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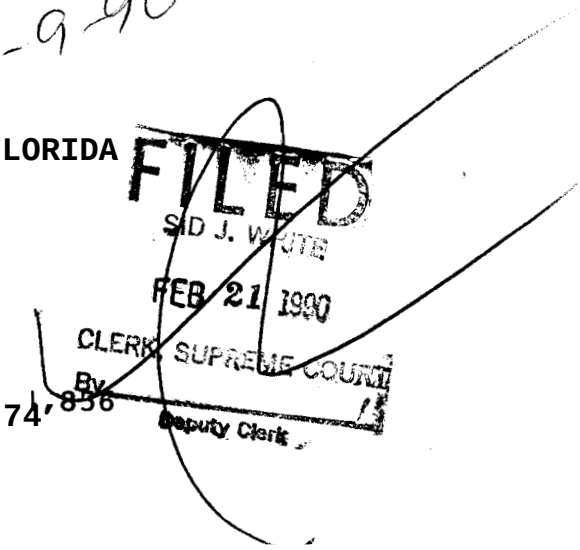
IN THE SUPREME COURT OF FLORIDA



WILLIAM LEGGETT,

Petitioner,

v. CASE NO. 74,836

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

WILLIAM LEGGETT,

Petitioner,

v. CASE NO. 74,856

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

William Leggett was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner", "defendant", by by his proper name.

Reference to Volume I of the record on appeal, containing the pleadings and orders filed in this cause, will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to Volumes II-IX of the record, containing transcripts, will be by use of the symbol "T" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

By information it was alleged that petitioner, between September 23 and 30, 1986, did knowingly commit a battery upon J[redacted] C[redacted], a child under the age of 18 years, by actually and intentionally touching or striking C[redacted], with a deadly weapon, a billy club, contrary to Section 827.03, Florida Statutes (1985)(R-45). The alleged victim is the nephew of petitioner.

On January 11, 1988, the state filed a motion to allow videotaping of testimony of victim pursuant to Section 92.53, Florida Statutes (1985)(R-84). On that same date a hearing on the motion was held during the course of which defense counsel objected to the proposal, stating: "And we object to the video-taping. If the child would be in the presence of the uncle, he would tell something different than he would if he was not there. The child is easily influenced," (T-47). The objection was overruled and the motion was granted (T-48).

On January 19, 1988, defense counsel filed a motion to bar the use of the video tape of a witness arguing, among other things, that neither the trial judge nor a special master was present at the taping as required by statute, and that "...it deprives defendant of his right of confrontation...." (R-95). The motion was denied (R-96,T-63). However, after the jury was selected but prior to the commencement of trial, the trial court offered to allow a second videotape to be made in his presence, and the defense accepted this offer (T-116-117).

On January 20, 1988, a hearing on the question of videotaping the alleged victim's testimony was conducted.

Martha Nan Jobson, a clinical social worker and therapist, testified that she has been involved in weekly therapy sessions with J[redacted] C[redacted] beginning in October, 1986, until the time of trial. She testified that C[redacted] "...is terrified of facing his uncle." Jobson explained, "When a child is alleging that they have been abused and they are a child victim, the most terrifying thing and the most traumatic thing they ever have to do is face their offender face to face." (T-138). Jobson expressed the opinion, based upon C[redacted]'s performance in school, his behavior, and his home placement, that it would be harmful mentally or emotionally if he had to testify in the presence of petitioner in open court (T-139). After trial defense counsel questioned Ms. Jobson, the trial court ruled the state would be allowed the videotape C[redacted]'s testimony, using the following language:

> THE COURT: All right. I'm satisfied from the testimony that it would be in the best interest of everyone and wouldn't diminish your client's rights in anyway if the child's testimony is videotaped with your client being present. We'll do that today, I believe at 11 o'clock.

(T-145).

Counsel next objected on the basis that appellant, having to sit in a wheelchair atop a table, was placed in a hallway and could not distinctly see or hear the witness' testimony (T-144-147).

During the ensuing trial by jury, the state presented the video taped testimony of J[redacted] C[redacted] Before this was done, defense counsel renewed the previously made objections.

