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

RESPONDENT'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 Third District Court of Appeal of Florida. The Respondent, the **STATE OF FLORIDA**, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal of Florida. In this brief, the Petitioner and the Respondent will be referred to respectively as the Defendant and the State. The symbol "R" will designate to the record on appeal and the symbol "T" will designate to the transcript of the trial court proceedings.

STATEMENT OF THE CASE

On March 16, 1988, the Defendant, **RICHARDO HERNANDEZ,** was indicted by the grand jury of Dade County for conspiracy to commit burglary, armed burglary, armed kidnapping, attempted armed robbery, and first degree murder.[1] (R. 5-8a). The co-defendants named in the indictment were Rene Alonso, Luis Dominguez, Nestor Trimino, and Juan Antonio Mendiola. It was alleged in the indictment that these offenses occurred between January 10 and 15, 1988. (R. 5).

Trial by jury commenced on February 27, 1990 and on March 9, 1990, the Defendant was found guilty as charged. (R. 34-35, 467; T. 2247-2248). On May 17, 1990, the Defendant was sentenced to five years imprisonment for conspiracy to commit burglary, twenty-five years imprisonment with a three year minimum mandatory sentence for armed burglary with a firearm, twenty-five years imprisonment with a three year minimum mandatory sentence for armed kidnapping with a firearm, fifteen years imprisonment for attempted armed robbery, and life imprisonment with no possibility for parole for twenty-five years for first degree murder. The sentences for all five counts were to run concurrently. (R. 494; T. 2469-2470).

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1 This indictment superseded the indictment of February 24, 1988.

On appeal to the Third District Court of Appeal, the Defendant argued inter alia that his constitutional right to confrontation had been violated as the trial judge had allowed two child witnesses to testify via closed circuit television.[2] The Third District Court of Appeal affirmed the Defendant's conviction and held that the Defendant's right to confrontation had not been violated as the use of the closed circuit television procedure was precipitated by important public policy considerations. Moreover, the trial judge had made a case-specific finding that the children would suffer severe emotional harm if forced to testify in front of the Defendant. The Third District found that the reliability of the testimony of the children was ensured as the testimony was made under oath following a determination that the children were competent to testify, the testimony was subject to contemporaneous cross-examination, and the judge, jury and the Defendant were able to observe the children's demeanor.

On May 14, 1992, the Defendant served his notice of intent to invoke the discretionary jurisdiction of this Court, citing the Third District's certification of conflict with Ford v.

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2 There were two other issues raised by the Defendant in his appeal to the Third District Court of Appeal. The Defendant contended that statements made by the prosecutor in closing argument deprived him of a fair trial. Additionally, the Defendant asserted that the trial court abused its discretion in excluding the testimony of the Defendant's expert witness, Dr. Dorita Marina, who was to testify about the children's competency to make an accurate and reliable identification. The Third District Court of Appeal found these arguments to be without merit.

State, 592 So.2d 271 (Fla. 2d DCA 1991), rev. granted, No. 79,220 (Fla. July 6, 1992). On June 12, 1992, this Court entered an order postponing a decision as to this Court's jurisdiction to review the opinion of the Third District Court of Appeal and ordered that briefs be served on the merits.

STATEMENT OF THE FACTS

Prior to the commencement of trial, the State moved the trial court to issue an order allowing for the testimony of David and Andrea Acosta, ages eight and eleven, to be presented via closed-circuit television. (R. 301-306). In support of this motion, the State presented the testimony of Dr. Alvarez, a clinical psychologist. Dr. Alvarez testified that he had evaluated the children and had concluded that they would suffer severe emotional harm if forced to testify in open court. (T. 438). Specifically, the children had told Dr. Alvarez that they did not want to testify in front of the individual who killed their mother. (T. 426-427). After argument from both parties, the trial court determined that the children would suffer severe emotional harm if they testified in open court in front of the Defendant and thus granted the State's motion for the use of the closed-circuit television procedure.

At trial, the State introduced the testimony of fifteen witnesses. The defense introduced the testimony of five witnesses including the Defendant.[3] The first witness to testify for the State was Tim Ross, a Detective for the Metro Dade Police Department who was a neighbor of Angela Acosta, the murder victim. (T. 1326).

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[3] The Defendant, Ricardo Hernandez, was known as "el negro". (R. 1).

Detective Ross testified that on January 13, 1988 at approximately 12:30 a.m., he heard the sound of breaking glass coming from his back yard. (T. 1328). He called "911" and then heard more breaking glass followed by a disturbed female voice speaking in Spanish. Two rounds of gunshots were fired and Detective Ross determined that the gunshots and screams were coming from the house directly behind his. (T. 1329-1331). He hypothesized that the second round of gunshots came from inside his neighbor's house as they were not as loud as the first round.

The second witness to testify for the State was Maggie Perez, the next door neighbor of the murder victim. (T. 1349). At approximately 1:00 a.m. she heard two rounds of gunshots. (T. 1350). Moments later she heard knocking at her front door and opened the door for Andrea Acosta, her eight year old neighbor who was yelling and crying and who stated that her mother was dead. (T. 1351-1354). Ms. Perez immediately called "911" and told the operator that someone was being murdered next door. (T. 1354). David Acosta, Andrea's six year old brother, eventually joined Andrea at the Perez's home where they later spoke to a police officer. (T. 1357-1359).

Gerald Reichardt, an identification technician with the Metro Dade Police Department Crime Scene Investigations Bureau, testified that he went to the scene of the homicide and met with Detective Ross who took him on a tour of the exterior of the

scene. On the outside of the Acosta home, Officer Reichardt noticed that a telephone service box cover had been removed and that the wires had been "yanked" out of the inside of the box. (T. 1375). A fingerprint was found on the inside of the box which was on the ground next to the house. (T. 1381). A scissor-type jack was also found on the outside under the broken window on the east side of the house. Officer Reichardt determined that this had been the point of entry. (T. 1387).

In the rear of the house there was a door with iron bars which had also had its window smashed. The blinds on this window were twisted and bent in various directions and there were traces of blood on the end of these blinds. (T. 1392). Officer Reichardt determined that this was not an additional point of entry as the iron bars on this window were still intact thus making entry impossible. (T. 1393).

Inside the house, Officer Reichardt noticed blood stains on the tiles covering the porch or foyer area in the front of the house. In the master bedroom of the house Officer Reichardt found blood on the headboard, on a man's jacket which was still hanging on a hanger, and on a large purse. The closet in the master bedroom was in complete disarray and appeared to have been through a "major ransacking." (T. 1404). The attic door which was located in the ceiling of the closet in the master bedroom, was out of place and insulating material from the attic was

scattered throughout the closet. (T. 1406). There was a safe inside this closet which looked like it had not been opened. (T. 1409). This safe which was opened later by the police, contained a grey bag filled with money. (T. 1409-1410). In the master bedroom was a cradle for a cordless telephone. (T. 1411-1412).

