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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/[redacted]ent,

vs.

Case No. 79,220

RUFUS FORD,

Respondent/[redacted]r.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT/[redacted] ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief refers to Tamara Alcendor's November 1, 1989 deposition by the letter "D" followed by the court reporter's page number. This deposition is part of the second supplement to the appellate record, but the clerk unfortunately numbered it with the same page numbers as those of the first supplement.

Respondent has added two issues to those raised by Petitioner. Rather than file a notice of cross-petition even though he did not independently have jurisdiction, he has characterized this brief as the brief of Respondent/Cross-Petitioner, as was done in State v. Smith, 573 So. 2d 306 (Fla. 1990). This Court has discretion to consider these additional issues. Savoie v. State, 422 So. 2d 308 (Fla. 1982).

STATEMENT OF THE CASE

Respondent adds the following to the Statement of the Case:

On January 4, 1989, a Hillsborough County grand jury indicted the Respondent, RUFUS FORD, for first degree murder. (R1358) On April 30, 1990, a jury found him guilty as charged. (R1741) He was sentenced to life in prison. (R1745) On appeal, the Second District Court of Appeal reversed for a new trial. Ford v. State, 592 So. 2d 271 (Fla. 2d DCA 1991). The State invoked the discretionary jurisdiction of this Court. This Court accepted jurisdiction on July 6, 1992, apparently on the basis of conflict with Hernandez v. State, 597 So. 2d 408 (Fla. 3d DCA 1992).

STATEMENT OF THE FACTS

Petitioner refers to eight pages in the record for the proposition that Tamara Alcendor was the victim of sexual abuse, in part by Rufus Ford. Brief of Petitioner at 2. Petitioner refers here to pretrial hearsay allegations about some physical evidence of sexual abuse and Tamara's single statement to Dr. Kuehnle that Ford abused her. Hearsay allegations, however, are not evidence, and the hearsay statement to Dr. Kuehnle was suspect since Tamara made numerous contradictory claims. Consequently, Respondent's supposed sexual abuse of Tamara is not properly a "fact" of this appeal.

Petitioner's short factual statement relies on the facts recited by the Second District and a requested judicial notice of the briefs filed below. Brief of Petitioner at 2. Factual assertions in briefs must cite to pages in the record, and, moreover, this Court does not have copies of the briefs filed below. Accordingly, Respondent adds the following to Petitioner's factual statement.

The Respondent, RUFUS FORD, married Sybil Ford on September 29, 1987. (R566) Tamara Alcendor, four years old at the time, was Sybil's natural daughter but not Ford's daughter. (R813, 843) They lived in Tampa with their daughter, Jennifer. (R846) In the fall of 1987, Sybil told her sister, Jannice Alcendor, that she had thought of committing suicide but would not do so. (R909)

At night on November 10, 1987, a neighbor sitting on his porch six apartments away and drinking beer with a friend saw Ford drive to his house and park in the front yard. (R230-32, 237-38) Sybil walked to the car and spoke to Ford. (R234) He asked her to take

some bags inside, but she walked empty-handed to the house. (R234) He took the bags and walked into the house a few minutes later. (R234-35) The neighbor testified that Ford -- holding his head, crying, and upset -- came out alone twenty minutes later and asked the neighbor to call the police. (R236, 241) Ford returned to the house to get his children. (R240) The neighbor told the police, however, that Ford was in the house only five to seven minutes and left the house carrying one of his children. (R239-40, 281)

When the paramedics arrived at 10:33 p.m., followed later by the police, they saw Ford running around the front yard, hysterical and saying that his wife was dead. (R244, 246, 290) He had no blood on his body. (R277) He complained loudly that, had they come sooner, they might have saved her. (R253-54, 259-60, 290-91) The children were inside a car. (R281) A tree trunk in line with the bedroom window appeared to have shotgun blast marks on it. (R892)

The police and paramedics found Sybil in an upstairs bedroom, dead of a gunshot with gunpowder in her mouth and blood dripping from it. (R244, 249, 251, 888) They did not remember moving her. (R248-49) She sat against the wall with her right arm on the night stand, her left shin under the bed, and her right knee partially bent under the bed. (R284, 297, 327-28) Blood had spattered on the wall, and a small blood smear was on the bed sheets. (R329-30)

The police found women's clothes downstairs on the couch. (R297, 318) In the kitchen, a pack of beer in a paper bag was on the table, dirt from an overturned plant was on the floor, and a receipt for a Westernfield twenty-gauge shotgun was tacked to a

bulletin board. (R319, 336-37, 889-90, 994) Some coins were on the bathroom floor and on the bedroom floor near Sybil's body. (R264)

The bedroom closet was not full and had only men's clothing in it. (R322, 994) A toothbrush lay on the floor near Sybil's body, a wallet partially overlay the brush handle, and an open, white, change purse lay over the wallet. (R264, 326, 731) The barrel of a Westernfield twenty-gauge shotgun with a spent round inside lay on top of the purse and wallet. (R284, 325-26, 332, 395) A black purse was on the floor against a night stand. (R328) The middle of three shelves on the wall above the body contained a .22 caliber rifle and boxes of .22 caliber shells and shotgun shells. (R331)

Ford told the police that he had gone to the store to buy beer and returned home. (R265, 281-82) Sybil came to the door or outside and yelled at him before returning inside, but he did not hear what she said. (R258, 265, 267, 275) He went inside and put the beer on the table. (R265, 275) He heard a loud boom, went upstairs, and saw Sybil lying on the floor. (R265, 275) He went outside with one child and returned for the other child. (R276)

The officers took scrapings from Sybil's fingernails and gunshot residue swabbings from Ford's and Sybil's hands. (R339-40, 388-90, 402) These items were not analyzed. (R341) One fingerprint on the shotgun had no comparison value, and the other did not match Ford's or Sybil's prints. (R370, 387, 396-97, 493-94)

On November 11, the medical examiner found an abrasion on Sybil's right upper chest, a bruise on her right shoulder, and fresh scratches on her right forearm and between her eyes. (R343,

522) These were not defensive wounds. (R543) She had drunk a small amount of alcohol. (R536-37) She did not have venereal disease. (R499, 537)

A shotgun shell went through her lower lip into the brain from left to right and upward at a thirty degree angle. (R524-26) Using a microscope, the doctor saw burned gunpowder in her mouth. (R964) Gas and heat from the shell lacerated the inner tissue. (R965) Powder stippling marks in the mouth and skin extended to the left lower eyelid and surrounded the wound, which was a half-inch by three-quarters of an inch wide and was irregular because of the lower lip's elasticity. (R525, 528-29, 553) The stippling pattern, wound size, gas lacerations, and burned gunpowder suggested a close range shot within a few inches but not contact inside the mouth or on the skin. (R531, 547-48, 963-65) Death occurred within seconds, but it could have been a suicide or homicide and the doctor waited for the police to decide this point. (R499, 526, 537, 539)

On November 12, Ford came to the police station with Tamara. (R411) Ford told the police that he thought he had caught a venereal disease from Sybil. (R436) She must have been having an affair, because he had not been with other women. (R437) He did not touch or strike her on the night she died. (R437) They had argued about the stereo being too loud. (R441)

The police talked separately with Tamara, who said she had been playing with her younger sister on the bed. (R443-44) Her mother took a shotgun from a shelf in the closet, put it in her mouth, and pulled the trigger. (R443, 450) Tamara wanted to live

with Ford because he treated her well. (R443) Her mother had sometimes come at her like a monster. (R452) On November 13, the police told the medical examiner that the death was a suicide. (R346-50, 374, 384, 445, 466, 500-01, 540-41) Their decision was based primarily on Tamara's statement. (R462)

Other officers interviewed Tamara on tape a year later on December 23, 1988. (R564-65, 896, 2108) She first said she did not know what happened, but, after prompting, said she was in bed with her sister Jennifer and her cousin Crissy watching television when Ford came upstairs with Sybil. (R2109-10, 2115-16) While they argued about which child was better and bigger, Ford got a big gun from the closet. (R2111) Tamara first said he cut Sybil with her knife but later said he put it near Sybil's face and shot her two times in the nose and leg before putting it on the bed. (R2110-13) Ford took Crissy, then Tamara, and then Jennifer outside. (R2117)

The following exchanges also occurred on the tape.

