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 RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

David Harrell was charged by information with one count of strong-arm robbery and one count of burglary with an assault or battery. (R. 1).

Prior to trial, the State filed a Motion to Allow Production of material Witness by Video and Authorizing Expense. (R. 20-2 1). This motion alleged that Harrell had been charged with robbing the two victims, Perla Scandrojlio and Pedro Mielniczuk, near the Miami International Airport, that Ms. Scandrojlio has cancer, and that the victims are unable and refuse to return to the United States. (R. 20). The State sought to produce the victims by satellite video. Id.

At a pretrial hearing on the foregoing motion, the prosecution advised the court that the two victims had returned to Argentina, subsequent to the offense. (SR. 3-4).[1] One of the victims had been in the United States, at the time of the incident, "in an attempt to get some sort of medical treatment," (SR. 3). Subsequent to the offense and prior to trial, the prosecution had contacted the victims "at least ten times in Buenos Aires, Argentina," and "they are absolutely refusing to come back for the trial," (SR. 4). The reason for the refusal to return to testify at trial was the female victim's "health problems," as well as the "nine hour flight from Buenos Aires." (SR. 4). When defense counsel questioned whether the witnesses were unavailable, the judge responded that they

[1] The symbol "SR" refers to the Supplemental Record filed with the lower Court. The Clerk of the lower Court included this transcript as an appendage to the Order Granting Motion to Supplement Record on Appeal. (R. 43, et seq.). The transcript is appended to that order in the record herein.

were unavailable because they were in Argentina, and "I am not going to tell the State that they should extradite a lady who has cancer here so she can testify as a State's witness." (SR. 7-8). The court's concern was not with the unavailability of the witnesses, but with safeguarding the defendant's constitutional right to confrontation. (SR. 8). When defense counsel expressed the desire to question the witness, on the record, as to the existence of her cancer, the judge agreed to permit such questioning during the video session, but asked that it be done outside the presence of the jury. (SR. 26-27). The prosecutor again reiterated that the witnesses were refusing to return to Florida. (SR. 29).

The prosecutor sought to have the victims testify by satellite television, and the technology was described for the court. The two witnesses would testify from a studio in Argentina. The jury, attorneys, judge and defendant would view that testimony on a television monitor set up in a studio in downtown Miami, in a room which was large enough to accommodate 50 people. (SR. 4-7). The television connection was "two-way," meaning that not only could all of the jurors, attorneys, defendant, judge, etc., view the witnesses while they were testifying, but, the witnesses, while testifying, would also be viewing the defendant on a television monitor in the studio in Argentina. (SR. 6, 11, 35).[2] The video connection was such that both the images and the sound would be transmitted "simultaneously, as "the Defendant, the attorney, everybody and the State, will get the questions at the same time and the witness and the jury and the judge, everybody will get the questions at the same time and the answers at the same time." (SR. 11). Furthermore, unlike some

[2] Thus, the judge specifically stated: "I am being told that the Defendant will view his accuser and his accuser will view him." (SR. 11).

situations in which children victims were questioned on one-way video connections in one room, while the defendant watched from another room, both the defendant and his attorney would be together in the same room, along with all other court personnel, and the defendant would thus have the unimpaired ability to consult simultaneously, and at all time, with counsel. (SR. 11-12).

When defense counsel professed an inability to actually know what the witnesses were seeing on the video monitor in Argentina, the court responded that those witnesses could be asked, on the record, to state what they see on their video monitor. (SR. 12). The prosecutor added that "[t]he defense can request that the camera be pointed at the defendant and ask the people [Argentina witnesses] is this the guy if they want to." (SR. 13). The judge described the video process as follows: "in this day and age, with the technology that we have available to us, this is probably as close as one can get . . . to having a person physically present." (SR. 21). Thus, the judge emphasized that the defendant would have the full rights of cross-examination "that will occur simultaneously." (SR. 25).

When defense counsel asserted that he did not know what kind of oath the witnesses would be giving, the court responded, "the usual oath." (SR. 15). Defense counsel asserted that the oath would not have any effect in Argentina and asked how the witnesses could be charged with perjury if they were lying. (SR. 15, 19-20). The prosecutor asserted that he intended to swear the witnesses in "through a video process by a clerk in our court." (SR. 20).

At the conclusion of the pretrial inquiry, the judge stated that the prosecution had "made a

record that you have attempted to secure the voluntary attendance of the witness and I believe that you have." (SR. 29). The judge further noted that the witnesses were not subject to being served with a subpoena. (SR. 29). The prosecutor then proffered that one of the officers handling the case, Detective Iris Deacan, who speaks Spanish, had contacted the victims about 10 times "and it got to the point where the woman [witness] became infuriated because we were contacting her so much." (SR. 30). The prosecutor also had one of the secretaries from the State Attorney's Office contact the female victim. (SR. 30).[3]

At the conclusion of the legal arguments, the judge orally ruled that "the defendant's rights to confrontation are not being violated as he is confronting the witness, but in the alternative the Court will find that the witness is unavailable and therefore, the simultaneous statement of the witness could be treated I suppose as hearsay and under that rule can be admitted. But frankly, I strongly feel that every precaution is being made to safeguard the defendant's rights of confrontation." (SR. 32). The judge viewed the case as involving exceptional circumstances, based on the geographical distance, the foreign country involved and the illness of the victim. (SR. 33).

