UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 04-14913-F

JESSIE EARL PURVIS

Petitioner- Appellant,

v.

JAMES V. CROSBY, JR.

Respondent-Appellee.

APPEAL OF A DENIAL OF A PETITION UNDER 28 U.S.C. § 2254

BRIEF OF APPELLANT

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NO. 04-14913-F

Jessie Earl Purvis v. James V. Crosby, Jr.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I HEREBY CERTIFY that the following named persons are parties interested in the outcome of this case:

1. Thomas Bell

   Trial Counsel for Defendant-Appellant Purvis

2. Honorable Ed Carnes

   United States Circuit Court Judge

3. Maureen Sullivan Christine

   Assistant State Attorney

4. Marvin F. Clegg

   Appellate Counsel at State Court on Direct Appeal for Defendant-Appellant Purvis

5. Carmen F. Corrente

   Assistant Attorney General, Counsel for Appellee

6. Honorable Kim C. Hammond

   Circuit Court Judge, St. Johns County

7. Honorable Marcia Morales Howard

   United States Magistrate Judge

8. William Mallory Kent

   Appellate Counsel for Petitioner-Appellant Purvis

9. Honorable Robert Mathis

   Circuit Court Judge, St. Johns County

10. Patrick McCormick

    Assistant State Attorney

11. Honorable Harvey E. Schlesinger

    United States District Court Judge

12. Rebecca Roark Wall

    Assistant Attorney General

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant Jessie Earl Purvis respectfully requests oral argument. At stake is a life sentence; at issue is a matter of fundamental constitutional right.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Purvis certifies that the size and style of type used in this brief is 14 point Times New Roman.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal in this cause under 28 U.S.C. § 2253(c) because a certificate of appealability was issued by Judges Anderson and Carnes by Order filed February 11, 2005. The Certificate of Appealability was issued as to the following issues:

> 1. Whether trial counsel was ineffective for failing to object to the state's request and the trial court's order to close the courtroom during the child victim's testimony?

and

> 2. If so, whether trial counsel's ineffective assistance of counsel constitutes sufficient cause and prejudice to excuse appellant's procedural default in failing to raise the following claims at trial or on direct appeal: appellant was denied (1) the right to a public trial by the closure of the courtroom, and (2) due process because the victim did not request that the courtroom be closed, and the court did not comply with the state statute governing closure of the courtroom?

STATEMENT OF THE ISSUES

I. Trial counsel was ineffective for failing to object to the state's request and the trial court's order to close the courtroom during the child victim's testimony.

II. Trial counsel's ineffective assistance of counsel constitutes sufficient cause and prejudice to excuse appellant's procedural default in failing to raise the following claims at trial or on direct appeal: appellant was denied (1) the right to a public trial by the closure of the courtroom, and (2) due process because the victim did not request that the courtroom be closed, and the court did not comply with the state statute governing closure of the courtroom.

STATEMENT OF THE CASE

Course of Proceedings, Disposition in the Court Below and Relevant Facts

This is an appeal of a denial of a petition under 28 U.S.C. § 2254, following a state appeal of a denial of a motion for post-conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. [*Defendant Purvis's Motion for Post-Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850* filed August 1, 2002] The underlying 3.850 motion was denied without requiring a response from the State and without any evidentiary hearing. [Order Denying Defendant Purvis's Motion for Post-Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850, dated September 11, 2002 and recorded by the Clerk of the Court September 20, 2002] The state appeal was summarily denied by citation decision and thereafter a motion for rehearing was denied on March 18, 2003.

The 3.850 Motion challenged the judgement and sentence in Case Number CF98-2194, Division 56A, St. Johns County, Florida, identifying eighteen separate issues.[1] The motion was in legally sufficient form and was properly sworn to by the Defendant-Petitioner Jessie Earl Purvis.

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[1] The underlying trial case was initiated by an information filed in St. Johns County. The defense filed a motion to recuse which resulted in the case being transferred to Judge Kim C. Hammond in Flagler County and was tried to verdict in Flagler County. The 3.850 motion was properly referred to Judge Hammond for adjudication.

The underlying case went to trial and resulted in a guilty verdict [R1-54-55],[2] which was affirmed on appeal in appellate case number 5D00-448 in a published decision, *Purvis v. State*, 783 So.2d 292 (Fla. 5th DCA 2001). Accordingly, there is a pre-existing state record on appeal. Any matters of record from and after the date of completion of the state record on appeal for the direct appeal will be referred to by descriptive reference to the matter in the record.[3]

Purvis was charged with three felonies stemming from alleged conduct with a girl (CM)[4] living in his household who was allegedly eleven years of age at the time of the first incident. The charges in the Second Amended Information covered from October 1, 1997 through April 30, 1998 in three counts: sexual battery on a child less than 12 between October 1, 1997 through April 30, 1998; sexual activity with

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[2] All references are to the underlying record on appeal from the direct appeal of the trial verdict in the state case.

[3] In this motion, the symbol "V" will refer to the volumes in the record on appeal as numbered by the clerk below, and "R" will designate pages in the record on appeal. "T" will refer to transcript pages as numbered by the clerk below, where the clerk has numbered each page and not simply the first page. Otherwise, the "T" will refer to the page as numbered on each page by the court reporter.