Petitioner, personally, informed the court that he would like another lawyer since defense counsel, Carl Swanson, was not, in petitioner's opinion, rendering competent representation. The trial court refused to appoint another lawyer in the midst of the trial. Defense counsel next moved that the state produce J[redacted] O[redacted] before the jury so that they could look at him, and counsel agreed that he would not have to testify, just appear. The request was denied. After the tape was played, counsel additionally objected on the basis that the tape did not adequately show O[redacted]s face, and as such a viewer could not discern the subtle expressions on his face that would indicate he was not telling the truth. Moreover, counsel stated: "As I understand our constitution under the state and federal guides that a defendant is entitled to be confronted with his witnesses before a jury. This is a new statute, never been run to the Supreme Court, but it is depriving this defendant of his constitutional right and we object to it for those grounds." (T-323-324). Counsel next moved for a judgment of acquittal, which was denied. During the course of denying the confrontation objections that had been lodged with respect to the tape, the trial court noted that a "two way mirror" was used in connection with the video taping (T-322-327).

The facts at trial during the state's case indicated that petitioner, on September 31, 1986, brought his nephew, J[redacted] O[redacted] to a hospital emergency room. O[redacted] has a laceration on his head as well as bruises on various portions of his body. The hospital staff suspected abuse. O[redacted] gave differing

explanations on how he sustained his injuries. He told a physician that he hit his head on a stairwell while chasing a cat, and he also said that he had cut his hair at school and petitioner struck him as punishment. He also told the physician that he had been getting three meals a day and had a roof over his head, and for the doctor not to spoil it for him (T-164-198). He unilaterally told a nurse that petitioner had not abused him (T-213-216). C[redacted] told a police officer that another boy had pushed him down some stairs, that petitioner did not abuse him, but that petitioner had told him to say that (T-217-226). Another doctor was told by C[redacted] that another boy pushed him down some stairs. This physician felt some of the injuries could not have happen in the manner described by C[redacted] (T-226-277). J[redacted] told Jobson that petitioner struck him with a billy club (T-278-290), and such a club was found in appellant's residence (T-292-306).

The petitioner presented several witnesses. Several of these have known petitioner, who is confined to a wheel chair, for years, and have never seem petitioner physically abuse J[redacted] C[redacted] They also related that C[redacted] is an extremely active and hyper young man, who routinely injured himself because of hard play, which included large amounts of climbing and jumping. Defense witnesses also related incidents where C[redacted] was hit and injured by other boys (T-335-464).

After argument of counsel and the trial court's instructions on the law, and after deliberation, the jury

returned a verdict finding petitioner guilty of aggravated child abuse as charged in the information (T-516-517). Petitioner was adjudged guilty and sentenced to **12** years in prison, with **354** days credit **(R-107-112).**

Notice of appeal was timely filed (R-121), petitioner was adjudged insolvent (R-115), and the Public Defender of the Second Judicial Circuit was designated to represent appellant.

On appeal to the District Court of Appeal, First District, petitioner attacked the trial court rulings that allowed the jury to hear the videotape of J[redacted] O[redacted] arguing Jobson's testimony did not go to the relevant statutory criteria, and was therefore deficient, the trial court did not make the various factual findings required **by** the statute, and that petitioner's Sixth Amendment right to confrontation was violated. The district court rejected these arguments in Leggett v. State, **548** So.2d **249** (Fla. 1st DCA **1989).**

Petitioner thereafter timely filed a notice to invoke the discretionary jurisdiction of the Court, followed **by** a jurisdictional brief. By corrected order dated February 2, **1990,** the Court accepted jurisdiction and scheduled the filing of jurisdictional briefs. This brief on the merits follows.

III. SUMMARY OF ARGUMENT

In this case the trial court permitted the alleged child victim of abuse to testify before the jury on video tape. When the tape was made, a two-way mirror was used that precluded the child witness from hearing or seeing petitioner.

Petitioner contends this was error for several reasons. Initially, petitioner asserts that the state's expert never did opine that the alleged victim stood a substantial likelihood of suffering at least moderate emotional or mental harm if required to testify in the presence of the accused and the jury. Secondly, the trial court did not satisfy the statutory requirement that it make a specific findings of fact as to the basis for its ruling.

