O.A. 5-8-92 067

3-6

FILED
SID J. WHITE
FEB 13 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,308

GEORGE MYLES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3003

HOWARD K. BLUMBERG
Assistant Public Defender
Florida Bar No. 264385

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 5

SUMMARY OF ARGUMENT 8

ARGUMENT 9

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO COMMUNICATE ELECTRONICALLY WITH HIS LAWYER DURING THE CLOSED CIRCUIT TESTIMONY OF THE ALLEGED CHILD VICTIM WHERE SECTION 92.54(4), FLORIDA STATUTES (1987) REQUIRES SUCH MEANS OF COMMUNICATION, AND THE DENIAL OF SUCH MEANS OF COMMUNICATION DEPRIVED THE DEFENDANT OF HIS RIGHT TO COUNSEL AND RIGHT OF CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF CITATIONS

CASES **PAGES**

CHAPMAN v. CALIFORNIA
386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 17

COMCOA, INC. v. COE
587 So.2d 474 (Fla. 3d DCA 1991) 10, 11

D.A.D. v. STATE
566 So.2d 257 (Fla. 5th DCA 1990) 12

FRICKE v. STATE
561 So.2d 597 (Fla. 3d DCA 1990) 17

GLENDENING v. STATE
536 So.2d 212 (1988), *cert. denied,*
492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989) 12

MARYLAND v. CRAIG
___ U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) 13

MATTER OF WOLF
231 N.J.Super. 365, 555 A.2d 722 (1989) 14

MYLES v. STATE
582 So.2d 71 (Fla. 3d DCA 1991) 10, 16

STATE v. CRANDALL
231 N.J.Super. 124, 555 A.2d 35 (1989) 14

STATE v. DiGUILIO
491 So.2d 1129 (Fla. 1986) 17

STATE v. SHEPPARD
197 N.J. Super. 411, 484 A.2d 1330 (1984) 13

STATE v. WARFORD
223 Neb. 368, 389 N.W.2d 575 (1986) 13

WESTON v. JONES
41 Fla. 188, 25 So. 888 (1899) 10, 11

WILDERMUTH v. STATE
310 Md. 496, 530 A.2d 275 (1987) 13

WILLIAMSON v. STATE
510 So.2d 1052 (Fla. 3d DCA 1987) 11

WOODLAND v. LINDSEY
586 So.2d 1255 (Fla. 4th DCA 1991) 11

OTHER AUTHORITIES

FLORIDA STATUTES (1987)

92.53 12
92.54 . . . . . 9, 11, 12
92.54(4) 9, 10, 11, 12, 15, 16, 17

FLORIDA CONSTITUTION

Article I, Section 16 9

UNITED STATES CONSTITUTION

Sixth Amendment 9

49 Fla.Jur.2d Statutes § 18 (1984) 10

Section 1656, Revised Statutes (1892) 10

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,308

GEORGE MYLES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

INTRODUCTION

Petitioner, George Myles, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "TR" will be used to designate the transcripts of proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

George Myles was charged by information with six counts of sexual battery upon a person less than twelve years of age (R. 11-16A). A jury trial on these charges commenced on March 2, 1988 (R. 32).

Prior to the commencement of trial, after flatly rejecting any plea bargain offered by the state, Mr. Myles moved to dismiss his court-appointed attorney and requested that he be allowed to represent himself (TR. 64-69, 77-87). The court denied the motion, but granted Mr. Myles the right to act as co-counsel (TR. 87-90).

At trial, S.M., one of the two alleged child victims,[1] was allowed to testify via closed-circuit television from the judge's chambers outside the presence of the defendant (TR. 514-515). The prosecutor, defense counsel and the judge were present in chambers with S.M. during her testimony, while Mr. Myles, the bailiff and the jury remained in the courtroom (TR. 853).

Prior to S.M.'s closed-circuit testimony, the bailiff provided George Myles with a microphone so that he could communicate with his attorney during that testimony (TR. 848). The microphone was very sensitive, so that Mr. Myles only had to whisper and his attorney would hear him through the headphones he would be wearing (TR. 849). The prosecutor noted that Mr. Myles could be moved a short distance away from the jury to remove the danger of the jury hearing the statements Mr. Myles made to his attorney (TR. 849).