[4] "CM" refers to the minor female who was the complainant, with "LP" and "Dorothy E" referring to minor females who presented *Williams* Rule-type evidence (i.e., similar fact evidence), and "ES" representing the minor female who presented evidence of abuse that was argued to be inextricably intertwined with CM's testimony.

a child 12 years or older on July 21, 1998, by a person in familial authority using digital penetration; and sexual activity with a child 12 years or older on July 21, 1998 by a person in familial authority using penile union with her vagina. (Vol.I R 5; 78)

Upon motion for disqualification citing multiple connections between the complainant's family and courthouse personnel, a circuit court judge from neighboring Flagler County was assigned to the case on May 24, 1999. (Vol.I R 88-96) A *Williams* Rule Notice was filed by the state on October 1, 1999 citing similar acts involving two other children and the defense moved to exclude it.. (Vol .I R 136; 144-150)

The case proceeded to trial, the alleged victim and three other girls testified against him, with the courtroom being cleared and closed to the public during the testimony of the alleged child victim. Purvis testified in his own defense. Purvis was found guilty as charged on all three counts. (Vol.I R 180-182) Purvis was sentenced on January 14, 2000 to prison for life on Count One, concurrent with 20 years each on Counts Two and Three, with credit for 521 days.

A notice of appeal was timely filed. (Vol. II, R 215-216) The Office of the Public Defender was appointed for appellate purposes on February 9, 2000. (Vol.II R 221) Purvis was represented by the Assistant Public Defender Marvin F. Clegg of the Public Defender's Office for the Seventh Judicial Circuit on his direct appeal

which was filed in a timely manner following judgment and sentence.

The direct appeal raised four issues none of which related to the issues presented by this appeal and the matters to be addressed under the certificate of appealability issued by this Court. The issues related to the clearing of the courtroom were not raised on the state direct appeal and could not be raised in the direct appeal because they had not been preserved for appeal by a timely objection and under Florida law were not considered fundamental error that could be raised on direct appeal absent a timely objection.

The Fifth District Court of appeal denied relief on the direct appeal. The decision of the Fifth District Court of Appeal read as follows:

> Per Curiam. Affirmed. *See State v. Pate*, 656 So.2d 1323 (Fla. 5th DCA 1995). *But see Richards v. State*, 738 So.2d 415 (Fla. 2d DCA 1999). We remand for correction of the defendant's scoresheet to reflect 120 points for victim injury. *See Poole v. State*, 777 So.2d 1186 (Fla. 5th DCA 2001).
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> Cobb, Griffin and Orfinger, R.B., JJ., concur.

Purvis v. State, 783 So.2d 292 (Fla. 5th DCA 2001).[5]

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[5] The correction in the scoresheet would have reduced the applicable sentencing range at the low end of the guidelines to 193.5 months, or 16.125 years imprisonment. The trial judge had imposed a sentence near the low end of the

The mandate issued as to the direct appeal on or about May 21, 2001. There was no further review sought either by petition to the Florida Supreme Court or the United States Supreme Court.

Thereafter Purvis filed a timely Motion for Post-conviction Relief under Rule 3.850, Florida Rules of Criminal Procedure on August 1, 2002. The 3.850 motion raised the same issues presented in this 2254 petition as to which this Court has granted the certificate of appealability.[6]

The trial court promptly denied the 3.850 motion on September 11, 2002 without benefit of a response by the state, a supplemental memorandum of law from counsel for petitioner Purvis, or any evidentiary hearing, despite the fact that the motion was facially sufficient, timely, and contained specific factual allegations that

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mistakenly calculated guidelines, despite the State's request for a sentence at the high end of the applicable range. No resentencing took place following remand, however, and the two concurrent twenty year sentences previously imposed on counts two and three remain in effect.

[6] In preparing for the 3.850 motion Purvis retained a private investigator who interviewed a number of witnesses and determined that C.M. and ES fabricated their testimony against Purvis to retaliate against his discipline of C.M. and his discipline of C.M.'s brother, Bradley Morris, who also was the boyfriend of ES at the time of the events in question. This was determined based on statements made by Bradley Morris, with whom ES came to live after the trial. This case in fact presents a claim of actual innocence, which is why the undersigned counsel has continuously represented Petitioner Purvis at all stages of the federal court proceedings *pro bono,* only asking for reimbursement of out of pocket costs.

if true, would entitled Purvis to relief, and which could not be conclusively refuted merely by attachments from the record.

The trial court's only attachment from the record to its order denying relief was a portion of the trial transcript [RIV-453, 455-458] that showed that the State had requested that the courtroom be cleared when the State called the alleged child-victim of the sex offense to testify, the trial judge said "Okay" to the State's request, and the defense attorney made no objection.

A timely notice of appeal of the denial of the motion was filed on October 21, 2002 with the Fifth District Court of Appeal in Florida. The appeal was denied and a timely motion for rehearing was denied on March 18, 2003.