> Q: [D]id Daddy shoot once in the air or once in the ground before Mommy got shot?
>
> A: Yes.
>
> Q: Or did he shoot her two times; do you know?
>
> A: Three times. . . .
>
> Q: Did he tell you to say that you shot Mommy?
>
> A: Yes.
>
> Q: No. No. Listen to me, honey. Listen to me.
>
> A. No.
>
> Q: He didn't say that Tamara should say she shot Mommy. What did he say?

A: I don't know.

Q: Who did he tell you to tell the police shot Mommy?

A: Crissy.

Q: No. Look at me, now. Pay attention.

A: Crissy. . . .

Q: Do you remember what you told the police how Mommy got killed?

A: Yes.

Q: What did you tell them?

A: Ah I said Daddy shoot her with the gun. That is all I said. . . .

Q: [D]o you remember telling the policemen that Mommy shot herself?

A: Yes. . . .

Q: Did you tell the policemen that Mommy shot herself?

A: No. Yes.

Q: You told them that, but that is not true, is it?

A: No. . . .

Q: And why did you say that? Did somebody --

A: Because Daddy told me to say that. . . .

Q: What really happened?

A: I don't know.

Q: Look at me. What did you really see? What is the truth? What, the truth is telling what you really know, what is the truth. All right?

A. Yes.

Q: What really happened? Mommy and Daddy were

having an argument. Is that the truth?

A: Yes. Yes.

Q. And then what happened? Look at me.

A: And then Daddy shot her.

(R2116-22)

The police tested the gun to determine a firing distance consistent with the powder pattern and wound on Sybil's face, but an expert discounted this test because it occurred outdoors and used different shotgun shells from the one that killed Sybil. (R568-75, 591, 600, 621, 652, 654) Using the same brand of shell as that fired into Sybil, the expert tested the shotgun indoors at a ninety degree angle at different distances. (R622-25) He concluded that it could have been fired at a distance greater than one foot but less than two feet. (R628)

The expert later performed the test using unfired shotgun shells from the scene, to obtain more accurate results. (R629-30) He decided that the wound was not a contact wound but could not say whether the gun was fired inside the mouth. (R648-49) It was fired less than twenty-four inches away and probably three to twelve inches away. (R647, 655, 661) The ninety-degree angle of the test firings might have altered the results, because the shell entered Sybil at a thirty degree angle. (R649)

A defense firearms expert performed the same tests at a thirty degree angle, which produced more elliptical patterns and irregular holes. (R926, 929-33, 943) At three inches, the pattern was the same as that on Sybil. (R941, 946, 965-66) The shotgun was not

fired at contact and probably was not fired farther than twelve inches away. (R949) In light of the firearm's length and Sybil's height, the expert could not exclude the possibility that she committed suicide. (R950-51)

The Dade County medical examiner found that the shotgun barrel could not have been inside Sybil's mouth because the gas from the shot would have been more explosive. (R765) Gray smoke from the firings dispersed at six inches and did not appear on Sybil's skin. (R773-76) The debris in her mouth was not gunpowder. (R803) The pattern on her skin resembled those made from six to twelve inches away. (R779) Her wound would have been rounder had it occurred at a closer range. (R781-82) The upward direction of the shot meant only that it was fired from the front because her teeth could have deflected it or her head might have been pointed up. (R784-85) Changing the firing angle would not substantially affect the test results. (R786-87) The doctor concluded that the gun was fired from the left of and below her face at a distance of six to thirteen inches and certainly less than twenty inches. (R783-85) In his opinion, the wound was not self-inflicted unless the gun was fired with a string or similar device. (R788-90)

The fingernail scrapings and gunshot residue swabbings taken in 1987 were analyzed. (R577) Although the swabbings from Ford's and Sybil's hands did not have gunshot residue, this test is often unsuccessful and the swabbings were taken two hours after the fact, a long time for this test. (R664-67) Sybil's fingernail scrapings not surprisingly had indications of blood. (R606-08)

A blood spatter expert could not determine whether the death was a suicide or homicide. (R707, 732) Under various suicide scenarios proposed by the prosecutor, she expected to see blood on the gun and Sybil's arms, but she could not say that no blood was on the gun. (R726-31) She did not give a more precise opinion because the photographs and police reports did not clearly establish whether the gun had blood on it. The photographs did not show blood on the gun, and police reports did not note any blood on the gun, but it was not analyzed for blood particles and the testimony did not indicate that the police looked for blood on the gun. (R711, 741) The police picture of the shotgun showed the stock but did not clearly show the barrel. (R747) After hard impact from a bullet, blood often mists into small particles that are hard to see. (R741) The police failed to get all of the information they should have gotten. (R737, 993) The expert determined from the spatters on the wall that the wound occurred thirty-two to thirty-four inches above the floor and six inches from the wall. (R713)

During trial on Monday, the parties interviewed Tamara on videotape in the office of Dr. Kuehnle, her therapist, but she would not talk despite many efforts to make her feel comfortable. (R812, 816, 829, 873-74, 883) After a lengthy session, she sucked her thumb, crawled into a fetal position, put her head on Kuehnle's leg, and then put her head on a defense counsel's leg. (R816, 873)

On Wednesday, the parties tried again in Judge Griffin's office, because Tamara felt comfortable with him. (R819) Although Judge Steinberg presided over the trial, Judge Griffin had handled

most of the pretrial proceedings before becoming ill. (R815, 2172) The video camera was hidden. (R820) Judge Griffin spoke to Tamara first and asked her to help out, before he left and defense counsel entered. (R820-21, 2171, 2180)

Tamara said that Ford and Sybil were arguing downstairs over which children they wanted. (R846, 2184-85, 2189) He pushed her down the stairs and onto the stove, causing her arm to bleed. (R2195-96) They fought over her purse. (R2195) Tamara and her sister Jennifer were upstairs watching television, but Tamara came downstairs and peeked at them. (R2185, 2189, 2196) They went upstairs to the bedroom, still arguing. (R2188-89, 2196) Ford took a gun and put bullets in it, but Sybil did not try to run away. (R2183-85, 2189, 2191, 2197) Sybil was scared. (R2190) Ford shot Sybil. (R2183) He and the children left the house and went to their car. (R2183) He told Tamara not to tell anyone. (R2184)

Tamara said she told the police what happened. (R2186) She denied telling them that Sybil killed herself. (R2186, 2188) She denied telling them that Sybil sometimes came at her like a monster. (R2198) She denied telling Dr. Kuehnle that Sybil had the gun and tried to shoot Ford. (R2202)

Kuehnle testified that Tamara had never previously said that Ford loaded the gun or that Ford pushed Sybil against the stove. (R830-32) Although Tamara had said that Ford shot Sybil, she also often said that Sybil got the gun and shot herself. (R845-46) Kuehnle believed that the police asked Tamara leading questions in December 1988, which may have influenced her answers. (R839)

SUMMARY OF THE ARGUMENT

I. The videotape was not authorized by any statute. Authorizing it was a matter of substance for the legislature rather than procedure for the court because the legislature has historically been involved in protecting children, intended to give them a substantive right, and had to consider many public policy concerns when it enacted the statute. The videotape violated Ford's confrontation rights because the it was not under oath, did not allow face-to-face confrontation, and restricted cross-examination. It was also unreliable because Tamara's statements were vastly inconsistent. The state interest involved is not sufficiently substantial in homicide cases to warrant abridgment of confrontation rights. Ford's due process rights were violated because confrontation was critical to his defense.

II. The evidence was insufficient to warrant a verdict of premeditated murder. The only evidence that arguably supported a finding of premeditation -- Ford's alleged loading of the gun -- was not inconsistent with his hypothesis of innocence that he later shot Sybil without premeditated design in the heat of anger.

III. Ford's discovery rights were violated because he never received the one full deposition to which he was entitled under the discovery rules. He restricted his questions for the first deposition because he was told it was to be used to determine the child's competence. He was prejudiced because, at trial, he did not know what she would say and she made statements she had not previously made.

ARGUMENT

ISSUE I

THE VIDEOTAPE WAS UNAUTHORIZED AND VIOLATED FORD'S RIGHTS TO CONFRONTATION AND DUE PROCESS.