The judge then signed the following order granting the motion to produce the witnesses by

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[3] Towards the end of the State's case-in-chief at trial, the prosecution had Mercy Esquivel, a secretary from the State Attorney's Office, describe some of the State's efforts to get the witnesses to return to Florida for the trial. (T. 412, et. seq.). In the two weeks prior to the trial, Ms. Esquivel had spoken to Pedro Mielniczuk, and he had stated, "there's no way my wife will come back because she is sick." (T. 418). The witness further added that his wife was "very sick and very scared." (T. 419). He added, as to himself, that his business would not let him go. (T. 419). When asked if he could come in a few more months, he said that he was very scared and was never coming back; that was his final answer. (T. 491).

video satellite:

> THIS CAUSE having come to be heard before this Court, and the Court being fully advised in the premises, it is hereby ORDERED AND ADJUDGED:
>
> 1. That the State shall be permitted to produce the testimony of Pedro Mielnicsuk and/or Perla Scandrojlio by television satellite in that the aforementioned witnesses are unavailable for trial.
>
> 2. The following procedure will take place to protect the defendant's right to confrontation of witnesses as guaranteed by the Sixth Amendment to the United States Constitution:
>
> a. The defendant, along with counsel, judge, and jury shall be present int he same room while the satellite testimony of witnesses is proceeding;
>
> b. The defendant, shall be able to view the witness in Miami, Dade County, simultaneously with the actual testimony in Buenos Aires, Argentina;
>
> c. The witness in Buenos Aires, Argentina, will be able to see the inquiring attorney and the defendant at all times during the proceedings;
>
> d. The testifying witness in Buenos Aires, Argentina, shall be sworn by the Deputy Clerk in Miami, Dade County, Florida. The jury, Judge, Interpreter, Clerk, and any other necessary court personnel shall be present during the proceedings;
>
> e. The State will not attempt to have the testifying witness make an in-court identification of the defendant.
>
> 3. The above delineated procedure will afford the defendant the ability to fully cross-examine the witnesses against him. The defendant will be able to observe the witness and the witness will be able to view the defendant during the proceedings. See Pointer v. Texas, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S. Ct. 1065 (1965); Douglas v. Alabama, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965).

(SR. 38-39).

At the outset of jury selection proceedings during the trial, the judge described for the prospective jurors the video process that would be utilized, when inquiring whether any venire

members would have a problem with it:

> . . . Those who were selected for a jury tomorrow are going to be taken by a van to a different location downtown. It's not the courthouse; it's a studio. Because in that studio we are going to have a live hookup via satellite to Buenos Aires because we are going to have a live hookup of a potential witness from Buenos Aires testifying here in this trial. It's the first time we have done it in Dade county.
>
> So does anybody have a problem with that?
>
> We are going to take you by van. We are going to have the court reporter there. The clerk is going to be there. All the attorneys will be there. The defendant will be there. I will be there. The jury and the alternates will be there. And we are going to be seeing it at the same time and seeing exactly what's happening. There will be television monitors. All of us will be in this studio and the courtroom together. And the only people that will be on the TV screen will be anyone who will be testifying from Buenos Aires. That person from Buenos Aires will be seeing - all of you on the jury will be seeing the defendant. There will be a split-screen monitor; and everything will take place the same as a courtroom except we will be in that studio, and there will be a hookup to Buenos Aires.

(T. 62).

After opening arguments, and prior to the testimony from the first witness, Ms. Scandrojlio, who was testifying from Argentina, the court again summarized the procedures which would be followed:

> . . . The court reporter is going to be there. The interpreter is going to be there. But it's a live hookup and not a tape recording, but a live hookup - a satellite hookup. So you will see them. You can see all that you have to see. The defense is going to be present to see the same thing too, and you will see how the TV is. The monitors are going to be to the person from Buenos Aires on one monitor. The other monitor is going to be divided in two. The bottom half is going to be the jury. And that's not half really. It's a bottom quarter is

> going to be the jury because they have two rows, and one of the cameras will be set where they are going to be able to see you folks on the jury, I figured on seven, but we just need one extra chair and the permanent there for eight of you. Then the top three quarters will be the entire setting in the video room where you are going to see the defendant.
>
> Your are going to have a podium where the attorneys will question from the podium. You will see the court reporter and the clerk on camera. The only person that will not be on camera is I will be off camera. I just don't have to have my photograph there. It was decided that I am the only one they don't need, apparently, on the video. They will hear my melodic voice, though. Then we have a court reporter too who is taking down everything, as well as everything is being video-recorded.
>
> . . .
>
> Our clerk here will be placing persons under oath, and we have an interpreter coming with us to translate. Before that I am going to have the clerk put the translator under oath that he or she will translate this from English to Spanish or Spanish to English to the best of his or her ability. And then I will ask that person's name, And they will be an official court interpreter. Those are the questions I will ask, then the person in Buenos Aires will be placed under oath. And you will see him or her or whoever testified and then the questions as it's going off. It will take a little longer because it's a translation and the translation hookup, but it's instantaneous. Whatever happens there, somebody sneezes in Buenos Aires, you are going to be able to hear it. What goes on here in the United States they are going to hear.

(T. 193-95).