Officer Reichardt testified that the house was a complex crime scene. Blood samples were taken from locations throughout the house and were submitted to the Serology Department of the Crime Scene Investigations Bureau.[4] The victim, Angela Acosta, was found in the living room area slumped on a love seat positioned against the south wall of the house. The victim was dressed in a pair of blue jeans which were unbuttoned, a Mickey Mouse sweatshirt and one sock. The mate of this sock was found down the hallway near one of the children's bedrooms. (T. 1428-1430). On the outside of the victim's left arm was a bloodstained area which was the result of a gunshot wound. (T. 1430-1431). Other than the blood of the victim, there was no other blood found in the living room area. (T. 1432). Under the victim's arm was the receiver of the telephone cradle that was located in the master bedroom. The phone system in the house was not functional. (T. 1433).

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[4] Toby Wolson, a criminalist with the Serology Department of the Metro Dade Police later testified that the blood samples taken from throughout the house were consistent with the blood of Mr. Alonso. (T.1682-1691).

During cross-examination Officer Reichardt testified that the fingerprint lifted from the inside of the telephone box belonged to Rene Alonso.[5] (T. 1437-1441). He stated that the house was entered through the window on the east side of the house by someone who was thin as the iron bars were only seven and a half inches from the wall of the house.

The two children, Andrea and David Acosta, who were present when their mother was murdered, both testified via closed circuit television from the judge's chambers. Prior to their testimony, the State outlined the agreement it had reached with the Defendant regarding the procedure to be used with the closed circuit television. The prosecutor explained,

> Before you notice that it was agreed between Mr. Casabrielle [defense attorney] and counsel for the State that even though Coy versus Iowa in adequate, the supreme C.O.Y versus U.S. Supreme Court requires that the testifying child be able to see the Defendant. [sic].
>
> That in this particular case, it is agreed that the camera will be turned off. In this case, and in return, quid pro quo here, in return the defense will not be asking either Andrea or David Acosta to stand in the courtroom and identify the person who shot their mother. [sic]. (T. 1474)

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5 This testimony was consistent with that of Charles Pardee, a fingerprint technician with the Metro Dade Police Department, who also identified this fingerprint as Mr. Alonso's. Technician Pardee further testified that no fingerprints belonging to the Defendant were found at the crime scene. (T.1679-1682).

The children subsequently testified under oath and were subject to contemporaneous cross-examination. (T. 1477). The jury and the Defendant watched the testimony from the courtroom. Pursuant to the stipulation, the children could not see the Defendant who was able to electronically communicate with his attorney.

Eleven year old Andrea testified that she woke up at 12:35 a.m. on the day of the shooting because she heard gunshots and glass breaking. (T. 1480). She got out of her bed, opened her bedroom door, saw a man with a gun, and thus immediately shut her door. (T. 1481). This man opened Andrea's door and pushed her to the floor. Andrea was then taken by this man to the living room where her mother and brother were and was pushed on the sofa. (T. 1481). This man stood behind the sofa and Andrea's mother, the murder victim, asked him not to do anything to her children. (T. 1482). After her mother was killed, Andrea ran next door and told her neighbor what happened. Andrea stayed with her aunt for a few days following the murder. While at her aunt's home, Andrea met with a police artist who drew a "composite" of the person that murdered her mother based on her description of him. (T. 1484). At trial, Andrea identified the "composite" of the murderer and it was offered into evidence. (R. 402, T. 1521).

On cross-examination, Andrea stated that while staying with her aunt after the shooting she met a policeman and told him what happened. (T. 1495). She remembered that during a meeting in

South America she pointed at an attorney in order to indicate that the man who shot her mother had the same complexion as this man. Andrea stated that she did this erroneously as she was later corrected by her brother. (T. 1497-98).

Eight year old David testified that on the night of the shooting he was in his room pretending he was asleep when a man with a gun entered his room and told him to go to the living room. (T. 1512-1513). David followed this man's orders and joined his mother who was already in the living room. (T. 1514). This man then went and got Andrea and brought her to the living room. This man was not bleeding or dripping blood. (T. 1517-1518). After the man shot his mother, Andrea went to the house next door while David remained with his mother. (T. 1518-1519). David stayed at his aunt's house along with his sister after the shooting. David remembered that an artist came to his aunt's house and first talked to Andrea and then to him. David stated that he was not allowed to be present while Andrea and the artist met. At trial, David identified the "composite" as the person who shot his mother. (T. 1520). After David moved to South America he met with Detective Koslowski who showed him a six-person photo lineup. From this group of photographs, David picked out the man who killed his mother and signed the back of that photograph. (T. 1523-1569).[6]

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[6] This photograph was later identified at trial as the Defendant. (T. 1884-85).

During cross-examination David testified that during the burglary there were three people in his house. Two of these men who were wearing masks were white and one of the men was black. (T. 1524-1525). None of the three men was wearing gloves but all were wearing black clothes. (T. 1525-1526). When David first came out of his bedroom he saw three men in the living room. The two white men were looking for money. (T. 1528-1529). The black man brought him from his bedroom to the living room where he sat on the sofa to the right of his mother. (T. 1532). The man who shot his mother stayed in the living room to David's left side. David stated that he remembered previously telling the defense counsel that the man who shot his mother had a stocking over his face and that the men in his house were white. (T. 1535-1536).

Two former co-defendants, Rene Alonso and Nestor Trimino, testified on behalf of the State and explained in detail the Defendant's involvement in the "home invasion." Mr. Alonso testified that he had plead guilty to second degree murder, kidnapping, armed robbery, armed burglary, and conspiracy to commit an armed burglary. (T. 1538). Mr. Alonso was serving a fifty year prison sentence for these offenses and had been warned that if he did not testify truthfully he could be charged with first degree murder and be given the death sentence if convicted. (T. 1540).

Mr. Alonso testified that he asked a Colombian man named Oscar about buying three ounces of cocaine. The cocaine was for Luis Dominguez and two other friends.[7] Oscar told Mr. Alonso that he could not get three ounces of cocaine because he could not break up a kilo. (T. 1542). However, Oscar did tell Mr. Alonso that he could get some cocaine from a house in Kendall. (T. 1542-1543). Mr. Alonso testified that he asked Luis Dominguez, Nestor Trimino, Juan Mendiola, and the Defendant, Ricardo Hernandez, to do a "home invasion" with him in order to get the cocaine. (T. 1544).

