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IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. 13-962
4D12-125

STATE OF FLORIDA,

Petitioner,

vs.

CALVIN LEWIS OVERHOLT,

Respondent.

PETITIONER'S MERITS BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by information with sexual battery of a child under the age of twelve (Count 1) and lewd or lascivious molestation of a child under the age of twelve (Count 2) (R pp. 10-11).

After a pre trial hearing, regarding the child victim testimony and the use of a screen the trial court ruled as follows:

> THE COURT: -- in State of Florida vs. Calvin Lewis Overholt, Jr. Case 472011CF115A. Mr. Albright is present, Mr. Cook is present. And the Defendant is present. The jury is out of the courtroom. We started -- we were gonna start 15 minutes early to do the hearing regarding the child victim/witness testimony. And the procedures which the State has proposed that we used in this case, I think this is a third or fourth case where this issue has come up and every time I address this issue, I -- I become more and more convinced that we really aren't flying under Florida Statute 92.54 and that case law because that actually involves taking testimony of the victim or witness outside of the courtroom and then using a closed circuit television to somehow publish that to the jury and somehow effectuate cross examination and they say that implicates the right to confront and cross examine witnesses. The procedure that is using here is far

different and for less, in my opinion, implicative of the right to confront and cross examine witnesses. What we have here is that the victim witness is live, here in court, present in front of the jury, the jury can see him. The witness victim is maybe eight to 10 feet away from the jury, maybe 15, 20 feet away from the Defense, defense counsel. Of course he's represented by counsel, he's not entitled to hybrid representation. Mr. Cook is the one that effectuates the right to confront and cross examine witnesses because he's the attorney of record. And Mr. Cook is absolutely unfettered in his ability to do that. Mr. Cook can see, hear, observe the witness in person, can confront and cross examine him. Mr. Cook can move about the courtroom if he wants to to get a better advantage or view of the witness or victim during their testimony. The only thing that we're having is a white screen that is typically used to publish pictures or overheads, but in this case is gonna be used just to set up a screen so the victim can't see the Defendant. The Defendant is still present in the courtroom. The Defendant can hear the witness victim because the victim is present. The only thing is the victim won't be able to see the Defendant, which gives the victim witness a little -- makes an already stressful situation -- people -- I've seen officers up on the witness stand looking at their reports and their hands are shaking. It's traumatizing enough testifying in felony court, but when you're a seven year old kid in a sex case, there's some additional trauma, I think that could be -- a reasonably prudent person of normal, common sense and intelligence could discern just from the mere circumstances. I'm not prejudging. You still have a burden to present evidence and testimony, I still have a burden to make specific findings, but I can tell you, I'm just make something findings regarding the procedures because this is the third or fourth time that we've

> utilized this procedure. And the Defendant will also have completely unfettered discretion consult with his attorney. So Mr. Cook can talk to his client, his client can suggest -- well, I heard this -- heard this in his voice or I -- additionally, I didn't make this finding, the Defendant can actually see the witness victim because there's a camera and it's broadcast on a large television screen in living color for the Defendant to see. So he can see him on TV, he can hear him in real time. The defense attorney, Mr. Cook can see and hear the victim witness and is not blocked at all by that screen. So with that, Mr. Albright, do you have any further evidence or testimony to offer on that issue?

(R. 2, pp3 -5) Trial counsel made no objection to the procedure as outlined by the trial court (R. 2, p. 5). Instead trial counsel argued that the trial court had not made sufficient findings that the child would suffer emotional harm (R. 2 p, 12). The trial court went on to find that the child's mother's testimony regarding his nightmares and emotional distress was reliable and found that the child would suffer at least moderate emotional harm without the protection of the screen (R. 1 p. 13-14).

Turning to the admissions contained in the recorded phone conversations between the victim's mother[1] and the defendant, they were played as follows:

(The recording was played.)

[1] Undersigned is using initials to protect the identity of the victim.

P.C : This is February 11th, 2010 --

DETECTIVE FARLESS: 11.

P.C.: 11, at 2:10 with phone call 2000.

(Phone rings)

(Phone rings)

CALVIN OVERHOLT: Hello.

P.C.: Hey, is this Cal? Hey, what are you doing?

CALVIN OVERHOLT: Nothing.

