O/a 5-9-90.

IN THE SUPREME COURT OF FLORIDA

WILLIAM LEGGETT,

Petitioner,

vs. CASE NO. 74,856

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner Leggett will be referred to as petitioner or by his proper name. Respondent state will be referred to as respondent or the state. References to volume I of the record on appeal, containing the pleadings and orders, will be by "R" followed by the page number. References to transcripts, volumes II-IX, will be by "T" and page number.

STATEMENT OF THE CASE AND FACTS

The only issue raised by petitioner is whether the trial court erred in permitting video tape testimony of the seven-year old victim pursuant to section 95.23, Florida Statutes (1985). Facts relevant to that single issue will be addressed in the argument section of this brief.

SUMMARY OF ARGUMENT

The evidence shows a substantial likelihood that the child victim would have suffered at least moderate emotional or mental harm if required to testify in the presence of the accused. The trial and district court of appeal did not err. This Court should not revisit Glendening and should deny review as improvidently granted.

ARGUMENT

ISSUE

THE TRIAL COURT DID NOT ERR IN GRANTING THE STATE'S MOTION TO ALLOW VIDEOTAPING OF TESTIMONY OF THE VICTIM.

Petitioner argues that the state's expert witness did not opine, and the trial court did not find, 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 accused. This argument is contrary to the record on appeal.

In Glendening v. State, 536 So.2d 212 (Fla. 1988), cert. denied, 109 S.Ct. 3219 (1989) this Court upheld section 92.53, Florida Statutes (1985) against a constitutional challenge grounded on Coy v. Jones, 487 U.S. 1012, 101 L.Ed.2d 857, 108 S.Ct. 2798 (1988) because, unlike the statute in Coy, "section 92.53 requires an individual determination for each child witness that the use of videotaped testimony is necessary to prevent the child from suffering emotional or mental harm." Glendening, 536 So.2d at 218. The relevant portions of the record on appeal support the district court of appeal and trial court decisions that the state made the requisite showing of Glendening and section 92.53.

The child victim in this case had been receiving therapeutic counseling from Nan Jobson from October 1986 until the date of the hearing, 20 January 1988. Jobson testified that

she saw the victim approximately once a week. (T **137)** In its motion to permit presentation of video testimony the state accurately stated the basis for the video taping:

> Ms. Jobson communicated to this Assistant State Attorney on January 8, **1988,** that J[redacted] is still very fearful of his uncle (the Defendant) and that to have him confront his uncle under any circumstances would cause him (J[redacted]) to suffer extreme emotional or mental harm.

(R 84) After videotaping was accomplished, the defendant objected on various grounds, moved to bar the video and/or to *re-*perform the video taping with the judge presiding. (R **95;** T **56-63)** After initially denying defendant'smotion, the trial judge agreed to conduct a hearing to determine if the videotaping was necessary and, if so, to redo the video taping. (T 116-121)

The sole witness at the hearing was the **child's** therapeutic counselor, Nan Jobson, a licensed clinical social worker and therapist who had been treating the child for approximately sixteen months. (T **133-137)** After establishing the **witness'** qualifications, the state asked, "Can you tell us your opinion concerning J[redacted]s ability to confront, that is to see his uncle [defendant] face to face at this point in his therapy?" (T **138)** After the court overruled an irrelevant objection from defendant'scounsel, Jobson answered:

> A: At this point in time having seen the child approximately weekly, he is terrified of facing his uncle. 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. Eventually I would hope that would be possible, but at this point in time it would be damaging to him emotionally to have to do that and **I** think it would make a behavior change, it would put back his school work, academically, mentally. It just would not be good at this point.

BY MS. **HARRISON:**

Q: Okay. And basically if you can tell us, on what do you base those conclusions that it would be harmful for him to confront his uncle at this time?

A: Basically on what the child tells me as well as his performance in school, his behavior, emotionally and his home placement.

Q: Okay. Do you have an opportunity to monitor his academic work and his behavioral progress?

A: Well, I'm in touch with the people that he lives with, the boys home. I'm in touch with the school that he attends.

Q: Okay. If he, for instance, in this past year and a half that you've counselled him, if he acts out in any particular way or has a behavior problem as you call it or regresses academically, are you made aware of those facts?

A: Yes, most of the time **I** attempt to stay in touch on a regular basis.

Q: Okay. Is it your opinion then that to have him come into open court and testify in the presence of his uncle would be harmful to him mentally or emotionally?

A: Yes, it is my opinion.

(T 138-39)

Defendant's counsel then cross examined the counselor on irrelevant matters, e.g., had the therapeutic counselor appointed or obtained a lawyer for the child victim. The trial judge attempted to bring the defendant's counsel back to the matter at hand and the issue here:

> THE COURT: Let me do this, Mr. Swanson. I think we're getting a little far afield of this hearing. If you wish to call the lady as a witness during the trial, but it's now I'm just concerned about the emotional aspects of testifying in court in the presence of your client on this child and so if you'll kind of focus your questions on that.

(T 144, emphasis supplied) Defendant's counsel then irrelevantly questioned the therapeutic counselor, whose credentials had already been established, whether she was a medical doctor with a license to practice medicine. At this point, the trial judge determined that neither side had any further questions and ruled as follows:

> 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 this child's testimony is videotaped with your client being present. We'll do that today, I believe at 11 o'clock.