According to Mr. Alonso, this group of men first met at an apartment on Bird Road to discuss who was going to "hit the house." (T. 1547). Also present at this meeting were Natasha Savinovitch and Dunia Leyva, the occupants of the apartment. (T. 1545-1547). Mr. Alonso again met with Nestor Trimino and the Defendant at a later date in order to make additional plans for the "home invasion." They met at the Flagler Dog Track and then drove to the apartment on Bird Road. According to the plan, Luis Dominguez and Juan Mendiola were to watch the people in the house while Mr. Alonso and the Defendant searched the house for merchandise. (T. 1555). Nestor Trimino was to be waiting close by with the getaway car. (T. 1555). Mr. Alonso stated that at the time of the home invasion the Defendant had a small imported car. At trial, Mr. Alonso identified the Defendant's car in

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[7] Luis Dominguez was one of the co-defendants. (R.1).

photographs shown to him by the State. These photographs were admitted into evidence. (R. 405-408, T. 1553-54).

Three to four days after this meeting, Mr. Alonso again met with Luis Dominguez, Juan Mendiola, and the Defendant at Flagler Dog Track. They met at approximately 9 p.m. and drove to the apartment on Bird Road. This group drove to this apartment in the Defendant's white car and a burgundy Chevrolet Nova. (T. 1557-1558). At the apartment, they dropped off the Defendant's white car and Mr. Alonso and Luis Dominguez got into a van driven by Natasha Savinovitch. The van was then driven to the Spanish Trace Apartments where the occupants of the burgundy Chevrolet Nova got into the van. Mr. Alonso testified that Natasha Savinovitch drove the van occupied by himself, the Defendant, Nestor Trimino, Luis Dominguez and Juan Mendiola to the house where the "home invasion" was to take place. (T. 1558-1560).

Natasha Savinovitch stopped the van at the corner near the house and Mr. Alonso got out of the van along with the Defendant, Luis Dominguez, and Juan Mendiola. Natasha Savinovitch then drove Nestor Trimino to a nearby gas station where he was to wait to be beeped by the others at the house at which time he was to go pick them up. Mr. Alonso testified that the group of four went and hid by the side of the Acosta home for two to three hours while waiting to grab someone entering or exiting the home. (T. 1562-1563).

While waiting on the side of the house, Mr. Alonso and Juan Mendiola removed a plastic box which was attached to the house and which covered the telephone wires. They pulled out the telephone wires so no one could call from the house. (T. 1565-66). At this time Mr. Alonso gave the gun he was carrying to Luis Dominguez. Juan Mendiola was the only other person in the group who was armed. (T. 1566). Mr. Alonso and the Defendant decided that they would try to take off the bars covering the side window and then enter the home through the window. They sent Luis Dominguez to go get a jack from a car in order to pull off the bars. (T. 1567-1568). Luis Dominguez left and returned with the jack but was unsuccessful in his attempt to try and pull off the bars with it. Luis Dominguez then left the scene. (T. 1574). Juan Mendiola broke the side window and Mr. Alonso, the smallest of the three remaining men, slid between the bars and went through the window. While entering through the window Mr. Alonso cut his right hand and thus dripped blood everywhere he went in the house.

Once inside the house, Mr. Alonso went to the glass door in the rear of the house and tried to open the door in order to let in the Defendant and Mr. Mendiola. The glass door would not open so Mr. Alonso kicked it and the glass shattered. Mr. Alonso then headed towards the front door and saw Juan Mendiola coming in the front door with a woman, the owner of the house. Mr. Alonso

immediately commenced his search for the cocaine. (T. 1577). Mr. Alonso searched the hallway, the closet in the hallway and then proceeded to the master bedroom where he searched the attic. Mr. Alonso's hand was still bleeding as he searched the house. Mr. Alonso stated that he never saw any children in the house. (T. 1580).

Mr. Alonso was searching the attic when he heard four gunshots. The Defendant approached Mr. Alonso and told him it was time to leave as the police were coming. Mr. Alonso and the Defendant then ran out of the house followed by Juan Mendiola. (T. 1581-1582).

The three men crossed the open field across the street from the Acosta's home and then saw Luis Dominguez driving the Defendant's car. They all got in the car and went to the Spanish Trace Apartments to pick up the burgundy Chevrolet Nova that was parked there. They stopped on the way to the apartments in order to hide a gun in an open field. Juan Mendiola then told the others that during the home invasion he had pushed the "lady" down on the sofa because she was trying "to go for something." (T. 1585). Four or five days after the incident Mr. Alonso met with the Defendant and Juan Mendiola in order to locate the gun that they had hidden in the open field. Mr. Alonso found the gun in the open field.

Mr. Alonso testified on cross-examination that he did not know the Defendant prior to the initial meeting at Flagler Dog Track. (T. 1627). Luis Dominguez had invited the Defendant as well as Nestor Trimino to join in the "home invasion." (T. 1628). After Mr. Alonso gained entry into the house through the side window, Juan Mendiola gave Mr. Alonso his gun. (T. 1646). After Mr. Alonso saw Juan Mendiola in the house with the "lady", he handed the gun back to Mr. Mendiola. (T. 1647). Mr. Alonso explained that blood was on the wall near one of the children's bedroom door because as he ran down the hallway he may have scraped the wall with his hand. (T. 1654-1656). Mr. Alonso stated that he did not go into that child's room and in fact did not even know it was a room. (T. 1656). Mr. Alonso further explained that he probably dripped blood on the area just outside of the living room when he was handing his gun to Juan Mendiola. (T. 1659). Mr. Alonso was the only man in the house who did not have a stocking over his face. (T. 1660-1661). Mr. Alonso left the house after the Defendant came to him and told him the "cops" were coming. (T. 1662). Mr. Alonso stated that to the best of his knowledge the Defendant did not shoot anyone inside the house. (T. 1662). When Mr. Alonso was in the attic crawl space he saw the Defendant standing beneath him just as the shots were fired. (T. 1674).

Mr. Trimino testified that he plead guilty to second degree murder and had been sentenced to nine years imprisonment.

(T. 1697-1699). Mr. Trimino understood that if he did not testify truthfully he could be charged with first degree murder and be given the death penalty if convicted.

