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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

247 So.3d 523
District Court of Appeal of Florida,
Fourth District.

Donovan Jonathan TILLMAN,
Appellant,
v.
STATE of Florida, Appellee.

No. 4D13–2516
|
[August 23, 2017]
|
Rehearing Denied May 30, 2018

Synopsis
Background: Defendant was convicted in the Circuit Court, 17th Judicial Circuit, Broward County, Barbara A. McCarthy, J., of sexual battery and lewd or lascivious molestation of a minor by a person under the age of 18, and sentenced to 31.125 years in prison. Defendant appealed.

Holdings: The District Court of Appeal, Warner, J., held that:

[1] trial court did not abuse its discretion in excluding defendant's mother from courtroom during defendant's trial, and

[2] defendant was not "in custody" during interrogation.

Affirmed.

West Headnotes (6)

[1] Criminal Law🔑Power and duty of court

Trial court did not abuse its discretion in excluding defendant's mother from courtroom during trial for sexual battery involving the defendant's younger cousin, despite the fact that the mother was listed as a Class C witness in the State's discovery request; the prosecutor maintained that he might call the mother on rebuttal, the mother was the sister of the victim's mother, the victim's mother had called defendant's mother when she discovered that her son was abused by defendant, the defendant texted the victim's mother, expressing regret for the incidents at issue in the trial, and the mother likely confronted the defendant about the accusations. Fla. R. Crim. P. 3.220(b).

[2] Criminal Law🔑Power and duty of court

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.

[3] **Criminal Law**🔑Power and duty of court

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.

[4] **Criminal Law**🔑Burden of showing error

Where the trial court exercises its discretion in excluding a witness under the sequestration rule 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.

[5] **Criminal Law**🔑Particular cases or issues
Infants🔑Warnings and counsel; waivers

Defendant, who was 16 or 17 at time of alleged incidents of sexual abuse, was not in custody during interrogation such that *Miranda* warnings had to be administered; defendant was brought to the station by his mother in the middle of the afternoon at the request of the detective, defendant's mother remained in the lobby during the questioning, defendant had already admitted the allegations of abuse in a prior interrogation in which defendant waived his *Miranda* rights, defendant knew of the purpose of the interrogation, the detective did not confront him with victim statements, the door to the interrogation room was not locked, defendant seemed relatively relaxed at the beginning of the interrogation and agreed with the detective that he was there of his own accord, and the detective told the defendant he was free to leave at any time and explained to him exactly how he could exit the building, defendant said he understood that he could leave, and he did leave at the end of the interview.

[6] **Criminal Law**🔑Opinion evidence

Defendant did not preserve for appeal his claim that the trial court erred in allowing experts to express opinions based upon studies rather than training and experience, where he failed to

object at trial.

***524** Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barbara A. McCarthy, Judge; L.T. Case No. 11001165CF10A.

Attorneys and Law Firms

Carey Haughwout, Public Defender, and Gary Lee Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Anesha Worthy, Assistant Attorney General, West Palm Beach, for appellee.

Warner, J.

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. Second, appellant contends that the court erred in denying a motion to suppress his statements to a detective, which were given without the warnings required of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The court did not err, however, in finding that appellant was not in custody and thus *Miranda* warnings were not compelled. Finally, we reject his claim that he was convicted of a nonexistent crime, as contact between the tongue and a sexual organ constitutes sexual battery. We also affirm appellant's sentence based upon *Davis v. State,* 199 So.3d 546 (Fla. 4th DCA 2016).

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.

Appellant, who was sixteen or seventeen at the time of the incidents, was charged with sexual battery and lewd or lascivious molestation for abuse of his cousin, who was five or six years old at the time of the incidents, which occurred at the victim's home as well as the home of another relative. The sexual battery incidents involved appellant placing his mouth over the victim's penis and having the victim do the same to appellant. The lewd and lascivious counts were incidents where appellant touched the victim's penis both above and beneath his clothes. In two statements to investigators appellant admitted the incidents,

although he sought to suppress the more incriminating statement. The victim also made a statement, through a therapist, confirming the abuse. Appellant was convicted after trial of all counts and ultimately sentenced to 31.125 years in prison, ***525** the lowest permissible sentence for the charges. He appeals his convictions on various grounds.

[1]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.

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.

[2] [3] [4]"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.