Third, petitioner asserts the use of the mirror violated his constitutional rights of confrontation. Petitioner fully recognizes that this particular argument has been decided against him in Glendening v. State, 536 So.2d 212 (Fla. 1988). Petitioner includes this third argument for two reasons, namely, to urge the Court to revisit Glendening, and to foreclose any later claim in the federal system, in the event petitioner fails to obtain relief here, that petitioner waived his constitutional claim by not asserting it in this Court during the instant proceedings.

IV. ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO ALLOW VIDEOTAPING OF TESTIMONY OF THE VICTIM, THEREBY VIOLATING APPELLANT'S RIGHT TO FACE-TO-FACE CONFRONTATION WITH THE WITNESSES AGAINST HIM GUARANTEED BY ARTICLE I, SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS VI AND XIV, CONSTITUTION OF THE UNITED STATES.

The record reflects that the state, pursuant to Section 92.53, Florida Statutes (1985) filed a Motion To Allow Videotaping Of Testimony Of Victim (R-84). This motion was granted over several objections, including arguments that the statutory requirements authorizing the procedure were not followed, and that the procedure violated petitioner's constitutional right to confront the witnesses against him in that the taping was done in such a manner as to preclude a face-to-face meeting between him and the alleged child victim (R-95-96, T-47-48, 63, 144-147). Petitioner contends the trial court erred in granting the motion in at least three respects. First, the state's expert did not opine that there was a substantial likelihood that the witness would suffer at least moderate emotional or mental harm if required to testify in the presence of petitioner and the jury. Second, the trial court did not follow the statute in that it did not make the requisite specific findings of fact. And third, since the witness could not see or hear appellant during the taping procedure, petitioner's Sixth Amendment right to confront his accusers face-to-face was violated. Petitioner will discuss these three points in the order indicated.

The relevant statutory provision is Section 92.53, Florida Statutes (1985). Subsection (1) provides: "On motion and hearing in camera and a finding that there is a substantial likelihood that a victim or witness under the age of sixteen would suffer at least moderate emotional or mental harm if he were required to testify in open court...the trial court may order the videotaping of the testimony of the victim or witness,,,to be used at trial in lieu of trial testimony in open court."

In the instant case petitioner's therapist, Nan Jobson, testified that, based upon her therapy sessions with the alleged victim, J[redacted] O[redacted] and her expertise in the area of child abuse, that it would be harmful mentally or emotionally for him to testify in the presence of petitioner and the jury (T-133-139). At no time did Ms. Jobson ever opine that there was a substantial likelihood that O[redacted] would suffer at least moderate emotional or mental harm. In other words, the witness in effect only related the opinion that she felt that the witness would suffer some amount of mental or emotional harm, but she did not give any testimony as to its likelihood or the level or extent of such. Petitioner also contends that the basis of Jobson's opinion was fatally flawed.

In Coy v. Iowa, 487 U.S. ___, 101 L.Ed.2d 857, 108 S.Ct. 2798 (1988), the high Court struck down as violative of the Sixth Amendment an Iowa statute that permitted the use of a screen placed between child witnesses and the defendant, whereby the witnesses did not hear or see the defendant. Part

of the reason for this result is the the Iowa statute contained a legislative presumption that young witnesses would be traumatized by seeing the accused. In Glendening, which will be discussed in greater detail later in this argument, this Court distinguished Coy in part by noting that our statute requires individualized findings of trauma.

In the instant case, Ms. Jobson, after stating that J[redacted] C[redacted] is terrified of petitioner, immediately added: "When a child is alleging that they have been abused and they are a child victim, the most terrifying thing and the most traumatic thing they ever have **to** do is face their offender face to face." (T-137). Clearly, at this point the witness was speaking **of** child victims generally, not this one in particular. Jobson also related that her opinion was **also** influenced by her observations of C[redacted] and other factors, such as his performance in school **(T-138).**

Thus, not only does this case involve expert testimony that does not meet the statutory criteria, the opinion expressed by the expert here was based in part on one of the features of Coy that prompted the decision reached in that case, namely, a general assumption on the part of the expert that persons in the position of the child here would be traumatized.

Not only did the state fail to adduce opinion evidence that satisfied the statutory criteria, the trial court failed **to** make any findings of fact that the criteria had been met. **As** noted, subsection (1) contemplates a "....finding that there

is a substantial likelihood that a victim or witness...would suffer at least moderate emotional or mental harm if he were required to testify in open court...." The requirement that the trial court make such a finding is further buttressed by subsection (7), which states: "The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section."

