

DAVID HARRELL,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER ON THE MERITS

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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?

The trial court erred in permitting the prosecution to introduce, via satellite from Argentina, the testimony of its complaining witnesses against Petitioner, The trial court's ruling impermissibly denied Petitioner the right to physically confront his accusers in a public trial and the record does not establish the existence of a compelling state interest that would justify creating a new exception to the constitutional right to confront one's accusers, as explicitly guaranteed in the Sixth Amendment to the United States Constitution' and Article I, § 16 of the Florida Constitution.' Furthermore, even if an exception to the literal right to physically confront one's accusers is necessary to protect unavailable foreign tourists, the witnesses in the present case were not unavailable and the method used to introduce the complainant's testimony did not sufficiently protect Petitioner's other rights, which are inherent in confrontation

Petitioner challenges his conviction for strong armed robbery because the use of satellite

¹ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him" U.S. Const, amend. VI.

² "In all criminal prosecutions the accused shall, . . . have the right . . . to confront at trial adverse witnesses, . . . and to have a speedy and public trial by impartial jury in the county where the crime was committed." Art. I, § 16 (a), Fla. Const.

testimony during his criminal trial, in the absence of a compelling state interest, was a *per se* violation of his right of confrontation. Respondent misconstrues Petitioner's Sixth Amendment claim as an attack on the manner in which the satellite was transmitted. To the contrary, Petitioner challenges the mere admission of satellite testimony and Petitioner's collateral arguments that challenge the manner in which the transmission occurred are illustrations of how the use of satellite testimony in defendant's case did not further the values of confrontation.

The complaining witnesses' absence from the Miami courtroom while they offered testimony against Petitioner was in direct violation of the Confrontation Clause. "The Confrontation Clause provides . . . a criminal defendant: 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) (emphasis added). The witnesses in the present case did not physically confront the Petitioner at trial. Instead, the complainants, while physically in Argentina, offered their testimony against defendant as their visual images were electronically transmitted to Miami. It is Respondent's position that because defendant was able, via satellite, to see the images of the complainants and the complainants, via satellite, were able to see his image, "the concerns with face-to-face confrontation [were] fully satisfied." Brief of Respondent on the Merits, p. 18. Respondent argues that "the oath, cross-examination and demeanor have been held to provide 'all that the Sixth Amendment demands'" Brief of Respondent on the Merits, p. 20, (citing *Maryland v. Craig*, 497 U.S. 836, 846, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990) and quoting *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980)). Respondent's reliance on *Craig* and *Roberts* to support its position is misplaced and its position reveals a constitutionally significant misunderstanding of the Confrontation Clause.

Contrary to Respondent's assertion, the electronic transmission of the complainants' visual images during Petitioner's trial was not "fully in compliance with the requirements of the Confrontation Clause," Brief of Respondent on the Merits, p. 20. In arguing that oath, cross-examination and demeanor are all that is required by the Sixth Amendment, Respondent attempts to reduce the constitutional right to physically confront one's accuser to a mere ancillary concern of the Confrontation Clause, which may be dispensed with arbitrarily. Respondent's position, which purports to rely on *Craig*, was clearly rejected by the Court in *Craig* when it held that although "the face-to-face confrontation requirement is not absolute [that] does not, of course, mean that it may easily be dispensed with." *Craig*, 497 U.S. 836, 850. Significantly, Respondent has failed to address the inherent constitutional deficiency of the satellite procedure used in the present case. The witnesses did not "physically" confront the defendant.

The United States Supreme Court enumerated four elements of confrontation "*physical presence*, oath, cross-examination, and observation of demeanor by trier of fact" that when combined, they serve the purposes of the Confrontation Clause. *Craig*, 497 U.S. 836,846. (emphasis added). Although physical presence is explicitly listed as an element of confrontation, Respondent argues that where the other three elements of confrontation are satisfied, physical presence is not needed. This Court **must** reject Respondent's argument, which has the effect of reducing the **Confrontation** Clause to a civil contract, which may be satisfied with substantial performance. This argument must be rejected as contrary to the holding that the "purposes of the Confrontation Clause" are served only through "the combined effect of the four elements of confrontation." *Id.* at 846.; See also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987).

The right of face-to-face confrontation is more than merely the right to see an accuser's

electronically transmitted visual image. Instead, it provides a defendant with the right to physically face his accuser's, *See Ritchie*, 480 U.S. 39 at 51 (a criminal defendant has "*the right physically to face*" those who testify against him). The United States Supreme Court has acknowledged a "strong symbolic purpose served by requiring adverse witnesses at trial to *testify in the accused's presence*." *Craig*, 497 U.S. 836, at 847 (emphasis added). In addition to the symbolism, it is the the physical presence of witnesses at a criminal trial or the "literal right to 'confront' the witness at the time of 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). The Court in *Green* further explained, "Confrontation: (1) insures that the witness will give his statements under oath, . . . (2) forces the witness to submit to cross-examination . . . [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness." *Id.* at 149. Accordingly, Petitioner's right to have his accusers physically appear before him is not as easily excused as Respondent's argument suggests.