The trial judge initially agreed to let Mr. Myles use the microphone (TR. 849). However, the judge almost immediately changed his mind and ordered the microphone to be disconnected (TR. 850). The judge ruled that Mr. Myles would be limited to writing down notes on a pad of paper during the child's direct examination and then discussing those notes with his attorney prior to cross-examination of the child (TR. 850). The judge set up the following oral relay system for Mr. Myles to communicate with his attorney during the child's direct examination:

---

[1]The other alleged child victim did not testify at trial.

> Rather than the microphone here, I would prefer that he tells the bailiff whatever he wants, and the baliff can come in and tell me and then I can stop or delay the proceedings in there, depending upon what he says.

(TR. 850).

Defense counsel asked the court to leave the microphone in place (TR. 850). However, the judge refused to do so based on his concern that the jury might overhear Mr. Myles if he claimed to his attorney through the microphone that the child was not telling the truth in her testimony (TR. 850-851). The judge insisted in his preference for the oral relay system:

> So, I would prefer not to have the microphone. If he wants to communicate with us in there --
> The bailiff will be in here. He will tell the bailiff and the bailiff will immediately come in, and we'll either stop -- stop the procedure, come back, and have the jury go back.

(TR. 851).

Defense counsel pointed out to the court that the statute authorizing closed-circuit testimony mandated communication between the defendant and his attorney during the testimony (TR. 852). The judge ruled that the oral relay system was sufficient means of communication (TR. 852). The judge did allow Myles to confer with his attorney between direct examination and cross-examination (TR. 896-898).

At the conclusion of the trial, the court granted a judgment of acquittal as to one count of sexual battery (R. 38), and the jury found Myles guilty as charged as to the remaining five counts of sexual battery (R. 131-135). Adjudications of guilt were entered accordingly, and Myles was sentenced to five concurrent terms of imprisonment for life with mandatory minimum twenty five year terms of imprisonment (R. 137-144).

Notice of appeal to the District Court of Appeal, Third District, was timely filed (R. 145). That Court affirmed the judgments of conviction and sentences (R. 149-160). The Court rejected Myles' claim of error in refusing to allow him to communicate with his attorney through the electronic method set up in the courtroom:

> Contrary to appellant's suggestion, the statute does not mandate electronic communication. Rather the statute suggests, by the use of the term "may", that there may be other appropriate means of

> attorney/client communication. *See, e.g., Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). Here, rather than allowing communication through a statutorily suggested electronic means, the trial court used a more mundane method, writing.

(R. 159).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed July 18, 1991. On December 27, 1991, this Court entered its order accepting jurisdiction and setting the case for oral argument.

STATEMENT OF THE FACTS

The state's case against George Myles consisted of (1) the testimony at trial of alleged victim S.M.; (2) out-of-court statements made by S.M.; and (3) medical evidence concerning the results of medical examinations of S.M. and the other alleged victim, J.M.

S.M. testified that George Myles, her father, "was hunching on her private part in front" (TR. 869-871). She stated that "his wee-wee" touched her "front private part" (TR. 873). This touching was both on the outside and the inside of her "private part" (TR. 874). This "hunching" took place on the bed in her father's room (TR. 871-872).

S.M. testified that after the defendant finished with her, he took J.M. onto the bed (TR. 874-875). The defendant then "hunched" J.M. "in the back part" (TR. 875). S.M. stated that she saw her father putting "his wee-wee" in J.M.'s "bungie" (TR. 876).

S.M. testified that she was five years old the first time her father "did anything bad" to her and J.M. (TR. 877). She testified that it happened to her again when she was six years old and when she was seven years old (TR. 880-882). She testified that it happened to J.M. again when she was six or seven years old (TR. 884).