A. Procedural background

The lengthy procedural history of Tamara's videotaped testimony began when her guardian ad litem moved to require that all deposition questions be asked in the office of Dr. Kathryn Kuehnle, Tamara's therapist, by Kuehnle rather than by lawyers. (R1909-13) On May 1, 1989, Kuehnle testified that indications of lacerations in Tamara's genitals had been found in September 1988. (R1930) After an investigation, however, the State determined that allegations of physical abuse were unfounded. (R1960-61, 1977)

Kuehnle thought that numerous traumatic events had emotionally disturbed Tamara. (R1933) She was not competent to testify because she had made so many inconsistent statements. (R1951, 1969) She might later become competent if not placed in stressful situations or forced to take sides or protect others, but a standard deposition would be stressful, traumatic, and unlikely to produce competent testimony. (R1936-38, 1952) Under stress, she might say "yes" to almost any question. (R1938-39) A deposition might also affect her future testimony. (R1939) When young children are repeatedly questioned and answers suggested to them, they can develop false learned memories which they later believe to be true. (R1939-40)

Kuehnle recommended that she interview Tamara in Kuehnle's

office from a prepared list of questions, preferably with attorneys watching through a one-way mirror. (R1948-49) Tamara knew Kuehnle, felt safe with her, and would respond better to her questions than to questions from strangers in a strange room. (R1948-50)

Dr. Melvyn Gardner, a psychiatrist, thought that Tamara could be deposed without psychological injury. (R1981) He had no evidence that she suffered from mental illness. (R1983) He disagreed that Kuehnle should ask the questions, because it was "obvious" that Kuehnle was "biased toward the client for the children." (R1982) Tamara might notice this bias and give false answers to please Kuehnle. (R1982) Conducting the interview properly through a third person would be impossible. (R1984) Gardner did not personally examine Tamara and based his opinion on police reports, witness depositions, and Kuehnle's testimony. (R1980-81)

Defense counsel observed that, despite numerous previous interviews, no one objected to them until the defense scheduled one. (R2004) The guardian responded that his office had only recently been appointed. (R2006-07) The judge ruled that depositions would be in Kuehnle's office, and each questioner should ask as few questions as possible in a gentle, patient, and nonaggressive manner. (R2013) On May 12, 1989, the defense deposed Tamara, and she said that Ford had shot Sybil, but the deposition soon ended after she started saying that she did not remember what had happened. (R2209-11)

On June 2, 1989, the public defender withdrew because of conflict. (R2034) On September 28, 1989, the prosecutor moved, pursu-

ant to section 92.55, Florida Statutes (1987), that Tamara's testimony be videotaped for trial. (R1424-25) On October 3, 1989, the defense moved to determine her competence to testify. (R1428)

On October 11 and 12, 1989, Dr. Kuehnle said that Tamara had testified by videotape for the defense in another case after Kuehnle had said she was competent.[1] (R1114-15) She was still competent but would suffer moderate emotional or mental harm if forced to testify before a jury, judge, and her step-father in court. (R1115-16) Although the last videotaping session had occurred in a safe setting, she afterwards became disturbed at home. (R1116) She was more stable than she was on May 1 but still had some ways to go. (R1131-32) She had made many contradictory statements to Kuehnle and others. (R1123-24) She loved her stepfather but was afraid he would get out of jail and whip her for talking about her mother's death. (R1116-17)

Defense counsel renewed all motions and arguments made by predecessor counsel. (R1438, 2073-74) The videotape was unauthorized and would violate Ford's confrontation right. (R1126, 1147, 2063, 2065) The closest statute authorizing the videotape was the child hearsay exception in section 90.803(23), Florida Statutes (1987), but it applied to sexual or child abuse cases, not to homicides. (R1147) Tamara was not competent because her statements were too inconsistent. (R1148) The prosecutor responded that she was competent, but the defense should not take a normal discovery deposi-

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[1]In that case, Judge Griffin granted a new trial because the jury's verdict was contrary to the weight of the evidence. When the State appealed, the Second District affirmed without opinion.

tion. (R1155) Dr. Kuehnle should ask the questions, including followup defense questions after Tamara's initial answers. (R1155)

Judge Griffin said that Tamara was a bright girl who had favorably impressed him during the previous videotaping. (R1155) He reserved ruling on her competence. (R1158, 2063) To help him determine her competence, he told counsel to submit questions for a November 1 deposition in Dr. Kuehnle's office. (R2066, 2068-70)

On October 24 and 31, counsel argued again orally and in writing that Tamara was not competent and the State had no authority to videotape her. (R1164, 1441-43) Section 92.55 authorized a videotape only upon proof of severe emotional or mental harm, unlike section 92.54, Florida Statutes (1987), which required only moderate harm. (R1165, 1444) Nobody had ever testified that Tamara would suffer severe harm. (R1166, 1444) Section 90.803(23) applied only to sexual abuse cases, and counsel renewed his confrontation and due process objections. (R1167, 1169, 1445, 1448)

Defense counsel did not specifically address section 92.53, Florida Statutes (1987), presumably because the prosecutor was not attempting to use that statute. (R1165) Attached to the written response, however, was a copy of Glendening v. State, 536 So. 2d 212 (Fla. 1988). Glendening quoted section 92.53 at length, and counsel underlined that portion of the statute which stated that it applied only to sexual and child abuse cases. (R1487)

The prosecutor withdrew his motion to videotape because section 92.55 did not apply. (R1172) He said instead that Tamara was competent, and he would call her to the stand. (R1172, 1175)

The parties then discussed the next day's deposition. (R1177) Defense counsel argued that restricting discovery was improper under section 92.55, absent severe emotional harm. (R1177) He submitted thirty-six written deposition questions. (R1534-35)

On November 1, Judge Griffin, defense counsel, a prosecutor, and Tamara met in Dr. Kuehnle's office. (D1) Dr. Kuehnle asked the questions. Tamara initially said she did not remember or know what happened. (D7-8) She then said that Sybil and Ford were fighting when Ford took a gun from the shelf and shot Sybil. (D9-10) She denied telling the police that Sybil shot herself. (D12) After Kuehnle asked most of the questions on the defense list, the judge asked if defense counsel had other questions. (D8-21) He asked the last few questions on his list and a few others before saying he had no other questions. (D21-22) The court deferred ruling on Tamara's competence until a defense expert examined her. (R1276-77)

On March 7, 1990, when the defense moved for Dr. Harry Krop to examine Tamara, the prosecutor argued that she had already been interviewed too often, including on November 1. (R1233-35) Defense counsel responded that the November 1 interview was not a deposition because he asked only a few questions. (R1236) Judge Griffin said he was "tremendously impressed by the brightness of this young child and the two interviews that I participated in on videotape with her." (R1239) He thought another interview with a psychiatrist would not be too traumatic. (R1239)

Dr. Krop saw Tamara on March 26, 1990, with the judge and both counsel present. (R1586, 1778) According to Dr. Krop's letter sub-

mitted as evidence, Tamara communicated well in response to questions, was comfortable with other parties present, and could distinguish between truth and falsehood. (R1313, 1586, 1779) She was precocious, had made much progress in therapy, and did not have a thought or adjustment disorder. (R1586) Her memory, however, might be compromised due to numerous interviews and the emotional impact of her experiences. (R1586) She was competent. (R1587) Testifying in court before her stepfather would make her uncomfortable and anxious but would not be overly traumatic. (R1587)

On April 5, 1990, the guardian ad litem moved to require that Tamara's testimony be taken by videotape. (R1590-91) On April 11, the parties renewed their arguments on her competence. (R1770-80) Judge Griffin denied the competency motion on April 13. (R1596)

On April 16, Dr. Kuehnle testified that Tamara was still not a normal, healthy child but was friendly and affectionate and had substantially improved. (R1300-02, 1306) Some evidence suggested that her mother physically abused her. (R1291, 1302) HRS had provided evidence of some sexual abuse, and she told Kuehnle that Ford abused her. (R1309-10) She was upset when talking about her mother and was afraid of her stepfather but also loved him. (R1296-97)

