ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,114

DAVID HARRELL,

Petitioner,

-VS-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, David Harrell, was the Appellant in the proceeding below and the Respondent, the State of Florida, was the Appellee. For the purposes of this brief, the Petitioner will be referred to as Mr. Harrell and the Respondent will be referred to as the prosecution. References to the transcript of proceedings and the remainder of the record on appeal will be abbreviated as "TR." and "R." respectively. References to the Supplemental Proceeding, which was held on March 15, 1995, will be abbreviated "SP".

STATEMENT OF THE CASE

The State of Florida filed a two-count information against Mr. Harrell and charged him with (1) robbery and (2) burglary to a conveyance with an assault or battery therein. (R. 1-2). Mr. Harrell entered a plea of not guilty to the offenses charged and, pursuant to his demand, he received a jury trial before the Honorable Jeffery Rosinek, Circuit Court Judge of the Eleventh Judicial Circuit of Florida, in Dade County. (TR. 1-591).

Before Mr. Harrell's trial, the prosecution requested permission to introduce the testimony of its complaining witnesses through satellite transmission. (R. 20). Over the objection of defense counsel, the trial judge, the Honorable Maxine Cohen Lando, Circuit Court Judge of the Eleventh Judicial Circuit, granted the prosecution's request. (SR. 1-37).

The jury found Mr. Harrell guilty of both strong armed robbery and burglary to a conveyance with an assault therein. (R. 25-26; TR. 500-501). The trial court then adjudicated Mr. Harrell guilty and entered an order departing from the sentencing guidelines. (TR. 504, 583). The trial court sentenced him to two, concurrent terms of fifteen years imprisonment. (TR. 583).

Mr. Harrell appealed his convictions to the Third District Court of Appeal. In his direct appeal, Mr. Harrell challenged the trial court's admission of testimony through the use of satellite transmission. The Third District Court of Appeal affirmed the convictions, but certified the following question as one of great public importance:

> DOES THE ADMISSION OF TRIAL TESTIMONY THROUGH THE USE OF A LIVE SATELLITE TRANSMISSION VIOLATE THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, OR ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, WHERE A WITNESS RESIDES IN A FOREIGN COUNTRY AND IS UNABLE TO APPEAR IN COURT?

STATEMENT OF THE FACTS

Pre-trial Hearing

The trial court, based upon the prosecution's unsubstantiated assertions of its witnesses' unavailability to come to the United States for Mr. Harrell's trial, allowed the complaining witnesses to testify against Mr. Harrell via satellite transmission from Argentina. (SP.24). The prosecution admitted that it did not issue subpoenas to the witnesses nor did the prosecution request law enforcement officers to visit the witnesses. (SP. 30-32). Defense counsel objected to the prosecution's mere assertion that complications related to cancer prevented the complaining witness from coming to the United States to testify at Mr. Harrell's trial and requested documentation to support the claim of illness. (SP. 8). The trial court refused defense counsel's request and stated, "[s]he doesn't need to have cancer. She is in Buenos Aires. She could be healthy." (SP. 8).

In an attempt to clarify its ruling, the trial court explained, "But I want it understood that I consider this to be exceptional circumstances because the witnesses to me are unavailable, and that is based on their geographical distance which is not just even out of the county or out of state, but at the other end of the world." (SP, 33). Although the trial court's finding of unavailability was based on the prosecution's proffers during the pre-trial hearing, the trial court ruled that defense counsel would be permitted to "inquire of the witness to satisfy the record." (SP. 27). The trial court instructed defense counsel, "I would request that you make that record. So the unavailability may be established I feel that is established." (SP. 27).

When defense counsel questioned one of the complaining witnesses about his availability and willingness to come to the United States to testify, the complaining witness stated, "I don't have any problem with going to the United States for the trial in this case, but it's because of problems

of my wife's health and problems of my work. But if I have to go, then I would." (T. 266). Defense counsel and the complaining witness then engaged in the following exchange:

> [Defense Counsel]. Did you tell at any time a prosecutor, anybody that called you, that you are not coming back to the United States under no circumstances; yes or no?
> [Witness]. No, I didn't say that.
> [Defense Counsel]. Are you sure about that?
> [Witness]. Yes, if I have to go. But because of a trip or for work or something I will go.

