OA 1-6-93

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 79,220

RUFUS FORD,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar No. 0365645

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 261041

Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSELORS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

The People of the State of Florida have already decided that the protection of child witnesses, like Tamara Alcendor, from emotional and mental harm is a compelling state interest sufficient to impinge upon Appellee's confrontation rights. All this Court need do is recognize the same. Even if this Court were to discount the will of the People, the trial court should not be constitutionally barred from fashioning a procedure that preserves all the aspects of confrontation that the United States Supreme Court requires.

STATEMENT OF THE CASE AND FACTS

Appellant/Petitioner relies on the facts as recited by the Second District below. Appellant further relies on the additional facts as follows.

Tamara Alcendor was, herself, the victim of sexual abuse, some of it by Appellant. (R. 1151, 1244, 1291, 1302, 1310, 1929, 1930, 1977).

Dr. Kuenle was fully cross-examined regarding Tamara's variable memory before and after the video tapes were played. (R. 867-884) The trial judge clearly gave defense counsel the opportunity to ask additional question at the November 1, 989 deposition. (R. 2013) Page 11 of the November 1, 1989 deposition as supplemented.

Tamara knew that Ford and his wife had fought and that her mother was bleeding as a result. (R. 2195) This corroborated Dr. Lardizabel's testimony concerning other cuts and bruises on the victim aside from the gunshot wound. Tamara knew that Appellant had just bought the shotgun. (R. 2197)

The trial court, in an addendum to its original order authorizing the video taping of Tamara's testimony, specifically directed that Appellee be present at the taping so that he can effectively confer with his attorney's. (R. 1597, 1598, 1600)

Additionally, Appellant requests that this Court take judicial notice of the briefs of the parties below together with the contents of Exhibit's 18 and 19.

ARGUMENT

ISSUE

WHETHER THE PROTECTION OF A CHILD WITNESS FROM EMOTIONAL AND MENTAL HARM CAUSED BY FACE TO FACE CONFRONTATION WITH THE DEFENDANT IS A COMPELLING STATE INTEREST SUFFICIENT TO OUTWEIGH THE DEFENDANT'S RIGHT TO THE FACE TO FACE ASPECT OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The crux of the Second District's opinion in Ford v. State, 592 So.2d 271 (Fla. 2d DCA 1991) is that the video taped testimony of Tamara Alcendor violated Respondent's confrontation rights because the procedure employed by the trial court was not "statutorily authorized". The State of Florida suggests that such statutory authority exists sufficient to find a compelling state interest to override Sixth Amendment confrontation concerns and, even if such a statute is deemed insufficient, the compelling interest is sufficient to support a procedure that denies Petitioner the right to "face to face" confrontation.

Section 92.55, Florida Statutes specifically indicates that the People of the State of Florida have not found existing statutory authority sufficient to protect the interests of "children as witnesses in criminal, civil, or juvenile proceedings". In a detailed fashion, the People have called upon this very Court to enact rules sufficient to protect child witnesses under the age of 16 and have laid out the parameters under which a trial court, under practical, day to day operation, can effectively protect such children from emotional harm caused by "face to face" confrontation. 92.55(1),(2) and (3). The People of this state considered the protection of child witnesses

urgent enough to require "emergency rules". Yet, the Second District dismissed the will of the People as "nonoperative". Ford, at 275. Still, it is this very "nonoperative" enactment that allows this Court to find a state interest compelling enough to allow Tamara Alcendor to testify without having to face the man who gunned a hole through her mothers face.[1]

Under constitutional law, it has long been the case that where fundamental rights are involved, any limitation upon those rights must be accompanied by a compelling state interest. See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, 178 (1973) It is not necessarily the legislature that has the last word in defining the scope of what interests it deems compelling. The courts have the last word on what constitutes a compelling interest. In Roe, the state's interest in regulating a woman's fundamental privacy right to an abortion did not become compelling until the third trimester. In other words, the High Court found and defined the fundamental right and, essentially, wrote the statute (or its parameters) for the states. Nonetheless, no one can call the finding of a fundamental right or a compelling state interest by a court to be legislation. Although faced with nothing less compelling than a finding that little Tamara would suffer at least moderate emotional harm, the Second District was unwilling to find a compelling state interest in shielding her from a "confrontation" with her murderous