In December, 1986, S.M.'s teacher, Constance Stone, played a tape for S.M. and two other students entitled "My Body is My Own" (TR. 803-804). Later that day, after the two other children had left the classroom, S.M. told Ms. Stone that the next time her father asked her to go into his room, she would say no (TR. 819). S.M. also told Ms. Stone that her father treated her "like garbage" (TR. 819).

Ms. Stone contacted social worker Lee Hickey and told her what S.M. had stated (TR. 820). On the following day, Ms. Stone and Ms. Hickey questioned S.M. about what she had said the previous day (TR. 821). In response to their questions, S.M. stated that her father had touched her private parts with "his thing" (TR. 822). S.M. stated that she was very scared two or three times and had blood on her pants (TR. 822). S.M. told Ms. Stone and Ms. Hickey that these events had started when she was five years old (TR. 822). S.M. was eight years old when she made the statements to Ms. Stone and Ms. Hickey (TR. 822).

Lee Hickey testified at trial that S.M. distanced herself from her father when he came to visit her at the HRS shelter where she resided (TR. 957). Hickey testified that J.M. was unhappy and distressed when the defendant came to visit him (TR. 959). Myles and Hickey had several confrontations when he was at the shelter attempting to visit his children (TR. 955-956).

After she and Ms. Stone questioned S.M., Ms. Hickey notified HRS about the statements made by S.M. (TR. 964-965). Hickey testified that S.M. became "openly seductive" after she made the statements concerning her father (TR. 974). S.M. required a lot of what Hickey termed "inappropriate touching" (TR. 974-975). She had a habit of putting her hands in very inappropriate places (TR. 987).

S.M. was examined by a psychologist on two occasions after she made the statements to Stone and Hickey. Approximately one month after she made the statements, S.M. refused to discuss the subject with the psychologist (TR. 996-999). One week later, S.M. again refused to discuss the subject with the psychologist, and she told the psychologist that he should believe her father and leave her alone (TR. 1000-1004).

S.M. and J.M. were examined at the Rape Treatment Center approximately six weeks after S.M. made the statements to Stone and Hickey (TR. 1067, 1089). A one-centimeter healed tear was observed in the area of J.M.'s anus (TR. 1069-1071). An external laceration caused by some type of trauma was found on the outside of J.M.'s rectum (TR. 1074). Two well-healed tears were found in S.M.'s hymen, and the hymen was dilated (TR. 1095). S.M. told the examining doctor that her father had touched her private parts and put his private part inside of hers on several occasions (TR. 1094).

Approximately one week after S.M. and J.M. were examined, George Myles was placed under arrest (TR. 1051-1052).

Several witnesses testified for the defense at trial (TR. 1166-1221). These witnesses testified as to George Myles' reputation for truthfulness, and that they had heard no complaints about Myles' conduct with children (TR. 1167, 1173, 1185, 1190, 1195). The witnesses also

testified concerning inappropriate sexual behavior by S.M. (TR. 1195-1196, 1215).

George Myles testified on his own behalf at trial (TR. 1236). Myles denied committing any of the alleged sexual acts upon S.M. or J.M. (TR. 1238). Myles claimed that S.M. was going along with other people who told her to lie so that she could get out of the foster home where she was living (TR. 1242).

SUMMARY OF ARGUMENT

The trial court erred in refusing to allow George Myles to communicate with his attorney during the closed-circuit testimony of the chief prosecution witness, one of the two alleged child victims. Section 92.54(4), Florida Statutes (1987) requires that a defendant be allowed to communicate electronically with his attorney during such testimony. Furthermore, means for private and immediate communication between the accused and his attorney during the examination of a child witness is an essential component of any procedure authorizing a child witness to testify by closed-circuit testimony. The right to counsel and the right of confrontation guaranteed by both the Florida and the United States Constitutions require such immediate and private means of communication. The oral relay system devised by the trial court and approved by the district court fell far short of satisfying these requirements.

ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO COMMUNICATE ELECTRONICALLY WITH HIS LAWYER DURING THE CLOSED CIRCUIT TESTIMONY OF THE ALLEGED CHILD VICTIM WHERE SECTION 92.54(4), FLORIDA STATUTES (1987) REQUIRES SUCH MEANS OF COMMUNICATION, AND THE DENIAL OF SUCH MEANS OF COMMUNICATION DEPRIVED THE DEFENDANT OF HIS RIGHT TO COUNSEL AND RIGHT OF CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

In this case, the trial court required the dismantling of equipment set up in the courtroom to allow Mr. Myles to communicate electronically with his attorney during the closed circuit testimony of the chief prosecution witness, one of the two alleged child victims.[2] The District Court of Appeal, Third District, approved the trial court's ruling, and held that Section 92.54(4), Florida Statutes (1987) does not mandate electronic communication between an accused and his attorney during the closed circuit testimony of a child witness. This interpretation of Section 92.54(4) is incorrect. Moreover, the district court's interpretation of the statute violates the defendant's right to counsel and right of confrontation guaranteed by both the United States Constitution and the Florida Constitution.

Section 92.54, Florida Statutes (1987), which authorizes the taking of the testimony of child witnesses outside of the courtroom and shown by means of closed-circuit television, establishes the following requirement concerning communication between a defendant and his attorney:

> (4) During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. *The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.*

In its decision in the present case, the district court held that this statute does not mandate electronic means of communication between the accused and his counsel:

---

[2]The other alleged child victim did not testify at trial.

> Contrary to appellant's suggestion, the statute does not mandate electronic communication. Rather the statute suggests, by the use of the term "may", that there may be other appropriate means of attorney/client communication. *See, e.g., Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). Here, rather than allowing communication through a statutorily suggested electronic means, the trial court used a more mundane method, writing.

Myles v. State, 582 So.2d 71, 73 (Fla. 3d DCA 1991).

This holding misconstrues the use of the term "may" in Section 92.54(4). The district court failed to take into account the principle that in a statute such as Section 92.54(4), "the term 'may,' which indeed ordinarily implies the exercise of choice or discretion, simply does not do so, and must, in contrast, be given a definition equivalent to the mandatory 'shall.' It is well-settled that, according to the context and surrounding circumstances, a statutory 'shall' is to be read as 'may' and vice versa." *Comcoa, Inc. v. Coe*, 587 So.2d 474, 477 (Fla. 3d DCA 1991). The specific principle of statutory construction to be applied in these circumstances provides that:

> an imperative obligation is sometimes regarded as imposed by a statutory provision notwithstanding that it is couched in permissive, directory, or enabling language. Thus, where a statute says a thing that is for the public benefit 'may' be done by a public official, the courts may construe it to mean that it must be done. *Permissive words in a statute respecting courts or officers are said to be imperative in those cases where the individuals affected have a right that the power conferred be exercised.*

49 Fla.Jur.2d Statutes § 18 (1984)(emphasis supplied)(footnotes omitted).

This Court had occasion to apply this principle in *Weston v. Jones*, 41 Fla. 188, 25 So. 888 (1899). That case dealt with Section 1656, Revised Statutes (1892), which provided that, under stated conditions, the judge "may, upon application of either party require formal pleadings. . . . ". This Court held this provision was not discretionary:

> The judge of the court below refused the motion in this case, evidently believing that the use of the word "may" invested him with a discretion as to whether he should require the filing of pleadings in such cases; but we entertain a contrary opinion. It is a familiar rule that, when a statute directs the doing of a thing for the sake of justice, the word "may" means the same as "shall." *Mitchell v. Duncan*, 7 Fla. 14. Again, permissive words

> in a statute respecting courts or officers are imperative in those cases where individuals have a right that the power conferred be exercised. Suth.St.Const. §§ 461, 462. Viewed in this light, we think the word "may" in this section is not used in the sense of giving the courts or judges a discretion to refuse an application of this character, seasonably made, in cases where the issues have not already been made up in the main suit, but to confer authority upon the court to require such pleadings when duly applied for. *Macdougall v. Paterson*, 11 C.B. 755. In this case the defendant had filed no answer to the bill of complaint, and no issues had been made up in the foreclosure suit, as to the debt or sum demanded. Either party was therefore, under the statute, entitled to an order requiring formal pleadings upon demand therefor seasonably made.

