulate*, 219 P.3d 841, 852 (Kan. Ct. App. 2009) (holding that *Waller* did not apply to order excluding, during

testimony of child victim, members of defendant's family who were witnesses in the case); *People v. Baker*, 926 N.E.2d 240, 245-46 (N.Y. 2010) (holding that *Waller* had "no bearing" on exclusion of mother of defendant's children as potential witness in child abuse manslaughter case); *State v. Jordan*, 325 S.W.3d 1, 52-53 (Tenn. 2010) (holding that sequestration of witnesses including members of defendant's family "in the ordinary case does not violate a right to a public trial"; internal citations and quotation marks omitted).

In this regard, *Nicely* and *Jordan* cited *Tharp*, but both failed to note that the Maryland Court of Appeals determined that *Waller* is implicated in challenges to the exclusion of persons under a rule of witness sequestration. *Tharp*, 763 A.2d at 164.

So far as decisions like *Nicely* are based on the view that *Waller* does not apply at all to any claim made under a witness-exclusion rule, they cannot be squared with the Public Trial Clause, especially in circumstances involving the defendant's family and friends.

As in this case, the prosecution can always make an uninformed claim that the defendant may have said something about the case to the persons closest to him or her. Here, however, neither the court nor the

prosecutor showed no interest in a determination as to whether Petitioner's mother had any relevant information in the case, or whether it was necessary to apply the rule to her, or whether there might be some alternative to excluding her. Proper application of *Waller* forbids such an abuse.

The state court decision should be reversed.

The present case presents a situation analogous to *Addy* and *Tharp*. As in *Addy*, the prosecutor made no claim that he actually intended to call the mother, and he admitted he did not even know what she might say. As in both cases, the court merely acquiesced in the prosecution's position without making any effort to determine whether there was a genuine reason for excluding her from the hearing and the trial.

At the pre-trial evidentiary hearing, the prosecutor moved to exclude the mother even though "I don't expect her to testify, but I think she's listed as a witness." T1 13.

Defense counsel pointed out that the mother had only been listed as a "C" witness under the discovery rule. *Ibid*. As already noted in this petition, the prosecution lists persons as "C" witnesses under this

definition:

> Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense.

Fla. R. Crim. P. 3.220(b)(1)(A)(iii) (emphasis added).

There was never any claim that the mother performed any ministerial functions in the case. Hence, she was a person "the prosecutor [did] not intent to call."

The prosecutor said that it was possible that, based on the court's rulings in the next several days (that is between the suppression hearing and the trial), "people can change." T 14. The judge said she knew nothing about the case or the mother's role in it. T1 15.

The prosecutor posed a hypothetical that he might feel it appropriate to call Petitioner's mother as a witness after the defendant testified at trial, T1 15-16. He said the defense could not dictate its strategy as to who to call. T1 16.

The prosecutor then apparently spoke with someone off the record, after which the judge said the mother would "not be aloud [sic]. She could be called as a witness." T1 16-17.

The prosecutor made no claim that he knew of any possible testimony by the mother, and did not call her at the pretrial hearing.

The pretrial hearing took place on April 18, 2013, and jury selection for the trial began on April 22. On the second day of jury selection, the prosecution again moved to exclude the mother from the courtroom. T 550-51. Petitioner pointed out that the mother was still listed as a "C" witness, and the prosecutor and the judge both acknowledged that they had no idea whether she could testify to anything of relevance:

> [PUBLIC DEFENDER]: They are C witnesses. What are they testifying to?
>
> THE COURT: I don't know.
>
> [PROSECUTOR]: Yes, that's exactly my point. I don't know.

T4 554.

The defense said it did not object to exclusion of Petitioner's stepfather. T4 554. When the judge asked if the stepfather would testify, the prosecutor said, "Their's [sic] potential of both. And again, it's the appearance of impropriety. It's the appearance. That's why it says that—" T4 556.

The prosecutor admitted that "I'm not saying they are going to be

called, but we're trusting a mother won't taint a pool." *Ibid.*

The court allowed the parents in the courtroom for jury selection. T4 557-58. The prosecutor then read to the jurors a list of witnesses several times but never included Petitioner's parents in the list, T3 347-48, T4 507-508, T4 578-79, a fact that the defense pointed out when the judge later ruled that the parents could be in the courtroom during trial testimony. T6 790-91. At that time, the State again hypothesized that they were "possible rebuttal witnesses, depending on what happens during the trial, whether the defendant testifies or not testifies." *Ibid.*

Without ever informing itself as to what, if anything, the parents could testify to and without consideration of any alternative, the court stood by its earlier ruling ("My ruling on that, we've heard it five times, I'm not allowing them in during the trial. They are listed as C witnesses. I'll note the objection for the record."), and concluded the discussion: "Okay. The objection is noted though for the record by the defense." T6 790-91.

In these circumstances, the court failed to comply with the requirements of *Waller*.

First, the only reason the prosecution gave for excluding

Petitioner's mother was that it was possible that she might become a witness if Petitioner testified at trial and if she had any information to rebut his testimony. This remote possibility did not amount to an overriding reason to expel her. And even if it were an overriding reason, the other *Waller* requirements would have to be met.

Second, her exclusion could have been less broad than covering the entire pretrial hearing and all of the trial testimony. For instance, the prosecution's evidence at trial consisted of testimony from the child, testimony from the child's mother about statements the child made to her, and evidence of statements Petitioner made to the police out of his mother's presence. There was no suggestion that she had ever discussed the alleged episodes with the child victim, or that she was privy to the hearsay statements of the child to his mother, and the record plainly showed she was not present during Petitioner's police interrogations. The prosecution pointed to nothing in its case about which she had knowledge. At most, it only said that Petitioner might have told her something that that could be used in rebuttal if he testified at trial. (In fact, he didn't testify.) Hence, at most, there might have a been a reason for excluding her if Petitioner had taken the stand.

Third, the court considered no alternative to banning her from the courtroom. In general, Florida has no written rule for exclusion of witnesses and the case-law rule affords the court broad discretion to allow exceptions to it. It "must not be enforced in such a manner that it produces injustice." *Wright v. State*, 473 So. 2d 1277, 1280 (Fla. 1985). The court could have considered the alternative of allowing the prosecution to depose the mother and thus keep her from changing her story under penalty of perjury. *See Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000) (holding that trial court properly exempted victim's next of kin from rule of sequestration where their testimony had been memorialized in prior depositions). Under section 27.04, Florida Statutes, the prosecution had the independent power to summon her and question her under oath.

Fourth, the court made no findings adequate to justify the closure.

In these circumstances, the prosecutor acted like the prosecutors in *Addy* and *Tharp*: he took the keys to the public courtroom into his own hands through a specious manipulation of the rule of sequestration of witnesses.

Petitioner was denied his right under the Public Trial Clause

when the trial court barred his mother from the courtroom. The state court decision affirming his convictions should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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