---

[1] On review below, Appellant Ford admitted that he was, at best only guilty of second degree murder. In other words, he admitted that he committed murder but only quarrelled with its degree. See Brief of Appellant below at P. 16.

father. Appellant suggests that this Court might, when shown the way, feel as the People of the State of Florida do, that Tamara Alcendor's welfare is at least compelling enough to warrant a limited intrusion upon Appellee's confrontation rights.

The Second District was unwilling to legislate a compelling state interest in protecting child witnesses outside the confines of sexual or child abuse cases, no matter how serious the crime, because the legislature had not actually made Section 92.55 operational. No such legislation was, however, required. The case conflicting with the Second District's opinion, Hernandez v. State, 597 So.2d 408 (3rd DCA 1992) had no problem finding a compelling reason to affirm the protection of a child witness to a heinous, violent crime. Without even acknowledging the existence of Section 92.55, the Third District turned to Ashley v. State, 265 So.2d 685 (Fla. 1972) for the proposition that "the trial court's use of a procedure not specifically authorized by statute or rule of court does not automatically entitle a defendant to a new trial". Thus, the Ashley court found that denial of live, face to face confrontation does not constitute the sort of *per se* error envisioned by the Second District. The lack of a statute authorizing the video-taping of a child witness' testimony in a non sex or abuse case was of no particular import where it is clear that a compelling state interest exists. The Third District cited to Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1991) for the concept that it is the compelling interest (as opposed to the existence of a statute) that allowed the trial court to fashion a

procedure that preserved the key aspects of confrontation yet preserved the emotional integrity of the child. See Craig, at footnote 3. Accordingly, when one couples the Peoples intent and acknowledgment of a compelling state interest as embodied in Section 92.55 with this Court's view in Ashley, it is clear that the Second District need not have imposed such an absolute bar to the use of child witness testimony outside the confines of allegations of sexual or child abuse.

This Court may also look to other statutory authority outside of the Sections 92.53,54, and 55 scheme in order to determine that a compelling state interest exists. Section 827.04(2) defines "child abuse" as follows:

> Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, ... or who knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Given the mental health testimony adduced at trial, there can be no doubt that Tamara Alcendor suffered mental injury by the sight of seeing her mother bloodily gunned out of life by Ford. If mental injury to a child is sufficient to warrant a misdemeanor conviction, then, surely, such mental harm is sufficiently compelling a reason for this Court to save little Tamara Alcendor from the sort of face to face confrontation the Second District requires her to endure.

The basic thrust of the State's case before this court is aimed at the complete bar the Second District put upon a child

witnesses video taped testimony as preserved for courtroom presentation, absent the "face to face" aspect of confrontation. However, the Second District drove yet a further stake into the heart of child witness testimony. It totally decried the procedure and finding's of the circuit court. The Second District shifted its focus to the lack of face to face confrontation and what it felt to be "severely limited" cross-examination amounting to "no cross examination at all". Ford, at 275. With respect to what the district court felt to be inadequate cross-examination, one need only examine the two video tapes as shown to the jury in Exhibit's 18 and 19. The defense "had at" Tamara almost exclusively. That the trial court ordered defense counsel to examine Tamara gently, patiently, and non-aggressively was only a common sense recognition of her "tender years" and that depositions "become fishing expeditions" that "wander all over heck and back". That defense counsel did not have an adequate opportunity to cross examine Tamara is belied by the record. After all, the judge clearly indicated that Tamara's "deposition" was going to be taken and the court clearly gave counsel the opportunity to ask additional questions at the November 1, 1989 discovery deposition. (R. 2013) Page 11 of the November 1, 1989 deposition as supplemented.

Apparently, the Second District felt that a child of tender years is supposed to be cross examined just as if she were an adult. The Constitution imposes no such requirement. The Confrontation Clause only ensures a defendant an opportunity for cross examination.