Thereafter Purvis filed a timely petition under 28 U.S.C. § 2254 at the United States District Court for the Middle District of Florida, Jacksonville Division. After numerous responses and replies, but without conducting an evidentiary hearing, the District Court denied the petition and denied the request for a certificate of appealability after Purvis filed a timely notice of appeal. The request for certificate of appealability was renewed at this court, initial denied, then granted on motion for rehearing.

Basic Case Facts

Jessie Earl Purvis at the time of the trial was a 58-year-old father and truck

driver who was charged with three felonies regarding his conduct with CM, an 11 year old girl at the time of the first incident. The offenses were alleged to have taken place between October 1, 1997 and July 21, 1998 in three counts: sexual battery on a child less than 12 between October 1, 1997 and April 30, 1998 using digital penetration of the vagina; sexual activity with a child 12 years or older on July 21, 1998, by a person in familial authority using digital penetration; and sexual activity with a child 12 years or older on July 21, 1998 by a person in familial authority using penile union with her vagina. (Vol.I R 5; 78)

CM lived with her mother Sara, who was the girlfriend of Mr. Purvis at the time and Sara had one son by Mr. Purvis, with the parties living together as a family. (Vol. II T 264; 293) CM had never reported any abuse by Mr. Purvis to Sara before this offense came to light. (Vol. II T 313)

During the trial, the first child called by the state was ES, to testify about what the prosecutor called "inescapable acts" or "intrinsically intertwined" matters. (Vol. II R 333) CM was 'best friends' with ES. (Vol. II T 262) Purvis was a trucker, and ES and CM had gone on a delivery trip with Purvis. ES was the girl who eventually brought the actions of Mr. Purvis to the attention of other adults when she stated that in the darkened truck cab sleeper compartment he mistakenly began rubbing her body instead of CM's. ES resisted and rebuffed his efforts and later told her boyfriend

Bradley upon her return home and then told her step-mother. ES testified that this first made CM mad at her. (Vol. V T 407-413; 422-426)

CM testified next. Regarding the alleged capital sexual battery offense, she testified she was eleven years old when Mr. Purvis touched her with his finger on her 'private' which she stated was her vagina, under her clothes, and she was upset and afraid to tell because he instructed her not to tell. She stated he did this again on a later date in her mother's bedroom. She admitted that she had not previously told anyone about the alleged pre-age 12 incidents. (Vol. VI T 458-501)

CM acknowledged she had been spanked by Mr. Purvis in the past and could feel 'aggravated' towards him at times. She stated he had also hit or punched her friend Bradley before and also recalled that Purvis got into an argument with her grandmother once after he disciplined CM. (Vol. VI T 506-510)

The state next proffered the testimony of the two *Williams* Rule (similar fact evidence) child witnesses, LP and Dorothy E. LP testified that CM was her cousin and Mr. Purvis was like an uncle to her. She testified that eight years earlier Purvis had touched her beneath her underwear while watching a movie with her. She ordered him to stop and threatened to tell her father but told no one for nearly eight years. (Vol. VII T 580-588; 642-644)

Dorothy E was called next and was the subject of a competency issue but was

allowed to testify. (Vol. VII T 591- 602) Dorothy E testified she thought of Mr. Purvis as an uncle and that he had disciplined her. She stated that he placed his finger in her vagina while she was playing Nintendo at age ten or eleven and she told no one, out of fear that he would hit her or out of fear of what people would think of her. (Vol. VII T 605-610; 658)

The trial court found sufficient similarities involving the girls' ages, location of abuse, type of abuse, familial authority exercised, and perception of authority and allowed the testimony for corroboration of CM's testimony. (Vol. VII T 622-624) Defense counsel requested a limiting instruction to the jury before each Williams Rule witness which the court agreed to read. (Vol. VII T 625 - 635) Dorothy E and LP then repeated their testimony for the jury. (Vol. VII T 634-661)

Purvis testified in his own defense that he had to physically discipline the child witnesses at various times. He testified that he never intentionally touched either ES or CM in the truck cabin on the delivery trip but may have brushed against a child's leg as he tried to adjust a thermostat for them. He stated the girls got upset about a delay in getting the truck back home, and were pitching a fit, with ES wanting to see her boyfriend Bradley. (Vol. VII T 675-689)

Purvis also denied improperly touching CM, LP or Dorothy E but stated he had repeatedly spanked all three of the girls. (Vol. VII T 692-732) The defense

presented no other evidence.

Facts Pertinent to COA Issues

During the trial the Assistant State Attorney requested that the judge order that the courtroom be cleared and closed during the testimony of the alleged child victim, C.M. The courtroom was so cleared on order of the trial judge. There is nothing in the record to indicate that the child herself requested this or that there was any need for the closure.

The Defendant's adult son and daughter-in-law, who had attended all prior court proceedings and were in the courtroom at the time the judge ordered the courtroom cleared, were required to leave the courtroom. They wished to be present during this testimony, the Defendant wished for them to be present, but they were ordered to leave. The Defendant's trial attorney told them they had to leave and he made no objection to the clearing of the courtroom.

The record is clear that the courtroom was cleared upon the motion of the prosecutor, when the prosecutor called the child sex victim to the witness stand:

> [ASSISTANT STATE ATTORNEY] MRS. CHRISTINE: Judge, at this time I'd like to make a motion to have the courtroom cleared because we'll be presenting the testimony of the minor victim.
>
> THE COURT: Okay. Are there persons likewise you wish to - -

MRS. CHRISTINE: This is her aunt and uncle.