(T. 266).

Trial

Perla Scandrojlia, the prosecution's first complaining witness, testified that she visited the United States from December 10 through 20, 1994. (TR. 211). As the witness testified, defense counsel objected to the witness constantly looking at an individual off screen. (TR, 213). At one point during the complaining witness' testimony, the trial *court, sua sponte*, stopped her because "she keeps looking to the right." (TR. 222). The trial court then ordered the camera to focus on both the complainant and the person sitting next to her. (TR. 222).

According to Scandrojlia, on the date she and her companion returned a rental car to the agency, she was robbed by a black man with short hair and gold teeth. (TR. 215). Pedro Mielniczuk, Scandrojlia's husband and the state's other complaining witness, could not see the alleged assailant well enough to offer a description, but he knew that the man who approached the car had gold teeth, (TR. 259). The complainants were lost and the man who approached the car offered them assistance. (TR. 216). During the conversation, the man handled the map the complainants received from the rental agency. (TR. 219). When the man returned the map, he allegedly took a purse from the car and another personal bag. (TR. 224).

At the conclusion the first complainant's testimony before the jury, defense counsel objected that the visual transmission was not simultaneous and that there was a delay in time between what is said and what is visually transmitted. (TR. 252). The trial court, in response to defense counsel's observation, pronounced, "You are right." (TR. 252).

Detective Shapiro of the Metro-Dade Police Department retrieved the map from the complainants and had it processed for finger prints. (TR. 295). A laboratory analysis determined that fingerprints found on the map matched fingerprints of the defendant. (TR. 296). Louisa Aguirre, the car control agent for Value Rent-A-Car, testified that a review of the agency's rental records showed that defendant never rented a car from the agency. (TR. 429). Aguirre further testified that the maps that are given to customers are maintained behind a counter in the rental office, and they are accessible only to agents of the company. (TR. 43 1).

Shapiro also testified that he conducted the photographic line-up with the complainants in this case and Scandrojlia identified the photograph of defendant as the alleged robber. (TR. 309). Scandrojlia testified, however, that she told the police that she was 60% sure that the person depicted in the photograph was the robber. (TR. 241).

At the close of the evidence, defense counsel moved for a judgment of acquittal, but the trial court denied the motion. (TR. 435,441).

SUMMARY OF ARGUMENT

Two material witnesses for the prosecution, who were also the sole complainants in the present case, were Argentina nationals who resided in Buenos Aires. The complainants were hesitant to return to the United States for Mr. Harrell's trial and the trial court held that they did not have to return because they were in another country and would have to travel for nine hours by airplane. Instead, the trial court ruled, over repeated defense objection, that the witnesses could testify via satellite instead of physically appearing at Mr. Harrell's trial. This ruling by the trial court, which permitted the prosecution to introduce testimony through the use of satellite, denied Mr. Harrell a physical face-to-face confrontation with his accusers as guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article I, section 16 of the Florida Constitution.

Because there was no physical face-to-face confrontation, the jury was unable to observe the demeanor of the witnesses as they testified against Mr. Harrell and could not see the subtle human nuances that are essential to the evaluation of a declarant's credibility. And because the witness did not return to the United States for Mr. Harrell's trial, the international oath administered by the trial court did not subject the complainants to the possibility of prosecution for perjury if they lied. A physical face-to-face confrontation, in conjunction with a lawful oath and the opportunity for the jury to observe the demeanor of the witnesses are essential elements of the right of confrontation. But these core elements of confrontation were not realized in the present case because the trial court permitted the complainants to testify via satellite instead of personally appearing in court.

This procedure thus did not comply with the requirements of the Confrontation Clause, and because no compelling state interest or public policy was advanced by the use of satellite testimony

in Mr. Harrell's criminal trial, no exception to the strict mandates of the Confrontation Clause is warranted. Accordingly, the trial court reversibly erred in permitting the prosecution, over defense counsel's objections, to introduce the testimony of its complaining witnesses through satellite testimony.