[5]In a second claim of error, appellant argues that the court erred in denying his motion to suppress his confession to a detective. Appellant made two statements to police. The first was to a Pembroke Pines detective and the second to a Coral Springs detective. Appellant filed a motion to suppress statements he made to the ***526** Coral Springs detective on grounds that, although he wasn't under arrest, this was a custodial interrogation and he was not read his *Miranda* rights.[3] The trial court held a hearing and concluded that the defendant was not in custody and thus, the statement was voluntary. The appellate court defers to the trial court's findings regarding the facts and uses the de novo standard of review for legal conclusions. *Nshaka v. State*, 82 So.3d 174, 178–79 (Fla. 4th DCA 2012).

3 Appellant waived his *Miranda* rights in the first statement and confessed to some of the same incidents as were contained in the second statement. However, the second statement was more detailed than the first and contained appellant's admission of abuse of two other children.

Miranda warnings apply only to in-custody interrogations. *Ross v. State,* 45 So.3d 403, 414 (Fla. 2010). In *Ramirez v. State*, 739 So.2d 568 (Fla. 1999), the Florida Supreme Court explained that determining whether a suspect is in custody for purposes of giving *Miranda* warnings is a mixed question of law and fact. It set forth a four factor test to determine whether a person is in custody:

> (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.

739 So.2d at 574. The court found that the defendant in *Ramirez* was in custody at the time his statement was taken. The officers, who already had probable cause to arrest the defendant, took him to the station and interrogated him in a small room, confronting the defendant with evidence of his guilt. Significantly, the court noted that the officers never told the defendant that he was free to leave.

Applying the *Ramirez* factors to the facts of this case, we agree with the trial court that the appellant was not in custody such that *Miranda* warnings were required. Appellant was brought

to the stationhouse by his mother in the middle of the afternoon at the request of the detective, who had left a message on the mother's phone. His mother remained in the lobby during the questioning. In contrast, in *Ramirez*, a uniformed and armed deputy came to Ramirez's home demanding production of evidence of the murder and burglary and then asked Ramirez to come with him to the station. Clearly, the manner that Ramirez was summoned for questioning was far more coercive than the manner in which appellant arrived for questioning.

As to the second and third factors, the interrogation of appellant must be placed in the context that this was appellant's *second* interrogation regarding the same abuse allegations. He had already admitted the allegations of abuse to the Pembroke Pines detective, after having waived his *Miranda* rights. Thus, the appellant knew of the purpose of the interrogation, and the Coral Springs detective told appellant that she had read the report of the other detective. Then the detective began by simply asking the appellant to tell her what he remembered. At no time did she read back to him his own prior statements. She did not confront him with victim statements for the crimes for which he was charged, although she did imply that another victim had told her of sexual contact with appellant. Mainly, she simply kept prodding him to remember the various incidents with the victim. While he was questioned in the interrogation room, and the court considered whether the door was locked, there was no testimony from the ***527** detective that the door was locked. And the appellant seemed relatively relaxed at the beginning. He agreed with the detective that he was there of his own accord. Finally, as to the fourth factor, and contrary to what occurred in *Ramirez,* the detective told the appellant he was free to leave at any time. She even explained to him exactly how he could exit the building, and he said he understood that he could leave, and he did leave at the end of the interview.

In sum, the four *Ramirez* factors do not point to a conclusion that appellant was in custody such that *Miranda* warnings had to be administered. The court properly denied the motion to suppress.

[6]We affirm the remaining issues arising out of the trial. As to his claim that the court erred in allowing experts to express opinions based upon studies rather than training and experience, the issue was not properly preserved by a specific objection which raised the ground now argued in this appeal. Appellant also claims that the court erred in allowing collateral crime evidence of his abuse of another family member to which he confessed in his statement to the detective. Under section 90.404(2)(b), Florida Statutes (2013), and *McLean v. State,* 934 So.2d 1248 (Fla. 2006), we conclude that the evidence was admissible. Even if either of the foregoing issues were error, we would conclude that they were harmless beyond a reasonable doubt, given his two confessions. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986).