THE COURT: All right. You have no objection to them remaining?

MRS. CHRISTINE: No.

THE COURT: Okay. [R-IV-455-456]

Although Florida Statutes § 918.16(2) was not expressly cited, it is apparent that it was under the authority of § 918.16(2) that the State and Court thought they were proceeding. Section 918.16(2) provides:

> (2) When the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, the court shall clear the courtroom of all persons upon the request of the victim, regardless of the victim's age or mental capacity, except that parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney may remain in the courtroom.

Although § 918.18 contemplates that the immediate families of the parties may be allowed to remain, in this case the record establishes that Mr. Purvis's son and daughter-in-law were required to leave the courtroom in response to the State's motion.

Purvis's adult son's affidavit, which was filed with the Circuit Court in support of the 3.850 Motion, stated in part as follows:

1. My name is Steven Earl Purvis.

> 2. I am the son of Jessie Earl Purvis, the defendant in *State of Florida v. Jessie Earl Purvis*, case number CF98-2194, Division 56A, in the Circuit Court in and For the Seventh Judicial Circuit in and for St. Johns County, Florida.
>
> 3. I attended literally every court proceeding during the entire course of this criminal case, including the trial of the matter, because my father wanted me to be present. I was present in the courtroom in the course of the trial at the time the State Attorney requested the judge to have the courtroom cleared when the alleged victim was to appear and testify against my father. The judge ordered the courtroom cleared. We were sitting one row behind the counsel's table where my father and his trial attorney, Tom Bell, were sitting. I mouthed and indicated by sign language to Mr. Bell asking whether the judge's order applied to me and whether I had to leave the courtroom also. Mr. Bell understood what I was asking and indicated that I and my wife, who was with me, had to leave the courtroom. My father was looking to Mr. Bell about this also and he was wanting us to be able to stay in the courtroom for this important testimony. I think it might have made a difference in the child's testimony, which I believe to have been false, if she had had to confront the public and my father's family with her false testimony. Later that same day during a break we got to talk to my father and he asked why we had to leave the courtroom. He said he had wanted us to be there for her testimony and that all she did was lie. Mr. Bell never explained why we had to leave the courtroom. I feel as if we were denied the right to a public trial, in which this accuser would have had to confront the public as well as my father.

The alleged victim of the sex offense, C.M., was thirteen years old at the time of the trial. There was nothing in the record to show any need to clear the courtroom

for her testimony or even to show that the child requested it be done. Indeed, she was the *de facto* step-child of Mr. Purvis and step-sister of the adult son, Steven Purvis, who was excluded from the courtroom, and there was nothing to show any compelling need to give her testimony in secret, particularly as to her own step-brother.

The trial court was not requested and did not conduct own its own initiative the hearing required by *Waller v. Georgia* to make particularized findings of the need to partially or wholly clear the courtroom. Instead without allowing any discussion of the issue or making any findings to support a need to clear the courtroom, the trial judge simply ordered the courtroom cleared and closed to the public during the child's testimony. Purvis's adult son and daughter-in-law, as well as the other members of the public in attendance, were required to leave the courtroom. Purvis himself wanted his son and daughter-in-law present and both Purvis and his son asked the defense counsel if they could remain, but were told they must leave. The most crucial portion of Purvis's trial was held in secret.

STANDARDS OF REVIEW

Habeas review of a state court's rulings is restricted by Title 28, U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412- 13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). A state court's

decision involves an "unreasonable application" of clearly established federal law under § 2254(d)(1) if its application is objectively unreasonable. *Parker v. Head*, 244 F.3d 831, 835 (11th Cir.2001). "[A]n unreasonable application of federal law is different from an incorrect or erroneous application of federal law." *Williams*, 529 U.S. at 412, 120 S.Ct. at 1523. A federal court's review is further restricted by 28 U.S.C. § 2254(e), which provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). *Herring v. Secretary, Dept. of Corrections,* 397 F.3d 1338, 1341-1342 (11th Cir. 2005).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions. A state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case.

A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case. An unreasonable

application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from the Supreme Court case law to a new context. An "unreasonable application" is an "objectively unreasonable" application.

Clearly established federal law is not the case law of the lower federal courts, including this Court. Instead, in the habeas context, clearly established federal law refers to the holdings, as opposed to the *dicta*, of the Supreme Court's decisions as of the time of the relevant state court decision. *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001), cited in *Henderson v. Campbell,* 353 F.3d 880, 890 (11th Cir. 2003).

The district court's determination of whether this standard has been met is subject to *de novo* review. *Harrell v. Butterworth*, 251 F.3d 926, 930 (11th Cir.2001), cert. denied, 535 U.S. 958, 122 S.Ct. 1367, 152 L.Ed.2d 360 (2002). A district court's findings of fact are reviewed for clear error. *Delancy v. Florida Dept. of Corrections*, 246 F.3d 1328, 1329 (11th Cir.2001). "Whether a particular claim is subjected to the doctrine of procedural default ... is a mixed question of fact and law," subject to *de novo* review. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001), cited in *Henderson v. Campbell,* 353 F.3d 880, 891 (11th Cir. 2003).