Previous proceedings had not detrimentally affected Tamara, except that, because she had been interviewed so often, she had become emotionally detached and talked about the event as if she was eating a peanut butter and jelly sandwich. (R1298-99, 1307) After seeing Dr. Krop, she sat under a chair during her next session with Dr. Kuehnle. (R1304, 1311) Testifying in front of strangers and

her stepfather in court would be upsetting and traumatic for her, and she did not want to do it. (R1298, 1301, 1308-10) She would suffer moderate emotional or mental harm if required to testify in court and might not say anything. (R1302, 1311) Dr. Kuehnle could not say whether the harm would be substantial. (R1307-08)

The guardian directed the court's attention to sections 92.53, 95.54, and 92.55, and suggested that Tamara was sexually abused. (R1287, 1315) Defense counsel relied on the written defense response on this subject and argued that Tamara could be made to feel comfortable in the courtroom in many ways, including by familiarizing her with the courtroom in advance. (R1317-19)

Judge Griffin said he had read the written response. (R1317) He had been present at many interviews and knew the child well. (R1328-29) She had previously said that she was willing to testify in court, but she was afraid and apprehensive when asked about testifying in front of her stepfather. (R1330) The judge orally granted the guardian's motion because in-court testimony would cause moderate emotional harm. (R1330-31)

The prosecutor next argued that the defense should not set two hours to depose Tamara, because she was deposed on November 1, 1989. (R1332, 1335) He stipulated that the defense could use prior inconsistent statements without establishing a predicate. (R1335) Defense counsel argued that the November 1 proceeding was not a deposition because its purpose was only to determine Tamara's competence. (R2221) Had he thought it was a deposition, they would have been there two or three hours rather than thirty or forty-five

minutes. (R2221) The court responded that counsel could have asked more questions and did not do so. (R2221)

In a written order on April 17, Judge Griffin refused to allow a deposition. (R1598) He also said that Tamara had reacted negatively to testifying in the defendant's presence and might not testify at all. (R1597) In-court testimony would cause moderate harm and perhaps severe harm. (R1597) Her testimony would therefore be videotaped in Dr. Kuehnle's office with counsel for both sides, but not in the defendant's presence. (R1598) Each questioner would ask simple questions and as few as possible. (R1598)

During jury selection before Judge Steinberg on Thursday, April 19, the prosecutor said they would videotape Tamara's testimony on Monday; he did not want to make opening arguments until he knew what she would say. (R116) Defense counsel thought it was unfair that no one knew what she would say. (R118) He could guess about her testimony, but videotaping and questioning by attorneys rather than doctors might elicit answers that were different from her previous answers. (R118)

On Monday, April 23, the parties tried to depose Tamara on videotape in Kuehnle's office, but she would not talk about her mother's death despite many efforts to make her feel comfortable. (R816, 829, 873-74) After a lengthy session, she sucked her thumb, crawled into a fetal position, put her head on Kuehnle's leg, and then put her head on a defense counsel's leg. (R816, 873)

On April 24, Dr. Kuehnle wanted to try one more time in Judge Griffin's chambers because Tamara felt comfortable with him. (R307)

Over renewed defense objections, Judge Steinberg decided to try again under the rules in Judge Griffin's order. (R307-09, 380, 424-34) Judge Griffin could be present to make Tamara feel comfortable but would not be present for the actual interview. (R432)

A video camera was hidden in Judge Griffin's chambers on Wednesday, April 25. (R562, 631, 820) The lawyers and the defendant watched through a monitor in a nearby office. (R676) Judge Griffin spoke to Tamara first for a few minutes and asked her to help out but did not discuss the case. (R633-34, 678, 820-21, 2171-80) He left, and defense counsel entered to ask questions with Dr. Kuehnle and the guardian present. (R677, 820-21, 2180) The defendant had no face to face confrontation with the child. (R677)

Tamara said that Ford and Sybil argued downstairs over which children they wanted. (R846, 2184-85, 2189) He pushed Sybil down the stairs and onto the kitchen stove, causing her arm to bleed. (R2195-96) They fought over her purse. (R2195) Tamara and her sister Jennifer were upstairs watching television, but Tamara came downstairs and peeked at them. (R2185, 2189, 2196) They went upstairs to the bedroom, still arguing. (R2188-89, 2196) Ford took a gun and loaded it, but Sybil did not try to run away. (R2183-85, 2189, 2191, 2197) Sybil was scared. (R2190) Ford shot her. (R2183) He and the two children went to a car outside. (R2183)

He told Tamara not to tell anybody, but she told the police what happened. (R2184, 2186) She denied telling them that Sybil killed herself and sometimes had come at her like a monster. (R2186, 2188, 2198) She denied telling Dr. Kuehnle that Sybil had

the gun and tried to shoot Ford. (R2202)

When the State introduced the two tapes as evidence, the court overruled the defense renewal of all objections. (R750, 809-10, 817-18, 821-23) The State played the tape of the interview in Judge Griffin's office, and the defense played the tape of the interview in Dr. Kuehnle's office. (R823, 875)

B. The videotape was not statutorily authorized

Two statutes, sections 92.53 and 92.55, arguably allowed the videotapes to be used at trial, but neither applied to this case. Whether Judge Griffin relied on one, both, or neither of these statutes is unclear. The judge rejected the guardian's suggestion to use section 92.54 (closed circuit television).

Section 92.55 asked this Court to promulgate emergency rules to protect child witnesses from severe emotional or mental harm in judicial proceedings. It asked that judges restrict depositions, require submission of questions in advance, use videotapes in lieu of courtroom testimony, forbid attendance of other persons at any proceeding, and set the place and conditions for all interviews. Judge Griffin's orders regarding the videotape and Tamara's deposition made full use of all of these powers.

If Judge Griffin relied on this statute, the reliance was improper for two reasons. First, as the defense objected, it required a showing of severe emotional harm to the child. (R1166, 1444) Nobody testified that Tamara would suffer severe harm from testifying in court. Dr. Krop believed she would not even suffer moderate harm. (R1587) Dr. Gardner believed a deposition would not

harm her. (R1981) Dr. Kuehnle believed she would suffer moderate harm but could not say that it would be severe. (R1302, 1307-08) The record showed that she was a friendly, affectionate, bright girl who had made great progress in therapy. (R1300-02, 1306) She had distanced herself from her mother's death and could talk about it unemotionally. (R1298-99) Judge Griffin orally found only that the harm would be moderate. (R1330) Because the evidence and the oral finding did not support the required level of severe emotional harm, section 92.55 was inapplicable.

The later written findings must be disregarded to the extent that they conflicted with the oral findings. Beal v. State, 428 So. 2d 401 (Fla. 2d DCA 1985). Moreover, the written findings pointed only to a "strong possibility" that testimony in court "could possibly cause severe emotional harm." (R1597) A mere possibility was not the finding that the statute required. The failure to make the requisite finding of severe harm was fatal. Leggett v. State, 565 So. 2d 315 (Fla. 1990).

Second, the statute did not actually authorize anything, including the videotape or any discovery restrictions. It only recommended the adoption of emergency rules authorizing judicial action to protect child witnesses. This Court has never adopted such rules. Although the defense did not object on this ground below, using a mere legislative resolution of doubtful constitutionality would have been fundamental error. The Second District correctly found that this statute was nonoperative. Ford, 592 So. 2d at 275.

Section 92.53 was likewise inapplicable because, as the

defense argued about this statute as well as the child hearsay exception under section 90.803(23), it allowed videotaping only "in a sexual abuse case or child abuse case." (R1167, 1169, 1445, 1448, 1487) As the defense pointed out, the instant case was not a child abuse case but a homicide of the child's mother. (R1147)

The guardian may have argued that Tamara was physically and sexually abused, perhaps by her mother. (R1315) Tamara had told Dr. Kuehnle that Ford abused her. (R1309-10) HRS, however, had determined that the allegations of abuse were unfounded. (R1960) Some of the allegations were unconnected to this case because they occurred in 1988, after Sybil Ford's death. (R1930) Moreover, the evidence of these allegations was not competent, because it consisted solely of double and triple hearsay from Dr. Kuehnle. Thus, the abuse may not have existed, was not supported by competent evidence, was not charged, was not relevant to the case at hand, and was not shown to have been committed by the defendant.