Appellant also challenges his sentence of thirty-one years, followed by fifteen years' probation, as a violation of the Cruel and Unusual Punishment Clauses, because it is a lengthy term-of-years sentence for a non-homicide crime which he committed as a juvenile. His crimes were committed prior to the enactment of Chapter 2014–220, which revamped juvenile sentencing but expressly made the law prospective. We have already decided this issue against his position in *Davis v. State*, 199 So.3d 546 (Fla. 4th DCA 2016); *see also Rollins v. State,* 216 So.3d 644 (Fla. 4th DCA 2017). We certify the same question as we certified in *Davis:*

> DO THE SENTENCE REVIEW PROVISIONS ENACTED IN CHAPTER 2014–220, LAWS OF FLORIDA, APPLY TO ALL JUVENILE OFFENDERS WHOSE SENTENCES EXCEED THE STATUTORY THRESHOLDS, EVEN THOSE CONVICTED OF NON–HOMICIDE OFFENSES COMMITTED PRIOR TO JULY 1, 2014?

For the foregoing reasons, we affirm both the convictions and sentences.

Ciklin and Klingensmith, JJ., concur.

ON MOTION FOR REHEARING

PER CURIAM.

We deny rehearing. As to the sentencing issue, we have concluded in *Hart v. State*, 43 Fla. L. Weekly D970a (Fla. 4th DCA May 2, 2018), that *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), has not been applied to sentences of thirty years or less. Thus, chapter 2014-220, Laws of Florida should not be applied retroactively to an original sentence which does not violate *Graham.* Although appellant's sentence is thirty-one years, we conclude that it too does not violate *Graham* and chapter 2014-220 does not apply.

We certify conflict with the same cases noted in *Hart*:

> *Cuevas v. State*, 241 So. 3d 947, (Fla. [2d DCA] Mar. 9, 2018) (reversing the denial of a rule 3.800(a) motion and concluding that a juvenile non-homicide offender's sentences of 26 years in prison were unconstitutional under *Graham* as construed in *Henry* and *Johnson*); ***528** *Blount v. State*, 238 So. 3d 913 (Fla. 2d DCA 2018) (reversing the denial of a rule 3.800(a) motion to correct juvenile nonhomicide sentences of 40 years in prison and remanding for resentencing pursuant to *Johnson*); *Mosier v. State*, 235 So. 3d 957 (Fla. 2d DCA 2017) (reversing the denial of a rule 3.800(a) motion and concluding that a juvenile nonhomicide offender's sentences of 30 years in prison followed by 10 years of sexual offender probation were unconstitutional under *Graham* as construed in *Henry* and *Johnson*); *Alfaro v. State*, 233 So. 3d 515, 516

(Fla. 2d DCA 2017) (reversing 30-year sentences for nonhomicide offenses and rejecting trial court's conclusion that "*Kelsey* only applied to juvenile offenders like Kelsey who initially received life sentences but had been resentenced to a term of years under *Graham*"); *Burrows v. State*, 219 So. 3d 910, 911 (Fla. 5th DCA 2017) (reversing denial of postconviction relief and remanding for resentencing where juvenile offender received 25-year sentences for non-homicide offenses).

Hart, at *4.

WARNER, J., dissents in part with opinion.

For the same reasons I dissented in *Hart v. State*, 43 Fla. L. Weekly D970a (Fla. 4th DCA May 2, 2018), I dissent from the denial of the motion for rehearing on sentencing. I concur in the denial of the other grounds for rehearing.

All Citations

247 So.3d 523, 42 Fla. L. Weekly D1844, 43 Fla. L. Weekly D1201

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Supreme Court of Florida

FRIDAY, DECEMBER 11, 2020

CASE NO.: SC18-1058
Lower Tribunal No(s).:
4D13-2516; 062011CF001165A88810

DONOVAN JONATHAN TILLMAN vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

Upon review of the response(s) to this Court's order to show cause dated April 6, 2020, the Court has determined that it should decline to exercise jurisdiction in this case. *See Pedroza v. State*, 291 So. 3d 541 (Fla. 2020). The petition for discretionary review is, therefore, denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

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VI. The defendant's sentence is illegal. He was a juvenile when the crimes occurred and his sentence of 373.5 months has no provision for early release. Further, the Criminal Punishment Code cannot apply to capital felonies, life felonies, and first degree felonies punishable by a term of years not exceeding life imprisonment when committed by juveniles.

ARGUMENT

I. THE COURT ERRED IN EXCLUDING THE DEFENDANT'S MOTHER AND FATHER FROM THE COURTROOM.

A "C" witness is a witness "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).

At bar, the state listed the defendant's mother as a "C" witness. R1 12. Nothing indicates that she performed "ministerial functions" in the case. Hence, she was a witness "whom the prosecutor [did] not intend to call at trial."