SUMMARY OF ARGUMENTS

I. Trial counsel was ineffective for failing to object to the state's request and the trial court's order to close the courtroom during the child victim's testimony.

Purvis had a Sixth Amendment right to a public trial. Purvis was denied his Sixth Amendment right to a public trial by the closure of the courtroom during the testimony of the alleged child victim, C.M. Under settled Supreme Court authority Purvis was entitled to not have his criminal trial closed to the public unless (1) the State could advance an overriding interest that was likely to be prejudiced absent closure, (2) the closure was no broader than necessary to protect that interest, (3) the trial court considered reasonable alternatives to closing the proceeding, and (4) the trial court made findings adequate to support the closure. Purvis himself and his adult son and daughter in law who were in attendance and who wished to remain when the judge summarily ordered the courtroom closed at the state's request, objected to his counsel to the closing of the courtroom during the alleged child victim's testimony. But Purvis's counsel, unaware of binding Supreme Court precedent, voiced no objection to the trial judge, which resulted in the deprivation of Purvis's constitutional right to a public trial. Denial of the right to a public trial is one of the limited class of error that is treated as structural error, therefore sufficient prejudice is presumed to entitle Purvis to a new trial.

II. Trial counsel's ineffective assistance of counsel constitutes sufficient cause and prejudice to excuse appellant's procedural default in failing to raise the following claims at trial or on direct appeal: the appellant was denied (1) the right to a public trial by the closure of the courtroom, and (2) due process because the victim did not request that the courtroom be closed, and the court did not comply with the state statute governing closure of the courtroom.

Ordinarily a petitioner would be procedurally defaulted from raising a claim under 28 U.S.C. § 2254, which could have, but was not, raised on direct appeal to the state court. Procedural default is overcome by showing cause and prejudice. In Purvis's case the closure of the courtroom could not be raised on direct appeal because Purvis's trial lawyer had not made a timely objection to the closure, thereby failing to preserve the issue for direct appeal. Under Florida's Criminal Appeal Reform Act as interpreted by the District Court of Appeal to which Purvis's direct appeal lay, closure of the courtroom is not seen as fundamental or plain error, and may not be raised on direct appeal absent a timely objection at trial.

On the other hand, under Florida law, guided by settled Supreme Court precedent, had the issue been presented on appeal, it would have been reversible error. Therefore, Purvis's trial counsel's failure to object constitutes ineffective assistance of counsel, and constitutes cause and prejudice for his procedural default.

Purvis was entitled to Due Process of law, which as applied to the facts of his case means he was entitled to not have the most significant portion of his criminal

trial - the testimony which convicted him of the charged offenses - closed to the public without the State and Court following the mandate of *Waller v. Georgia* that it not be closed without the Court following the strict requirement of *Waller*.

ARGUMENTS

I. Trial counsel was ineffective for failing to object to the state's request and the trial court's order to close the courtroom during the child victim's testimony.

We argue that the record as it currently exists establishes that Purvis is entitled to relief on his claims arising out of the closure of the courtroom when the child sex-victim testified.[7] The record is clear that the courtroom was completely cleared upon

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[7] The record is clear that the courtroom was cleared upon the motion of the prosecutor, when the prosecutor called the child sex victim to the witness stand:

> [ASSISTANT STATE ATTORNEY] MRS. CHRISTINE: Judge, at this time I'd like to make a motion to have the courtroom cleared because we'll be presenting the testimony of the minor victim.
> THE COURT: Okay. Are there persons likewise you wish to - -
> MRS. CHRISTINE: This is her aunt and uncle.
> THE COURT: All right. You have no objection to them remaining?
> MRS. CHRISTINE: No.
> THE COURT: Okay. [R-IV-455-456]

Although Florida Statutes § 918.16(2) was not expressly cited, it is apparent that it was under the authority of § 918.16(2) that the State and Court thought they were proceeding. Section 918.16(2) provides:

> (2) When the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, the court shall clear the courtroom of all persons upon the request of the victim, regardless of the victim's age or mental capacity, except that parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney may remain in the courtroom.

motion of the state when the state called the thirteen year old child victim witness to testify. The trial court made none of the four factor findings required under *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), before clearing and closing the courtroom. Also, the order clearing and closing the courtroom did not comply with the restrictions of Florida Statutes, § 918.16. The Defendant's adult son and daughter-in-law, who had attended every court appearance at the request of the defendant, were made to leave the courtroom by this order closing the courtroom.

This was reversible error under Florida law had the trial attorney made a timely objection. *Pritchett v. State,* 566 So.2d 6, 7 (Fla. 2nd DCA 1990); *Thornton v. State*, 585 So.2d 1189 (Fla. 2nd DCA 1991); *Alonso v. State*, 821 So.2d 423 (Fla. 3rd DCA 2002). The defense attorney failed to object. His failure to object prevented the issue from being raised on direct appeal, because this error, although a structural error, has been held by the Florida appellate courts to not be fundamental error for purposes of direct appeal when no trial objection is made.