Mr. Trimino testified that around the time of the murder he was living in an apartment on Bird Road with his girlfriend, Dunia Leyva. Mr. Trimino was present at a meeting at this apartment when plans were discussed for a "hold up" of a house in Kendall. (T. 1702). Also present at this meeting were Luis Dominguez, Juan Mendiola, Rene Alonso, and the Defendant. (T. 1702-1703). According to the plans Mr. Trimino was to wait at a gas station while the others committed the "hold up." When he was beeped he was to go pick up the others on the street near the house. (T. 1700).

On the night of the "holdup", Mr. Trimino met the Defendant, Juan Mendiola, Luis Dominguez, and Rene Alonso at a market on 7th Street and 47th Avenue. They left this market together in a white car and drove around Kendall. (T. 1708-1711). (T. 1712-1714). Mr. Trimino stated that they drove the white car to approximately one block from the house where the holdup was to occur and everyone got out except him. (T. 1715-1716). Mr. Trimino then drove to a gas station about twenty-five blocks away and waited for two and a half to three hours. He then called Dunia Leyva and asked her to pick him up. (T. 1717-1718). Mr. Trimino was picked up at the gas station by Ms. Leyva one and a half hours after he called her. (T. 1719).

When they were leaving the gas station Mr. Trimino saw Luis Dominguez who was looking for a jack. (T. 1720). Luis Dominguez took the jack from the white car and was dropped off approximately a half a block from the Acosta's home. Mr. Trimino then went home with Ms. Leyva. Mr. Trimino never saw Luis Dominguez again that evening. (T. 1721). The next morning Luis Dominguez and the Defendant came to the apartment on Bird Road and the Defendant stated that there had been a shooting. Mr. Trimino testified that after that morning up until the time he was arrested he never saw Luis Dominguez or the Defendant. (T. 1723).

During cross-examination, Mr. Trimino testified that he drank heavily during the time period in question. He did not recall making a statement in a deposition that he had been too drunk to remember anything that went on at the meeting at the apartment on Bird Road just prior to the murder. (T. 1723-1726). He also did not recall making a statement at a deposition that he never spoke with the Defendant after the murder about what had happened. (T. 1728).

Dr. Charles Wetli, a forensic pathologist for Dade County, examined the victim's body at the scene of the crime and performed an autopsy of the body. Dr. Wetli testified that the victim died of a gunshot wound to the chest. The bullet first

entered the victim's body at her left bicep, exited the bicep and reentered the body on the left side of the chest. The bullet was found on the right side of the victim's chest. (T. 1739-1742).

Dr. Wetli testified that when the victim was shot she was seated and her left arm was significantly raised in a defensive position. The shooter had to have been to the left of the victim and pointing the gun downward. Dr. Wetli was unable to deduce the distance the shooter was from the victim. According to Dr. Wetli, the victim lost consciousness within a minute or so of the shooting and died a few minutes later. (T. 1744-46). There was no evidence that the victim moved after being shot. The victim's urine contained traces of cocaine and marijuana but the presence of these substances was unrelated to her death. (T. 1747-48). There was no cocaine found in the victim's blood thus indicating that she was not under its influence at the time of death. (T. 1748). Dr. Wetli stated on cross-examination that the shooter could have been standing outside the living room at the location of the blood stain in the hallway but the victim's body would have had to have been twisted to the left. (T. 1749-1751).

Thomas Quirk, a firearms examiner for the Metro Dade Police Department, examined the victim's Mickey Mouse sweatshirt and found no gunshot residue. This indicated that the shooter was at least four feet away. (T. 1812, 1829). He stated that the victim had her left arm in front of herself in a defensive position.

(T. 1815). The wound revealed that the shooter would have had to have been above the victim and shooting downward. (T. 1816).

David Koslowski of the Homicide Bureau of the Metro Dade Police Department testified that he was responsible for the $30,010 found in the Acosta's safe and the twenty eight grams of cocaine found in the dresser drawer in the master bedroom. After the murder, Detective Koslowski met with Andrea who was nine, and David who was six, at the home of their Aunt Beatrice. John Valor, the sketch artist, was also present. (T. 1866). Detective Koslowski later met with the children in San Antonio, Venezuela two months after their mother was murdered. (T. 1869).

While in Venezuela Detective Koslowski showed Andrea and David a photographic lineup comprised of six individuals. The children were shown the photographs at separate times so as to ensure that they did not influence one another. Andrea was unable to identify the murderer in the photo display. David identified photograph number three as the shooter. Detective Koslowski testified that the Defendant was the man in photograph number three. (R. 403, T. 1884-85).

John Valor, the sketch artist for the City of Miami Police Department, testified that he spoke with Andrea alone and showed her a book containing various facial features. (T. 1834-36). Andrea chose features from the book she thought resembled the

shooter and Mr. Valor drew a "composite" using these features. Mr. Valor made notations of Andrea's description of the shooter who was described by Andrea as a thirty-three year old man with brown eyes, a dark brown mustache, a dark complexion, and of medium build. (T. 1840). After Andrea was satisfied with the composite sketch, Mr. Valor showed the composite to David who stated, "That's the man that shot mommy." (T. 1840).

Jose Diaz was working with Homicide Bureau of the Metro Dade Police Department at the time of the murder. He was instructed to look for a 1986 Hyundai and a scissor-type jack as part of the murder investigation. Mr. Diaz set up a surveillance around the apartment of the Defendant on February 4, 1988. He saw the Defendant drive into the parking lot of his building accompanied by another man, go to his apartment, and then drive away moments later. Mr. Diaz stopped the Defendant in his Hyundai a couple of blocks away from his apartment. Mr. Diaz asked the Defendant and the other occupant to exit the Hyundai so he could conduct a search for a car jack. The Defendant's Hyundai was missing the scissors-type jack. (T. 1776). The Defendant was eventually placed under arrest. On cross-examination, Mr. Diaz testified that the scissor-type jack which was found at the scene of the murder is used by a variety of different cars including Hyundais.

The first witness to testify for the Defendant was Officer Garafalo who was assigned to the Homicide Bureau of the Metro Dade Police Department. (T. 1992). Officer Garafalo responded to the scene of the shooting at 1:20 a.m. and was assigned to speak to Andrea and David Acosta. Andrea told Officer Garafalo that the man who shot her mother was a tall, white, Latin male with a dark complexion, a mustache and wearing all black clothing. (T. 1994). Andrea also told Officer Garafalo that the two other individuals were also white, Latin males wearing similar clothing. (T. 1994).