The prosecution then asked for the first witnes, Perla Scandrojlio, to be sworn. (T. 200). The deputy clerk, in Miami, then adminstered the oath. (T. 201-2). Defense counsel, after having objected in the pretrial hearing to the absence of an adequate record as to the reasons why the witness could not come to the United States, immediately objected to the witness stating on the record her

reasons for not coming to the United States to testify. (T. 201). Defense counsel also objected to the oath as being unenforceable. (T. 202). The witness then explained that she had been asked to return to the United States to testify, "but I did not accept," "because I wasn't well." (T. 203). "I wasn't in health - in proper health conditions." (T. 203). She further stated that she had had "some operations." (T. 203). She was physically and psychologically unable to return to the United States. (T. 204). The witness further acknowledged that she ws able to see the court personnel on the video monitor in Argentina. (T. 204). The judge then asked the witness in Argentina to leave the Argentina studio for a few minutes, while the judge brought the jury into the Miami studio and once again explained the technological procedures to the jury. (T. 205-206). Once again, the judge explained how the procedures would work:

> You will notice that there are two screens, The screen on the left is in this room; it's a split screen. One camera is shooting right from behind you, and it's shooting this way and it gets from my hand all the way to the middle of this table about here (indicating), That's one camera. The second camera is shooting from right underneath those TV screens toward you so that there is a split screen You folks are on the camera, and these people are on camera. Can you all see that?
>
> THE JURY: Yes.
>
> THE COURT: The second screen is in Argentina - it's in Buenos Aires, and the witness will be coming in and sitting in one of those chairs and testifying. Everything is being interpreted in English and Spanish. There is a slight delay between Miami and Buenos Aires, and it makes it even more of a delay because we have a translator, So just be patient as we go along.

(T. 206-207). Ms. Scandrojlio was then brought back into the studio in Argentina and sworn in and her testimony commenced. (T. 209-10). The camera in Argentina "zoomed in" on the witness. (T. 210).

Ms. Scandrojlio and her companion, Pedro Mielniczuk, had arrived in the United States on December 10, 1994 and were to leave, from the Miami International Airport, on December 20, 1994. (T. 211-12). On December 20th, they were proceeding to return their rental car, when they got lost near the airport, (T. 212,215). The person who robbed them showed up in a white car. (T. 215). Ms. Scandrojlio described this man as having dark skin, short hair and some gold teeth. (T. 215). The man asked where the two victims were going and Ms. Scandrojlio showed the man a map and pointed out their destination. (T. 216). While Pedro was driving, and Perla was sitting in the front passenger's seat, the man offered to show the two of them how to get where they were going, and, after a few conversations at the passenger's side of the victims' car, the man took the map from Perla and made signs for Pedro and Perla to follow him. (T. 215-18). The man whom they were following was accompanied by a black woman in his car. (T. 217-18). The map which Perla had handed to this man was from Value Car Rental, and Perla identified it in court. (T. 219-20).

Subsequently, the man whom they were following came back to the victims' rental car, to the passenger's side, and yanked Perla's purse away. At this time, he put his hand into the victims' car and took the purse, while Pedro had initially struggled, before letting go. (T. 223-24). The purse which was taken contained the passports, money and tickets for the return flight to Mexico. (T. 224). The man who grabbed the purse was the same man who had previously come to their car and taken the map. (T. 224). Pedro started pursuing the perpetrators' car, but he lost sight of the car. (T. 226). The police arrived shortly thereafter and obtained a description of the perpetrator and the perpetrator's car. (T. 226).

Subsequently, the police prepared a photo lineup, which they presented to Perla Scandrojlia in Mexico. (T. 226). She picked out one photo, of which she said that she was 60% sure of the person. (T. 229-30).

During the course of Ms. Scandrojlio's testimony, defense counsel complained that the witness was looking to the right, as if to get direction. (T. 213). The judge observed that the person to the right, in the studio with the witness, was Maria, the woman who ran the studio in Buenos Aires. (T. 2 13-14). Upon the judge's representation of the foregoing, defense counsel responded, "That's fine." (T. 215). At a subsequent point in the witness' testimony, the judge interrupted the examination and asked to have the camera in the Argentina studio focus on both the witness and the woman who was operating the studio. (T. 222). Subsequently, the court interpreter commented that the sound was "cutting off," but, as the questioning and responses proceeded immediately thereafter, any such problem appears to have been momentary in nature. (T. 223).

During cross-examination, the witness, at one point, asked for defense counsel's question to be repeated, as it had been "cut off a little bit." (T. 248). Upon inquiry by defense counsel, the witness indicated that at one other point in time the questioning had been cut off a little bit, and for that reason, the witness had asked defense counsel to repeat a question. (T. 248).

After the conclusion of the examination of Ms. Scandrojlio, and prior to the examination of Pedro Mielniczuk, defense counsel asserted that the video transmission was "not actually simulcast. There tends to be a one second delay between what you say and the response in Argentina." (T. 252).

The judge concurred with defense counsel's description. (T. 252).

Questioning of Pedro Mielniczuk then proceeded. (T. 256). At the commencement of his questioning, he acknowledged that he saw the people in the Miami studio on the bottom of the video monitor in Argentina. (T. 256). During the course of his examination he also acknowledged that he had been unable to come to the United States to testify because of his job and because of his wife's need for assistance. (T. 264). Mr. Mielniczuk referred to Perla Scandroljio as his wife, and reasserted that he could not come here to testify because of his wife's health and his own work problems. (T. 266). Upon further questioning, he qualified this, by adding that "if I have to go, then I would." (T. 266). He denied having asserted that he would never return under any circumstances. (T.2 66).

Mr. Mielniczuk related the events of the day upon which he was returning to the airport. He and Perla got lost while returning the rental car and two people offered assistance. They approached on Perla's side and gestured for Pedro to follow them. (T. 257). Pedro described the male as a black man, about 30 years old, with some gold teeth. (T. 258-59). Perla gave their map to the woman who accompanied the man and, after following this couple for a few blocks, the woman got out of the car, gestured for Pedro to follow, and the man brought the map back, throwing it down, while grabbing and yanking Perla's purse. (T. 259-60). The map was identified by Pedro as being the one which he had obtained from Value Rental. (T. 260). The perpetrator then struggled with Pedro for a few seconds, and Pedro let go of the purse and chased the perpetrator's car for 20-30 blocks. (T. 262-63). The police subsequently presented him with a photo lineup in Mexico, but he was unable to identify

anyone. (T. 263-64).