ARGUMENT

THE TRIAL COURT RULED THAT A NINE-HOUR FLIGHT FROM BUENOS AIRES TO MIAMI WOULD PRECLUDE TWO COMPLAINING WITNESSES FROM PHYSICALLY APPEARING AT DEFENDANT'S TRIAL AND OFFERING LIVE IN-COURT TESTIMONY. DOES THE TRIAL COURT'S RULING TO CONVENIENCE THE COMPLAINING WITNESSES AND PERMIT THEM TO TESTIFY, VIA SATELLITE, VIOLATE THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, OR ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

This Court, pursuant to the United States Supreme Court's interpretation of the Confrontation Clause of the Sixth Amendment to the United States Constitution, which is made obligatory on the States by the Fourteenth Amendment, must answer the certified question[1] in the affirmative. *Maryland* v. *Craig,* 497 U.S. 836, 846, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990); *Pointer v. State of Texas*, 380 US. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). Because (A) the use of satellite testimony in a criminal trial proceeding, instead of live in-court testimony, does not comport with the requirements of the Confrontation Clause and because (B) the inconvenience of a nine-hour flight is not a compelling state interest that would necessitate an exception to the strict mandates of the Confrontation Clause, reversal of the lower court's judgment is required.

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[1] The question certified is "DOES THE ADMISSION OF TRIAL TESTIMONY THROUGH THE USE OF A LIVE SATELLITE TRANSMISSION VIOLATE THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, OR ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, WHERE A WITNESS RESIDES IN A FOREIGN COUNTRY AND IS UNABLE TO APPEAR IN COURT?' *Harrell v. State,* 22 Fla. L. Weekly D582, 584 (March 5, 1997).

A. Requirements of the Confrontation Clause

The Confrontation Clause mandates that a criminal defendant be afforded "the right physically to face those who testify against him." *Pennsylvania v. Ritchie, 480* U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987). If a witness is not physically present in the courtroom and does not literally face the defendant, whom he is testifying against, there is no face-to-face confrontation as guaranteed by the Sixth Amendment. As observed by the Supreme Court of the United States, **"it is this literal right to 'confront'** the witness at the time of the trial **that forms the core of the values furthered by the Confrontation Clause."** *California v. Green, 399* U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970) (emphasis added). *See also Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980) ("[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial."); Coy v. *Iowa, 487* U.S. 1012, 1016, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988) ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

The right to physically confront one's accuser is ancient, and the United States Supreme Court has acknowledged that a right of confrontation existed even under Roman Law. As observed by the Supreme Court, while the Roman Governor Festus was discussing the proper treatment of his prisoner, Festus stated, "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face."' Coy, 487 U.S. at 1015 (quoting Acts 25:16). The Court also observed that "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence- face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak..."' Coy, 487 U.S. at 1016 (quoting

Richard II, Act 1, SC. 1). The majority opinion in *Coy* was "embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution."'487 U.S. at 1017 (quoting *Pointer v. State of Texas, 380* U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)).

There is no dispute that the complaining witnesses in the present case did not physically appear in the courtroom during defendant's trial and present live testimony. In fact, the Third District Court of Appeal conceded that the witnesses were not physically present during defendant's criminal trial when it held that "the witnesses were in the courtroom in a virtual sense." *Harrell v. State,* 22 Fla. L. Weekly D582, 583 (March 5, 1997). By its own definition, the Third District Court of Appeal defmes virtual as "[i]n essence but not in fact; existing or resulting in essence or effect though not in actual fact, form or name." *Id.* at 584. Accordingly, the literal right to confront one's accusers face-to-face was not satisfied in defendant's case and any argument to the contrary must be rejected.

The Third District's holding that satellite testimony is the equivalent of live physical face-to-face confrontation ignores the vital impact that a witness' non-verbal communication has upon the jury's evaluation of that witness' credibility. In addition to the "literal right to 'confront' the witnesses" at trial, the Confrontation Clause affords a defendant the derivative rights of a physical, face-to-face confrontation, one of which is that it **"permits the jury that is to decide the defendant% fate to observe the demeanor of the witness in making his statement."** *Green, 399* U.S. at 157 (1970) (emphasis added).