P.C.: Nothing much. What you up to?

CALVIN OVERHOLT: Nothing.

P.C.: Hey, I needed to talk to you about something. [SC] (inaudible) talked to me about that you had done something to him and I wanna call and ask you if you did. I'm not gonna say nothing, I just need to know.

CALVIN OVERHOLT: No, I didn't touch that boy.

P.C.: Because (inaudible) his grades has dropped and he said that you did and told me what you had done to him. And I don't think it's right, but if you did do that to him, you shouldn't have done it.

CALVIN OVERHOLT: I didn't touch that kid. I can't help what he says. Pearly --

P.C.: I believe -- I believe [SC], I believe that you did do it. Because my -- I just -- I can't do it. I need to get him some help now and I need the truth because I need the truth. If not, I'm gonna have to call the law to find out. Please, just tell me the truth.

CALVIN OVERHOLT: Pearly, I am telling you the truth. I haven't been around [SC].

P.C.: You was. Around right there, right around Christmastime, Cal. And he told me that he come in and said good morning to you and you put your hands down his pants and put your finger in his butt hole.

CALVIN OVERHOLT: I never -- no, Pearly.

P.C.: My son will not just come up and tell me that cause you know I can tell when

my son's lying to me and I know my baby is not lying to me. And you know -- you know it's the truth. I haven't told [SC] but I'm gonna – (inaudible). I need to know the truth, Cal, I really do and I don't believe I'm getting the truth from you. He really needed the help and I need the help.

CALVIN OVERHOLT: Pearly -- Pearly, I did touch him in the private, I never stuck my finger up his ass hole.

P.C.: Okay, Cal.

CALVIN OVERHOLT: But, I never done that. I don't know he where he come up with that (inaudible). I (inaudible) do this. Cheyenne says to put it -- put it up his asshole. She damn sure did. There's no reason why.

P.C.: My daughter is not gonna do that. You just told me that you did, so.

CALVIN OVERHOLT: (inaudible).

P.C.: So, I'm gonna --

CALVIN OVERHOLT: I wouldn't be -- I wouldn't be saying that, Pearly, if I didn't catch him.

P.C.: Yeah, but --

CALVIN OVERHOLT: But anyway --

P.C.: Why -- why did you do that, Cal? Why –

CALVIN OVERHOLT: I don't know. I don't know.

P.C.: You don't know. You don't know why you did that to my baby? My baby(inaudible). (inaudible) and I swear to God. I gotta go. (inaudible).

(Recording turned off.)

(R. 2 pp. 100-103).

The second phone call was also played for the jury as follows:

(The recording was played.)

P.C.: Hello.

CALVIN OVERHOLT: Pearly.

P.C.: What? What?

CALVIN OVERHOLT: I don't believe you're being mad at me.

P.C.: Well, (inaudible) mad at you.(inaudible) I'm not gonna say nothing. I just want you to stay away. You hear me.

CALVIN OVERHOLT: Pearly, Pearly, I'll definitely stay away. (inaudible).

P.C.: You -- did you -- did you stick your finger up my son's as?

CALVIN OVERHOLT: I'm telling you the God's truth, Pearly, I swear on your mamma's (inaudible), I did not do nothing like that to that boy.

P.C.: But you touched his private parts?

CALVIN OVERHOLT: No, I didn't Pearly. What do you want me to say, sweetheart?

P.C.: You told -- you just got done telling me you did.

CALVIN OVERHOLT: I said I don't (inaudible).

P.C.: Yes, you did. You said you just --

CALVIN OVERHOLT: Pearly, listen, listen. Pearly, are you still there?

P.C.: Yeah, I'm still here.

CALVIN OVERHOLT: Pearly, I'll tell you (inaudible) honestly, honestly, all jokes --

P.C.: You never did what, Cal?

CALVIN OVERHOLT: I never stuck my fingers up his fuckin' butt.

P.C.: No, but what did you do?

CALVIN OVERHOLT: What do you mean what I do?

P.C.: What did you do to my son is what I wanna know, exactly what you did to him?

CALVIN OVERHOLT: I just stuck my hands down his britches, I did.

P.C.: Just down his britches and did what -- in the front or the back?

CALVIN OVERHOLT: The front.