Weston, 41 Fla. at 194-195, 25 So. at 890. *See also Comcoa, Inc. v. Coe*, *supra* (upon satisfaction of statutory prerequisites for writ of replevin without notice trial court is mandatorily required to issue writ; use of word "may" in statute merely a means of conferring authority upon court to require issuance of writ when duly applied for); *Woodland v. Lindsey*, 586 So.2d 1255 (Fla. 4th DCA 1991)(trial court has mandatory duty under statute to enter order either revoking, modifying, or continuing probation after probationer admits violation of probation; word "may" in context of statute must be construed as an imperative to the court to exercise its authority); *Williamson v. State*, 510 So.2d 1052 (Fla. 3d DCA 1987)(provision that "courts may order" sealing of file properly read as mandatory).

This principle of statutory construction requiring that permissive words in a statute be read as imposing a mandatory duty is clearly applicable to Section 92.54(4). The use of the word "may" in Section 92.54 is merely a means of conferring authority upon the court to require electronic communication between the accused and his counsel during the closed circuit testimony when such means of communication are duly applied for. Indeed, Section 92.54 would make no sense if it read: "the judge and defendant and the persons in the room where the child is testifying *shall* communicate by any appropriate electronic method." The accused cannot be compelled to communicate with his attorney if he does not wish to do so. The purpose of 92.54 is thus to require electronic means of communication between the accused and his attorney if the accused wishes to avail himself of such means of communication. In this case, defense counsel requested that such means of electronic communication be made available

under the statute, and the trial court was therefore obligated to allow the accused to utilize the means of electronic communication already set up in the courtroom.

In *D.A.D. v. State*, 566 So.2d 257 (Fla. 5th DCA 1990)(en banc), the Fifth District Court of Appeal construed Section 92.54(4) as imposing a mandatory duty on the trial court to provide electronic means of communication. There, the defendant was convicted of attempted lewd assault on a child. At the request of the prosecutor, the alleged child victims were permitted to testify at trial outside the presence of the defendant. The judge, counsel and the witness went into chambers and the witness's testimony was broadcast over a speaker into the courtroom where the defendant was required to remain.

On appeal, the conviction was reversed based upon the trial court's failure to comply with the requirements of Section 92.54, Florida Statutes (1987). One of the statutory violations found by the district court was the failure to provide electronic means of communication between the defendant and the persons in the room where the child was testifying:

> Further, the judge failed to insure that he and the persons in the room where the child was testifying and the defendant could communicate by any appropriate electronic method *as required by Section 92.54(4), Florida Statutes (1987).*

D.A.D. v. State, *supra*, 566 So.2d at 258.

Means for private and immediate communication between the accused and his counsel during the examination of a child witness are an essential component of any procedure authorizing a child witness to testify outside the presence of the accused. The importance of direct communication between the accused and his lawyer during a child's testimony was noted by this Court in *Glendening v. State*, 536 So.2d 212 (1988), *cert. denied*, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). After holding that application of Section 92.53 to permit videotaping a child's testimony instead of requiring the child to testify in open court did not violate the defendant's confrontation rights, the Court noted the following:

> The fact that Glendening was required to view the child's testimony from behind a two-way mirror as it was videotaped does not change the conclusion. In the present case, Glendening was accompanied by counsel behind the two-way mirror and was able to communicate with counsel questioning the child if the need

> arose. His opportunity to engage in full and effective cross-examination was not interfered with by his exclusion.

536 So.2d at 217 (footnote omitted).

In the Maryland statutory procedure held constitutional by the United States Supreme Court in *Maryland v. Craig*, ___ U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the defendant remains in electronic communication with defense counsel during the testimony of the child. For example, in *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275, 279 (1987) a direct telephone communication was established between the defendant in the courtroom and defense counsel in the room next door "in the event there is any reason to discuss anything between the two of them, just so they have the same accessibility to each other as they would if they were sitting here at the counsel table together." Indeed, it was this very electronic line of communication between the defendant and his attorney which led the Court in *Wildermuth* to reject the claim that the proceedings denied the defendant his right to be present at all court proceedings in his case. 530 A.2d at 291.