This possible existence of abuse from other people did not transform this homicide into the "sexual abuse case or child abuse case" required by the statute. The statute did not apply unless the charged crime was a sexual battery, aggravated child abuse, or similar offense. Otherwise, possibly abused children with relevant testimony could testify by videotape in every case if "moderate" emotional harm could be shown, even if the abuse was unrelated to the charged offense. If a juvenile witness was sexually molested, he could -- by this reasoning -- testify by videotape years later in a completely unrelated automobile personal injury case.

This absurd consequence was not within the legislative intent to allow prosecution of child abuse cases without further undue emotional harm to the abused. The courts have characterized this intent, not as allowing protection for all child witnesses of all crimes, but as "sparing child victims of sexual crimes the further trauma of in-court testimony." Glendening v. State, 536 So. 2d 212, 217 (Fla. 1988), quoting Chambers v. State, 504 So. 2d 476, 478 (Fla. 1st DCA 1987). Allowing videotaping of a mere witness to a homicide was contrary to this legislative focus on the child victims of sexual crimes.

C. Protecting children by allowing the videotaping of their testimony is a substantive legislative matter.

The State does not particularly dispute this point that the videotaped testimony below was not within the express provisions of sections 92.53 and 92.55. In this regard, the State implicitly agrees with the decision below and with Hernandez v. State, 597 So. 2d 408, 409 (Fla. 3d DCA 1992), that "no authority expressly authorizes the procedure used here." The State and Hernandez instead insist that no such authority is required. Because section 92.55 as well as logic and public policy demonstrate a compelling state interest to protect child witnesses, the lack of specific enabling authority to allow videotaped child testimony in homicide cases is "of no particular import," as long as constitutional confrontation requirements are satisfied. Brief of Petitioner at 5; 597 So. 2d at 409.

This argument assumes its conclusion and sidesteps the issue. While a compelling state interest may be necessary for confronta-

tion purposes, it does not dispositively set the limits of this Court's power. Otherwise, this Court could levy taxes for homes for the homeless because protecting the homeless is a compelling state interest. The issue here is not solely whether protecting child witnesses is a compelling state interest but rather whether this interest is within the judicial or legislative domain under the separation of powers doctrine of Article II, section 3, Florida Constitution. To assume -- as Hernandez and the State do -- that protecting child witnesses in homicide cases is a compelling state interest worthy of judicial intervention, is merely to assume their argument's conclusion -- that reasonable measures to protect child witnesses in homicide cases are always within the judicial realm.

Determining whether a matter is legislative or judicial may be the murkiest area in Florida's constitutional law. Traditionally, this Court distinguishes legislative from judicial matters by distinguishing substance from procedure, but this distinction is not always helpful.[2] It is particularly murky in matters of judi-

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[2] This Court has often promulgated laws of substance and, conversely, often deferred to the legislature's promulgation of rules of procedure. For example, compare the substantive law in Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973) (Court has authority to reexamine contributory negligence doctrine "in light of current 'social and economic customs' and modern 'conceptions of right and justice'") with Chapter 39, Florida Statutes (consisting almost entirely of procedural rules on juvenile justice). Hoffman and Chapter 39 are not easily reconciled. Moreover, this Court has overruled the legislature on substantive matters, State v. Walker, 461 So. 2d 108 (Fla. 1984) (criminalizing the transfer of drugs from prescription bottles to other containers violated substantive due process), and the legislature can overrule this Court's procedural rules by a two-thirds vote. Art. V, § 2(a), Fla. Const.
(continued...)

cial process, such as the Evidence Code, which involve both substance and procedure. In recent years, this Court has adopted procedural rules to effectuate the legislative intent in

> areas of judicial process that necessarily involve both procedural and substantive provisions to accomplish a proposal's objective. . . . The judiciary and the legislature must work to solve these types of separation-of-powers problems without encroaching upon each other's functions and recognizing each other's constitutional functions and duties. One example of such a cooperative effort is The Florida Evidence Code, adopted by both the legislature, chapter 76-237, and the Supreme Court in In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979).

Leapai v. Milton, 595 So. 2d 12, 14 (Fla. 1992).

According to In re Florida Evidence Code, 372 So. 2d 1369, 1369 (Fla. 1979),

> [i]t is generally recognized that the present rules of evidence are derived from multiple sources, specifically, case opinions of this Court, the rules of this Court, and statutes enacted by the legislature. Rules of evidence

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[2](...continued)
Consequently, supposing that the substance/procedure distinction adequately delineates the separation of powers between this Court and the legislature is logically unsound and empirically incorrect.

A better approach is listing the factors relevant to the separation of powers doctrine and weighing them to determine where the law or rule fits on the continuous spectrum between the legislative and judicial realms. Some matters are purely legislative, some are purely judicial, and some are a hybrid. In this approach, whether a law or rule relates to courtroom procedure is only one factor to be weighed. Other factors include whether the subject area (1) is within a special judicial or legislative expertise, (2) has been the subject of legislative action, (3) is constitutionally reserved for the legislature or judiciary, (4) relates to primary rights or duties, (5) relates to the enforcement of primary rights or duties, (6) protects or focuses on specific classes of persons, (7) has historically been a matter of legislative or judicial concern, (8) relates to powers inherent in a legislative or judicial body, or (9) involves substantial public policy considerations.

> may in some instances be substantive law and, therefore, the sole responsibility of the legislature. In other instances, evidentiary rules may be procedural and the responsibility of this Court.

In In re Florida Evidence Code, this Court adopted the Code's provisions as enacted by the legislature, "to the extent that they were procedural." Id. This tactic avoided the otherwise inevitable confusion and uncertainty over whether a particular provision was procedural or substantive. This Court followed this same course in 1981 for Code amendments, In re Amendment of Florida Evidence Code, 404 So. 2d 743 (Fla. 1981), and again in 1986 when it adopted Code amendments creating or amending the child hearsay exception, § 90.803(23), Fla. Stat. (1987), and the statutes at issue in this case, sections 92.53 (section 90.90 at that time) and 92.55. In re Amendment of Florida Evidence Code, 497 So. 2d 239 (Fla. 1986). This Court reiterated that the "Florida Evidence Code is both substantive and procedural in nature." Id. at 240.

Although evidentiary statutes like section 92.53 (formerly section 90.90) are thus both substantive and procedural, this Court's decisions do not clearly distinguish which parts of these statutes are substantive and which are procedural. In fact, Respondent has found no decision applying this distinction to evidentiary matters. The difficulty is compounded because a statute's procedural provisions can be within the legislative power if "necessary to implement the substantive provisions." Smith v. Department of Insurance, 507 So. 2d 1080, 1092 (Fla. 1987).

In general, substantive law "prescribes the duties and rights

under our system of government," while procedural law "concerns the means and method to apply and enforce those duties and rights." Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975). A substantive law "creates, defines, and regulates rights" while a procedural law is "the legal machinery by which substantive law is made effective." State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969).[3]

For several reasons, devising standards to protect child witnesses is a substantive matter for the legislature rather than a procedural matter for the judiciary. First, the legislature intended to provide a substantive rights for children when it enacted Chapter 85-53, Laws of Florida, which included the child hearsay exception and the child videotape and closed circuit television statutes. According to this law's preamble, "children are in need of special protection as victims or witnesses," have "the right . . . to be protected," and have the "right to be free from emotional harm and trauma occasioned by judicial proceedings." Consequently, the legislature gave children the right to move for an opportunity to testify by videotape or closed circuit television without the defendant's presence. Although these statutes could from one perspective be characterized as procedural in the sense of effectuating a child's right to be free of emotional trauma, they are more fairly characterized as substantive because they afford children

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[3] As noted in footnote 2, these definitions are often less than helpful. For example, from one perspective, substantive law could be defined as the right to be treated fairly, and all other laws are procedural because they are the machinery by which this sole substantive law is made effective. As this example illustrates, almost everything in this area is relative to the perspective with which the law or rule in question is viewed.

the opportunity to testify with reduced emotional trauma, and they determine the standards by which this opportunity is provided. See Smith, 507 So. 2d at 1092 n.10 (statute is "clearly substantive because it sets the standard for establishing a claim").