Geraldo A. Remy, the second witness to testify for the Defendant, was the court-appointed counsel for Juan Mendiola, another co-defendant. Mr. Remy was present at the deposition conducted in Venezuela on November 3, 1988. Mr. Remy testified that when Andrea was asked about the complexion of the shooter she pointed to him as having a similar complexion. (T. 1996). During cross-examination, Mr. Remy testified that Andrea responded to a leading question posed by the defense: "Andrea, now the man that you saw that had the same color skin as Jerry here, is that the man that shot your mother?" Andrea responded "Yes." (T. 2002).

Dr. Dorita Marina who conducted psychological evaluations of Andrea and David was also called as a witness for the Defendant. The State objected to any testimony by Dr. Marina

concerning the children's truthfulness or veracity as such testimony invaded the province of the jury. (T. 2017). The defense argued that Dr. Marina's testimony was admissible as she was going to testify as "to the ability of these children to observe, the ability or the acceptability of these children to suggest, and the ability of these children to memorize facts." (T. 2018-19). The trial court sustained the State's objection and prohibited Dr. Marina from testifying as to those facts outlined by the defense. (T. 2024-25).

Vilma Hernandez, the wife of the Defendant, took the stand and testified that her husband was always with her and the children including the night of January 12 to 13, 1988. (T. 2053-56). During cross-examination, Mrs. Hernandez stated that she did not remember if January 12 fell on a weekday or a weekend. She stated that she thought January 13 was a weekday. Mrs. Hernandez recalled previously stating in a deposition taken one year before the trial that she did not specifically remember January 13, 1988. (T. 2061-62).

The Defendant, Ricardo Hernandez, denied killing Angela Acosta and denied even being involved in the burglary. (T. 2064). The Defendant stated that he knows Luis Dominguez because he is his brother-in-law. (T. 2065). The Defendant testified that he got in a fight with Luis Dominguez after he told Mr. Dominguez that Mrs. Dominguez, the Defendant's sister, was cheating on him.

(T. 2067). This fight occurred approximately two years and seven months before trial. (T. 2067). The Defendant denied ever knowing Nestor Trimino, Juan Mendiola, or Rene Alonso. (T. 2067-68). The Defendant admitted that he had previously been to Dunia Leyva's apartment on Bird Road to discuss payment for a car he had sold to Luis Dominguez's father. He drove to that apartment with his wife and children. Dunia Leyva, Luis Dominguez, and another woman were present in the apartment at that time. According to the Defendant he never returned to that apartment. (T. 2068-69).

During cross-examination the Defendant identified himself as the person photographed in photo display number three which David had identified as his mother's murderer. (T. 2070). The Defendant additionally testified that he was arrested not far from his apartment while driving his car, a 1986 Hyundai. The State showed the Defendant the photographs of the white Hyundai which Mr. Alonso had identified as belonging to the Defendant. The Defendant stated that it looked like his car. (T. 2072). The Defendant stated that Luis Dominguez used his car more than he did. He did not know if his car was missing a jack as he was never "curious enough to search the car". (T. 2075-76).

The jury found the Defendant guilty as charged.

POINT ON APPEAL

WHETHER THE PROCEDURE WHICH ALLOWED ANDREA AND DAVID ACOSTA, WITNESSES TO THEIR MOTHER'S MURDER, TO TESTIFY VIA CLOSED-CIRCUIT TELEVISION VIOLATED THE DEFENDANT'S RIGHT TO CONFRONTATION.

SUMMARY OF THE ARGUMENT

The Defendant's constitutional right to confrontation was not violated by the use of the closed-circuit television procedure. The State has an important interest in protecting child witnesses. The legislature in fact recognized this important interest when it asked this Court to adopt rules to administer such a procedure. The absence of these rules however, is not to be equated with a violation of the Defendant's right to confrontation. In the instant case, the trial court made a specific finding that such a procedure was necessary in order to protect Andrea and David Acosta from severe emotional harm. Additionally, the children's testimony was reliable as it was made under oath, was subject to contemporaneous cross-examination, and the judge, jury and Defendant were able to observe the children's demeanor. There was thus no violation of the Defendant's right to confrontation as the procedure satisfied the standard of Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990): the procedure was necessary to further an important interest and the reliability of the testimony was otherwise assured.

If this Court should determine that the Defendant's right to confrontation was violated as there is no specific authority for the use of a closed-circuit television procedure in a prosecution for murder, such error was harmless. The remaining evidence against the Defendant is overwhelming.

Lastly, although this Court has postponed its ruling as to its jurisdiction to review the decision below, this Court should note that Ford v. State, 592 So.2d 271 (Fla. 2d DCA 1991), rev. granted, No. 79,220 (Fla. July 6, 1992), is not expressly and directly in conflict with opinion of the Third District Court of Appeal. This Court should therefore conclude that it lacks jurisdiction to review the decision below.

ARGUMENT

THE PROCEDURE WHICH ALLOWED ANDREA AND DAVID ACOSTA, WITNESSES TO THEIR MOTHER'S MURDER, TO TESTIFY VIA CLOSED-CIRCUIT TELEVISION DID NOT VIOLATE THE DEFENDANT'S RIGHT TO CONFRONTATION.

A defendant is not entitled to a new trial merely because the trial court implements a procedure not specifically authorized by statute. As was stated by this Court in Ashley v. State, 265 So.2d 685 (Fla. 1972), "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." Id. at 692. In the instant case, the use of the closed-circuit television procedure did not deny the Defendant due process of law. The two-prong test set forth in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990) was satisfied and thus there was no violation of the Defendant's right to confrontation.

The Defendant contends that Ashley, 265 So.2d 685, is distinguishable as the trial court in Ashley was confronted by a tabula rasa and the procedure used was subsequently authorized by legislative enactment. In comparison, closed-circuit television procedure in the case sub judice was allowed based on "the authority of a statute which was not only non-operative but was specifically conditioned upon its adoption by this Court." (See

Defendant's brief at p. 11). Even though the Defendant's factual statement may be correct, it is irrelevant to the issue at bar as well as to the rule espoused in Ashley. The relevant fact is that in Ashley, as in the instant case, the trial court implemented a procedure which at the time of trial was not specifically authorized. This Court in Ashley held that the defendant was not entitled to a new trial as there was no due process violation. This Court should reach a similar conclusion in the instant case as this Defendant's right to confrontation, and ergo his right to due process, was not violated, as the two prong test of Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), was satisfied.[8]

In Craig, the Supreme Court held that the confrontation clause does not guarantee a criminal defendant an absolute right to a face-to-face meeting at trial with the witnesses against him. The Court concluded that the right to a face-to-face confrontation may be abrogated "where denial of such confrontation is necessary to further an important public policy

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[8] This Court has interpreted the right of confrontation under Article I, Section 16 of the Florida Constitution, as affording defendants the same protection as afforded under the United States Constitution, Amendment VI. 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)(videotaped testimony of child witness in child sexual abuse case did not violate defendant's right to confront witness where individualized determination was made that child would suffer emotional and mental harm if forced to testify in court and defendant was permitted to watch testimony behind two-way mirror and conduct full cross-examinations of child.)

and only where the reliability of the testimony is otherwise assured." 497 U.S. at ____, 110 S.Ct. at 3166, 111 L.Ed.2d at 682. The following analysis will show that in the case sub judice, the closed-circuit television procedure was necessary to further an important public policy and the reliability of the testimony of David and Andrea Acosta was otherwise assured. There was thus no violation of the Defendant's right to confrontation.