So the state's own filings showed it did not intend to call the mother as a witness. She should not have been excluded under the rule of sequestration.

It does not appear that any of the state's discovery submissions listed the defendant's father. R1 11-15, 20, 22.[1] Hence,

[1] It did list as a "C" witness a man who lived with the de-

the father also could not be barred from the courtroom under the rule of sequestration.

The rule of sequestration may not be used as a ruse to bar people from the courtroom. *See Gore Newspapers Co. v. Reasbeck*, 363 So. 2d 609 (Fla. 4th DCA 1978).

In *Gore Newspapers*, a clever attorney said a newspaper reporter attending a suppression hearing was a potential witness and had him excluded under the rule of sequestration. He did this again when two other reporters appeared. The reporters sought a writ, which this Court granted.

While this Court noted that sequestration is in the sound discretion of the court, it wrote: "It goes without saying that witnesses should not be sequestered indiscriminately. Normally 'the rule' is invoked without ceremony as a routine matter; however, when its use is challenged, as it was here, the trial judge must determine that its use is proper and then exercise his discretion whether to allow sequestration." *Id*. at 611.

At bar, the state's claim that it might call the mother and the father as potential witnesses was not as blatant a ruse as in *Gore Newspapers*, but it was still baseless.

It listed the mother as a person it <u>did not</u> intend to call, and did not list the father at all. Despite repeated requests by

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fendant's mother, R1 12, ER 12, but he was not the defendant's father.

the defense for some explanation as to what their testimony would be, the state merely theorized that they might rebut some hypothetical testimony of the defendant. T1 15-16; T6 791.

In fact, the prosecutor said he did not know what the parents would testify to:

> MS. GIRAULT-LEVY: They are [C] witnesses. What are they testifying to?
>
> THE COURT: I don't know.
>
> MR. EL RASHIDY: Yes, that's exactly my point. I don't know.

T4 554, ER 712.

During jury selection, the state made clear it did not intend to call the parents as witnesses as it did not include them in its list of potential witnesses read to the jury. T3 347-48; T4 507-508; T4 578-79.

Moreover, it is not a normal practice for a party to invoke the rule of sequestration against <u>its own witness</u> over the objection of the party that would supposedly be harmed by the witness's testimony. If the state was truly concerned that the defendant's parents would change their (never disclosed) testimony, the solution would have been to memorialize it by deposition. *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).

On these facts, the state's claim that the parents were witnesses subject to the rule of sequestration was baseless.

Further, even where a party moves to exclude someone who is a legitimate fact witness, upon objection the court must make an inquiry to determine whether the witness's "exclusion from the rule will result in prejudice to the [moving party]." *Gore v. State*, 599 So. 2d 978, 986 (Fla. 1992).

Here, the court made no inquiry to determine whether the state would be prejudiced by exclusion of the parents from the rule of sequestration. It frankly admitted that it did not know what, if anything they might testify to. T4 554, ER 712.

Exclusion of the parents constituted a partial closure. A partial closure is justified only if (1) the party seeking closure shows "an overriding interest that is likely to be prejudiced," (2) the closure is "no broader than necessary to protect that interest," (3) the court considers reasonable alternatives, and (4) "the court must make findings adequate to support the closure." *Kovaleski v. State*, 103 So. 3d 859, 860-61 (Fla. 2012); (partial closure of trial); *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (closure of suppression hearing).

"[W]ithout 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) (citing, inter alia,

State v. Beckstead, 88 P.2d 461 (Utah 1939) (error to exclude friends and relatives of accused during testimony of alleged victim in case of carnal knowledge of minor)).

The partial closure at bar requires reversal. While there seems to be no Florida case directly on point, the highest courts of other states have ordered reversal of convictions where a defendant's family members or friends have been excluded. *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).

II. THE COURT ERRED IN ALLOWING IMPROPER EVIDENCE AS TO WHY A CHILD MAY NOT REPORT SEXUAL ABUSE.

Both at the pretrial hearing and at trial, the state relied on evidence based on the training of the sexual assault center witnesses and scientific research as to why a child may initially deny being the victim of a sexual crime. The court erred in allowing this testimony over objection.

At the pretrial hearing, Ms. Vazquez testified that, based on her training and experience, “it’s common for kids to deny abuse.” What the state asked why, counsel objected on grounds of relevancy and speculation as to why the child in this case said there had been no abuse. The court overruled the objection based on “training and experience.” T1 28-29, ER 183-84.