During the course of Pedro's satellite testimony, there was just one interruption due to technical reasons, as Argentina momentarily lost the Miami picture, while retaining full audio sound. (T. 274). The picture was promptly restored (T. 275), and questioning of Pedro was immediately concluded.(T. 275-78).

At the conclusion of the satellite television proceedings, defense counsel renewed the objection to those proceedings and the prosecutor responded that the video "speaks for itself," and that everything could be seen. (T. 280).

Detective Shapiro responded to the scene of the robbery, and obtained a description of the vehicle and perpetrators. (T. 288, 292-92). He also obtained from the victims the Value Rental map, which the perpetrator had handled, before dropping in the victims' rental car. (T. 294). Shapiro had the map processed for fingerprints and prints were found which matched those of the defendant. (T. 295-96, 355-57, 391-96).[4] Shapiro also conducted the photographic lineup, in Mexico, at which time Perla Scandroljio picked out the photo of the defendant. (T. 308-10). Detective Iris Deacon, who was at the photo lineup in Mexico as well, stated that Perla said that the defendant's photo looked like the person who robber her and that she was "60% sure" it was the same person. (T. 341-42). Shapiro had the defendant arrested and further noted that the defendant had some gold teeth. (T. 303-

[4] Besides having three of the defendant's prints, the map also had one print from Perla Scandroljio. (T. 357).

304).

Louisa Aguirre, an employee of Value Rental near the Miami International Airport, testified, on the basis of the company's computer records, that the defendant did not have any payroll or personnel records with Value Rental, and that there were no records of the defendant having rented a vehicle from Value Rental. (T. 422-29). Thus, potential explanations for how the defendant's prints might have gotten on the Value Rental map were eliminated. Ms. Aguirre further identified the map from the victims' vehicle as the map which Value gives to its customers. (T. 43 1).

After the State rested, the defendant's motion for judgment of acquittal was denied. (T. 435). The defense then rested (T. 440-41), and the defendant was found guilty as charged of one count of strong-arm robbery and one count of burglary, without an assault, of an occupied conveyance. (T. 500; R. 25-26). He was adjudicated guilty of both offenses and sentenced to concurrent terms of 15 years incarceration. (R. 27-28, 30-32).

On appeal to the Third District Court of Appeal, the defendant claimed that the testimony presented by satellite transmission violated both the Confrontation Clause of the United States Constitution and the prohibition against the use of hearsay testimony. With respect to the hearsay issue, the Court concluded that the hearsay rule was inapplicable because that rule applies only to out-of-court statements, and the testimony herein was in-court testimony subject to cross-examination. (R. 48-49). With respect to the Confrontation Clause argument, the Court found that there was no violation of the Confrontation Clause, since the two-way transmission provided face-

to-face confrontation:

> The Confrontation Clause requires the defendant to cross-examine the adverse witness face-to-face, thereby permitting the finder of fact to evaluate the witness's credibility. . , .
>
> . . .
>
> Here, the use of video satellite testimony at trial did not violate the Confrontation Clause, because satellite testimony meets the face-to-face element. In this case, the witnesses were in the courtroom in a virtual sense. [footnote omitted]. Satellite testimony allowed the defendant and witnesses to interact, if only in two dimensional space. Defense counsel had the opportunity to, and did, contemporaneously cross-examine the witness. Furthermore, the defendant, judge, and the trier of fact observed the demeanor of the witness while testifying. The presence of "these, elements of confrontation--oath, cross-examination, and observation of witness' demeanor--adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." Craig, 497 U.S. at 851.

(R. 50-52). The Court additionally addressed public policy concerns, finding that the use of satellite testimony could serve to reduce costs, inconvenience and travel time, "thereby promoting efficient use of limited resources." (R. 54). Such technology would also serve to deter violence against foreign tourists, thereby making it easier for them to testify. Id.

The Court indicated that it reviewed the videotape of the satellite testimony and concluded "that the jurors were able to determine the credibility and demeanor of the witnesses testifying, even during the brief period when the transmission was not perfectly synchronized." (R. 55). The Court further suggested procedures to be utilized for satellite transmissions, adopting the protocol set forth in In re San Juan Dupont Plaza Hotel Fire Litigation, 129 F.R.D. 424 (D.P.R. 1989). In addition to

fmding, in the alternative, that any error was harmless in the instant case (R. 55), the Court 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?

(R. 58).

QUESTION PRESENTED

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?

SUMMARY OF ARGUMENT

As the two-way satellite transmission enabled the defendant and jury to see the witnesses, while the witnesses were also able to see the defendant, the face-to-face requirement of the Confrontation Clause was fully satisfied. The technology used in this case thus differs significantly from one-way satellite transmissions or one-way closed-circuit television. When the requirements of the Confrontation Clause are fully satisfied, as they are in this case, it is not necessary to resort to any exceptions to the Confrontation Clause. Such exceptions, based on strong state interest, need to be supported by case-specific factual findings. Such findings were not needed in this case because they are only needed when the Confrontation Clause requirements have not been satisfied.