Second, protecting children has long been a special legislative concern. See VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So. 2d 880, 883 (Fla. 1983) ("insurance is a field in which the legislature has historically been deeply involved"). Even the most cursory inspection of the statute books reveals a plethora of laws about children. The 1991 statutory index has three pages of listings on child abuse, care, and custody; three pages on minors; and five pages on juvenile delinquency, detention, and offenders. Chapter 39 of the Florida Statutes has eighty pages of detailed procedural rules to provide "judicial and other procedures through which children . . . are assured fair hearings and the recognition, protection, and enforcement of their constitutional and other legal rights." § 39.001(2)(a), Fla. Stat. (1991) (emphasis added). It would be anomalous if the legislature could through the years enact these statutory protections for juveniles and yet somehow not protect juvenile witnesses because the issue was supposedly procedural rather than substantive.

Third, the protection of child witnesses in homicide cases involves substantial public policy issues, which indicates that the matter is substantive rather than procedural. Although the courts "may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary

legislative pronouncement." VanBibber, 439 So. 2d at 883. In this instance, public policy must determine the age of the persons protected, the types of cases involved, the degree of trauma necessary, and the relevance of the protected person's availability to testify. Although this Court can and must determine the constitutionally minimum requirements below which the legislature cannot go, this Court is not well-equipped to ascertain the optimum requirements in the light of public policy. These are substantive matters best determined by the legislature through the political process. For these three reasons, the circumstances under which child witnesses in homicide cases may testify by videotape is a substantive matter for the legislature rather than a procedural matter for the courts.

Finally, Petitioner and Hernandez both erroneously rely on Ashley v. State, 265 So. 2d 685 (Fla. 1972). In Ashley, the judge held separate guilt and penalty phase hearings at a time when the law did not specifically authorize this procedure. Hernandez quoted Ashley for the proposition that in "order for such procedure to be a valid basis for a new trial it is incumbent upon a defendant to establish that its use denied him due process of law." 597 So. 2d at 409, quoting, 265 So. 2d at 692 (emphasis added).

Ashley, however, involved the sequence of evidence presented in capital cases, a procedural matter now incorporated in Florida Rule of Criminal Procedure 3.780. Morgan v. State, 415 So. 2d 6, 11 (Fla. 1982). It did not involve substantive matters, such as the content of death penalty aggravating circumstances, id., or, in

this case, the use of evidence prepared outside the courtroom and the rights of child witnesses to protection from emotional trauma. Ashley is not pertinent here, because the judiciary has sole authority over the order and manner in which evidence is presented in the courtroom,[4] but it must share authority with the legislature over the nature of out-of-court evidence that can be used.

Because the videotaped testimony in this case was within the substantive domain of the legislature, the judge below could not permit the preparation and use of a videotape unless some statute authorized it. Because no statute authorized this videotape, its use was error and this Court should affirm the decision below.

D. The videotape was hearsay which did not qualify under any exception.

If this Court believes that the use of the videotape was a procedural matter within the authority of the judge, then Respondent argues alternatively that the videotape was hearsay not qualified under any exception. It was therefore expressly excluded by section 90.802, Florida Statutes (1987). "Except as provided by statute, hearsay evidence is inadmissible" (emphasis added).

According to section 90.801(1)(c), Florida Statutes (1987), "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." To the extent that this statute is procedural, this Court has adopted it. In re Amendment

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[4] For the same reason, a judge can allow a witness to speak through a microphone, even though this procedure is not specifically authorized. A judge has authority over procedural matters of this sort that occur inside the courtroom.

of Florida Evidence Code, 404 So. 2d 743 (Fla. 1981). The videotape in this case was plainly a statement offered in evidence to prove the truth of the matter asserted. Moreover, although the declarant, Tamara Alcendor, may have testified for the trial, she did not testify at the trial when she made the videotape. Instead, she testified outside the trial, and the tape was later played at the trial. Accordingly, the videotape was hearsay as defined in section 90.801.[5]

Under section 90.802, this hearsay was admissible if some statute authorized it. As we have seen, however, no statute authorized the videotape. The closest statute was section 92.53, which applied only to sexual or child abuse cases. Accordingly it was inadmissible because a "videotaped statement which is offered at trial but does not meet the requirements of section 92.53 is usually hearsay; and, unless there is an applicable exception, it will not be admitted." C. Ehrhardt, Florida Evidence, § 401.3 at 106 (1992).

This failure to recognize that videotapes are hearsay was a fatal flaw in Hernandez and in Gonzalez v. State, 818 S.W.2d 756 (Tex. Cr. App. 1991), on which Hernandez relied. Gonzalez and Hernandez claimed that televised testimony was not expressly for-

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[5] A more interesting question is whether testimony by closed circuit television under section 92.54 which is instantaneously replayed at the trial is a statement at the trial and therefore not hearsay. On balance, it should be considered hearsay, because the testimony still originates from outside the trial and therefore does not occur "at" the trial for purposes of section 90.801(1)(c). This would be consistent with the oft-repeated shorthand definition of hearsay as an out-of-court statement.

bidden by the law and therefore was permitted if consistent with the confrontation clause. In this case, however, the videotape was expressly forbidden by section 90.802 and not rescued by any exception or other statute. Accordingly, the trial judge below had no authority to permit this hearsay.

Relying on Glendening v. State, 536 So. 2d 212 (Fla. 1989), the State claims that a videotaped statement pursuant to section 92.53 is not hearsay. Brief of Petitioner at 10. Section 92.53, however, stated in effect that videotapes are hearsay which are nevertheless admissible under a hearsay exception. Glendening did not say that videotapes are not hearsay, only that, "when the requisites of the statute are met, . . . videotaped testimony is the equivalent of testimony in open court" for purposes of determining whether the child has testified under section 90.803(23). 536 So. 2d at 216. The State thus relies on a statement in Glendening that it takes out of context. Glendening does not say that a videotape is the same as in-court testimony for all purposes and therefore is not hearsay.

This Court should affirm because the videotape was hearsay not rescued by any exception.

E. Expressio unius est exclusio alterius

As previously stated, both this Court and the legislature have adopted section 92.53, which expressly applies to child and sexual abuse cases. If this Court and the legislature had intended to apply it to other cases, they would have said so.

> Expressio unius est exclusio alterius. "Where a statute enumerates the things on which it is

> to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

Locke v. Hawke, 595 So. 2d 32, 36-37 (Fla. 1992) (emphasis in original). Section 92.55 reinforces this conclusion, because it applies (if at all) only to cases of severe emotional harm, which was not shown in this case. Because section 92.53 does not expressly apply to homicide cases, the legislature and this Court intended to exclude such cases from its operation. Accordingly, reversible error occurred below when the trial court applied section 92.53 to a homicide case.

F. Ford's right to confrontation was violated

The videotaping violated Ford's right to confrontation because he did not confront the child witness face-to-face. "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." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). "[F]ace-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." Id. at 1020.

According to Maryland v. Craig, 111 L. Ed. 2d 666 (1990), the right to face-to-face confrontation is not absolute, but it is also not easily dispensed with. The state may deny defendants this right only if the denial "is necessary to further an important

public policy and only where the reliability of the testimony is otherwise assured." Id. at 682. In the present case, the denial of Ford's right to confront Tamara Alcendor failed this two-pronged test because a sufficiently important state interest did not exist, and the reliability of her testimony was not otherwise assured.

1. The reliability prong

The videotape did not preserve the basic elements and purposes of the confrontation clause and therefore did not satisfy the reliability prong of the test. The videotape was hearsay -- an out-of-court statement introduced in court for the truth of the matter. Even assuming arguendo that it qualified under a new hearsay exception for child witness testimony, this new exception was not firmly rooted in our jurisprudence. Because it was not firmly rooted, the hearsay was "presumptively unreliable and inadmissible for Confrontation Clause purposes," Lee v. Illinois, 476 U.S. 530, 543 (1986), absent a "showing of particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980).

Craig said that these guarantees of trustworthiness are shown in child hearsay cases when the other three elements of the confrontation right are preserved. "[T]he child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." 111 L. Ed. 2d at 682.

In the present case, only the demeanor element of the con-

frontation right was preserved. The oath element was not preserved because Tamara did not testify under oath, and the importance of testifying truthfully was not impressed on her. Because the camera was hidden, she did not even know that her statements were being videotaped for trial. Neither section 92.53 nor section 92.55 authorized hiding the camera.