In *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1350, (1984), the Court established a number of conditions for the use of videotaped presentation of the testimony of a child victim, including the following conditions concerning communication between the accused and his counsel:

> 10. The defendant and his attorney shall be provided by the State with a video system which will permit constant private communication between them during the testimony of the child witness.
>
> * * * * * *
>
> 16. The testimony of the child victim shall be interrupted at reasonable intervals to provide the defendant with an opportunity for person-to-person consultation.

In *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986), a conviction for sexual assault on a child was reversed because the procedure by which closed-circuit television was used to present the testimony of the state's primary witness denied the defendant his rights under the due process and confrontation clauses. One of the constitutional infirmities in the procedure identified by the Court was the inadequate opportunity for communication between the defendant

and his attorney during the testimony. The defendant did not have any means of communication with his attorney during the examination of the child. The court did permit the defendant to confer with his attorney during a recess after the direct examination of the child and prior to cross-examination. The Court found this limited means of communication inadequate:

> Once the State has made an adequate showing on the record [of the necessity of closed-circuit testimony], the use of a new evidentiary tool such as closed-circuit television must be as minimally intrusive as possible. ... *At the very least, the defendant must at all times have a means of communicating with his attorney*, and the court must be able to control the examination by interrupting the questioning to rule on objections.

389 N.W.2d at 581 (citation omitted).

It is not enough to just provide the accused and his counsel with some means to communicate during the child's testimony; it is essential that such means guarantee the privacy and confidentiality of those communications. In *State v. Crandall*, 231 N.J.Super. 124, 555 A.2d 35 (1989), the court observed that during the closed circuit testimony of a child witness the accused "must be permitted to communicate by two-way telephone with his counsel." 555 A.2d at 40. The court then noted the following:

> If the defendant remains in the courtroom, the privacy and confidentiality of his communications with counsel must be assured, and he should not communicate with counsel in a manner so as to be heard by the jury.

555 A.2d at 40, n.7.

The importance of immediate and private communication between an accused and his attorney during closed circuit testimony was elaborated upon in *Matter of Wolf*, 231 N.J.Super. 365, 555 A.2d 722 (1989). There, a teacher appealed from a decision of the State Board of Education dismissing him from his position as a tenured teacher. The dismissal was based on complaints of the teacher's inappropriate behavior made by a number of students. Prior to the hearing of the student witnesses before an Administrative Law Judge, the teacher was excluded from the courtroom and provided with a closed circuit television hookup by which he could view and hear the proceedings. The teacher was not provided with any method of conferring with his attorney, who remained in the courtroom. The attorney was allowed to halt the

proceedings at any time to leave the room to confer with his client. The appellate court strongly disapproved of this procedure:

> While the witnesses against him testified, petitioner was forced to sit in another room and view the proceedings on television, without contact with his attorney, unless the proceedings were halted and the attorney left the room to confer with petitioner. In a case so fraught with credibility determinations, petitioner was unable to tell his attorney on a question-by-question or even word-by-word basis of circumstances where he thought the children might be lying or exaggerating so that they could be more effectively cross-examined.

555 A.2d at 727 (footnote omitted).

The electronic means of communication mandated in Florida by Section 92.54(4) assure the necessary immediacy and privacy of communications between an accused and his counsel during the closed circuit testimony of a child witness. Anything less does not meet the requirements of Section 92.54(4), and is insufficient to protect the accused's right to counsel and right of confrontation.

Particularly inadequate were the non-electronic means of communication provided by the trial court in this case. The judge set up the following oral relay system for Mr. Myles to communicate with his attorney during the child's direct examination:

> Rather than the microphone here, I would prefer that he tells the bailiff whatever he wants, and the baliff can come in and tell me and then I can stop or delay the proceedings in there, depending upon what he says.