1. ***No opportunity for jury to observe demeanor of witnesses***

The trial court, in permitting the admission of satellite testimony, prevented the jury from observing the demeanor of the witnesses as they testified against defendant. In the satellite transmission used during the defendant's trial, the audio and visual transmissions were not synchronized. Because there was a delay between the transmission of the witnesses' voices and the visual images of them, the broadcast of the witnesses' testimony was not simultaneous. In fact, during trial defense counsel observed, "it's [the satellite testimony] not actually simulcast. There tends to be a delay between what you say and the response in Argentina" and the trial court responded, "You are right." (TR. 252). Moreover, despite its affn-mance of the lower court's judgment, even the Third District Court of Appeal expressed "concern . . . by the delay in the audio portion of the transmission." *Harrell*, 22 Fla. L. Weekly at D584 (March 5, 1997).

The Third District Court of Appeal, however, characterized this as a "minor" problem that existed only for a brief period. To the contrary, the problem with the transmission was not a minor problem that was remedied during the trial. The lack of synchronization was inherent in the satellite used in the present case and the quality of the broadcast was not at all similar to that used by American television networks when transmitting live interviews from one state to another.[2] With the procedure used here, the witnesses appear to move in slow motion.[3]

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[2] During the pre-trial hearing on the prosecution's motion to introduce the satellite testimony, the prosecution represented that the procedure would "be like when on the Today Show they interview Roy Black in Miami." (SR. 6).

[3] A video tape of the trial proceedings has been transmitted to this Court and its viewing is necessary for a full and fair review of the present issue.

Because of the poor quality of the satellite transmission and the jury's inability to physically observe the witnesses' entire person or their facial reactions as they testified against defendant, this necessary element of confrontation was not satisfied. More than a century ago, the United States Supreme Court observed that in confrontation the defendant

> has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of **compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief.**

Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 338-339, 39 L.Ed. 409 (1895) (emphasis added).

The importance of this opportunity to observe the demeanor is made clear by the Supreme Court's recognition that a witness does not have to look at the defendant, "he may studiously look elsewhere, but the trier of fact will draw its own conclusions." Coy, 487 US, at 1019; See *also Government of the Virgin Islands v. Aquino,* 378 F.2d 540,548 (3d Cir. 1967) ("Demeanor is of the utmost importance in the determination of the credibility of a witness."); *Broadcast Music v. Vana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949) (The demeanor of a witness is "wordless language."). The satellite procedure used in Mr. Harrell's case did not adequately provide the jury with the opportunity to observe the demeanor of the witnesses testifying against him.

Furthermore, because the complaining witnesses were looking into a camera when testifying, it was never clear to the jury whether the witnesses were looking at Mr. Harrell when they testified or if they avoided making eye contact with what was only a visual image of Mr. Harrell. Yet, this observation is necessary for the jury to draw conclusions about the witnesses' believability. *Coy,* 487 U.S. at 1019. The poor quality of satellite transmission used in the present case also denied the

jury the opportunity to observe the witnesses' subtle reactions to probing questions. The satellite was incapable of transmitting the natural human reactions one may experience when testifying, such as "sweaty" palms, shaking hands, nervous tapping of the foot, uneasy shifting of one's weight from one side of the chair to the other, incessant blinking of the eyes, and even tear-filled eyes. An observation of these natural human responses are necessary to a jury's determination of the credibility of a witness.

Although demeanor includes the subtle nuances inherent in human nature that may be inarticulable, they are nonetheless indispensable to the jury's evaluation of a witness' credibility. As Judge Freedman observed, it is not infrequently that defense counsel "leads a hostile witness to reveal by his **demeanor-his** tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance- that his evidence is not to be accepted as true." *Aquino*, 378 F.2d at 548 (emphasis added), The absence of the opportunity for the jury to observe the demeanor of the witnesses against Mr. Harrell and the lack of physical face-to-face confrontation, improperly denied Mr. Harrell his right to confront his accusers as guaranteed by the Sixth Amendment to the United States Constitution.