The right to cross-examination also was not preserved, because, unlike Ohio v. Roberts, 448 U.S. 56, 71 (1980) and California v. Green, 399 U.S. 149, 165 (1970), defense counsel was "significantly limited . . . in the scope [and] nature of his cross-examination." The court allowed him to ask only a few simple questions gently, patiently, and non-aggressively. (R1598) These non-threatening questions might easily have encouraged Tamara to think she could lie without fear of being caught. The judge's order did not subject Tamara to normal cross-examination but rather protected her from it. Her testimony did not receive "to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." Craig, 111 L. Ed. 2d at 682.

The cross-examination element of the confrontation right therefore was not satisfied in this case. Only one of the four elements (face-to-face confrontation, demeanor, full cross-examination, and oath) was satisfied. Consequently, the statement was presumptively and constitutionally unreliable.

Idaho v. Wright, 111 L. Ed. 2d 638 (1990), which held that the totality of the circumstances surrounding the statement determined its reliability for constitutional purposes, buttressed this con-

clusion. Wright found that the consistency of the witness's statements was an important factor to consider when assessing their reliability. See Jaggers v. State, 536 So. 2d 321, 325 (Fla. 2d DCA 1988) ("[T]here appear to be serious problems with a trial judge determining such reliability of the out of court statements in the face of directly contradictory in-court or video taped statements under oath and introduced at trial.") Wright also found that corroboration by other witnesses or evidence was irrelevant to determining a statement's reliability.

In the present case, Tamara gave many inconsistent stories to the police and to Kuehnle. She first said that Sybil Ford committed suicide. A year later, the police asked her strongly leading questions, which may have influenced her answers and created false learned memories. (R839) She told the police that three shots were fired, that Ford stabbed Sybil with a knife, and that her cousin Crissy was present. None of these assertions could have been true. In therapy, she continued to tell Dr. Kuehnle different versions of the events, including a version that Sybil shot herself first before Ford shot her. (R845-46) On the Monday of trial, when she knew she was being videotaped, she refused to talk at all about her mother's death. Two days later, when she did not know she was being videotaped, she had a new version, including the critical new assertion for the State's premeditation argument that Ford loaded the gun while Sybil was in the room. (R830-31)

A person's statements cannot be reliable if they are constantly changing. The state could not overcome the presumptive unrelia-

bility of Tamara's out-of-court statements and guarantee their trustworthiness if her other statements were vastly inconsistent. Consequently, the reliability prong of the confrontation test was not met in this case.

2. The substantial state interest prong

The substantial state interest prong of the test also was not met. Craig found a substantial state interest in allowing child abuse victims to testify in child abuse cases without the additional trauma of confronting the person who committed the abusive acts against them. A rationale for this state interest is that, absent encouragement to testify, the abusers can often repeat the same acts against the same victims without fear of prosecution, because the victim's testimony or statements are typically essential to the apprehension and prosecution of child abusers. Moreover, society finds unfairness in forcing already abused child victims to suffer even more trauma while helping to bring their molesters to justice.

These rationales did not apply in this case, which involved homicide, not child abuse. Unlike typical child abuse cases, nothing in this case indicated that, unless Tamara testified, she would be subject to further instances of the same crime as that charged, i.e., homicide. She was not the object and victim of the crime and instead merely happened to be a witness. The state did not have to use her as a witness and in fact was fully prepared not to use her. The trial had already begun and jeopardy had already attached before the prosecutor knew whether she could testify. If the State's concern for her emotional well-being was so great, then

it should not have called her as a witness at all.

Moreover, the unfairness of having her testify about the events in this case was not different in principle from the unfairness in any case of having child witnesses testify about a crime and accuse the person they believe committed it. If Tamara's mere witnessing of a crime which had no special relation to her youth was enough to qualify her for videotaping, then all child witnesses could be videotaped in every case, as long as "moderate" emotional harm could be shown. The state's interest in protecting children, of course, extends to all cases, but, if the child will suffer only "moderate" harm from testifying, then the state's interest can at best outweigh the defendant's right to confrontation only in the special circumstances of the typical child abuse case.

In addition, Craig required a finding that the presence of the defendant himself would cause the trauma to occur. Consequently, section 92.53 is unconstitutional because it does not require such a finding.

> The trial court must also find that the child witness would be traumatized, not by the courtroom generally but by the presence of the defendant. . . . In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present.

Craig, 111 L. Ed. 2d at 685 (citations omitted).

In this case, despite repeated questioning, Dr. Kuehnle never said that Tamara would suffer moderate harm solely from her

father's presence. Instead, Kuehnle testified that the combination of her father's presence and the many people in the courtroom would cause the harm.

> A. I believe that this would be very upsetting to this child to be in a courtroom with strangers and to be presented with her father in the courtroom, that there are ambivalent feelings, that this child is fearful of him on one hand and has some attachment to him on the other hand. It's the only father she's ever known, and I believe it would be detrimental to her to bring her into this courtroom. (R1301) . . .
>
> Q. [T]he only added thing that would be occurring next week in court would be that the father would be present in the courtroom; is that correct?
>
> A. And many people present, yes. (R1306) . . .
>
> Q. [T]his child's discomfort level is going to be there no matter what. The only additional thing about the in-court that you really would be bothered by would be Mr. Ford's presence? . . .
>
> A. Correct. Mr Ford's presence and the people and the number of people that would be in the courtroom. . . . And the jury, there would be a lot of people. (R1308-09)

Kuehnle's view here that the combination of courtroom atmosphere and her father's presence would cause moderate emotional harm did not satisfy the Craig requirement that the harm be caused solely by the defendant's presence. Kuehnle's view did not exclude the possibility mentioned in Craig of having Ford present in the videotaping room with Tamara during her testimony. Consequently, Kuehnle's testimony was insufficient under Craig to justify violating Ford's right to confront the witness against him.

Kuehnle also mentioned that Tamara had said she did not want

to testify in front of her father. (R1310) This statement evidently made little impression on Kuehnle because Kuehnle did not remember it very well. (R1310) Based on his own impression of the statement, Judge Griffin found orally and in writing that Tamara had a "negative" reaction to testifying in open court before the defendant. (R1597) She dramatically "evidenced fear and apprehension." (R1330) A mere showing of a dramatic "negative" reaction, however, was not enough because children will always have a dramatic "negative" reaction to accusing others in court. According to Craig, "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" 111 L. Ed. 2d at 685 (citation omitted). The trial court's finding that Tamara had "negative" feelings of "apprehension" was insufficient to satisfy this Craig standard.

Craig did not decide what the minimum showing of emotional trauma was, but it approved the Maryland standard of "serious emotional distress such that the child cannot reasonably communicate." Id. The finding of "moderate" emotional harm in this case was not even close to the Maryland standard and was constitutionally insufficient to justify abridging Ford's confrontation rights. Section 92.53 is unconstitutional because its requirement of merely "moderate" harm does not meet the Craig standard. The "moderate" psychological inconvenience that Tamara may have suffered in this case was vastly outweighed by the potential harm to Ford, who was

literally fighting for his life at the time the decision to videotape was made.

The State failed to satisfy its burden of overcoming the presumptive unreliability of Tamara's out-of-court statements and failed to demonstrate a substantial state interest that outweighed Ford's right to confront the witness face-to-face. Accordingly, this right was violated, and this Court should affirm the Second District's decision.

G. Ford's right to due process of law was violated

Ford's right to due process of law under the Fourteenth Amendment and his right to confrontation under the Sixth Amendment were also violated because his actual presence while Tamara accused him was critical to his defense. Her videotaped testimony was the single most critical stage of this trial. A defendant has a due process right during critical stages of his trial "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Kentucky v. Stincer, 482 U.S. 730, 745 (1987), quoting, Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934).

Ford's presence at the videotape did have a reasonably substantial relation to his defense because his theory was precisely that Tamara did not start lying about him until after she was taken from him in December, 1988. During the year before that time, when she had been with him, she had never uttered these lies. Even on the Monday of trial, when she knew that her statements were being videotaped, perhaps for use against him, she did not repeat her

claims. Only when Ford was not present would she claim that he had killed Sybil Ford. Accordingly, his face-to-face confrontation during her testimony at trial was critical to his defense, because his theory was that she would not lie to his face. "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back'" Coy, 487 U.S. at 1019.