Because the law was already well settled that the defendant was entitled to have his immediate family members remain in the courtroom during the testimony of the

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Although § 918.18 contemplates that the immediate families of the parties may be allowed to remain, in this case the record establishes that Mr. Purvis's son and daughter-in-law were required to leave the courtroom in response to the State's motion.

child victim under § 918.16, and the law was also well settled that to constitutionally apply § 918.16, the court was required to make the four factor findings of *Waller v. Georgia*, defense counsel was clearly ineffective for failing to object to the motion and order.

No prejudice is required to be shown from an order denying a defendant his right to a public trial under the Sixth Amendment.[8] The deprivation of the right to the public trial is its own prejudice and although it may not be considered fundamental error for direct appeal purposes by the Florida courts, *this Court* has clearly held that it is structural error requiring reversal without the requirement that the defendant establish any prejudice beyond the closing of the courtroom itself. *Judd v. Haley*, 250 F.3d 1308 (11th Cir. 2001).

Therefore, Purvis was denied effective assistance of counsel and denied his right to a public trial and is entitled to a new trial.

Purvis asked for a certificate of probable cause only as to grounds one, five and six, of Petitioner Purvis's federal habeas petition filed in the district court under authority of 28 U.S.C. § 2254. All three grounds relate to the clearing of the courtroom during the testimony of the child witness in this sex offense case. Ground

[8] But in this case the failure to preserve the issue for direct appeal, when if it had been preserved Purvis would have had reversible error on direct appeal, is prejudice for ineffective assistance of counsel.

one stated the issue in terms of ineffective assistance of counsel arising out of the trial counsel's failure to object to the request and order that the courtroom be cleared, ground five stated the issue in terms of the state's request that the courtroom be cleared and the judge's order clearing the courtroom deprived petitioner of his right to a public trial, and ground six stated the issue as a denial of due process in that the court failed to comply with the governing Florida Statute on closing courtrooms during child witness testimony.

The issue presented by this petition have been the subject of numerous reported appellate decisions in other cases from this circuit and other circuits. *See, e.g., Judd v. Haley, 250 F.3d 1308* (11th Cir. 2001), *Smillie v. Greiner*, 99 Fed. Appx. 324, 2004 Westlaw 1157743 (2nd Cir. 2004), *Sevencan v. Herbert*, 342 F.3d 69 (2nd Cir. 2003), *Woodson v. Hutchinson*, 52 Fed. Appx. 195, 2002 WL 31689442 (4th Cir. 2002), *Brown v. Artuz,* 283 F.3d 492 (2nd Cir. 2002), *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000), *Martin v. Bissonette*, 118 F.3d 871 (1st Cir. 1997).

Before the child victim was called to the witness stand as a state witness against Petitioner Purvis, the state asked the court pursuant to the state statute (Florida Statutes, § 918.16) to clear the courtroom. The court completely cleared the courtroom without conducting any hearing to determine the necessity of closing the trial to the public and without hearing any proffer from the state why it was necessary

to clear the courtroom. There was a total clearing of the courtroom.

The record reflects that defense trial counsel did not object. The issue was not raised on direct appeal in state court because of the failure of the trial counsel to preserve the error by a timely objection. Under governing Florida law the issue was not fundamental or plain error and not subject to appeal in the absence of a contemporaneous objection.

The issue was raised in a timely state post-conviction motion under Rule 3.850 of Florida's Rules of Criminal Procedure. Petitioner's state post-conviction motion included the affidavit of Petitioner's adult son and daughter (as well as the sworn claim of Petitioner himself), that they asked defense trial counsel at the time of the state's motion to clear the courtroom if they were required to leave the courtroom in response to this order, and they were told by the defense trial attorney that they were required to leave. The son and daughter also swore that they had attended every proceeding in the case, had attended the trial up to this point, and both they and Petitioner wanted them to remain in the courtroom for the confrontation of the child accuser witness. They alleged in the attached affidavits that in their opinion the child would have been less likely to testify falsely if she had to face the family when testifying. [There was no evidentiary hearing either in state court or before this court, therefore for purposes of ruling on this petition, this Court was bound by the factual

allegations in the petition and attached affidavits unless clearly refuted by the record.]

Under controlling Florida law the failure to object to an improper order clearing a courtroom under § 918.16 waives the issue for direct appeal. The denial of the right to a public trial by an order clearing a courtroom under § 918.16 may not be raised on direct appeal absent a contemporaneous objection. Therefore, the issue could not be raised on direct appeal.

The district court appeared to impliedly recognize and agree with this proposition, because the district Court denied the state's argument that the issue was procedurally barred.

The issue was raised in a timely manner in Petitioner's state post-conviction motion under Florida Rule 3.850, and was raised again on the appeal to Florida's District Court of Appeal and raised again in the federal habeas petition which was denied without evidentiary hearing by District Judge Harvey E. Schlesinger. Judge Schlesinger also denied Petitioner's request for certificate of appealability ("COA"). Petitioner then renewed his request for a COA at this Court, which was at first denied, then granted on motion for rehearing.