In the instant case, when granting the state's motion, the trial court simply stated that the court was "...satisfied from the testimony that it would be in the best interest of everyone...if this child's testimony is videotaped with your client being present." (T-145). Apart from the obvious response that it was not in the best interest of petitioner that the alleged victim's testimony be taped, this could hardly be construed as satisfying the requirement that a specific finding be made. The trial court did not utter the words or phrases "I find," "substantial likelihood," or "moderate emotional or mental harm."

From use of the language, "satisfied from the testimony," for all we know the trial court placed undue reliance upon that portion of the expert's testimony that relied upon generalized notions of trauma of child witnesses, contrary to the teachings of Coy. Such vague language thwarts, rather than promotes, intelligent review. It appears that one of the very reasons why the legislature enacted statutory standards and required specific factual findings is to facilitate intelligent review by the appellate courts.

In Griffin v. State, 526 So.2d 752 (Fla. 1st DCA 1988), the Court was dealing with Section 90.803(23), Florida Statutes (1985), which recognizes a hearsay exception for statements made by a child victim of sexual abuse. This provision is similar to Section 92.53, Florida Statutes (1985), in that both require that a hearing be held on the question of admissibility of the evidence, and both specifically require the trial court to make a specific finding on the record as to the basis of its ruling.

Section **90.803(23)(a)(1)** requires that hearing be held to determine if the proposed hearsay statement was made under circumstances showing sufficient safeguards of reliability. In Griffin, the trial court did not make the required findings of fact, and this failure was one of the reasons why the conviction appealed from in that case was reversed. See also Distefano v. State, 526 So.2d 110 (Fla. 1st DCA 1988); State v. Allen, 519 So.2d 1076 (Fla. 1st DCA 1988); and, Salter v. State, 500 So.2d 184 (Fla. 1st DCA 1986).

Petitioner relies upon Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988). Mr. Jaggers went to trial on two counts of sexual battery involving his daughter and stepdaughter, and one count of sexual battery involving his niece. There, as here, the testimony of the children were videotaped and a one-way mirror was used. In Jaggers, a guardian ad litem for the children testified "to the effect that it would be in the children's 'best interests' to testify by means of video tape outside the presence of Jaggers." [Petitioner hopes the

parallels between the language used by the guardian at litem in Jaggers and that used by the trial court here in making its "finding" is not lost on the reader].

After the guardian's testimony, "the trial court entered a ruling that there was a substantial likelihood that these children would suffer at least moderate emotional trauma or mental harm if they were required to testify in open court." 536 So.2d at 324.

On appeal, the Court held that use of the one-way mirror violated Coy. It is significant to note that Jaggers was decided after Glendening. In Jaggers, the court stated:

> The policy behind section 92.53 is for the purpose of shielding child witnesses from the trauma of courtroom testimony is cases where substantial likelihood of trauma has been specifically found by the court after a proper hearing. It is this requirement of individualized findings under section 92.53, which the Florida Supreme Court in Glendening II found distinguished this statute from the generalized statute assailed in Coy. In so holding, the Glendening II court recognized that the policy of protecting child victims of sexual abuse from probable trauma in a given case qualified as such an important public policy of the type acknowledged in Coy.
>
> Although there is no constitutional infirmity with the procedure outlined under section 92.53, those procedures were not properly followed in this case. A review of the record reflects that the trial court did not make the required findings of fact under section 92.53(7) necessary to support its determination that the two child witnesses whose testimonies were video taped, would suffer at least moderate emotional or mental harm if they were required to testify in open court. Such a case-specific finding mandated by section 92.53 is precisely what renders that statute constitutional, because the statute is closely tailored to protect the child victim only in those particular circumstances were

> [sic] it is deemed necessary.
>
> As stated previously, the trial court did not set forth the specific basis for finding that the daughter or stepdaughter would suffer moderate emotional trauma by testifying at the trial against Jaggers. All the court stated was that its decision was based on the testimony of the guardian ad litem for the children.

536 So.2d at 329.

As noted earlier, in the instant case the trial court not only failed to make any sort of finding as contemplated by subsection (1), the trial court did not support that "finding" by making, on the record, reference to the basis of its ruling pursuant to subsection (7). Like Jaggers, the trial court in this case merely referred to the testimony given at the hearing. Also as noted, the expert's opinion itself did not satisfy the statutory criteria, and the opinion was partially based on generalized notions of trauma.