The physical presence of a witness at trial satisfies both the confrontation element of the Sixth Amendment and it furthers the Sixth Amendment right to a public trial. Although the right of confrontation and the right to a public trial are in separate clauses, the two rights are intra-dependent guarantees that must be applied in concert. As Professor Jonakait concludes, the Sixth Amendment should be read as part of an integral Bill of rights where each guarantee is interpreted in light of the rest of the Sixth Amendment.³ The Sixth Amendment rights to a public trial and to

³ In support of his conclusion, Jonakait writes,
Unless each grant was randomly dropped into the Sixth, the clauses should not be read in isolation. The individual guarantees, however, do fit together to serve broader purposes than those served by each

physically confront one's accusers are not realized when a satellite transmits a witness' testimony from a location outside of the courtroom. As observed by the United States Supreme Court, the right to a public trial "has always been recognized as safeguard against any attempt to employ our court as instruments of persecution. . . . [because] the forum of public opinion is an effective restraint on possible abuse of judicial power. "*In re Oliver*, 333 U.S. 257, 270, 68 S.Ct. 499, 506, 92 L.Ed. 2d 682 (1948). When a witnesses is permitted to testify without ever appearing in the public courtroom, spectators are unable to see that the witness has freely come to testify, without coercion. Without public scrutiny of all aspects of criminal trials, the possibility for judicial abuse is increased.

Respondent next argues that because the concerns of the Confrontation Clause were "fully satisfied" through satellite testimony, there was no need to demonstrate a compelling state interest in order to use this procedure in Petitioner's case. Remarkably, Respondent asks this Court to interpret the Sixth Amendment in a manner that was not even contemplated by the Third District's certified question.⁴ If accepted, Respondent's interpretation of the Sixth Amendment would have no restriction on the use of satellite testimony in criminal proceedings and may be used irrespective of witness availability. Moreover, this procedure could be used without regard to the location of the witness, even if the witness is in a neighboring county.

separately. . . . These are not separable guarantees. Instead, they dovetail to construct a forum that will not only **find** facts, but will also be a check on governmental overreaching.

Randolph N. Jonakait, *Forward: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. Crim. L. & Criminology 713, 734-35 (1992).

⁴ Does the use of satellite testimony violate the Confrontation clause, "where a witness resides in a foreign country and is unable to appear in court."

None of the cases relied on by Respondent support its proposed interpretation of the Sixth Amendment. In both *Brady v. State*, 575 N.E. 2d 981,989 (Ind. 1991) and *People v. Algarin*, 498 N.Y.S. 2d 977, 980 (N.Y. Sup. Ct. 1986) those courts were reviewing the testimony of child witnesses in sexual battery prosecutions. In *Brady*, the Indiana Supreme Court reversed a defendant's conviction because the videotaped testimony of a child victim violated the constitution of that state. 575 N.E.2d at 988. That court further explained, in dicta, that if the child witness were to testify via closed circuit television, there would be no violation of the Indiana Constitution. In *Algarin*, a trial court in the state of New York held that "the statute which authorizes the examination of emotionally traumatized child victims by live closed-circuit television outside of the physical presence of the defendant [does not] violate the defendant's constitutional right of confrontation. 498 N.Y.S. 2d at 978. The New York court's holding simply recognized a Confrontation Clause exception, which has been upheld by the United States Supreme Court in *Maryland v. Craig*, 497 U.S. 836,846, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990). Respondent also cites *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975), the Missouri Supreme Court decision which held that the use of a closed circuit television in a trial for the violation of municipal ordinance did not violate the Sixth Amendment. In *McCoy*, the Missouri Supreme Court acknowledged that the proceeding was "civil in nature" and, unlike Petitioner's case, there was no right of confrontation, Consequently, this case offers neither a precedent nor persuasive authority for Respondent's position.

Respondent is unable to find legal authority to support its extraordinary assertion that adult witnesses in criminal prosecutions should be permitted to testify via satellite, even when the witnesses are available and there is no compelling state interest furthered by using a satellite to transmit their testimony. There is no precedent for such a cavalier dispensement of the requirement

of physical conformation. Instead, the judicial precedent “reflects a preference for face-to-face confrontation at trial.” *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980)). Furthermore, the United States Supreme Court’s “precedents confirm that a defendant’s right to confront accusatory witnesses may be satisfied absent *aphysical*, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” *Craig*, 497 U.S. at 850 (emphasis added). See *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980)).