> Of course, the Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish". (Emphasis supplied, citation omitted).

Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631, 643 (1987). See also Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674,683 (1986):

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Below, the Second District opined that the trial judge's common sense admonition to, basically, not badger the poor child denied Appellee virtually any cross-examination. Yet, as noted above, not only was defense counsel given the full opportunity to ask more questions of Tamara, but Appellee himself was afforded the opportunity to be present so that he could consult with his attorneys. (R. 1597, 1598, 1600). Any speculation that defense counsel may have felt compelled to refrain from asking any further questions is not a matter to be considered on direct appeal and should be best left up to an appropriate motion for post-conviction relief. Accordingly, inasmuch as Appellee was given the opportunity to cross-examine, as opposed to badger, harass, or delve headlong into the irrelevant, this Court is

asked to outright reverse the findings of the Second District concerning its conclusion that Tamara was not cross-examined "at all".

Moreover, the Second District decried the lack of findings that Tamara's statements were "trustworthy", especially absent an oath or other indicia that she was telling the truth. Yet, whenever a court admits hearsay evidence, totally absent any of the findings and safeguards that are present in this case, few will quarrel that the out-of-court hearsay declarant was not under oath at the time the statement was made. Although the Rules of Evidence allow for the introduction of hearsay under the recognized assumption that a particular exception exists because the statement can be deemed trustworthy, many billions of lawyers words have no doubt been spent attacking the credibility and reliability of such ostensibly trustworthy statements. In this case, both the trier of fact and the judge were exposed to all the vagaries of Tamara's recollection of events with much of her testimony preserved on video tape. Can the same be said of the ordinary out-of-court hearsay statement? Of course not. Thus, why place such an artificially high threshold of constitutionality on a procedure that has so thoroughly explored all aspects of Tamara's trustworthiness? The procedure below allowed Appellee to confer with his lawyers during the depositions, subjected Tamara to the opportunity to be cross-examined, exposed all of her variances to the trier of fact so that counsel could argue about them, and even produced, via video tape, Tamara so that the jury could observe her demeanor while

testifying. This Court in Glendening v. State, 536 So.2d 212 (1989) indicated that a child's video taped statement made under the structures of Sections 92.53 and 54 is NOT hearsay. Surely, if hearsay testimony of testimony taken under Sections 92.53 and 54 doesn't violate the Constitution, neither does Tamara's.

Finally, the Second District made much ado over the fact that Tamara, during her last deposition, did not know she was being video taped. The court felt that, somehow, this lack of knowledge was responsible for the change in Tamara's testimony from previous episodes. Since when does the average, run-of-the-mill, out-of-court hearsay declarant understand that his or her statements will one day become critical testimony at trial? How often is there a video camera around when a coconspirator makes statements implicating his co-criminal? In short, the Second Districts' own interpretation of the facts, when compared to the realities of day to day trial life, is simply absurd. If anything, the ease of the situation Tamara found herself in during the last deposition may just as well have accounted for the truthfulness of her testimony. Accordingly, this Court is also asked to reverse the "factual findings" of the Second District on this point as well.

CONCLUSION

Nothing prevents this Court from admitting that there is a compelling state interest at least equal to the magnitude of the interests protected by Sections 92.53 and 54 so as to allow for the avoidance of the face to face aspect of confrontation. Section 92.55 is ample evidence that the People of the State of

Florida deem Tamara's interests to be compelling. Although this Court has not taken the action requested by the legislature in Section 92.55, it now has the opportunity to do so. The Constitution does not forbid the avoidance of face to face confrontation where, as here, emotional trauma will be the likely result.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar # 0365645

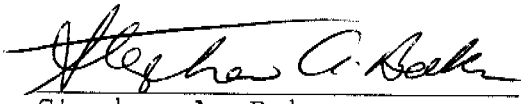
PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 261041

Westwood Center
2002 N. Lois - 7th Floor
Tampa, Florida 33607
(813) 873-4739

Counselors for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Stephen Krosschell, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, FL 33830, this 20th day of August, 1992.



Stephen A. Baker