Nevertheless, in the alternative, it will also be seen that such compelling state interests do exist in the instant case, for the purpose of permitting deviations from the literal requirements of the Confrontation Clause, and that those state interests are supported by adequate findings, including the poor health of the victim, who was thus unable to attend the trial, and the lengthy travel arrangements which would otherwise have to have been endured from Argentina to the United States.

ARGUMENT

THE ADMISSION OF TRIAL TESTIMONY THROUGH THE USE OF A LIVE SATELLITE TRANSMISSION DOES NOT 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,

The admission of trial testimony through the use of a two-way satellite transmission does not violate the Confrontation Clause rights of a defendant under either the state or federal Constitutions. The most significant fact in this type of technology is that it is "two-way," thus enabling both the defendant and the testifying witnesses to simultaneously observe one another, while permitting contemporaneous, in-court, cross-examination. Likewise, the jury is able to view the demeanor of the testifying witnesses. Under such circumstances, the concerns with face-to-face confrontation are fully satisfied through such testimony. Such technology differs significantly from either one-way closed-circuit television or videotaped testimony, since those alternative methods do not permit the contemporaneous face-to-face confrontation which does exist in the instant case,

As stated in California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970), confrontation

> (1) 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; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of the truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

(footnote omitted). See also, Maryland v. Craig, 497 U.S. 836, 845-46, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Craig, 497 U.S. at 845. Thus, the Clause promotes the "practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony].'" Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970) (plurality opinion), The concern with face-to-face confrontation derives from the notion that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" Coy v. Iowa, 487 U.S. 1012, 1019-20, 108 S.Ct. 2798,101 L.Ed. 2d 857 (1988).

While face-to-face confrontation has been described as "the core of the values furthered by the Confrontation Clause," Green, supra, 399 U.S. at 157, the Supreme Court of the United States has "nevertheless recognized that it is not the *sine qua* non of the confrontation right." Craig, 497 U.S. at 847. Thus,

> [T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Delaware Fensterer, 474 U.S. 15, 22, 106 S.Ct. 292, 88 L.Ed. 2d 15 (1985) (quoted in Craig, 497 U.S. at 847). Likewise, the oath, cross-examination and demeanor have been held to provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement.'" Craig, 497 U.S. at 847, quoting Ohio v. Roberts, 448 U.S. 56, 69, 100

S.Ct. 2531, 65 L.Ed. 2d 597 (1980) (quoting Green, supra, 399 U.S. at 166).

The foregoing concerns are fully satisfied by the two-way satellite transmission technology which was utilized in the instant case. The principal concern, with face-to-face confrontation, is literally satisfied, as the defendant was able to view the testifying witnesses contemporaneously with their in-court testimony, and the jury was likewise able to view the witnesses. Similarly, the witnesses were able to view the defendant on the monitor in the studio from which they were testifying. The witnesses were subject to cross-examination and the witnesses were also placed under oath. Such two-way satellite transmissions are thus fully in compliance with the requirements of the Confrontation Clause.

The foregoing conclusion is clearly established from a careful review of the opinions of the United States Supreme Court in Craig and Coy. The general principles set forth above are discussed at great length in Craig, in the Court's opinion authored by Justice O'Connor. Besides setting forth the general principles, the Court, in Craig, went on to hold that the face-to-face confrontation requirement is not absolute, and that it can be dispensed with under limited exceptions. Those exceptions must be based upon the necessity of furthering an important state interest, when the trial court makes the requisite case-specific findings of necessity. 497 U.S. at 855-60. Those exceptions come into play only if the face-to-face confrontation requirement has not been satisfied in the first place. As the face-to-face confrontation does exist in the instant case, by virtue of the two-way transmission, it is not, in the instant case, necessary to satisfy the requirement of case-specific

findings of necessity.'

Justice O'Connor, the author of the majority opinion in Craig, also wrote a concurring opinion in Coy v. Iowa, supra. Court, in Coy, held that the face-to-face confrontation requirement was not satisfied when a screen was placed between the defendant and the child sexual assault victims who were testifying. In a concurring opinion, Justice O'Connor clearly enunciated the view that had a two-way closed circuit television system been utilized, the requirements of the Confrontation Clause would have been satisfied:

> . . . We deal today with the constitutional ramifications of only one such measure, but we do so against a broader backdrop. Iowa appears to be the only State authorizing the type of screen used in this case. . . . A full half of the States, however, have authorized the use of one- or two-way closed-circuit television. . . . Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor.

487 U.S. at 1023. Similarly, in Brady v. State, 575 **N.E. 2d 981,989 (Ind. 1991), the Supreme Court** of Indiana, after concluding that one-way closed-circuit videotaping of a child victim's testimony did not satisfy the Confrontation Clause - because the child was not aware of the defendant's presence - proceeded to set forth the reasons why a two-way closed-circuit system would fully satisfy the Confrontation Clause:

> . . . In removing the protected person from the often intimidating and sterile environs of the courtroom to a nearby private room during the trial and interposing a two-way closed circuit television arrangement which would permit the witness to see the accused and the trier of fact and would allow the accused and the trier of fact to see and hear

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[5] As the State argues at pp. 27-30, infra, such case-specific findings of necessity, coupled with a sufficiently compelling state interest, have been satisfied in any event herein.

> the witness, the witness's testimony would be facilitated and the threat of emotional or mental harm to the witness would be significantly reduced. In such a closed circuit arrangement, there is no person or body interposed between he witness and the accused and a face-to-face meeting as contemplated by the Constitution occurs. In such manner, the main goal of the [Indiana] statute, reducing the trauma caused by in-court testimony before the accused, can still e achieved in large measure without compromising appellant's constitutional right to meet the witnesses face to face.