2. ***An effective oath***

Additionally, the use of satellite testimony also deprived Mr. Harrell of a second derivative right of physical face-to-face confrontation, the right to have the witness against him testify under lawful oath with the threat of perjury. Green, 399 U.S. at **157** (1970). During the pre-trial hearing on the prosecution's motion to introduce satellite testimony from Argentina instead of live in-court testimony, defense counsel argued that the oath, if administered from Dade County to a person in Argentina, would have no legal consequences. Defense counsel further explained that oath, as

contemplated by the trial court[4], would not subject the witnesses to perjury if they lied. In overruling the objection, the trial court responded,

> **[b]ut that is not really the issue when one takes an oath.** The issue is whether or not there are any, you are aware that there can be any bad consequences, when you swear to God to tell the truth, **the idea of an oath really is not so much perjury or is that God would strike you down if you lied.**

(SR. 15) (emphasis added).

Notwithstanding the trial court's pronouncement to the contrary, the purpose of the oath is not to place the fear of God into the declarant, but to admonish the declarant that he or she would be subject to prosecution for making false statements. As observed by the United States Supreme Court, the Confrontation Clause not only provides for personal examination, "but also 'insures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and **guarding against the lie by the possibility of a penalty for perjury."'** *Craig*, **497** U.S. at 845-846 (quoting Green, 399 U.S. at 158) (emphasis added).

Significantly, the oaths administered to the complaining witnesses were not ones legally recognized in the State of Florida, Because the trial court misconstrued the purpose of administering an oath to a witness, the trial court did not require that a legally effective oath be administered to the witnesses before they offered testimony against Mr. Harrell. Accordingly, the entirety of the complainants' testimony should not have been admitted at trial.

An oath has no effect unless the declarant is subject to a perjury prosecution if he or she knowingly makes a material false representation. For purposes of prosecuting perjury, this Court

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[4] The deputy clerk in Miami was to administer an oath upon the witnesses in Argentina in the presence of the jury, judge, and interpreter. (SR. 17-18).

has observed that the court in which the oath is made must have jurisdiction of the cause when the oath was made. *Markey v.* State, 47 Fla. 38, 52, 37 So. 53, 56 (1904). It is established that "a tribunal must have jurisdiction of the cause or proceeding before perjury can be committed." *Markey*, 47 Fla. at 52, 37 So. at 56 (quoting Maynard v. *People*, *25* N.E. 740, 741 (1890) (Jurisdiction being an element without which there can be no perjury)). The trial court below had no jurisdiction over the foreign witnesses as they offered testimony via satellite and, consequently, their testimony was not given under lawful oath.

The witnesses elected not to return to the United States to testify in person during Mr. Harrell's criminal trial and the prosecution alleged that it was without the lawful authority to demand that they return. Where the prosecution is without lawful authority to require the attendance of the witnesses for a trial against Mr. Harrell, the same absence of authority would preclude the prosecution from demanding that the witnesses return to the United States to defend themselves against a perjury prosecution. In addition to the prosecution's admission of no lawful authority over the witnesses, the trial court similarly conceded, "she's outside the court's jurisdiction." (SP. 8-9).

Because the witnesses were not in the jurisdiction of the trial court when the alleged oath was administered, the oath was not lawful and their testimony was inadmissible. Despite its affirmance of the trial court's judgment, even the Third District Court of Appeal implicitly acknowledged the legal deficiency of the oath administered in defendant's trial when it held,

> requirements that future satellite transmissions should follow to preserve the defendant's constitutional rights. First, a court official from the jurisdiction holding the trial, such as a clerk authorized to administer oaths, a court reporter, and any technical staff needed for the transmission, should be the only people authorized to be present in the room where the witness is testifying. The court official should

> administer the oath and hand the witness any documents requested by the attorneys or the court.

Harrell, 22 Fla. L. Weekly at D584 (March 5, 1997).