As to Ground One the District Court denied relief solely on the basis that Petitioner had not established prejudice. That conclusion is wrong. The prejudice

was the denial of the right to a public trial.[9] The prejudice resulted because Petitioner's trial counsel failed to object to the order closing the courtroom to the public. If he had objected the trial court would either have followed the law, which would have resulted in not closing the courtroom, or if the trial court persisted in denying Purvis his right to a public trial, by objecting Purvis's counsel would have preserved the issue for direct appeal and would have been entitled under *Waller v. Georgia,* 467 U.S. 39 (1984) and *Judd v. Haley,* 250 F.3d 1308 (11th Cir. 2001), to reversal on appeal and a new trial.

The District Court adopted the state circuit court's reasoning that Petitioner failed to allege the requisite prejudice. The state circuit court explained - and the District Court quoted and adopted this explanation - that the failure to allege the

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[9] "Two more notes about *Waller* are relevant for our purposes. First, a violation of one's right to a public trial is structural error. *See id.* at 49, 104 S.Ct. 2210; *Johnson v. United States,* 520 U.S. 461, 469, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Waller* as one of the "limited class" of cases where structural error has been found). Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). As such, structural errors are not subject to harmless error analysis. *See id.* at 309, 111 S.Ct. 1246. Therefore, once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way. The mere demonstration that his right to a public trial was violated entitles a petitioner to relief. *Judd v. Haley,* 250 F.3d 1308, 1314 - 1315 (11th Cir. 2001).

requisite prejudice was *a failure to establish an impact on the outcome of the trial.*

This is not the governing standard. *Waller v. Georgia* is well known for the proposition that the denial of the right to a public trial is one of the small group of issues which amounts to structural error and is *per se* prejudicial. [10] No impact on the outcome of the trial must be shown. This proposition is bedrock constitutional law, but it was not applied by the state court - nor was it applied by the District Court.

The state court decision - which the District Court adopted and by implication - clearly constitutes a decision contrary to controlling Supreme Court precedent and contrary to this Court's decision in *Judd v. Haley*. Purvis is entitled to relief.

As to Grounds Five and Six, the District Court found they were procedurally barred, asserting that despite counsel's failure to object to the denial of the right to a public trial, the issue should have been raised on direct appeal anyway, and by not doing so, Petitioner had procedurally waived the issue.

The District Court itself acknowledged that Florida law barred this issue on direct appeal absent a contemporaneous waiver, but skirted that obstacle by asserting

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[10] "The parties do not question the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. We agree with that view . . . " *Waller v. Georgia,* 467 U.S. 39, 49-50, 104 S.Ct. 2210, 2217 (1984).

that Purvis's appellate counsel should have raised Petitioner's trial counsel's failure to object as an issue of *ineffective assistance of counsel* in the direct appeal.

Of course this is incorrect. Ineffective assistance of trial counsel is not an issue that can be raised on direct appeal because there is an inadequate record to establish whether the failure to make the objection was a matter of strategic choice. Florida courts, like this Court, do not permit ineffective assistance of counsel challenges on direct appeal except in the most extraordinary circumstances.[11]

There was no basis for raising an IAC claim *in the direct appeal* for the failure of the trial counsel to object to the closing of the courtroom. This is a classic example of the type of IAC issue that cannot be resolved absent an evidentiary hearing to determine whether the trial counsel's decision to not object was a knowing and reasonable strategic choice joined in by the client or was ineffective assistance of counsel. Purvis alleged in his habeas that it was not a strategic choice, but no one knows what the trial attorney would say about it. We have a silent record because no record was made on this point one way or the other because there has never been an evidentiary hearing permitted. There has never been an evidentiary hearing on this

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[11] The District Court's argument was logically flawed as well, because the District Court had concluded as to Ground One that *there was no ineffective assistance of counsel* because Petitioner was not prejudiced. If there was no ineffective assistance of counsel, there was no IAC claim for Purvis's appellate counsel to raise in the direct appeal.

point at any stage of the proceedings. If Purvis had attempted to raise the issue on direct appeal it would not have been considered because there was no record upon which to make a determination whether it was IAC or strategic choice. Indeed, the District Court cited *no authority* for the argument that a claim of IAC for failure to object to the closing of the courtroom could have been raised on direct appeal, because there is no such authority.

The District Court again quoted the state circuit court's order which denied these grounds on the basis that they could have been raised on direct appeal. The state court order, however, does not explain how the issue could have been raised on direct appeal because the order itself acknowledges that under Florida law the issue was not fundamental error - *i.e.,* could not be raised on direct appeal without a contemporaneous objection.

The state court order does not suggest that the issue could have been "back doored" on appeal by an IAC claim and if it had, it would have been error.

II. Trial counsel's ineffective assistance of counsel constitutes sufficient cause and prejudice to excuse appellant's procedural default in failing to raise the following claims at trial or on direct appeal: appellant was denied (1) the right to a public trial by the closure of the courtroom, and (2) due process because the victim did not request that the courtroom be closed, and the court did not comply with the state statute governing closure of the courtroom.