(emphasis added). See also, Kansas Citv v. McCoy, 525 SW. 2d 336 (Mo. 1975) (two-way closed-circuit television, where witnesses and defendant saw one another on monitors, held to satisfy Confrontation Clause in misdemeanor prosecution); People v. Algarin, 498 N.Y.S. 2d 977, 980-81 (N.Y. Sup. Ct. 1986) (two-way closed-circuit television satisfied face-to-face Confrontation Clause requirement).

In view of the foregoing, it should be concluded that the use of a two-way satellite transmission, such that used herein, in which the testifying witnesses conkmporaneously observed the defendant, and both the defendant and the jury observed the witnesses, is fully in compliance with the concerns of the Confrontation Clause. This does not entail any exception to the Confrontation Clause and does not require any case-specific findings in support of any exception to the Confrontation Clause.[6]

The arguments advanced by the Petitioner herein do not appear to assert that two-way

[6] Cases in which closed-circuit television testimony has been deemed to violate the Confrontation Clause have invariably involved one-way transmissions, where the testifying witness is unable to observe the defendant while testifying. See, e.g., State v. Warford, 389 N.W. 2d 575 (Neb. 1986).

satellite transmissions constitute a per se violation of the Confrontation Clause, Rather, the Petitioner appears to be asserting that due to the manner in which the transmission occurred in the instant case, the Confrontation Clause was violated. Thus, the Petitioner asserts that there were technological difficulties, such as the alleged lack of simultaneity in the transmission, resulting in the audio and visual transmissions not being synchronized. Brief of Petitioner, pp. 1 l-l 3. Similarly, the Petitioner complains about the effectiveness of the oath being administered, by a deputy clerk in Miami, to witnesses in Argentina. Brief of Petitioner, pp. 13-15. While these arguments will be shown to be lacking in merit, what is significant, at the outset, is that these are claims which are fact-specific to the instant case; they do not apply, across-the-board, to all satellite transmissions, and they do not mandate a conclusion that two-way satellite transmission testimony is, in and of itself, violative of the Confrontation Clause.

With respect to what the Petitioner alleges to be the lack of synchronization between the audio and visual transmissions from Argentina, the sole statement by defense counsel, after the conclusion of the testimony of Ms. Scandrojlia, was that the video transmission was "not actually simulcast. There tends to be a one second delay between what you say and the response in Argentina." (T. 252). This was not in the form of an objection, and, as such, any claim based on this "one-second delay" is not preserved for appellate review. See, e.g., Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985) (grounds of objection on appeal can not differ from those asserted in trial court). Furthermore, as stated in the lower Court's opinion:

> Again, after reviewing the videotape, we conclude that the jurors were able to determine the credibility and demeanor of the witnesses testifying, even during the brief period when the

transmission was not perfectly synchronized,

(R. 55). This establishes several things. First, since the transmission was not "perfectly synchrozined" for a "brief period," this is clearly a matter which is not inherent in the two-way transmission, but is limited only to an occasional technical malfunction As such, it has no bearing on the general question of whether two-way satellite transmissions can, as a general rule, be utilized without violating the Confrontation Clause. Second, since it lasted for just a "brief period," it does not affect the overall testimony of the witnesses. Third, even when, during the "brief period," there is a lack of perfect synchronization, there is no reason why the demeanor and credibility of the testifying witnesses can not be determined just as fully as it could with perfectly synchronzied transmissions or, for that matter, with actual in-court testimony. The tone of the witnesses can still be heard; their facial gestures can still be seen; the words can still be heard; and cross-examination can still proceed, Thus, the lower Court, after viewing the videotape, concluded that "the jurors were able to determine the credibility an demeanor of the witnesses testifying."

For the foregoing reasons, this lack of a "perfectly synchronized" transmission does not impair the ability of courts, in general, to utilize such testimony; nor does it affect the testimony in the instant case.[7]

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[7] The Petitioner also alleges that on the videotape "the witnesses appear to move in slow motion." Brief of Petitioner, p. 11. This assertion was never made in either the trial court or the District Court of Appeal, and, as such, is improperly asserted in this proceeding for the first time, Additionally, the allegation suggests that any such problem may be exist on the videotape itself, as opposed to the live transmission. Since the live transmission began and ended at the same time as the proceedings in Miami, apart from the possibility of the one-second delay, the testimony which those in Miami viewed on the monitor from Argentina would likewise have been proceeding at the same pace as the actual testimony. In the absence of any comment by any attorney, judge or juror

The other alleged flaw which the Petitioner claims to have existed is the lack of an effective oath subjecting the testifying witnesses to the potential penalties for perjury. The Petitioner appears to be claiming that an oath is unenforceable when it is not administered by a proper official at the same location as the witnesses who are being sworn. Once again, this is a claim which does not apply to all two-way satellite transmissions of testimony and does not present a bar, regardless of its ultimate merit, to the general use of such transmissions.[8]

The Petitioner does not cite any assertion for the proposition that an oath administered by a properly authorized clerk in Florida and sworn to by the witness in Argentina is in any way ineffective. Since the witness taking the oath knows that it is being administered in, Florida, and knows that it is being administered in conjunction with the testimony which the witness is about to give for use in a Florida trial, there does not appear to be any reason why that witness could not be subjected to perjury proceedings, in Florida, if the witness was ultimately deemed to have given perjurious testimony.