The important public policy, the first prong of the Craig standard, which necessitated the use of the closed-circuit television procedure, was the protection of child witnesses or victims under the age of 16. This policy was enunciated in Section 92.55, Florida Statutes, where the Florida Legislature recognized that the Rules of Criminal Procedure were inadequate in protecting child witnesses and victims. The Legislature thus recommended that the Florida Supreme Court make amendments to the Rules of Criminal Procedure in order to give more protection to child witnesses and victims.[9] Andrea and David Acosta, the two

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[9] Section 92.55, Florida Statutes (1989), titled, "Judicial or other proceedings involving child victim or witness under the age of 16; special protections" reads:

> 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

child witnesses in the case at bar, heard their mother plead for mercy and then saw her murdered. The trial testimony establishes

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> 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 ss. 90.90 (transferred to § 92.53 by Laws 1985, c. 85-53, § 9) and 92.54.
>
> (2) In ruling upon the motion, the court shall take into consideration the age of the child, the nature of the offense or act, the relationship of the child to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the child, and any other fact that the court deems relevant.
>
> (3) In addition to such other relief as provided by law, the court may enter orders limiting the number of times that a child may be interviewed, prohibiting depositions of a child, requiring the submission of questions prior to examination of a child, setting the

that these children would have suffered severe emotional harm if forced to testify in open court in front of the Defendant. The use of the closed-circuit television procedure was therefore necessary to further the important public policy of protecting child witnesses such as Andrea and David Acosta. The first prong of Craig was thus satisfied.

The Defendant cites Ford v. State, 592 So.2d 271 (Fla. 2d DCA 1990), rev. granted, No. 79,220 (Fla. July 6, 1992) in support of his contention that the trial court was precluded from using the closed-circuit television procedure as this Court never adopted the amendments to the Rules of Criminal Procedure recommended by the Legislature in Section 92.55, Florida Statutes. In Ford the State presented the testimony of a seven year old witness via closed-circuit television. The Second District concluded that this procedure was not authorized in a prosecution for murder as Section 92.55 was a "non-operative" statute and thus the defendant's right to confrontation was violated.[10] This contention and the conclusion reached in Ford

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> place and conditions for interviewing a child or for conduction any other proceeding, or permitting or prohibiting the attendance of any person at any proceeding. The court shall enter any order necessary to protect the rights of all parties or the defendant in any criminal action.

[10] The Ford opinion suggests, however, that the Second District was not quite convinced of this determination as the court went on to hold that "even if" the procedure could be used without an enabling statute or rule, the procedures used by the trial court failed to meet the

is erroneous as Craig did not hold that the "public policy" or "important state interest" must be set forth in a statute or a rule although their existence is evidence of a State's public policy. The Defendant's argument was in fact, recently rejected by a Texas court in Gonzales v. State, 818 S.W.2d 756. (Tx. Crim. App. 1991).

In Gonzales, 818 S.W.2d 756, the court held that the presentation of a ten-year old witness' testimony via closed-circuit television did not violate the defendant's state or federal constitutional rights. The ten-year-old was the witness to a murder, an offense not named in the Texas statute allowing for the use of the closed-circuit television procedure.[11] The Texas court concluded,

> [W]e see no reason why an expression of this important public policy must necessarily be in the form of an act or statute. More importantly, we have found nothing in any pertinent opinion from this Court or from the Supreme Court that would permit only the Legislature to make this "public policy" determination on behalf of the State. Id. at 765.

The court then listed three public policy considerations which supported the trial court's action:

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second prong of the requirements set forth in Craig; the reliability of the testimony was not otherwise assured as the witness did not take an oath and the cross-examination was severely limited.

11 See Article 38.071, Sections a and 3, V.A.C.C.P.

(1) an expressed legislative concern that seeks to exclude the offender from all hope of escape.

(2) an expressed legislative concern to protect children under similar circumstances.

(3) The expressed affirmation and reaffirmation by the judiciary of this State and the United States that the protection of children is a legitimate and compelling state goal.

Id. at 761.

The Florida Legislature has recommended to this Court that it make amendments to the Rules of Criminal Procedure in order to adequately protect child victims and witnesses. § 92.55, Fla. Stat. (1989). This recommendation from the Legislature is one public policy consideration which was not present in Gonzales, 818 S.W. 2d 756. There is thus greater reason in the case at bar than in Gonzales to conclude that Florida has an important interest in protecting child witnesses and victims.

There are two public policy considerations present in Gonzales that are also present in the instant case. First, as in Gonzales, the Florida Legislature, in enacting Sections 92.53 and 92.54, Florida Statutes, sought to protect the rights of children similarly situated to Andrea and David Acosta.[12] As was stated

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12 The Defendant emphasizes that pursuant to Sections 92.53 and 92.54, Florida Statutes, the closed-circuit television procedure may only be used in child abuse and sexual abuse cases. This Court should note that prior to the enactment of these statutes, the closed-circuit television procedure

in 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), the legislative intent in enacting Section 92.53, Florida Statutes, "was to spare children, to the extent conditionally permissible, the trauma of testifying in open court."[13] Id. at 216. This rationale is equally applicable to the instant case where Andrea and Davis Acosta witnessed their mother's murder and where Dr. Alvarez testified that these children would suffer severe emotional harm if forced to testify in open court in front of the murderer. The Defendant's contention that the State's reasoning for enacting sections 92.53 and 92.54, Florida Statutes (1989) does not apply to this murder case is therefore unfounded. (See Defendant's brief at p. 13).

Secondly, as was pointed out in Gonzales, 818 S.W.2d 756, the United States Supreme Court has confirmed that the protection of children is a legitimate and compelling State goal. See New York v. Forbes, 456 U.S. 747, 756-757, 102 S.Ct. 3346, 3354-3355, 73 L.Ed.2d 1113, 1121-1122 (1982)(state interest in safeguarding the physical and psychological well-being of a minor is compelling); Globe Newspaper Co. v. Superior Court, 457 U.S. 596,

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was in fact employed by a trial court in a prosecution for sexual battery. See Arencibia v. State, 539 So.2d 531 (Fla. 3d DCA 1989).