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 defines 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 physically confront one’s accusers face-to-face was not satisfied in defendant’s case and any argument to the contrary must be rejected.

Because the trial court dispensed with physical confrontation in defendant’s case, it was necessary for the prosecution to have established that the “denial of such confrontation [wa]s necessary to further an important public policy” *Craig*, 497 U.S. at 850. The record, however, does not support such a finding. The Third District Court of Appeal ruled that where a foreign witness is unavailable, it is necessary to deny a defendant the right of physical confrontation and

permit the witness to testify via satellite, in order to increase judicial efficiency and deter violence against foreign tourists. In reviewing Petitioner's challenge to the admission of satellite testimony in his criminal prosecution, this Court need not reach the merits of the important public policy goals alleged to be furthered by the use of satellite testimony.⁵ This is so because even if the goals alleged by the Third District were important public policies, these goals may be achieved through the use of already existing procedures to secure the testimony of unavailable witnesses, who are beyond the trial court's jurisdiction,

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)⁶, to enter an order to perpetuate testimony. Unlike the use of satellite testimony at trial, the Florida Rules of Criminal Procedure protect a criminal defendant's *right of physical confrontation*. When a proper motion is filed, the Florida rule requires a trial court to order a commission to be issued to take a deposition of an unavailable witness. The rule mandates that the

. . . application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice. . . .

(3) If the deposition is taken on the application of the state, the defendant and defendant's attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time and place and

⁵ Petitioner does not recede, however, from the arguments presented in the Initial Brief of Petitioner and the amicus brief, which challenged the public policy interests alleged by the court below.

⁶ A similar procedure is authorized by Fed. R. Crim. P. 15 (b)

shall produce the defendant at the examination and keep him in the presence of the witness during the examination.

Fla. R. Crim. P. 3.190(j) (emphasis added).⁷

The existing rule, as distinguished from the novel rule urged upon this Court by the Third District Court of Appeal, protects defendant's right to physically confront his accuser's, which "forms the core of the values furthered by the Confrontation Clause." **California v. Green, 399** U.S. at 149. The Third District attempts to create a Confrontation Clause exception, which denies physical confrontation and is, therefore, significantly more intrusive than the constitutionally valid exception that already exists. Because the new exception proposed by the Third District furthers no additional important state interests, this Court must reject the Third District's proposed rule as an unnecessary and unjustified infringement on a defendant's constitutional right of physical confrontation.

Moreover, there was no need for any exception to Confrontation Clause in the present case because the witnesses were available. During the pretrial hearing on the prosecution's motion to introduce its witnesses' testimony via satellite, the prosecution presented no documents to substantiate its claims of witness unavailability. (I. 43-30-32).⁸ Instead, the prosecution made unsupported assertions that the witnesses were unavailable because of health concerns and their refusal to return to the United States. This bare assertion alone does not support a finding of unavailability that is legally sufficient to require even a motion to perpetuate testimony.

⁷ The Federal rule also requires the defendant's presence during the examination. See Fed. R. Crim. P. 15 (b).

⁸ The symbol "I" references the Supreme Court Index to the Record on Appeal.

Furthermore, the trial court held, “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.*” (I. 43- 33). Accordingly, it must be presumed that the witnesses were available for trial and the trial court’s ruling, which permitted them to testify via satellite, was based on convenience and not a necessity to further an important state interest.

Because the use of satellite testimony in Petitioner’s case was not necessary to further an important public policy, as the ruling was based on witness convenience, and because there already exists a constitutionally valid procedure to secure witness testimony when unavailability is properly established, this Court must reverse the ruling of the court below and reject the invitation to create a more constitutionally intrusive Sixth Amendment exception, which is unwarranted.

Finally, even if this Court were inclined to hold that a new exception to the Confrontation Clause is necessary to further compelling state interests, which can not be achieved through the use of perpetuated testimony, the procedure used in Petitioner’s case was insufficient to protect his right of confrontation and his conviction must be reversed. Despite its **affirmance** of the satellite procedure used in Petitioner’s case, the Third District Court of Appeal acknowledged several legal deficiencies with the procedure used in the present case when it listed the following

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.

Second, two-way audio and visual transmissions should be

provided for each witness in color. "IN" monitors and "OUT" monitors from and to the location of the witness should be in the courtroom. Video screens should be placed on the witness stand. One camera should be focused on the defendant and another camera should be focused on the witness at all times, A third camera should focus on the presiding judge. Each camera should transmit to its corresponding monitor.

Finally, the transmission should be scrambled to prevent any interference or interception of the testimony, and descrambled in the courtroom. The party calling the witness should ensure that persons other than those in the courtroom are not able to watch, listen or otherwise monitor the satellite testimony.

Harrell, 22 Fla. L. Weekly at D584 (March 5, 1997). If the foregoing procedures are necessary to protect a defendant's constitutional rights, but none of the listed procedures were followed in Petitioner's case, it necessary follows that Petitioner's rights were not protected.

