IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,882

DCA CASE NO. 90-1522

RICARDO HERNANDEZ,

Petitioner,

-vs-

THE STATE OF FLORIDA

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, RICARDO HERNANDEZ, was the Defendant in the trial court and the Appellant in the District Court of Appeal, Third District. The Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal. In this brief, the Appellant will be referred to as Petitioner and the Appellee as the State.

The symbol "R" will designate the 513 page record on appeal forwarded to this Court by the District Court of Appeal, while the symbol "TR" will designate the 2472 pages

of trial court transcripts similarly transmitted to this Court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner was tried for and convicted of first degree felony murder, conspiracy to commit burglary, armed burglary, armed kidnapping, and attempted robbery. (R.509). The charges against the Petitioner stemmed from events that occurred during a home invasion burglary involving several people. (R.510). Two Codefendants entered guilty pleas and testified at the Petitioner's trial about his participation in the charged crimes. (R.510). The defense raised was that the Petitioner had been misidentified by the non-accomplice witnesses and that the accomplice witnesses were lying about the Petitioner's involvement in the incident. (TR.1994-2100).

Prior to trial, the State filed a motion to permit the victim's two children, David and Andrea, ages 8 and 11, witnesses to the murder, to testify by way of closed-circuit television. (R.510). The motion relied explicitly on §92.55, Florida Statutes (1989). (R.302-303). After considering the testimony of a psychologist who had examined the children, the Court ruled that they would suffer severe emotional harm if they were required to testify in open court. (R.510). The trial court permitted the children to testify from the Judge's chambers by way of one-way closed-circuit television. (R.510).

David remembered being at home in his room on the night in question. (TR.1511). David got up from bed that night when he heard a shot or crash. (TR.1513). At that time, a man came to David's room with a gun in his hand and forced David to go to the living room. (TR.1513). In the living room, the man made David sit on the sofa with his mother. (TR.1514). The man then went and forced David's sister Andrea into the living room. (TR.1514-15). David and Andrea sat on the sofa with their mother, and the man asked for money. (TR.1515-16). David's mother told the man not to kill her children, and, while the man was standing to the left, he shot David's mother. (TR.1516-17). Andrea then left the house to call the children's aunt, and David remained in the house. (TR.1518). David and

Andrea later stayed with their Aunt Beatrice. (TR.1519).

While staying at Beatrice's house, the children were visited by a police artist. (TR.1520). The artist had Andrea describe the man who shot her mother and drew a picture based on her description. (TR.1484, 1520). The artist then showed this "composite" sketch to David who identified it as the man who shot his mother. (TR.1520). This sketch was introduced into evidence. (R.402; TR.1521). The prosecution later argued that the sketch represented a rough likeness of the Petitioner. (TR.2104-05). David also testified about his identification of the Petitioner from a six-person photo lineup shown to him by Detective Koslowski in South America about a year after the shooting. (R.403; TR.1522, 1844).

David remembered that one black man and two white men in masks were in his house on the night of the shooting. (TR.1525). David testified that the man who shot his mother held the gun in his left hand when he fired the shot. (TR.1531). On cross-examination, David remembered that his mother sat in between his sister and him to David's left when she was shot. (TR.1532-33). David was looking at his mother and did not look at the man when he shot David's mother. (TR.1533). David did claim, however, that he looked at that man's face for "many hours." (TR.1534). David admitted that he had stated in a deposition that the man who shot his mother was wearing a stocking on his face and that all the men in the house that night were white. (TR.1535-36).

Andrea Acosta was awakened at 12:35 a.m. by the sound of broken glass and shots being fired. (TR. 1480). A man with a gun took Andrea from her bedroom to the living room where her mother and brother were sitting on the sofa. (TR.1481). While they sat on the sofa, the man with the gun shot Andrea's mother, and Andrea then ran to her next door neighbor's house. (TR.1483). Andrea remembered describing the shooter to the police artist and described the "composite" picture as looking like the man who shot her

mother. (TR. 1484-90). Andrea remembered speaking to Detective Garafalo but did not recall telling him that all of the men in the house that night were white latin men. (TR.1495). Andrea said that her brother told her that she was wrong when she made this comparison. (TR.1496). Andrea could not remember if the shooter was wearing a mask that night. (TR.1501).