B. ***Exception to Confrontation Clause not warran ted***

The introduction of the complaining witnesses' testimony via satellite in Mr. Harrell's criminal trial violated the Confrontation Clause. Admittedly, the requirements of the Confrontation Clause "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 245. The Confrontation Clause does not exclude, for example, the admission of specified out-of-court statements that bear adequate indications of trustworthiness. Most notably among these exceptions is the dying declaration. ***Mattox,*** 156 U.S. 237,244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895) (Dying declarations are not admitted "in conformity with any general rule regarding the admission of testimony, but as an exception."). See ***also*** § 90.803, Fla. Stat. (1995) and § 90.804, Fla. Stat. (1995). In addition, "there has traditionally been an exception where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." ***Barber v. Page, 390*** U.S. 719, 722, 88 S.Ct. 1318, 1320, 20 L.Ed.2d 255 (1968). Also excepted from the Confrontation Clause is the use of closed circuit testimony to ensure the "physical and psychological well-being of child abuse victims," who "would be traumatized, not by the courtroom generally, but by the presence of the defendant." ***Craig,*** 497 U.S. at 853,856. In creating this exception, the United States Supreme Court held that "a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling one."' ***Id.*** at 852 (quoting ***Globe Newspaper Co. v.***

Superior Court of Norfolk County, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982)).

The introduction of testimony through the use of satellite transmission, for the convenience of foreign tourists, would not be excepted from the Confrontation Clause by either of the existing exceptions recognized by the United States Supreme Court. Because the convenience a foreign tourist finds in testifying via satellite is neither a compelling state interest nor an important public policy, a new exception to the Confrontation Clause is not warranted. In its opinion affirming the trial court's judgment, the Third District Court of Appeal concluded that "a trial court in a criminal case may employ new procedures without precedent if the procedure furthers an important public policy interest." *Harrell*, 22 Fla. L. Weekly at D584 (March 5, 1997). The Third District Court of Appeal offered two important public policies allegedly advanced by the use of satellite testimony (1) cost, inconvenience, and travel time and (2) deterring violence against foreign tourists.

The policies stated by the appellate court, however, are not realized by the use of satellite testimony and even, *arguendo*, if the polices were realized by the use of satellite transmission they are not important enough to compromise a defendant's constitutional right of confrontation,

It is only "in certain narrow circumstances, [that] 'competing interests, if "closely examined," may warrant dispensing with confrontation at trial."' *Craig*, 497 U.S. at 848 (quoting *Roberts, 448* U.S. at 64 (quoting *Chambers* v. *Mississippi*, 410 U.S. 284,295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973)). No such narrow circumstances exist under the present facts and, consequently, no exception is necessary.

1. ***Cost, inconvenience, and travel time are not reduced***

The record below directly belies the appellate court's assertion that this procedure reduces cost, inconvenience or travel time. The cost for introducing the testimony of the complaining witnesses via satellite was at least $5,000.00 for the satellite alone. In its motion to the trial court, the prosecution stated that the cost of the procedure was $2,500.00 per hour, with a minimum of two hours. (R. 20). The price of two round-trip plane tickets from Buenos Aires to Miami does not exceed $5,000.00. Neither did this procedure reduce the inconvenience of the court. In order to accommodate the satellite testimony, defendant's trial was moved from the criminal courthouse to "a room set up. It is Downtown." (SR. 6). The room was not a courtroom and had to be arranged to accommodate the legal proceedings. The use of satellite testimony in Mr. Harrell's case did not reduce the costs or inconvenience of the trial, instead, it increased both.

Furthermore, in addition to the costs and inconvenience of satellite testimony in Mr. Harrell's case, the Third District Court of Appeal listed several other requirements that would be necessary for all future satellite testimony in a criminal trial. First, the Third District would require a court official from the jurisdiction holding the trial to be present with the declarant who is testifying via satellite. Second, the Third District would require audio visual transmissions in color and would double the number of cameras used for the transmission. And fmally, the Third District would require the signals of the transmission to be scrambled. These additional requirements would surely increase the cost of introducing satellite testimony, which already exceeded the cost of paying for the complainants' to fly to the United States. Consequently, the first public policy consideration advanced by the appellate court is unattainable and could not qualify as a necessary justification to deny a defendant his right of confrontation.

2. Deterring violence againstforeign tourists is not sufficient reason for an exception

This second asserted public policy, conveniencing foreign tourists who would otherwise be required to return to the United States for a criminal trial, is a direct attempt to circumvent the essence of the Confrontation Clause. In *Maryland v.* Craig, the United States Supreme Court created an exception to the Confrontation Clause because it was necessary to protect the child from trauma and the emotional stress suffered by the child witness in the presence of the defendant. The Court recognized that this exception would require a case-specific finding that the procedure was "necessary to protect the welfare of the **particular child** witness who seeks to testify." ***Craig, 497*** U.S. at 856 (emphasis added).