(T 145)

The following exchange then took place:

THE COURT: How about if we meet over there at 11 o'clock if your client will be there at 11?

MR. SWANSON: I have some objections from the statute that I want to put in the record.

THE COURT: Please do that now.

MR. SWANSON: I want to do that now.

THE COURT: Please go ahead.

MR. SWANSON: Okay. Under Florida Statutes 92.53, now in force and effect, the statute reads: In child abuse case where the civil or criminal nature in which videotaped testimony is to be utilized in lieu of trial testimony in open court, motion must be filed by, then it lists, the victim or the witnesses, the victim's witness or the witness' State Attorney, the parent, the legal guardian or guardian ad litem; B, for the trial judge on his own motion or any party in a civil proceeding and the Judge shall preside upon a special mass to preside at videotaping unless the following conditions are met.

THE COURT: Well, I'm going to be there myself.

MR. SWANSON: What?

THE COURT: I'm going to go. I'm going to preside so we can skip that.

MR. SWANSON: Now, 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 to ensure the defendant can observe and hear the testimony of the child in person, but the child cannot see or hear the defendant. The defendant and attorney for the defendant may communicate by appropriate private method. We object to the facilities that they had over there last time. It says in this statute that the defendant should be able to hear the child. Over 50 percent of the time that device they

had in the hall would not repeat or relate or expound the testimony of the child so you could hear or understand it.

THE COURT: We'll take -- I'll address that when I'm there. That's why I'm going to be there presiding?

MR. SWANSON: And on top of that, the provisions for the man to sit in this wheelchair who is crippled, they had to put in a table and that's an improper position. He was afraid he would fall off and he'd have to be real careful to hardly move and look at the child and the distance to see the child was so far that he couldn't even observe and my client --

THE COURT: Mr. Swanson, look, let's put these -- after we do this again, I'm doing this again for you, so after we do the second time, then you can state your objections.

MR. SWANSON: I'm calling your attention to some factors that existed that I don't want to happen again.

THE COURT: I'm going to do the best I can to accommodate you and then after that you say here's why I object and you'll tell me what you find to be offensive about it, but right now we're just anticipating things, but I'm definitely going to be there to accommodate you.

MR. SWANSON: We'll be happy to show you then Judge.

THE COURT: All right. We'll meet over there.

MR. SWANSON: I wanted to alert you ahead of time so you'll know what to look for.

THE COURT: We'll talk about it after we get over there and how about if we meet at 11 o'clock and we'll try to arrange it as best we can so everyone's rights are protected.

MR. SWANSON: And for the record we object to this lady's testimony. She's not qualified to testify as to the mental condition of the child.

THE COURT: Thank you very much.

All right. So, we'll meet over there at 11. Okay.

(T 145-148)

Based on the above record quotations, there can be no doubt that the state showed through the uncontradicted testimony of counselor Jobson that the specific child victim was terrified of the defendant and that the child victim would suffer "at least moderate emotional or mental harm", section 92.53(1), if required to testify in open court in the presence of the accused. It is self-evident that the trial judge and the state, if not alway defendant's counsel, understood very well the purpose of the hearing and that the judge's ruling was the individual determination required by the statute and Glendening.

Although the state maintains that the record refutes petitioner's claims on the merits, it should be noted that at no point during or after the hearing did the defendant object to the videotaping on the basis of either (1) there had been no individualized showing that the victim would suffer moderate or emotional harm or (2) that the trial court had not made the specific findings, i.e., "magic words," required by the statute. This failure to properly preserve the issue by bringing the specific objection to the attention of the trial court for

correction is particularly relevant where, as here, there can be no contextual doubt as to what has transpired and the objection could have been so easily cleared up. It should be noted that the hearing here preceded Glendening and the trial court did not have the benefit of that opinion. In view of the trial court's clear and correct understanding of the purpose of the hearing, any claimed defects in the wording of his ruling are harmless and irrelevant.

Petitioner also argues that this Court should revisit and recede from Glendening and hold the statute unconstitutional. The state does not believe it to be useful to replough this so recently ploughed ground.

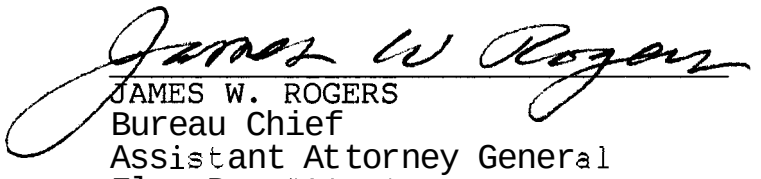
Based on the examination of the law and the record, it is clear that the decision below is consistent with Glendening and section 92.53. It is also clear that the district court properly distinguished this case from Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988) and that there is no direct and express conflict on which to base jurisdiction in this Court. Accordingly, it is recommended that jurisdiction should be discharged as improvidently granted.

CONCLUSION

The courts below did not err nor is there direct and express conflict jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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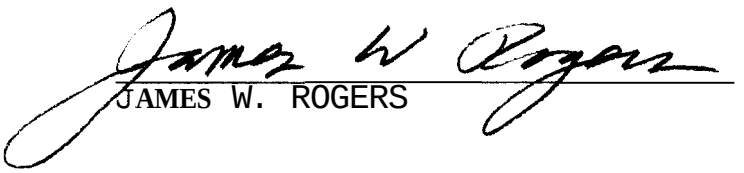
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 8th day of March, 1990.



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