On appeal, the Petitioner argued that the trial court violated his right to confrontation under the United States and Florida Constitutions in allowing the children to testify by way of closed-circuit television. (R.510-511). The Petitioner contended that the absence of an enabling statute or rule permitting such testimony rendered the trial court's ruling subject to reversal and cited *Ford v. State*, 592 So.2d 271 (Fla. 2d DCA 1991) in support of this position. (R.511). The Petitioner also argued that the method used to present the children's testimony did not comply with confrontation clause requirements, as set forth in *Maryland v. Craig*, ____ U.S. ____, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990). (R.511).

The Third District Court of Appeal affirmed the Petitioner's conviction and upheld the trial court's ruling. The Third District rejected the argument that, since §92.55 was a non-operative statute, there was no legal authority to legitimize the presentation of close-circuit testimony in a homicide case and certified conflict with *Ford v. State, supra*, and the Second District Court of Appeal on this issue. (R.511). The Third District ruled that the Petitioner had to show that the use of closed circuit testimony denied him due process of law in order to succeed in his demand for a new trial. (R.511). The Third District found no such due process violation and also held that the closed circuit testimony procedure employed at trial did not amount to a violation of the Petitioner's right of confrontation. (R.511-13).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN UPHOLDING THE TRIAL COURT'S DECISION TO ALLOW TWO CHILD WITNESSES TO TESTIFY VIA CLOSED CIRCUIT TELEVISION IN A NON-SEXUAL ABUSE CASE AND, IN SO DOING, VIOLATED THE PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in upholding the trial court's decision to allow the witnesses in question to testify *via* closed circuit television. The statute cited by the trial court in support of its decision, §92.55, is specifically non-operational and has never been approved by this Court. The District Court of Appeal failed to take into consideration the unique provision of the Florida Constitution which places trial court rule making authority in this Court. Since this Court never approved §92.55 and the closed circuit testimony amounted to a violation of the Petitioner's constitutional right to confrontation, this Court must reverse and remand for a new trial.

ARGUMENT

THE DISTRICT COURT ERRED IN UPHOLDING THE TRIAL COURT'S DECISION TO ALLOW TWO CHILD WITNESSES TO TESTIFY VIA CLOSED CIRCUIT TELEVISION IN A NON-SEXUAL ABUSE CASE AND, IN SO DOING, VIOLATED THE PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The trial court was incorrect in allowing the closed circuit testimony to occur. The statute which the trial court relied upon to allow the closed circuit testimony, §92.55, is a statute in which the Florida Legislature requested this Court to adopt amendments to the Rule of Criminal Procedure allowing a trial judge to "enter any order necessary to protect a child under the age of 16 who is a victim or witness in any judicial proceeding." This statute was merely a recommendation, however, and this Court, to date, has not adopted the rules recommended. Consequently, the statute was and is a nullity, and the trial court had no basis for this ruling. The closed circuit testimony amounted to a violation of the Defendant's constitutional right to face-to-face confrontation. *See Maryland v. Craig*, ____ U.S. ____, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988).

In *Maryland v. Craig, supra.*, the United States Supreme Court ruled that, while an accused's constitutional right to face-to-face confrontation is not easily dispensed with, the prosecution may deny it if the denial "is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.*, ____ U.S. at ____, 110 S.Ct. at 3166, 111 L.Ed.2d at ____. In the present case, the denial of the Defendant's right to confront the child witnesses failed this two-pronged test because a sufficiently important state interest did not exist and the reliability of the testimony in question was not otherwise assured. Accordingly, the Defendant's constitutional rights were violated.

§92.55, Florida Statutes (1989) states, in relevant part, as follows:

> 92.55 **Judicial or other proceedings involving child victim or witness under the age of 16; special protections.--** The Legislature finds that rule 3.220, Rules of Criminal Procedure, Rule 1.280, Rules of Civil Procedure, and Rule 8.070, Rules of Juvenile Procedure, as such rules pertain to protective orders, are not adequate in protecting the interests of children as witnesses in criminal, civil, or juvenile proceedings. Accordingly, the Legislature requests the Supreme Court, pursuant to the authority vested in the court by s.2(a), Art. V, State Constitution, to adopt, as emergency rules, amendments to the Rules of Criminal Procedure, the Rules of Civil Procedure, and the Rules of Juvenile Procedure, providing for the following:
>
> > (1) Upon motion of any party, upon motion of a parent, guardian, attorney, or guardian ad litem for a child under the age of 16, or upon its own motion, the court may enter any order necessary to protect a child under the age of 16 who is a victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm. Such orders shall relate to the taking of testimony and shall include, but not be limited to:
> >
> > (a) Interviewing or the taking of depositions as part of a civil or criminal proceeding.
> >
> > (b) Examination and cross-examination for the purpose of qualifying as a witness or testifying in any proceeding.
> >
> > (c) The use of testimony taken outside of the courtroom, including proceedings under §§90.90 and 92.54. (footnote omitted).

The Legislature included §92.55 in Chapter 85-53, Laws of Florida. Chapter 85-53 also included language amending §92.53, Florida Statutes (1989) (Sexual abuse or child abuse case; videotaping or testimony of victim or witness under age 16) and establishing §92.54, Florida Statutes (1989)(Use of closed circuit television in proceedings involving sexual offenses against victims under the age of 16) and §90.803(23), Florida Statutes (1989) (Hearsay exceptions; statement of child victim). This court has upheld

§§90.803(23), 92.53, and 92.54 against constitutional attacks. *See Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed. 2d 569 (1989); *Perez v. State*, 536 So.2d 206 (Fla. 1988), *cert. denied*, 492 U.S. 923, 109 S.Ct. 3253, 106 L.Ed. 2d 599 (1988). The Legislature did not include language requesting Supreme Court adoption, "pursuant to the authority vested in the court by §2(a) Art V, State Constitution," in any of the other pieces of legislation included within Chapter 85-53.

In *Ford v. State*, 592 So.2d 271 (Fla. 2d DCA 1991), the Second District Court of Appeal ruled that the "non-operative" nature of §92.55 made it inapplicable in a case in which the State used the statute to introduce the videotaped testimony of the Defendant's stepdaughter in a first degree murder case. The *Ford* court noted that the legislature had restricted the procedures contained in §§92.53 and 92.54 to child abuse/sexual abuse cases and that there was no statute or other authority which provided for the use of videotaped testimony in a homicide case. *Id.* at 275. The *Ford* court noted that the use of videotaped testimony in the absence of legal authority contravened the Defendant's right to confrontation. *Id.* In discussing §92.55, the *Ford* court noted that:

> Section 92.55 is a non-operative statute as the legislature did not act. We decline the state's invitation to legislate, deferring to the body in whose province such action would be more properly addressed.

Id. The reasoning and analysis of *Ford v. State* were sound and apply with equal force in the instant case.

In its opinion below, the Third District rejected the reasoning of *Ford v. State* and cited to *Ashley v. State*, 265 So.2d 685, 692 (Fla. 1972) for its ruling that "the trial court's use of a procedure not specifically authorized by statute or rule of court does not automatically entitle Defendant to a new trial. (R.511). This principle, and the rule espoused in *Ashley* are inapplicable to the instant situation.

Ashley v. State, *supra*., concerned a situation in which the trial court allowed a jury

to return a "split verdict" in a first degree murder/death penalty case. *Id.* at 690. Specifically, the trial court instructed the jury that it was first to retire and deliberate on the issue of guilt only; in the event that the verdict was one of guilty as charged, the trial court would then allow the parties to present penalty evidence and direct the jury to retire a second time and consider the issue of penalty. *Id.* Since, at the time of the trial, there was no Florida Statute governing the procedure to be employed in a death penalty case, the trial court had no statutory authority to conduct this "bifurcated trial." *Id.* at 692. The *Ashley* court noted that the Florida Legislature had enacted a law providing for bifurcated trial procedures in a death penalty case subsequent to Ashley's trial. *Id.* In affirming *Ashley's* conviction, the Court noted that "[t]he split verdict procedure in this case not only did not prejudice the Appellant, but in fact gave him a second chance to convince the jury that he should not receive the death penalty." *Id.* at 692.