Petitioner draws the attention of the Court to the following portion of Jaggers, which is applicable to the instant case:

> Child abuse is a horror that must be eliminated from our society with as little further damage to the child victims as possible. While we are vitally concerned about the abuse of children and the need to protect those tender lives from the further trauma of the courtroom, we must also be concerned with the duty of the courts to assure that a person accused of such a crime be assured of a fair and impartial trial. When there is a substantial issue, as in this case, not as to the identity of the perpetrator of the crime, but whether or not the charged crime in fact occurred, we must look with microscopic vision at not only the substance of the evidence presented but at the manner in which the evidence may be prejudicially directed toward guilt or innocence by the manner in which it is

> allowed to be presented or the extent to which it may be upheld. Under the circumstances of this case, we are convinced that in balancing the due process rights of appellant and the possible harm, if any, to the victims by requiring by requiring their confrontation with appellant, or strict compliance with Coy and section **92.53,** the rights of appellant must prevail.

536 So.2d at **330.**

The facts of this case should be compared and contrasted with those before the Court in Glendening. The Court's opinion in this case describes the nature of the evidence presented, and the specificity of the trial court's ruling:

> In the present case, the trial court conducted a hearing on the issue of whether the child victim would suffer at least moderate emotional or mental harm if required to testify in open court. The child's mother and the child's guardian ad litem testified that the child had expressed a fear of seeing her father and described behavior of the child on various occasions to support their conclusions. In addition, Dr. Meyer, a pediatrician who had attempted to examine the child, and Ms. Shapiro, a social worker who works with sexually abused children, testified that based upon their experience with this particular child testifying in open court would be a terrifying experience, particularly if she were to be cross-examined with her father in the room. Both Dr. Meyer and Ms. Shapiro felt that examining the child by way of videotaping where she was not able to see her father would minimize her emotional trauma. Based upon this testimony, the trial judge concluded that there was a substantial likelihood that the victim would suffer at least moderate emotional or mental harm if required to testify in open court in the presence of the defendant.

536 So.2d at **218.**

Thus, in Glendening, the testimony at the hearing included specified behaviors on the part of the child. Here, no such

behaviors were detailed, only the conclusory statement that C[redacted] was terrified of petitioner. In Glendening, none of the testimony was based upon notions of generalized trauma, as the opinion reveals the experts opinion was based upon their contact with the particular child. Here, as has been noted, a portion of the expert's testimony dealt with child victims generally. In Glendening, the trial court's finding met the precise statutory criteria. Here, it did not and, in fact, only mentioned that it would be in the "best interests" of everyone if the videotaping was done.

The district court affirmed petitioner's conviction with reference to Glendening. Leggett v. State, supra. As has been shown, this case actually conflicts with Glendening.

Petitioner accordingly argues that the above-discussed errors of failing to adduce testimony that satisfied the statutory criteria, that the expert based her opinion partly upon generalized notions of trauma, and of the trial court failing to make specific findings of fact on the record with regard to the criteria, is reason enough to reverse the conviction appealed from. But even if the Court disagrees, petitioner additionally asserts that the manner in which the taping procedure was done operated to violate petitioner's Sixth Amendment right to confront his accusers.

To be more precise, in this case the taping was done pursuant to Section 92.53(4), Florida Statutes (1985), which provides: "The court may require the defendant to view the testimony from outside the presence of the child by means of a

two-way mirror or other similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant.'' In this case, such a procedure was employed (T-327).

Petitioner is cognizant that the Court in Glendening rejected the constitutional argument made here. Petitioner raises the constitutional argument here for two reasons. First, while Glendening is correct in observing that our statutes require and the facts of that case reveal the existence of an individualized finding of trauma, which distinguishes **Coy,** petitioner requests to the Court to revisit the constitutional issue in light of the experience of the petitioner here. In petitioner's case, Glendening has seemingly be read to mean that it is always okay to videotape and it is always okay to use mirrors. **As** noted Glendening was cited as authority to affirm petitioner's conviction, although the facts here are radically different from those of Glendening. In other words, while Glendening itself appears to be good law, its existence has led to poor application of the law, exemplified by the instant case.