The absence of these procedural protections resulted in the commission of several errors during Petitioner's trial. While testifying, the first witness made several glances to the right before the trial court ordered the camera to assume a vantage that would show both the witness and the person whom she was looking at. Moreover, the witness was not merely looking at the person off-screen, at one point during her testimony, it appears that the witness received a translation from the other woman. The problems with this witness' testimony are apparent in the first twenty minutes of the videotape, which is labeled exhibit #1. Although it affirmed the conviction, even the Third District Court of Appeal expressed concern "that one witness glanced to the right of the camera."

Additionally, there was no guarantee that the trial court's rule of sequestration was followed in the present case. Before the First witness testified, the trial court ordered her to leave the room. A review of the videotape of the proceeding, however, reveals that during the time that the witness was instructed to leave the room, the camera operator continuously spoke with an unidentified

person off-screen.

In addition to the several technical difficulties with the procedure in Petitioner's case, including a momentary total black-out, the other elements of confrontation were compromised by the satellite procedure. The audio and visual transmissions were not synchronized. This Court's review of the video exhibits, which are included in this record, will reveal the transmission difficulties that were inherent to the satellite testimony. Respondent argues that defense counsel's record reference to the satellite's delay in transmission was not a specific objection and "any claim based on this 'one-second delay' is not preserved for appellate review." (Brief of respondent, p. 23.). Defense counsel objected to the complete use of satellite testimony and it necessarily follows that the errors, which were directly caused by the use of this procedure, need not have separate objections. See *Gaither v. State*, 58 1 So. 2d 922,924 (Fla. 2d DCA 1991) (defense counsel's general objection at end of evidentiary hearing on the admissibility of videotape of child's testimony was "sufficient to preserve for appeal" the trial court's ruling.)⁹ Because there was a delay between the transmission of the witnesses' voices and their visual images, the broadcast of the witnesses' testimony was not simultaneous. The Third District Court of Appeal characterized the delayed transmission a "minor" problem that existed only for a brief period. To the contrary, the lack of synchronization was inherent in the satellite used in the present case and the witnesses appear in unnatural slow motion throughout their entire testimony.

⁹ The trial court's ruling, over defense counsel's objection, to permit the use of satellite testimony was based in part on the prosecution's representation that there would be a simultaneous transmission. Accordingly, defense counsel's observation and the trial court's acknowledgment that the satellite transmission was not simultaneous was merely an observation made on the record to support a previously made objection.

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 Petitioner, prevented the jury from adequately observing demeanor evidence. The opportunity to observe witness demeanor is essential to the fact-finding process. See *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 importance of demeanor observation was also recognized in *Hochheiser v. California*, 208 Cal. Rptr. 273,279 (Cal. App. 1984) and *Commonwealth v. Bergstrom*, 524 N.E.2d 366,366 (Mass. 1988). In condemning the use of closed circuit television during a prosecution for lewd conduct on a minor, *the Hochheiser* court observed that "the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status conferral." 208 Cal. Rptr. at 279. Like the California court, the Supreme Judicial Court of Massachusetts has similarly condemned "testimony by electronic means outside [the] physical presence of defendant and jury." *Commonwealth v. Bergstrom*, 524 N.E.2d 366,366 (Mass. 1988).

The court in *Bergstrom* observed that

[i]n reality . . . , the camera unintentionally becomes the juror's eyes, necessarily selecting and commenting upon what is seen For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways. . . .

Id. at 375-76, Because demeanor evidence is an essential element of confrontation, the absence of an adequate opportunity to observe demeanor was an impermissible confrontation infringement.

The use of satellite testimony in Respondent's case also precluded the witnesses from

testifying “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). In the present case, the witnesses had the subjective belief that they were beyond Florida’s control because they chose not to return for trial and the prosecution stated that it was without the lawful authority to demand that they return. Accordingly, it cannot be argued that the witnesses offered testimony under the threat of a perjury conviction. The Respondent’s reliance on the Treaty on Extradition Between the United States of America and the Republic of Argentina, 23 U.S.T. 3501 (Sept. 15, 1972) was not presented to the trial court, where the logistic of the treaty and the practical application of extradition could have been fully litigated. This treaty was not introduced at the trial level and, consequently, this Court may not speculate as to the effect of this treaty on the confrontation deficiencies in Petitioner’s case,


Because it is impossible for satellite testimony to satisfy the physical presence requirement of confrontation and because there was no compelling state interest to justify an exception to the Confrontation Clause, the trial court erred in admitting satellite testimony in Petitioner’s trial.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to answer the certified question in the affirmative and reverse the judgment of the Third District Court of Appeal

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., Kirkconell, 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 20th day of August, 1997.

 
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