(TR. 850). Defense counsel asked the court to leave the microphone in place (TR. 850). However, the judge refused to do so based on his concern that the jury might overhear Mr. Myles if he claimed to his attorney through the microphone that the child was not telling the truth in her testimony (TR. 850-851). The judge insisted in his preference for the oral relay system:

> So, I would prefer not to have the microphone. If he wants to communicate with us in there --
> The bailiff will be in here. He will tell the bailiff and the bailiff will immediately come in, and we'll either stop -- stop the procedure, come back, and have the jury go back.

(TR. 851). Defense counsel pointed out to the court that the statute authorizing closed-circuit

testimony mandated communication between the defendant and his attorney during the testimony (TR. 852). The judge ruled that the oral relay system was sufficient means of communication (TR. 852).

This oral relay system[3] set up as a substitute for the electronic means of communication mandated by Section 92.54(4) was woefully inadequate, as it lacked any semblance of immediacy or privacy. All communications between Mr. Myles and his attorney during the child's testimony were privileged, and thus not subject to disclosure to either the bailiff or the trial judge. Furthermore, by the time any communication had made its way through this oral relay system to defense counsel, chances are that the prosecutor would have moved on to a different question and the effectiveness of the communication would have been greatly lessened.[4]

Direct, private and immediate communication between Mr. Myles and his attorney was absolutely essential in this case for another reason. Prior to the commencement of trial, Mr. Myles repeatedly requested that he be allowed to represent himself (TR. 64-69, 77-87). The court denied the motion, but did grant Mr. Myles the right to act as co-counsel (TR. 87-90). Considering Mr. Myles' status as co-counsel, it was imperative that he be allowed to immediately and privately communicate with his attorney at all times during the child's testimony.

The record in this case conclusively demonstrates that the means of communication made

---

[3]The decision of the district court in this case describes the procedure employed by the trial judge as "a more mundane method, writing." *Myles v. State*, 582 So.2d 71, 73 (Fla. 3d DCA 1991). The decision states that "[t]he trial court advised appellant that, during the child's testimony, he could communicate with his attorney by writing his communication and having the bailiff deliver it to his lawyer." *Id.* It is, however, clear from the record in this case that the trial judge's procedure involved an oral system of communication from Mr. Myles to the bailiff to the judge in chambers to defense counsel in chambers (TR. 850-852). The only form of writing authorized by the trial court was for Mr. Myles to write down notes on a pad of paper during the child's direct examination and then discuss those notes with his attorney prior to cross-examination of the child (TR. 850).

[4]Ironically, the trial judge required the dismantling of the electronic communications system set up in the courtroom because he feared that the proceedings would be disrupted by Mr. Myles speaking into a microphone during the child's testimony. Yet, the oral relay system set up by the judge had the same, if not greater, potential for disruptiveness by requiring Mr. Myles to speak to the bailiff in front of the jury.

available to Mr. Myles during S.M.'s testimony fell far short of the electronic means of communication required by Section 92.54(4) as well as the Florida Constitution and the United States Constitution. By denying such means of communication to George Myles during S.M.'s testimony, the trial judge in this case clearly erred.

This error cannot be deemed to have been harmless. S.M. was indisputably the chief prosecution witness at trial. S.M. gave the only eyewitness account of the offenses alleged to have been committed against both her and the other alleged child victim. Her testimony was the cornerstone of the prosecution's case. This being the case, it cannot be said that the erroneous denial of Mr. Myles' statutory and constitutional right to electronic means of communication with his counsel during S.M.'s testimony was harmless beyond a reasonable doubt. Accordingly, Mr. Myles' convictions and sentences must be reversed, and a new trial granted. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *Fricke v State*, 561 So.2d 597, 602 (Fla. 3d DCA 1990); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse his judgments of conviction and sentences and remand the case to the trial court with directions that he be granted a new trial.

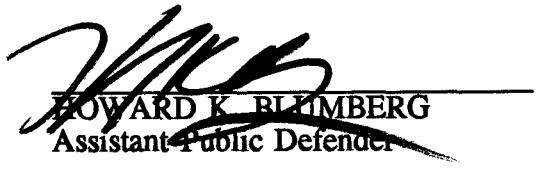
Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY:
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 10th day of February, 1992.



HOWARD K. BLUMBERG
Assistant Public Defender