P.C.: In the front. What right do you have touching my seven year old son like that?

CALVIN OVERHOLT: Pearly, I'm trying to talk to you. Pearly, I'm not -- Pearly, I don't

know. I'm fuckin' crazy, I guess. I -- don't ask me, Pearly. I'm just, I'm very sorry. Very sorry.

P.C.: How (inaudible) my son any better. It's not gonna take away the pain that he's gonna go through.

CALVIN OVERHOLT: Pearly, (inaudible) one fuckin' time.

P.C.: Did you touch any one of my other kids?

CALVIN OVERHOLT: No, I didn't.

P.C.: You did not. Did you have Simon do anything to my kids?

CALVIN OVERHOLT: No. No, no, no, no, no. No, I did not, Pearly, I'd kill him. I swear on mama's (inaudible).

P.C.: Don't swear on my mamma's (inaudible) like that. She don't deserve it.

CALVIN OVERHOLT: Shit, I tell the truth when I tell that.

P.C.: You're not telling me the truth about nothing, Cal. You told me a little bit about what I wanted to hear -- needed to hear and not --

CALVIN OVERHOLT: You hear what, what?

P.C.: You told me the truth and I want the rest of it.

CALVIN OVERHOLT: There is no more.

P.C.: There is more because my son don't know nothing about no sticking no fingers up nobody's butt holes.

CALVIN OVERHOLT: I'm telling you, I never did.

P.C.: Oh, but it makes you-all hot and hard, huh? It made you-all hot and hard to sit and do that to my kid?

CALVIN OVERHOLT: No, my dick don't get hard.

P.C.: How many times you touch my son down there?

CALVIN OVERHOLT: Just once.

P.C.: Just once?

CALVIN OVERHOLT: One time. That's -- that's the truth. Pearly, I ain't got no reason -- I'm not -- I told you the truth and I'm not lying about nothing else. You wanted to know the truth, tell you the truth -- I tell you the truth and yet you still (inaudible) --

P.C.: Well, guess -- do you know what, I believe that you did stick your finger up my son's rear end because I will get him checked, Cal. If you do not tell me everything that I need to know, I will go get him checked and I will take him to the sheriff's department right now.

CALVIN OVERHOLT: Pearly, Pearly, I'm telling you the truth, I never did that. I went (inaudible) in the front, but I never touched him in the butt.

P.C.: But you shouldn't have touched him at all.

CALVIN OVERHOLT: You're right, you're right, you're right.

P.C.: Yeah, I know I'm right.

CALVIN OVERHOLT: But I never touched him -- touched him in the butt.

(Recording turned off.)

(R. 2 pp 104-108)

The eight year old victim, S.C., testified at trial that the defendant touched him in his private area, both on his front and in the back (R. 2 p. 86). The child testified that he touched his privates under his pants, inside of his underwear (R. 2 p. 87). The Defendant asked him if it felt good and did not stop when the child asked him to stop (R. 2 p. 87). The child also testified that the defendant put his finger inside of his butt hole (R. 2 p. 88).

The Jury entered a verdict of Battery as a lesser included offense of Sexual Battery (R. 1 p. 42). On November 30, 2011, Appellant was adjudged guilty in accordance with the jury's verdicts (R. 1 pp. 47-48) and sentenced to serve life in prison on Count 2 (R. 1 p. 50), concurrent with one year in jail on Count 1 (R. 1 p. 49). Credit was given on each sentence for time served. Appellants lowest permissible Criminal Punishment Code sentence is 84.75 months in prison (R. 1 pp.43-44).

On April 3, 2013 this Court issued an opinion reversing the conviction for battery and lewd and lascivious molestation of a child under the age of twelve, finding the trial court erred in allowing a screen to be placed between the victim and the

defendant in the courtroom during the victim's testimony. Overholt v. State, 4D12-125 (Fla. 4th DCA, April 3, 2013) citing McLaughlin v. State, 79 So. 3d 226 (Fla. 4th DCA 2012). The Fourth District Court of Appeal found as follows:

> Calvin Overholt, Jr., appeals his convictions for battery and lewd and lascivious molestation of a child under the age of twelve. Citing to our decision in McLaughlin v. State, 79 So. 3d 226 (Fla. 4th DCA 2012), Overholt argues that the trial court committed reversible error when it allowed a screen to be placed between the victim and Overholt while the victim testified in open court during his jury trial. We agree and reverse his convictions and sentence.
>
> ***
>
> On appeal Overholt argues that the conditions under which the victim testified violated his Sixth Amendment right to confront witnesses against him and otherwise denied him a fair trial. Overholt argues that the court should have followed the procedure of section 92.54, Florida Statutes (2012), and used a closed circuit television. McLaughlin is on point. The method of shielding employed by the trial court to shield the victim from the defendant is not authorized by the statute and was inherently prejudicial. McLaughlin, 79 So. 3d at 228–29 (citing State v. Parker, 276 Neb. 661, 757 N.W.2d 7, 18–19 (2008)). (Footnote omitted).

The Fourth District Court of Appeal essentially found this type of error per se reversible and wholly failed to conduct a harmless error analysis.

SUMMARY OF THE ARGUMENT

In this case, the defendant was able to view the witness via a television placed next to the screen, thus his right to confrontation was not violated. Moreover, in light of the defendant's admissions, any error was harmless beyond a reasonable doubt.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEALS ERRED WHEN IT FOUND THAT THE TRIAL COURT PROPERLY PLACED A SCREEN BETWEEN THE VICTIMS AND THE DEFENDANT AND ALLOWED THE TESTIMONY TO BE SEEN VIA CLOSED CIRCUIT TV, MOREOVER, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

In this case, the Fourth District Court of appeal has erroneously found that the use of the screen to shield the victim is not authorized by statute and is inherently prejudicial. Moreover, contrary to the holding of the Fourth District Court of Appeal, any error is harmless beyond a reasonable doubt.

As a preliminary matter, in this case, the defendant failed to object to the procedure employed by the trial court, thus, this claim was wholly unpreserved for appellate review (R. 2, pp 3-5). See Barnes v. State, 29 So. 3d 1010, 1026 (Fla. 2010)(finding alleged confrontation clause violation procedurally barred because no specific objection was made to preserve the claim for review); Dawson v. State 951 So. 2d 931 (Fla. 4th DCA 2007) citing Mencos v. State, 909 So.2d 349, 351 (Fla. 4th DCA 2005)(finding that although Dawson also complains of a Confrontation Clause violation, he did not make that objection below, therefore, it is not preserved).

Additionally, in Mclaughlin v. State, 79 So. 3d 226 (Fla. 4th DCA 2012), as relied upon by the Fourth District Court of

Appeal, the error was not found to be fundamental as it was found to be in this case, rather the Court engaged in a harmless error analysis and found that in that case the error could not be harmless because, the defendant **never admitted** the crimes and the state's case relied wholly on the victims testimony. Id. at 228. Thus, because this type of error is not fundamental, it was in fact unpreserved and all relief should have been denied by the Fourth District Court of Appeal.

In this case, the Fourth District Court of appeal relied on State v. Parker, 276 Neb. 661, 757 N.W.2d 7, 18 (2008), where the Supreme Court of Nebraska wrote:

> [T]he screen unduly compromised the presumption of innocence fundamental to the right to a fair trial. The presence of the screen in the courtroom, in an obvious and peculiar departure from common practice, could have suggested to the jury that the court believed [the victim] and endorsed her credibility, in violation of [the defendant's] right to a fair trial.
>
> ....
>
> [T]he inherently prejudicial practice in this case cannot pass close scrutiny, because the court had available another equally effective method of protecting [the victim] while procuring her testimony that would not have been inherently prejudicial to [the defendant's] due process rights. Section 29–1926 specifically provides for various means of obtaining the victim's testimony through pretrial videotaping or closed-circuit video from another room. It does not, actually, make any reference to using a screen in the courtroom.

First, unlike Nebraska, the use of the screen for the protection of the child witness is in fact authorized by Florida

law. Contrary to the finding of the Fourth District Court of Appeal in this case, Section 92.54, Florida Statutes, does not provide the sole means by which a trial court may exercise its inherent authority and its discretion to protect a child witness. To the contrary, pursuant to Florida Supreme Court case law, a trial court may implement a procedure not expressly authorized by the Supreme Court or otherwise authorized by law if the procedure is necessary to further an important public interest. State v. Tarrago, 800 So. 2d 300 (Fla. 3d DCA 2001). See State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993).