Several cases provide support, by way of analogy, for the ability of Florida to prosecute perjured testimony given in another geographical jurisdiction, while contemporaneously transmitted to the court in Florida, with knowledge, on the part of the testifying witness, that the testimony is

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viewing the monitor contemporaneously with the testimony from Argentina, there is no reason to believe that whatever effect the Petitioner perceives on the videotape was similarly in existence during the contemporaneous transmission.

[8] For example, a witness testifying by two-way satellite transmission from California could be administered an oath in the studio or other facility in California.

being so transmitted and so used. For example, in Keselica v. Commonwealth, 480 S.E. 2d 756 (Va. App. 1997), the appellate court held that the State of Virginia had jurisdiction to try a criminal case, based on a scheme to solicit funds from Virginia, when the solicitations were made by the defendant, while in Maryland, by use of the telephone and mails. "'Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."' Id. at 758, quoting Strassheim v. Daily, 221 U.S. 280, 285, 31 S.Ct. 558, 55 L.Ed. 735 (1911). See also, Commonwealth v. Snowdy, 603 A. 2d 1044 (Pa. App. 1992) (telephone call from Florida, in which defendant agreed to sell Pennsylvania resident cocaine, with transaction consummated in Florida, was sufficient to subject defendant to prosecution in Pennsylvania for conspiracy relating to the distribution of cocaine in Pennsylvania); Pennington v. State, 521 A. 2d 1216 (Md. 1987) (Maryland had jurisdiction to prosecute offense of obstruction of justice where defendant stabbed victim in the District of Columbia, in an effort to dissuade the victim from testifying in Maryland judicial proceedings).

So, too, in the instant case, notwithstanding where the witnesses are when they are taking the oath, they would be subject to prosecution for perjury in Florida, insofar as they know, at the time that they are taking the oath, that their testimony is being used in a Florida judicial proceeding, and they intend for their testimony to have effect within Florida's jurisdiction.

Not only does the basis exist for Florida, or any other similarly situated state, to assert this form of jurisdiction, but, it should also be noted, insofar as a foreign country is involved in the

instant case, that the extradition treaty which exists between the United States and Argentina would permit extradition for the offense of perjury. The Treaty on Extradition Between the United States of America and the Republic of Argentina, 23 U.S.T. 3501 (Sept. 15, 1972), permits extradition for any offenses listed in Article 2, "provided that these offenses are punishable by the laws of both Contracting Parties by deprivation of liberty for a maximum period exceeding one year." Item 2 1 on the list includes "false statements, accusations or testimony effected before a government agency or official." See, Respondent's Appendix A. In Florida, the offense of perjury in an official proceedings, as a third degree felony, is punishable by five years, and thus qualifies under the treaty. Section 837.02, Florida Statutes. Likewise, under Article 275 of the Argentina Penal Code, perjury is punishable by imprisonment of up to 12 years. See, Respondent's Appendix B, p. 941.

Lastly, as previously noted herein, even if the two-way satellite transmission does not fully satisfy the Confrontation Clause, the use of such technology may nevertheless be permissible if it satisfies an acknowledged exception to the Confrontation Clause. Thus, the Court, in Craig, supra, noted that the requirements of the Confrontation Clause are not absolute and that exceptions may exist when the "use of the procedure is necessary to further an important state interest." 497 U.S. at 852. Such exceptions are based on public policy and, as previously noted, require case-specific factual findings, Id. at 855-60. See also, Glendening v. State, 536 So. 2d 212,217"19 (Fla. 1988); Hopkins v. State, 632 So. 2d 1372, 1375-76 (Fla. 1994). Such cases typically involve testimony from child victims of sexual offenses. The cases generally involve one-way closed-circuit television, where the defendant sees the witness, but the witness does not see the defendant. Thus, the face-to-face confrontation is lacking, and it is necessary to determine if a compelling state interest is

supported by case-specific findings. Since the instant case does satisfy the face-to-face requirement, this argument is presented solely in the alternative, as it is not necessary in the instant case, to demonstrate the existence of a valid state interest and case-specific findings supporting that interest.'

The first such state interest in the instant case relates to the goal of promoting complete factual development when witnesses, by virtue of health-related problems, are unable to travel great distances for the purpose of testifying. This has been recognized as a valid public-policy exception to the literal requirements of the Confrontation Clause:

> When the question is one of the health of the witness, there must be "the requisite finding of necessity" which is "case specific" in order to dispense with confrontation in open *court. Maryland v. Craig,* 497 U.S. 836, 855, 110 S.Ct. 3157, 3169, 111 L.Ed. 2d 666 (1990).

Stoner v. Sowders, 997 F. 2d 209, 212-13 (6th Cir. 1993). Not only are health reasons a valid public-policy state interest for the purpose of permitting an exception to the literal requirements of the Confrontation Clause, but, the specific facts in the instant case were sufficiently developed to justify this exception. The witness herself stated, upon questioning, was due to her poor health and the fact that she had had "some operations." (T. 202-203).

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[9] The principal argument of the amicus brief filed in this case asserts that case-specific findings in support of a strong state interest did not exist herein. The fundamental flaw of that argument, as asserted above, is that such a state interest, and findings in support of it, are not required when the requirements of the Confrontation Clause are fully satisfied, as they are herein, through the use of a two-way transmission, which enables all pertinent parties to view one another contemporaneously. Thus, the amicus briefs analysis of this Court's prior decisions, such as Hopkins v. State 632 So. 2d 1372 (Fla. 1994), Leggett v. State, 565 So. 2d 3 15 (Fla. 1990), and State v. Ford, 628 So. 2d 1338 (Fla. 1993), is completely irrelevant to the technology used herein.

