IN THE SUPREME COURT OF FLORIDA

PETER AVSENEW,
Appellant,

v. Case No. SC18-1629

STATE OF FLORIDA,
Appellee
_____/

RESPONSE TO MOTION FOR REHEARING

A. Under our rules of appellate procedure, the role of a rehearing motion is to "state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision." Fla. R. App. P. 9.330(2)(A). The state's motion does not purport to point to anything this Court has overlooked or misapprehended.

B. The state says rule 3.190(i) serves to protect rights under the Confrontation Clause. Reh. motion, p. 2. This argument assumes without citation or discussion that the rule cannot afford greater protections than the bare constitutional minimum.

Florida law has long protected its people's rights beyond the federal minimum, for example in a long line of cases preceding the incorporation of the Bill of Rights into the Fourteenth Amendment

in the middle of the twentieth century. *See Holten v. State*, 2 Fla. 476 (1849) (state constitutional rights to a public jury trial, to be heard by counsel, and to be present at all material stages of the trial when the judge sent written instructions to the jury out of the presence of the accused and his counsel); *Simon v. State*, 5 Fla. 285 (1853) (involuntary statements of the accused could not be used against them); *Groner v. State*, 6 Fla. 39 (1855) (charging document must allege all facts necessary for conviction); *Joe v. State*, 6 Fla. 591 (Fla.1856) (reasonable doubt standard in criminal cases); *Atzroth v. State*, 10 Fla. 207 (Fla.1860) (same); *Motion to Call Circuit Judge to Bench*, 8 Fla. 459 (1859) (right to unanimous verdict); *Cato v. State*, 9 Fla. 163 (1860) (right to accurate jury instructions); *Potter v. State*, 109 So. 91, 92 (Fla.1926) (double jeopardy); *Johnson v. State*, 9 So. 208 (Fla.1891) (where defendant was charged with first degree murder and convicted of second degree murder, and second degree murder conviction was overturned on appeal, he could not be retried for first degree murder); *State v. Capetta*, 216 So. 2d 749 (Fla.1968) (right to self-representation); *Buckman v. Alexander*, 3 So. 817, 818 (Fla.1888) (compulsory process); *Pittman v. State*, 41

So. 385, 388-89 (Fla.1906) (noting state law basis for right of compulsory process and that, at that time, federal constitutional right did not apply to states); *Gildrie v. State*, 113 So. 704 (1927) (prosecution could not use evidence obtained in an illegal search); *Hart v. State*, 103 So. 633 (1925) (same).

C. The state next says the defendant's confrontation rights are met regardless whether the witness can see the defendant. Reh. motion, p. 2. This Court did not reach the constitutional issue pursuant to the well-settled doctrine of constitutional avoidance — there was no need to discuss the constitutional issue as application of the rule was sufficient to dispose of this appeal.

Regardless, the state's argument ignores that the heart of the confrontation right is that the witness be able to see the defendant while testifying:

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in *Jay v. Boyd,* 351 U.S. 345, 375-376 (1956) (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is

> told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. … .

Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988) (emphasis added).

Thus, the Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses," and this guarantee "derives not only from the literal text of the Clause, but also from our understanding of its historical roots." *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (emphasis added). This right of "face-to-face confrontation forms the core of the values furthered by the Confrontation Clause." *Id.*, 847 (emphasis added).

Craig allowed only one small exception: situations in which seeing the defendant rendered a child victim unable to testify, citing a "compelling" the interest in "the protection of minor victims of sex crimes from further trauma and embarrassment." *Id.* at 852.

Even when allowing that possibility, the Court wrote: "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." *Id.* at 850 (emphasis added). The right to face-to-face confrontation can be denied only on a case-by-case determination that "the child witness

would be traumatized, not by the courtroom generally, but by the presence of the defendant. In other words, 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." *Id.* at 856 (emphasis added).

Obviously, this narrow exception does not apply to this case, which does not involve a child witness, much less one that would have been traumatized by seeing the defendant.

C. In footnote 3 of its rehearing motion, the state says that requiring that the witness be able to see the defendant is too restrictive because of witnesses with sight problems or who refuse to face the defendant. As to the issue of sight problems, that involves a physical impossibility beyond the power of the court. The same is true for blind defendants who cannot see their accusers. That does not affect the constitutional requirement that witnesses and defendants must be so positioned as to be visible to each other if they can see.

As for the refusal of a witness to look at the defendant: "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." *Coy*, 487 U.S. at 1019.

Moreover, this Court explicitly left room for flexibility in application of the criminal rule where necessary — but here there was no necessity for not arranging for the witness to be able to see the defendant. Slip op. 12.

D. When invoking rule 3.190(i), the state represents to the court that it was "necessary to take the deposition to prevent a failure of justice," under subsection (1), and that the witness's testimony was "material and necessary to the case" under subsection (2). (Emphasis added.)

The state now tells this Court the opposite: that the deposition testimony was not necessary to prevent a failure of justice, it was not necessary to the case. It says that it pales into insignificance so that it "had no impact upon the outcome of this case." Reh. motion, p. 5. Without indicating that this Court overlooked any of the evi-

dence, it regurgitates the evidence in the light most favorable to the prosecution in an effort to trivialize the mother's testimony.

The state's argument overlooks the tremendous stress it placed on the deposition testimony in its presentation to the jury in opening statement and final argument. See the corrected supplemental transcript filed on November 20, 2019 at pages 1957-61, 1963-64, 2911-15, 2928, 2936-37, 2967, 2973-75, 2980-81. It overlooks that the mother's testimony gave a wealth of detail about the defendant's suspicious actions and discussions verging on a confession. The jurors would be amazed at the suggestion that the mother's testimony was so insignificant as the state now claims.

Anyone who has experience with jury trials will understand the power of the testimony of the mother against her own son — which this Court noted at pages 14-15 of the slip opinion. This Court did not overlook or misapprehend anything. The error was not harmless beyond a reasonable doubt.

WHEREFORE, rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 9 February 2022 a copy hereof was electronically filed with this Court, and a copy hereof was furnished to:

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