Second, in the event petitioner does not prevail in this Court and he wishes to press his constitutional claim in the federal system, he includes the constitutional argument to forestall any argument to the effect that petitioner waived the constitutional claim by not presenting it here.

In Coy v. Iowa, a prosecution for sexual assault on two 13-year old girls, a screen was placed between the defendant and the two witnesses during the trial, which allowed the defendant to hear and see the witnesses, but which precluded the witnesses from hearing and seeing the defendant. In holding this procedure violative of the Sixth Amendment, the Court stated:

> The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," California v. Green, **399** U.S. **149, 174** (Harlan, **J.,** concurring), with a lineage that traces back to the beginnings of Western legal culture.
>
> * * *
>
> Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, see, e. g. Ohio v. Roberts, **448** U.S. **56 (1980);** Dutton v. Evans, **400** U.S. **74** (1970), or restrictions on the scope of cross-examination, Delaware v. Van Arsdall, **475** U.S. **673 (1986);** Davis v. Alaska, **415** U.S. 308 **(1974).**
>
> * * *
>
> The reason for that is not, as the State suggests, that these elements are the essence of the Clause's protection--but rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, as Justice Harlan put it, "[s]imply as a matter of English" it confers at least **"a** right to meet face to face all those who appear and give evidence at trial." California v. Green, supra, at **175.**
>
> * * *
>
> We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.

101 L.Ed.2d at 863-864.

Here, as was true in Coy, the witness was permitted to testify against petitioner under circumstances where he was not required to face petitioner. Use of a two-way mirror, as was used in this case, violates Coy. In Coy, the Court, referring to the screen used in that case, remarked that it was "...difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." 101 L.Ed.2d at 866. The same can be said with respect to the two-way mirror used here.

In the case sub judice, defense counsel complained: "If the child would be in the presence of the uncle, he would tell something different than he would if he was not there" (T-47). The validity of this statement on the part of counsel was explicitly recognized in Coy:

> The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related to both to appearances and reality. This opinion is embellished with reference to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 400, 404 (1965).
>
> * * *
>
> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956),

> quoted in Jay v. Boyd, 351 U.S. 345, 375-376 (1956)(Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.

101 L.Ed.2d at 864-866.

In this case the expert's opinion was based at least in part on the trauma of a young child testifying in court, and it is clear that the policy underlying Section 92.53, Florida Statutes (1985), is to relieve such witnesses of that trauma. The Court in Coy spoke to this as well:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child: but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

101 L.Ed.2d at 866.

In Coy, the Court drew a distinction between rights implicit within the Confrontation Clause, such as cross-examination and the right to exclude out-of-court statements, with the right to a face-to-face encounter, a right flowing "...from the irreducible literal meaning of the clause." 101 L.Ed.2d at 867. Although strongly suggesting that there may not be any exceptions to the right to a

face-to-face encounter, the Court expressly left "...for another day...the question whether any exceptions exist." 101 L.Ed.2d at 867. The Court went on to hold that the Iowa statute's implicit presumption of trauma was merely a generalized finding which was not sufficient to create an exception. The Court noted that there had been no individualized findings that the two 13-year old witnesses involved in *Coy* needed special protection.

In the instant case the opinion of the expert, Jobson, was based both upon the trauma experienced by child witnesses generally and the individual characteristics of Mr. O[redacted] (T-138-139). The record which the state made below is not susceptible of dissection to ascertain the extent to which Jobson's opinion was based upon the witness in this case, as contrasted to child witnesses generally. Furthermore, as noted repeatedly within this brief, Jobson's opinion did not fit the statutory criteria, and the trial court neglected to make the requisite specific findings. Simply put, *Coy* directly controls the instant case.

Based upon the above, petitioner requests the Court to quash Leggett v. State, supra, and remand the cause to the trial court with directions to conduct a new trial.

V. CONCLUSION

Based upon the preceding analysis and authorities, petitioner argues he has demonstrated that the district wrongly decided his case. Accordingly, petitioner requests the Court to quash Leggett v. State, supra, and remand the cause to the trial court with directions to conduct a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Petitioner, WILLIAM LEGGETT, #008599, Lawtey Correctional Institution, Post Office Box 229, Lawtey, Florida, 32058, on this 21st day of February, 1990.

CARL S. MCGINNES