13 See Ch. 85.58, Laws of Fla.: "WHEREAS, it is necessary that safeguards be instituted for the children of the State of Florida who are victimized to assure that their right to be free from emotional harm and trauma occasioned by judicial proceedings is protected by the Court...."

607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982)(state interest in safeguarding protection of minor victims from further trauma); FCC v. Pacific Foundation, 438 U.S. 726, 749-750, 98 S.Ct. 3026, 3040-3041, 57 L.Ed.2d 1073 (1978)(government interest in well-being of its youth); Ginsberg v. New York, 390 U.S. 629, 640, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195 (1988)(state has interest in the welfare of children and safeguarding them from abuses); Prince v. Massachusetts, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed.2d 645 (1944)(state may secure against dangers to children). Accordingly, the fact that this Court did not amend the rules of criminal procedure as was recommended by the legislature does not preclude this Court from concluding that the State of Florida has an important interest in protecting children such as Andrea and David Acosta. The State submits that the first prong of the Craig standard was satisfied.

An issue analogous to the one at bar was recently visited by an appellate court of New Jersey. In State v. Nutter, No. A-5898-8874 (N.J. Super, App. Div. July 2, 1992) the appellate court held that the trial court erroneously allowed child witnesses in a murder case to testify via closed-circuit television. According to the New Jersey court, such a procedure conflicted with the New Jersey statute allowing for testimony to be taken via closed-circuit television in prosecutions for sexual assault, criminal sexual assault, and child abuse cases. N.J.S.A. 2A: 84A-32.4. The court determined that since murder

cases were not included in the list of offenses where a closed-circuit television procedure could be used, the state was precluded from using the procedure. The court stated,

> Like the State, we agree that theoretically a policy interest sufficient to outweigh the right to physical confrontation may exist without the formality of statutory codification. However, when the Legislature has considered the issue of the protection of child witnesses and has delineated with precision their limited circumstances which, upon appropriate findings, will prevail over a defendant's right to face-to-face confrontation. That is the expression of the public policy of this State. (emphasis supplied). Slip op. A-5898-8874 at p. 20.

Nutter can be distinguished from the instant case in two important respects. Foremost, the Florida Legislature did express the public policy of Florida when it enacted Section 92.55, Florida Statutes. The legislature recognized that Sections 92.53 and 92.54, Florida Statutes, were inadequate to protect the interests of child witnesses and victims under the age of 16. It thus recommended that this Court make amendments to the Rules of Criminal Procedure so as to adequately further this important state interest of protecting child witnesses and victims. The lack of the recommended amendments to the Rules of Criminal Procedure does not alter the public policy of the State of Florida which was set forth in Section 92.55, Florida Statutes. Section 92.55, Florida Statutes, is the public policy of this State.

Nutter is additionally distinguishable in that the legislative history of the New Jersey statute providing for closed-circuit television in sexual assault and abuse cases, indicates that the Statute's purpose is "to spare a youthful witness the ordeal of repeatedly discussing details of sexual assault or abuse; no more and no less." Nutter at 19. As this reasoning is inapplicable to murder cases, the New Jersey court concluded that the scope of statutory coverage does not extend beyond the cases delineated in the statute. Contrarily, in Section 92.55, Florida Statutes, the legislature intended that child witnesses and victims under the age of 16 be afforded greater protections. Moreover, the legislative history of the Florida Statutes dealing with a closed-circuit television procedure Sections 92.53 and 92.54, Florida Statutes, does not reflect a public policy applicable solely to sexual abuse cases as in Nutter. The purpose enunciated in the legislative history can be equally applicable to murder cases. See Glendening v. State, 536 So.2d 212 (purpose of Sections 92.53 and 92.54, Florida Statutes, was to spare children trauma of testifying in open court). Nutter is therefore inapposite and this Court should conclude that the closed-circuit television procedure used during the testimony of David and Andrea Acosta was necessary to further an important State interest. The inquiry thus turns to whether the testimony of Andrea and David Acosta was "otherwise assured," the second prong of the Craig standard.

In the case sub judice, Andrea and David Acosta were both extensively deposed by both parties. At the time of trial, they both testified under oath, (T. 1479, 1505), and were subject to rigorous, contemporaneous cross-examination. (T. 1492-1503, 1507-1510, 1524-1536). Furthermore, before the children were allowed to testify via closed-circuit television, the trial court made a case-specific determination, based on the testimony of Dr. Alvarez, that the children would suffer severe emotional trauma if forced to testify in open court in front of the Defendant. The trial court therefore made the individualized findings required under Craig and thus there was no violation of the Defendant's right to confrontation.

The Defendant contends that 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 identification placed their trial testimony in serious doubt." (See Defendant's brief at p. 12). The Defendant's analysis is faulty in that the issue of "reliability" does not turn on whether there were inconsistencies in the pretrial statements or identification of the witnesses. The inquiry as was stated in Craig, 497 U.S. at ___, 110 S.Ct. at ___, 111 L.Ed.2d at 682, is whether the "other elements of confrontation--oath, cross-examination, and observation of the witness' demeanor" are

present, thus insuring the reliability of the witnesses' statements at the time of trial. These "other elements" of the right to confrontation were present in the instant case thus supporting the State's assertion that the testimony of Andrea and David Acosta was "otherwise assured."

Even if this Court were to determine that the issue of "reliability" did turn on whether the pretrial statements and identifications made by David and Andrea Acosta were consistent, a contrary conclusion is not warranted. David and Andrea gave substantially identical accounts of the events that transpired the night their Mother was murdered. Additionally, Andrea met with a sketch artist who drew a "composite" of the murderer based on Andrea's description of him. When David saw this "composite" he exclaimed, "That's the man that shot mommy." (T. 1840). Although Andrea was unable initially to select the Defendant from the six man photo lineup, David did identify the Defendant from this same lineup. Thus, contrary to the Defendant's assertion, the trial testimony of David and Andrea Acosta was not to be "placed ... in serious doubt," (Defendant's brief at p. 12), as the testimony of David and Andrea Acosta was "reliable."

This Court should note that David Acosta was questioned by both parties at the time of trial in order to ascertain his ability to discern truth from lies. The State asked David some preliminary questions to establish that he knew what was

happening and knew what a lie was. (T. 1505-1507). The defense then interrupted the direct examination and stated,

> Before we proceed, Mr. Novick, Judge, with regard to the issue of competency, I will [sic] like to raise it at this point and perhaps be allowed to voir dire the witness. (T. 1507).