The Supreme Court held in Ford,

> 'All courts in Florida possess the **inherent powers to do all things that are reasonable and necessary for the administration of justice** within the scope of their jurisdiction, subject to valid existing laws and constitutional provisions.' **A court's inherent powers include its ability to protect witnesses**. Thus, the trial court could have relied on its inherent powers to use an unauthorized procedure that would have protected the child witness in the instant case.

State v. Ford, 626 So. 2d at 1345 (citations omitted)(emphasis added). See also Harrell v. State, 709 So. 2d 1364 (Fla.), cert. denied, 525 U.S. 903, 142 L.Ed.2d 194, 119 S.Ct. 236 (1998). Thus, it is clear that the use of the screen to protect the child witness is in fact authorized by Florida Law.

Secondly, in Mclaughlin, this Court misconstrued the holding of Coy, when it found the use of the screen inherently prejudicial. In Coy v. Iowa, 487 U.S. 1012, 1021 (1988), the

U.S. Supreme Court required **individualized findings** of necessity to justify child testimony from behind a screen, and in Maryland v. Craig, 497 U.S. 836, 855-856 (1990), the Court required an evidentiary hearing to determine whether child testimony on one-way closed circuit television was necessary to protect the child (emphasis added).

In Maryland v. Craig, 497 U.S. 836, 844-845 (1990), the United States Supreme Court explained the holding of Coy as follows:

> We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial. Indeed, in Coy v. Iowa, we expressly "le[ft] for another day ... the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to meet face to face all those who appear and give evidence at trial.' " 487 U.S., at 1021, 108 S.Ct., at 2803 (quoting Green, supra, 399 U.S., at 175, 90 S.Ct., at 1943 (Harlan, J., concurring)). The procedure challenged in Coy involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 U.S., at 1014-1015, 108 S.Ct., at 2799-2800. **In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that any exception to the right "would surely be allowed only when necessary to further an important public policy"- i.e., only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case**. Id., at 1021, 108 S.Ct., at 2803;

> see also id., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring). **We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception."** Id., at 1021, 108 S.Ct., at 2803. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in Coy.(Emphasis added).

In Maryland v. Craig, 497 U.S. 836 (1990), the Supreme Court affirmed the use of closed circuit television as a means to view testimony of a child victim, however the Court made **no distinction between a screen and closed circuit television** (emphasis added). Rather, the Court affirmed the use of closed circuit television based upon the fact that in Craig, the lower court had made individualized findings regarding the harm to the child victim, unlike in Coy, where there were no individualized findings. Id. at 845.

Therefore, the undersigned would argue that the Court's holding in Mclaughlin v. State, 79 So. 3d 226 (Fla. 4th DCA 2012), and in this case, that the use of a screen is inherently prejudicial, is wrong in light of the fact that the United States Supreme Court, in both Coy and Craig, has found no distinction between the use of a screen and the use of closed circuit television. Rather, the issue in both of those cases

centered upon the particularized findings of harm to the child victim, not the method by which the child testified.

Moreover, the Fourth District Court distinction in Mclaughlin, that testifying from behind a screen lends undue credibility to the witness, yet testimony via closed circuit television does not, is a distinction that is illogical at best, and contrary to United States Supreme Court precedent in Coy and Craig.

Thirdly, the Fourth District Court of Appeal essentially found that the error is per se reversible when it failed to engage in a harmless error analysis. This ruling is expressly and directly in conflict with this Court's decision in Hopkins v. State, 632 So. 2d 1372, 1377 (Fla. 1994) and with the First District Court of Appeal decision in Hughs v. State, 819 So. 2d 815(Fla. 1st DCA 2002).