The witness then testified:

> Q. So let’s back up. Based on your training and experience, why is it that, what are some of the reasons that children don’t always come into the SATC and tell you the full story the first time?
>
> A. First of all, they could be afraid that they are going to get in trouble. Sometimes they are made to believe that they were a consenting party with the act and they feel guilty about what happened, ashamed about what’s happened. Sometimes if it’s a known person that’s abused them, they don’t want to get that person into trouble either.

T1 29, ER 184.

At trial, the state asked Ms. Boltz, who did the first interview of the boy, about what might affect how forthcoming a

DCA June 22, 2018), on the same question of law.

In or before 2012, Montgomery was sentenced to a total of 25 years in prison for crimes committed when he was 17. The Fifth District ruled that this sentence violated the Eighth Amendment under *Graham*. *Montgomery*, 230 So. 3d at 1258.

In *Ostane*, the defendant received a 30 year sentence for a crime committed when he was 17. The crime occurred sometime before 2002. The Fifth District held that he was entitled to an opportunity for early release under *Graham*, *Johnson*, *Montgomery*, *Burrows* and cases from this Court.

III. Direct and express conflict as to the exclusion of the defendant's mother from the courtroom

Under the Due Process and Public Trial Clauses of the state and federal constitutions, a defendant is entitled to the presence of close family members at his or her trial.

"[W]ithout 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) (citing, inter alia, *State v. Beckstead*, 88 P.2d 461 (Utah 1939) (error to exclude friends and relatives of accused during testimony of alleged victim in case of carnal knowledge of minor)).

Further, upon objection, the court must make an inquiry to determine if allowing the person to sit in the courtroom "will

result in prejudice" to the party seeking to remove him or her. *Gore v. State*, 599 So. 2d 978, 986 (Fla. 1992).

Here, exclusion of the defendant's mother constituted a partial closure. A partial closure is justified only if (1) the party seeking closure shows "an overriding interest that is likely to be prejudiced," (2) the closure is "no broader than necessary to protect that interest," (3) the court considers reasonable alternatives, and (4) "the court must make findings adequate to support the closure." *Kovaleski v. State*, 103 So. 3d 859, 860-61 (Fla. 2012); (partial closure of trial); *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (suppression hearing).

There was no "overriding interest … likely to be prejudiced" by the mother's presence. Where one has a constitutional right to have family present in court, exclusion is proper only if there is an alternative available to meet the purpose of the rule for sequestration of witnesses. *See Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000) (holding trial court properly exempted victim's next of kin from rule of sequestration where their testimony had been memorialized in prior depositions).

By listing the defendant's mother under category "C," the state declared that, at most, she was a person "who performed only ministerial functions or <u>whom the prosecutor does not intend to call at trial</u> and whose involvement with and knowledge of the case is fully set out in a police report or other state-

ment furnished to the defense." Fla. R. Crim. P. 3.220(b)(1)(A)(iii). (Emphasis added.) As the lower court acknowledged, the mother did not perform ministerial functions, and her knowledge was not set out in police reports. App. A2.

The decision below is directly and expressly contrary to *Gore*, *Kovaleski* and *Beasley* on the same point of law. The defendant was deprived of a basic constitutional right under *In re Oliver* and *Waller*. *See also People v. Nieves*, 683 N.E.2d 764 (N.Y. 1997); *People v. Mateo*, 536 N.E.2d 1146 (N.Y. 1989); *Longus v. State*, 7 A.3d 64 (Md. 2010); *State v. Ortiz*, 981 P.2d 1127 (Haw. 1999); *State v. Torres*, 844 A.2d 155 (R.I. 2004).

The state can always claim members of the defendant's family may have information that could be used in rebuttal. To affirm the ruling below would allow routine exclusion of the defendant's family from a defendant's trial.

IV. Direct and express conflict as to custodial interrogation

Under the state and federal constitutions, the police must advise suspects of their rights before custodial interrogation. *J.D.B. v. North Carolina*, 564 U.S. 261 (U.S. 2011); *Wilson v. State*, 242 So. 3d 484 (Fla. 2d DCA 2018) ("The protection against self-incrimination is … set forth in article I, section 9, of the Florida Constitution, and this fundamental right must be broadly construed."); Amend. V, XIV, U.S. Const.