The defense then questioned David Acosta about the difference between the truth and a lie. (T. 1507-1510). Following this examination, defense counsel stated, "You can proceed, Mr. Novick." (T. 1510). The defense did not contend that David was not competent to testify. If David Acosta was not competent to testify or to make an identification, the Defendant waived this argument by failing to apprise the court of this following his preliminary examination of David.

If this Court should determine that the trial court improperly allowed David and Andrea Acosta to testify via closed circuit television as there was no authorization for such a procedure or that the requirements set forth in Craig were not met, the remaining issue before this Court is whether the error was harmless. The State submits that such a procedure, if erroneously permitted, was harmless and the Defendant's conviction should be affirmed.

In Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) the Supreme Court concluded that violations of the Confrontation Clause, including the denial of face-to-face confrontation, were subject to harmless error analysis, 487 U.S. at 1021, 108 S.Ct. at 1803, 111 L.Ed.2d at 867. The Court stated,

> An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence. 487 U.S. at 1021-1022, 108 S.Ct. at 2803, 111 L.Ed.2d at 867.

In Glendening v. State, 526 So.2d 212, the Supreme Court of Florida relied on Coy and concluded that if the trial court committed error in the denial of face-to-face confrontation, the error was harmless. The child did "not implicate the defendant in any wrong doing" and in fact stated that the defendant did not hurt her. The court thus held that any alleged error was harmless as the exculpatory testimony "unquestionably did not contribute to conviction and was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986)."

Similarly, in the case sub judice, Andrea and David Acosta testified as to the events which transpired the night their Mother was murdered. They did not, however, identify the

Defendant at trial as the murderer. The only inculpatory testimony from these children was David's identification of the Defendant from a photo lineup. (R. 403, T. 1522, 1844). The fact that David made this identification does not contravene the State's harmless error argument. An evaluation of the remaining evidence introduced by the State establishes that even without the admission of the children's testimony, the verdict would have remained unchanged as the other evidence against the Defendant was overwhelming.

Two former co-defendants, Rene Alonso and Nestor Trimino, testified for the State and described in detail the Defendant's involvement in the burglary. According to Mr. Alonso, the Defendant was present at the first meeting at the apartment on Bird Road where the burglary was discussed as well as the subsequent meeting at the Flagler Dog Track. (T. 1545-47, 1559). Mr. Alonso identified the Defendant's car, which he had described as a small, white, imported car, in photographs shown to him by the State. (T. 1552-53). Mr. Alonso testified that just prior to the burglary, the Defendant dropped off his white car and got into a van with the rest of the group. (T. 1557-58). The Defendant was present when the conspirators stationed themselves outside the Acosta home and waited to gain entry. (T. 1562-63). The Defendant was also present when Luis Dominguez left and returned to the Acosta home with a scissor-type car jack. It was the Defendant who told Mr. Alonso to leave the house as the

police were coming. The Defendant's car, which was driven by Luis Dominguez, was in fact the getaway car. (T. 1584-85). Lastly, the Defendant accompanied Mr. Alonso and Juan Mendiola four or five days after the murder to a field in order to locate the murder weapon they hid there.

Mr. Trimino also testified that the Defendant was present at the initial meeting at the apartment on Bird Road. (T. 1702-03). The night of the incident the Defendant met the others at a market and drove to approximately one block from the Acosta home. At this point, Mr. Trimino left and the Defendant accompanied the others to the house. (T. 1715-16). Mr. Trimino later saw Luis Dominguez who was in search of a jack. Mr. Dominguez got the jack from a "white car" that had been used by the group earlier in the evening. (T. 1720-21).

The Defendant testified that he was arrested in his car, a 1986 Hyundai. The Defendant testified that the photograph of the car which was shown to him by the State looked liked his car. (T. 2072). This was in fact the same car which Mr. Alonso had identified as the Defendant's. The Defendant did not know if the scissor-type jack was missing from his car as he was "never curious enough to search the car." (T. 2075). Mr. Diaz, a former detective with the Metro Dade Homicide Bureau, testified that when he arrested the Defendant in his white 1986 Hyundai, the jack was missing from the Defendant's car. (T. 2075).

The testimony of Vilma Hernandez, who stated that the Defendant was with her at the time of the murder, and the testimony of the Defendant was not credible. Mrs. Hernandez stated that when the Defendant was not at work "he would always be at home with me and if he were to go out he would have to take me and the children along." (T. 2055, 2056). The Defendant reiterated this and stated, "every time I would go out I would go out with them" (wife and children). (T. 2069). This testimony was contradicted by Mr. Diaz who testified that when the Defendant was seen driving to and from his apartment before his arrest, he was not with his wife and children but with an unknown man.

Accordingly, as the remaining evidence against the Defendant was overwhelming, the Defendant's conviction should be affirmed even if the trial court erroneously allowed the two child witnesses to testify via closed-circuit television.

The State acknowledges that this Court has postponed its decision on jurisdiction. The State submits that when such issue is addressed, this Court will conclude that it lacks discretionary jurisdiction to review the decision below as it does not expressly and directly conflict with Ford v. State, 592 So.2d 271 (Fla. 2d DCA 1991), rev. granted, No. 79,220 (Fla. July 6, 1992). In Ford the procedures used by the trial court failed

to meet the second requirement of Craig. The child witness in Ford did not take an oath before testifying and was not subject to rigorous cross-examination; the reliability of the testimony was thus not "otherwise assured". As the Second District Court of Appeal stated,

> The trial court so severely limited defense counsel's ability to cross-examine, it resulted, in fact, in no cross-examination at all. It resulted in questions and opportunity not even approaching the right to cross-examine in conformity with right of confrontation. Id. at 3070.

In the case at bar, the reliability of the testimony of Andrea and David Acosta was "otherwise assured" as these witnesses testified under oath and were subject to rigorous cross-examination.

As the decision below does not expressly and directly conflict with an opinion of another district court, this Court lacks discretionary jurisdiction.

CONCLUSION

Based on the foregoing points and citations of authority, the Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **RESPONDENT'S INITIAL BRIEF ON THE MERITS** was furnished by mail to **CLAYTON R. KAEISER, ESQUIRE,** KAEISER and POTOLSKY, P.A., Special Assistant Public Defender, One Northeast Second Avenue, Suite 200, White Building, Miami, Florida 33132, on this 1st day of ~~July~~ September, 1992.

Katherine B. Johnson

KATHERINE B. JOHNSON
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/blm