The State's theory naturally was different. The State believed that she told the truth only when she was not in Ford's presence, and his absence was therefore necessary to encourage her truthfulness. The State's theory, however, assumed that Ford was guilty, contrary to his constitutionally guaranteed presumption of innocence. Because he was presumed innocent before trial, his theory was entitled to greater weight than the State's theory, which presumed the opposite. His theory and his defense required his presence when Tamara testified, because his presence had a "relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." His absence from the most critical stage of this trial therefore violated his due process rights to make his defense and to confront the witnesses against him.

ISSUE II

THE EVIDENCE DID NOT EXCLUDE THE REASONABLE HYPOTHESIS THAT THE KILLING WAS NOT PREMEDITATED.

According to State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989),

> [a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. . . . The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

Ford presented two hypotheses of innocence. The first, that his wife committed suicide, was rebutted by Tamara's videotaped testimony that he shot his wife. He therefore did not move for acquittal on this ground, although it was and is still a valid argument for the jury. He moved instead for acquittal on the hypothesis that the evidence showed at best only second degree murder during an argument. (R862) Denying this motion was error because no evidence was inconsistent with this hypothesis. (R865, 968)

According to the State's view of the evidence, Ford was angry at his wife for giving him venereal disease and suspected her of having an affair. (R436-37) He came home with groceries and asked her to take them in, but she refused. (R234) He followed her into the house and found all of her clothes on the sofa. (R297, 318) She may have been leaving him for another man. He became angry, and they argued about who should take which children. (R2184-2185, 2189) They struggled in the kitchen, knocking over a plant.

(R2195-96) Upstairs, they still argued, and he took a gun and loaded it. (R2183-85, 2188-89, 2191, 2196-97) At some point, he shot her. (R713, 2183) Less than twenty minutes after entering the house, he ran out, upset and crying. (R236, 241) He asked his neighbor to call the police because his wife was dead. (R236, 241)

The evidence does not make clear the circumstances under which the death occurred, except that Sybil was shot in the corner of the bedroom, three feet off the ground. (R713) We have only the State's speculations about Rufus's state of mind. Consistent with the evidence, Rufus and Sybil could have been struggling on the floor and/or he could have fired the shot impulsively or accidentally. Proof merely of impulse was insufficient to establish premeditation. Asay v. State, 580 So. 2d 610 (Fla. 1991). If Rufus was standing over his wife, as the State hypothesized, then the shot would have been downward. It in fact entered at an upward angle (although her teeth might have deflected it). (R524-26, 784)

The only evidence arguably supporting premeditation and rebutting the hypothesis that Ford shot during a struggle without premeditation in the heat of anger over his wife's infidelity was Tamara's thoroughly impeached videotaped testimony -- which she had not previously told anyone -- that he loaded the gun while Sybil was in the room. Even this testimony, however, was not legally inconsistent with the hypothesis. Ford could have loaded the gun at some point with the intent to frighten Sybil, but he might never have had the premeditated design to kill her. Tamara did not say exactly when the gun was loaded. The record is totally silent

about Ford's state of mind when the shot occurred. It could have occurred during a struggle for the gun. He might have shot without intent to kill or, alternatively, with the intent to kill but without premeditated design.

Many cases have reduced a first degree murder charge to second degree when the evidence was as lacking as it was below. For example, in Jackson v. State, 575 So.2d 181 (Fla. 1991), as in the present case, the testimony did not show what occurred, except that the victim was shot with a gun during a robbery. This evidence did not exclude the possibility that the gunman fired a single shot without premeditation when the victim resisted the robbery.

In Hall v. State, 403 So. 2d 1319 (Fla. 1981), an officer and the two codefendants struggled over the officer's gun when it discharged from a distance of two to five feet away. One reasonable hypothesis not excluded by the evidence was that the officer struggled until one of the codefendants "pulled the trigger without intending to kill." Id. at 1321. Similarly, a reasonable hypothesis not excluded by the evidence in this case was that Ford "pulled the trigger without intending to kill" during a struggle.

In Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983), the defendant's wife wanted to leave him, just as Sybil may have wanted to leave Ford. During a quarrel between the defendant and his wife, he chased her stepfather down the street and repeatedly stabbed him. These events were consistent with the state's premeditation hypothesis, but also "equally consistent with the hypothesis that the intent of the defendant was no more than an

intent to kill without any premeditated design." Id. at 1006.

In Febre v. State, 30 So. 2d 367 (Fla. 1947), the defendant shot his wife's lover after finding them together nearly naked at their house. This was like the evidence below that Ford's wife had an affair and had given him venereal disease. The evidence in Febre did not exclude the hypothesis that the defendant acted without premeditation in the heat of passion. See also Jenkins v. State, 161 So. 840 (Fla. 1935) (premeditation not shown if defendant kills woman in anger after she bites him); Forehand v. State, 171 So. 241 (Fla. 1936) (killing not premeditated when defendant seized officer's gun and shot him in anger after the officer fought with the defendant's brother and fell to the ground on top of him).

Buford v. State, 403 So. 2d 943 (Fla. 1981), held that striking with a weapon and inflicting a mortal wound sufficiently warrant a verdict that the person intended the results. Buford, however, applied to striking the victim physically with a weapon and not to firing a gun. Moreover, unlike the present case, the evidence in Buford showed exactly what happened, that the defendant twice lifted a cement block and dropped it on the child victim.

Petitioner is unaware of any case convicting the defendant of premeditated murder on evidence as slender as that in the present case. Usually, the defendant makes incriminating statements, or the physical evidence is more substantial, or felony murder is charged. These circumstances were not present in this case. This Court should therefore reduce the charge to second degree murder.

ISSUE III

THE ABRIDGED DEPOSITION PROCEDURE VIOLATED FORD'S DISCOVERY RIGHTS.

As discussed on pages 16-20 of this brief, the court refused to allow the defense to conduct a full deposition of Tamara. The prosecutor relied on section 92.55, (R1176) but this statute was only a legislative resolution and was not operative. Moreover, as defense counsel pointed out, it did not allow restrictions absent a finding of severe emotional harm. (R1177) Significantly, section 92.53 did not allow restriction of depositions. Because the court found only that the harm was moderate, counsel was correct that restricting depositions was not statutorily justified.

Florida Rule of Criminal Procedure 3.220(l) likewise allowed restrictions on depositions only when necessary to protect witnesses from "harassment, unnecessary inconvenience or invasion of privacy." One full deposition would have constituted no more harassment or inconvenience than is present in every case. Rule 3.220(l), like section 92.53, allowed no discovery restrictions because of "moderate" emotional harm to the deponent.

Florida Rule of Criminal Procedure 3.220(h)(l) required the court to grant a second deposition "upon good cause shown." In this case, the defense did show good cause because the first deposition was restricted. The defense was entitled to one full deposition, which it never got.

By requiring the defense to submit questions in advance to be asked by Dr. Kuehnle in the judge's supervising presence, (R2068-

70) the court chillingly affected the discovery process. While the court did allow defense counsel to ask a few questions and asked whether he had other questions, (D21-22) the court did not allow a full discovery deposition and would have ended it had counsel gone much further in his questions. The purpose of this deposition was not discovery but a determination of Tamara's competence. (R2066) Defense counsel structured his proposed questions and time schedule accordingly. If defense counsel had known that this deposition was his only deposition, it would have lasted two or three hours rather than thirty or forty-five minutes. (R2221)

Florida's discovery rules disfavor trial by ambush and yet an ambush was exactly what the defense got. As both the prosecutor and the defense counsel said during trial but before the videotaping procedure began, they still did not know what the child would say. (R116, 118) Consequently, defense counsel was caught by surprise when he himself elicited Tamara's statement on the videotape that Ford had loaded the gun while her mother was in the room. (R2189-91) This statement was the only evidence arguably supporting premeditation in this case. Otherwise, the State's evidence supported at best only a charge of second degree murder during a domestic dispute.

Because the deposition procedure used in this case violated Ford's right to full discovery, the court erred by denying the defense request to depose Tamara. (R1598, 2221) Accordingly, this Court should affirm the giving of a new trial.

CONCLUSION

Ford asks for reduction of the charge to second degree murder and a new trial on that charge.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen A. Baker, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 15th day of September, 1992.

Respectfully submitted,

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