Unlike the Third District Court of Appeal, the United States Supreme Court did not create a general exception to the Confrontation Clause just to accommodate children who had nothing "more than 'mere nervousness or excitement or some reluctance to testify." ***Craig, 497*** U.S. at 856. In fact, the Court further explained its ruling when it held that, "if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, **denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present."** ***Craig, 497*** U.S. at 856 (emphasis added).

Here, in the light most favorable to the prosecution, the witnesses were merely reluctant to come to the United States for Mr. Harrell's trial. To support its representation of unavailability, the prosecution made a bare assertion, which was ultimately corroborated by that witness during defendant's trial, that one witness suffered from cancer. Significantly, no medical reason was

proffered as to the unavailability of the prosecution's second complaining witness. Instead, the prosecution proffered that the witness refused to return to the United States for trial.

Unlike the prosecution's first complaining witness, the second complainant completely contradicted the prosecution's pre-trial assertions regarding his availability for trial. While testifying at defendant's trial, the second complaining witness denied ever having told anyone from the State's Attorney Office that he would not return for defendant's trial. In fact, the second complainant unequivocally stated, **"I don't have any problem with going to the United States for the trial in this case,** but it's because of problems of my wife's health and problems of my work. **But if I have to go, then I would."** (T. 266) (emphasis added).

The mere reluctance of a witness to return for trial would not justify denying a defendant his constitutional right to confront his accusers. If the witnesses are truly unavailable, lawfully authorized procedures, which do not violate the Confrontation Clause, are already available to a trial court and no exception to the Confrontation Clause is necessary or justified. If a witness is unavailable to testify at a defendant's trial, the appropriate procedure is for the trial court, pursuant to Fla. R. Crim. P. 3.190 (j)[5], to enter an order to perpetuate testimony. Unlike the use of satellite testimony at trial, the Florida and Federal rules of criminal procedure protect a criminal defendant's right of confrontation.

Moreover, the distinction between foreign tourists and domestic tourists, or other Floridians who do not live in Dade County, is arbitrary and has no legal foundation. The distance from Miami to Seattle is much farther than the distance from Miami to Nassau, but the ruling of the Third District

[5] A similar procedure is authorized by Fed. R. Crim. P. 15 (b)

Court of Appeal would permit a witness from Nassau to testify via satellite and require a witness from Seattle to return to Miami. A domestic witness in a criminal proceeding, pursuant to the Confrontation Clause, is required to physically appear and testify at trial and the same must be required of foreign tourists. The principle of treating tourists and citizens equally was most recently affirmed when this Court held that in sentencing a defendant, the fact that one victim is a tourist is not sufficient grounds to enhance the punishment. *State v. Jones, 685* So.2d 1280, 1281 (Fla. 1996) ("vulnerability" of tourists is insufficient to justify departure from the sentencing guidelines),

The trial court reversibly erred in permitting the prosecution, over defense counsel's objections, to introduce the testimony of its complaining witnesses through satellite testimony and this error may not be considered harmless, First, the testimony of the complaining witnesses was the only evidence to establish that the charged offenses occurred. But for the complaining witnesses' testimony, the prosecution could not establish the elements of the alleged crimes. See Coy, 487 U.S. at 1022 ("harmlessness must therefore be determined on the basis of the remaining evidence). Moreover the problems throughout the satellite testimony, i.e, one witness's communication with an unidentified person during her testimony and the numerous technical difficulties, including the delay in the audio transmission, the slow motion images of the witnesses, and the complete black out at one portion of the testimony, were harmful errors that would require reversal even if the procedure did not violate the Confrontation Clause,

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to answer the certified question in the affirmative, reverse the judgment of the Third District Court of Appeal, and remand Petitioner's cause to the trial court for a new trial,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to: RICHARD POLIN, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33 13 1; DAVID HENSON, ESQ., Rirkconell, Lindsey, Snure and Henson, P.A., 1150 Louisiana Avenue, Suite 1, Winter Park, Florida 32790-2728; and ELLIOT H. SCHERKER, ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33 13 1 this 20 day of May, 1997.

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