Ordinarily a petitioner would be procedurally defaulted from raising a claim under 28 U.S.C. § 2254, which could have, but was not, raised on direct appeal to the state court. Procedural default is overcome by showing cause and prejudice. In Purvis's case the closure of the courtroom could not be raised on direct appeal because Purvis's trial lawyer had not made a timely objection to the closure, thereby failing to preserve the issue for direct appeal. Under Florida's Criminal Appeal Reform Act, closure of the courtroom is not seen as fundamental or plain error, and may not be raised on direct appeal absent a timely objection at trial.

The Florida Supreme Court has held in the context of post-conviction relief that a claim such as this is not procedurally defaulted by failure to raise it on direct appeal, if there was no contemporaneous objection, because under Florida law, the failure to object to the unconstitutionality of a statute as applied under particular facts is waived by failure to make a contemporaneous objection and cannot be raised as fundamental error on appeal:

The constitutionality of a statute *as applied to a certain set of facts* is an

issue requiring a contemporaneous objection, or it is deemed waived.

Trushin v. State, 425 So.2d 1126 (Fla.1982).

Cited in *Bell v. State*, 585 So.2d 1125, 1126 (1991).

Jones v. State, 883 So.2d 369 (Fla. 3rd DCA 2004) explains the Florida law on this particular issue:

> The defendant's main contention in this petition is that the failure to make findings under *Waller* is fundamental error and that his appellate counsel should have raised the issue on appeal, even in the absence of a proper objection in the trial court.
>
> The en banc Fourth District Court of Appeal has recently rejected such an argument. The Fourth District held that where the partial closure takes place without objection this does not constitute fundamental error. The majority view across the country is that a failure to object to a closure of the trial waives the right to a public trial. Furthermore, in *Dixon v. State,* 191 So.2d 94, 96 (Fla. 2d DCA 1966), the second district summarily rejected the appellant's claim of a violation of his right to a public trial because no objection was made. Most recently, our supreme court pointed to the lack of objection as a reason why there was no reversible error in the partial closure of a courtroom during voir dire. See *Evans v. State,* 808 So.2d 92, 105 (Fla.2001).

Jones v. State, 883 So.2d 369, 371 (Fla. 3rd DCA 2004). See *also Evans v. State*, 808 So.2d 92, 105 (Fla. 2001) (partially closure of courtroom not reversible error citing failure to object at trial).

On the other hand, under Florida law, guided by settled Supreme Court precedent, had the issue been presented on appeal, it would have been reversible

error. Therefore, Purvis's trial counsel's failure to object constitutes ineffective assistance of counsel, and constitutes cause and prejudice for his procedural default.

In *Mitchell v. State*, 846 So.2d 559 (4th DCA 2003), a case strikingly similar to Purvis's, the District Court of Appeal summarized the binding Florida law on this point as follows:

> Appellant's second ground alleged that on the last day of his trial, August 7, 1997, the presiding judge instructed the bailiff to lock the courtroom doors, and, as a consequence, Appellant's family and friends were told they could not attend. He argued, in the alternative, that closing the trial was fundamental error, citing *Williams v. State,* 736 So.2d 699 (Fla. 4th DCA 1999)(excluding public from part of trial reviewable on appeal despite lack of contemporaneous objection) and that his trial counsel was ineffective for failing to object, resulting in the issue not being preserved for appellate review. The trial court's order accepted the state's argument that this was an issue that could have been raised on direct appeal, citing *Campbell-Eley v. State,* 756 So.2d 1043 (Fla. 4th DCA 2000)(reversing conviction where judge required all persons to vacate the room). After the trial court's ruling, this court receded from *Williams* and held, in *Alvarez v. State,* 827 So.2d 269, 276 (Fla. 4th DCA 2002), that the failure to object to the closure of a trial constitutes a waiver of the right to a public trial.

Even the Fourth District Court of Appeal had applied waiver when the trial counsel made an express statement in response to an order clearing a courtroom and did not object, holding that by doing so the trial lawyer had waived the Defendant's right to a public trial. *Berkuta v. State*, 788 So.2d 1081 (Fla. 4th DCA 2001).

On the record in Purvis's case, his trial counsel's acknowledgment without

objection to the court ordering the courtroom cleared constituted a waiver, under Florida law, of the right and waived the issue for direct appeal.

Additionally, Purvis was entitled to Due Process of law, which as applied to the facts of his case means he was entitled to not have the most significant portion of his criminal trial - the testimony which convicted him of the charged offenses - closed to the public without the State and Court following the mandate of *Waller v. Georgia* that it not be closed without the Court following the strict requirement of *Waller*.

CONCLUSION

Petitioner-Appellant Jessie Earl Purvis respectfully requests this honorable Court grant his petition, vacate his judgment and sentence and remand his case for a new trial, or in the alternative, remand the case to the district court for an evidentiary hearing.

Respectfully submitted,

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RULE 28-1(m) CERTIFICATE OF WORD COUNT AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY pursuant to 11th Cir.R. 28-1(m) and FRAP 32(a)(7) that this document contains *** words.

I ALSO HEREBY CERTIFY that two Adobe PDF copies of the foregoing were served by electronic mail to Rebecca Roark Wall, Esq., by emailing to:

Rebecca_Wall@oag.state.fl.us

on April ___, 2005.

_____

William Mallory Kent

APPENDIX