In Hopkins, this court found as follows:

> Even though the constitutional right to face-to-face confrontation is involved in both evidentiary issues raised in this case, **a constitutional error does not automatically require reversal of a conviction. In fact, "constitutional errors, with rare exceptions, are subject to harmless error analysis**." State v. DiGuilio, 491 So.2d 1129, 1134 (Fla.1986). The United States Supreme Court has taken a similarly strict view of constitutional error. See Arizona v. Fulminante, 499 U.S. 279, 306-09, 111 S.Ct. 1246, 1263-64, 113 L.Ed.2d 302 (1991) (citing only three examples of constitutional error that are not subject to

> harmless error analysis: coerced confession, right to counsel, and impartiality of judge). **In fact, the Supreme Court has specifically determined that violations of the Confrontation Clause, including denial of face-to-face confrontation, are subject to harmless-error analysis. Coy, 487 U.S. at 1021, 108 S.Ct. at 2803; see also Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).**
>
> In assessing the harmlessness of a denial of face-to-face confrontation, the reviewing court cannot speculate on whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation. Instead, harmlessness must "be determined on the basis of the remaining evidence." Coy, 487 U.S. at 1022, 108 S.Ct. at 2803.
>
> In the instant case, neither the victim's testimony by closed circuit television nor her out-of-court statements were properly admitted due to the court's failure to make the specific findings required by sections 92.54 and 90.803(23). **Based upon Hopkins' own admission to several investigators, there is evidence to support his conviction on one count of child sexual battery. Thus, the errors in admitting the child's closed-circuit testimony and out-of-court statements were harmless with respect to that count.**

Moreover, in Hughs v. State, 819 So. 2d 815 (Fla. 1st DCA 2002), the First District Court of Appeal addressed the whether the use of a partition may in fact be harmless and found as follows:

> On the second issue, we agree with Appellant that the trial court's findings were insufficient to satisfy the requirements of section 92.54, Florida Statutes (1997)(permitting the use of closed circuit television in proceedings involving victims or witnesses under the age of 16). See Hopkins v. State, 632 So.2d 1372, 1376 (Fla.1994)(holding that the trial court's findings were insufficient under section 92.54(5)). Moreover, section 92.54 provides for the use of closed circuit television but not a partition. See generally Coy v. Iowa, 487 U.S. 1012, 1021, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)(reversing judgment against defendant convicted of lascivious acts with a child and remanding for determination of whether the Confrontation Clause error was harmless; although the Iowa statute at issue permitted testimony by a child behind a screen in the courtroom, there were no individualized findings by the trial court that these particular witnesses needed special protection). **However, this error by the trial court was harmless because of Appellant's admissions.** See Hopkins, 632 So.2d at 1377 (holding that there was harmless error because appellant's own admission to several investigators supported his conviction of sexual battery).

It is notable that the Fourth District Court of Appeal decision in Mclaughlin, the Court in fact conducted a harmless error analysis and reasoned as follow:

> The State has made no attempt to establish that this inherently prejudicial practice was harmless and did not actually contribute to the jury's verdict. Nonetheless, we hold that the error was harmful. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986); see § 924.33, Fla. Stat. (2010) ("No judgment shall be reversed unless the appellate court is of the opinion, after an

> examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant."). **McLaughlin never admitted to committing the acts on the victims, and the State's entire case relied upon their testimony.** Both of the victims testified that McLaughlin used threats to keep them from telling anyone about the alleged abuse. Therefore, the jurors could have made the inference that the screen was used because the court believed the victims needed to be protected from testifying in the presence of McLaughlin. Accordingly, we reverse and remand for a new trial.(Emphasis added)

It is clear that in Mclaughlin the Fourth District Court of Appeal recognized the necessity of a harmless error analysis, particularly in the situation where the defendant makes admissions. However in this case, it appears that the Fourth District Court of Appeal has receded from that position and ignored the necessity of a harmless error analysis as required by this Court in Hopkins, supra. Here, the defendant admitted to the lesser included offense of battery and the jury convicted him as such.

Therefore, the Fourth District Court ruling that placing a screen in front of the victim while testifying is per se reversible error, is wrong in light of the aforementioned precedent and this case should be reversed and the conviction and sentence should be affirmed.

CONCLUSION

Based on the foregoing argument, Petitioner requests that this Honorable Court reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE/EFILING

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioners Brief on the Merits" has been furnished electronically to this Court and by Electronic Mail to: Tatjana Ostapoff, Assistant Public Defender, appeals@pd15.org, located at the Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl. 33401. This 4th day of October 2013.

//s Melanie Dale Surber
MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on October 4, 2013.

//s Melanie Dale Surber
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