In the instant case, the trial court allowed the State to present closed circuit testimony on the authority of a statute which was not only non-operative but was also specifically conditioned upon its adoption by this Court pursuant to its rule making authority under Article V, §2(a) of the Florida Constitution. This is unlike the *Ashley* situation where the trial court was guided by a *tabula rasa* and subsequent legislative enactments actually validated the trial court's actions. When the Legislature placed the conditional language in §92.55, it was not only deferring to this Court's rule making authority but was also placing all parties on notice that the suggested revisions were procedural in nature and were to be placed into effect by the Supreme Court of Florida -- not Florida trial courts.

Article V, §2(a) of the Florida Constitution states in relevant part:

> The Supreme Court shall adopt rules for the practice and procedure in all courts . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Inherent in this requirement is the conclusion that the Legislature does not have the power to enact or adopt rules for practice and procedure. *Carmel v. Carmel*, 282 So.2d 9 (1973). While the Legislature may regulate matters of substantive law, *e.g. Vaught v. State*, 410 So.2d 147 (Fla. 1982), it may not attempt to govern practice and procedure. *See Bernhardt v. State*, 288 So.2d 490 (Fla. 1974). In this case, the Legislature **specifically recognized** that §92.55 intruded into the Constitutional sphere of this Court and requested that the Court adopt it as a rule of procedure. The Court's failure to satisfy the Legislature's request rendered §92.55 a nullity.

The District Court's reliance upon the case of *Gonzalez v. State*, 818 S.W. 756 (Tex. Crim. App. 1991)(en banc) as authority for its decision below also must be re-examined in light of the unique Florida Constitutional provision set forth in Article V, §2(a). While the *Gonzalez* court allowed a child witness to testify outside of the Defendant's presence in the absence of specific statutory authority, it did not have to confront a situation where the Legislature's recommendation was specifically conditioned upon the approval of the Texas Supreme Court and the Supreme Court had failed to act. While Texas trial courts may be allowed more leeway in experimenting with trial procedures, in Florida -- and especially in this case -- the State Constitution gives this Court the responsibility of governing trial procedure.

The District Court opinion in this case also misapplied the Confrontation Clause test described in *Maryland v. Craig*, ___ U.S. ___, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990). To begin with, the reliability of the children's testimony was not assured to the point of allowing them to testify outside the presence of the Defendant. The children's pretrial statements, identifications, and lack of identifications placed their trial testimony in serious doubt. The Defendant's attempts to present expert testimony to show that the children were not competent to make identifications was rebuffed by the trial judge.

(TR.2014-2030). The inconsistencies in the childrens' statements were important in assessing their reliability. *See Idaho v. Wright*, ____ U.S. ____, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *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.")

Furthermore, the substantial state interest prong of the test was not satisfied in this case. The substantial state interest underlying §§92.53 and 92.54, Florida Statutes (1989), which allow videotaped and closed circuit testimony in sexual abuse or child abuse cases, does not apply in this case. In these types of cases, a rationale for the state interest is that, unless these victims are encouraged 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 unnecessarily even more trauma while helping to bring their molesters to justice.

These rationales do not apply in this case, which involved homicide, not child abuse. Unlike typical child abuse cases, nothing in this case indicated that, unless the children testified, they would be subject to further instances of the same crime as that charged. i.e., homicide. They were not the objects and victims of the crime and, instead, merely happened to be witnesses. The prosecution did not have to call the children as witnesses in this case and, in fact, at one point during this case's pendency, announced that it did not intend to call the children at trial. (TR.33, 452). The trauma which these children were subjected to was the product of reliving a horrible experience and would occur regardless of whether they testified in open court or the trial judge's chambers. Altogether, the state interest in presenting the testimony in question via closed circuit television was, at best,

minimal.

In conclusion, the District Court of Appeal opinion in this case was deficient in several important respects. The District Court failed to recognize that §92.55 was not only non-operational but also conditioned upon this Court's approval. Thus, the trial court's reliance upon §92.55 was not only misplaced but non-sanctioned. The Petitioner's constitutional right to confrontation was therefore violated in this case. The use of closed circuit television to present the testimony of the child witnesses in this homicide case was done without authority and caused prejudice to the Petitioner. This Court must reverse the decision of the District Court of Appeal and remand this cause for a new trial.

CONCLUSION

Based on the foregoing argument and citations of authority, the District Court of Appeal's decision should be reversed and the cause remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Suite N-921, Miami, Florida 33128 this 7th day of July, 1992.

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