Another valid interest, noted in the lower Court's opinion, relates to the minimization of "cost, inconvenience, and travel time . . . thereby promoting efficient use of limited resources." (R. 54). This is a particularly significant factor with witnesses traveling great distances, even more so with witnesses from foreign countries. Trial dates for criminal cases in major metropolitan areas are often difficult to anticipate. No sooner is a date set than it is postponed at the last minute. Witnesses traveling great distances or from foreign countries are often the victims of such last-minute postponements, necessitating multiple trips and losses of time. In addition to the actual inconvenience that such logistical matters impose upon traveling witnesses, there is also the reasonable prospect that such witnesses will be left with a feeling of contempt for the judicial system which treats them shabbily, subjecting them to the repeated inconveniences. This, in the long run, will only contribute to the growth of a sentiment in the public that it is either futile to cooperate, or not worth the effort of cooperating, with a judicial system which disregards the legitimate interests and concerns of witnesses and victims. The public ultimately pays the price when such witnesses, frustrated by high levels of inconvenience, choose not to testify. Satellite testimony does alleviate these concerns. Witnesses from thousands of miles away will not find out, immediately after arriving at Miami International Airport, that there trip was for nought. Satellite depositions can be scheduled, or canceled, by telephone, without such a high degree of imposition on the testifying witnesses.

A second, and related, state interest, identified by the lower Court, is the deterrence of violence against foreign tourists, as the satellite testimony makes it easier for them to testify. Foreign tourists, victimized by violent crimes in Florida, are capable of developing an attitude that,

upon leaving Florida, they want nothing further to do with this State. Some statements to such effect were made by the witnesses in this case. (T. 418-19). However, crime against foreign tourists has significance far beyond the individual victims. A few high-profile violent crimes against foreign tourists can, and have, resulted in mass media publicity in foreign countries, resulting in tens of thousands of potential tourists deciding to forego Florida for a safer vacation. The decimation of the tourist industry adversely affects everyone who lives in Florida.[10] An inability to prosecute crimes against foreign tourists, by virtue of witnesses unwilling to return to Florida, will seriously undermine this State's substantial interests, as unprosecuted crimes against tourists will only serve to further tarnish the State's reputation as a tourist attraction.

Rather remarkably, the Petitioner posits that a deposition to perpetuate testimony would better serve the interests of the defendant than the testimony by two-way satellite transmission. Insofar as depositions to perpetuate trial testimony may ultimately be read into evidence at trial (as they need not be videotaped), see, Rule 3.190(j)(6), Florida Rules of Criminal Procedure, the all-important interest, addressed at great length by the Petitioner, of enabling the jury to evaluate the credibility of the testifying witnesses (by seeing if their hands shake, if their palms sweat, if tears flow), will obviously be completely undermined. Moreover, the question herein is not which method is "preferable." The question is whether the method used was constitutional, by providing the protections required by the Confrontation Clause.

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[10] Indeed, the potential effect of such crimes on the tourist industry in Florida induced the Florida legislature to enact section 910.006, Florida Statutes, for the purpose of vesting Florida courts with jurisdiction to prosecute crimes occurring on cruises originating from Florida, even when those crimes occur beyond Florida's territorial jurisdiction,

Although not controlling, the State would further note that the policy of utilizing advanced technologies, when consistent with the rights of an accused, has been advanced by this Court through amendments to Rule 3.160(a), Florida Rules of Criminal Procedure, sanctioning the use of audiovisual devices for first appearances and arraignments, as long as the defendants have the opportunity to confer with counsel during the hearing. This Court noted:

> When technology is available, audiovisual arraignments, as well as appearances, can save time and expense, provide safety, minimize the need for additional court personnel, and still fully and accurately protect defendants' rights. , , ,
>
> As the population grows, with the attendant multiple places of confinement and courthouses, the use of audiovisual transmissions can enhance the efficiency of the courts.

In re Rule 3.160(a), Florida Rules of Criminal Procedure, 528 So. 2d 1179, 1179-80 (Fla. 1988). The audiovisual technology employed in this case provides similar benefits, and similarly protected the defendant's rights.

Lastly, should this Court find that the use of the two-way satellite transmission violated the defendant's rights under the Confrontation Clause, for the reasons advanced in the lower Court's opinion, any such error should be deemed harmless in the instant case.

CONCLUSION

As the technology used in the instant case fully satisfied the requirements of the Confrontation Clause, the certified question should be answered in the negative and the decision of the lower Court should be approved. The answer to the certified question should distinguish between the two-way transmission utilized in this case as opposed to one-way transmissions which will typically not satisfy the Confrontation Clause absent case-specific findings in support of a state interest warranting an exception to the Confrontation Clause, Such findings were not required in this case, as the technology used did, in and of itself, fully satisfy the Confrontation Clause.

Respectfully submitted,

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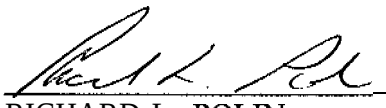

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was mailed this 11th day of July, 1997 to DONALD TUNNAGE, Assistant Public Defender, Counsel for Petitioner, Office of the Public Defender, 1320 N.W. 14th Street, Miami, FL 33 125; ELLIOT H. SCHERKER, Esq., Counsel for Amicus Curiae, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, FL 33 13 1; and DAVID HENSON, Esq., Counsel for Amicus Curiae, Kirkconnell, Lindsey, Snure and Henson, P.A., 1150 Louisiana Avenue, Suite 1, Winter Park, FL 32790-2728.

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