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VIDEO AND CLOSED CIRCUIT TESTIMONY

Statutes: F.S. 92.53, 92.54 and 92.5

In cases involving children as victims or witnesses, the State frequently faces the difficult situation of how to handle a highly traumatized child. The parents inevitably request that the child not have to testify in court. The victim almost never wants to confront his or her abuser in court. It is necessary for the ASA to fully understand the options available to minimize the trauma of each and every child. Even if you do not plan to utilize the options outlined in this chapter, this knowledge will assist you in explaining to the child's parents why it is necessary for their child to testify in court. This chapter will cover three Florida Statutes which have been enacted by the legislature specifically for the protection of children under 16 years of age. The statutes discussed are as follows:

F.S. 92.53: Videotaping of testimony of victim or witness under the age of 16.

F.S. 92.54: Use of closed circuit television in proceedings involving victims or witnesses under the age of 16.

F.S. 92.55: Judicial or other proceedings involving child victim or witness under the age of 16; Special Protections.

VIDEOTAPED TESTIMONY

Elements

1. There must be a motion filed and a hearing in camera to determine the following:

2. The victim must be less than 16 years of age.

3. a) There must be a substantial likelihood that the victim or witness would suffer at least moderate emotional or mental harm due to the presence of the defendant if the child is required to testify in open court, *o*r

   b) The victim or witness is otherwise unavailable as defined in s. 90.804(1).

4. If elements one through three have been satisfied, the trial court may order the videotaping of the testimony of the child victim or witness in a case, whether civil or criminal in nature, in which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

Who may file the motion

1. The victim or witness *o*r
   a. Her attorney.
   b. Her parent.
   c. Her legal guardian.
   d. Her guardian ad litem.

2. A trial judge on his own motion *o*r

3. Any party in a civil proceeding *o*r

4. The prosecuting attorney *o*r

5. The defendant *o*r

6. The defendant's counsel.

Who shall preside at the videotaped testimony?

The judge shall preside or shall appoint a special master to preside at the videotaping unless the following condition are met:

1. The child is represented by a guardian ad litem or counsel *an*d

2. The representative of the victim or witness and the counsel for each party stipulate that the requirement for the presence of the judge or special master may be waived *and*

3. The court finds at a hearing on the motion that the presence of a judge or special master is not necessary to protect the victim or witness.

What are the defendant's rights of participation at the videotaping?

The defendant and his counsel shall be present at the videotaping unless the defendant has waived this right. The court may require the defendant to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and his attorney may communicate by any appropriate private method.

May the parties involved use an interpreter at the hearing?

Any party, or the court on its own motion, may request the aid of an interpreter, as provided in s. 90.606, to aid the parties in formulating methods of questioning the child and in interpreting the answers of the child throughout proceedings conducted under this section.

When must the motion for videotaped testimony be filed?

The motion may be made at any time with reasonable notice to each party to the cause, and videotaping of testimony may be made any time after the court grants the motion.

***What is the admissibility of the videotaped testimony*⊥**

The videotaped testimony shall be admissible as evidence in the trial or the cause; however, such testimony shall not be admissible in any trial or proceeding in which such witness testifies by use of closed circuit television pursuant to s. 92.54.

Does the court have to make findings of fact on the record?

The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

CLOSED CIRCUIT TESTIMONY

Elements

1. There must be a motion filed and a hearing in camera to determine the following:

2. The victim must be less than 16 years of age.

3. a) There must be a substantial likelihood that the victim or witness would suffer at least moderate emotional or mental harm due to the presence of the defendant if the child is required to testify in open court, *o*r

   b) The victim or witness is otherwise unavailable as defined in s. 90.804(1).

4. If elements one through three have been satisfied, the trial court may order that the testimony of a child under the age of 16 who is a victim or witness be taken outside of the courtroom and shown by means of closed circuit television.

Who may file the motion?

1. The victim or witness *o*r
    a. Her attorney.
    b. Her parent.
    c. Her legal guardian.
    d. Her guardian ad litem.

2. A trial judge on his own motion *o*r

3. Any party in a civil proceeding *o*r

4. The prosecuting attorney *o*r

5. The defendant *o*r

6. The defendant's counsel.

Who may be in the room during the recording of the testimony?

1. The judge.
2. The prosecutor.
3. The defendant.
4. The attorney for the defendant.
5. The operators of the videotape equipment.
6. An interpreter.
7. Some other person who, in the opinion of the court, contributes to the well-being of the child and who will not be a witness in the case.

What are the defendant's rights of participation during closed circuit testimony?

The court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The defendant's right to assistance of counsel, which includes the right to immediate and direct communication with counsel conducting cross examination, must be protected and , upon the defendant's request, such communication shall be provided by any appropriate electronic method.

Must the court make findings of fact on the record?

The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

SPECIAL PROTECTIONS

Purpose

The legislature finds that the rules of procedure as they pertain to protective orders, are not adequate in protecting the interests of children as witnesses in criminal, civil, or juvenile proceedings. The legislature requests the Supreme Court to adopt rules amending the Rules of Criminal and Civil Procedure as necessary to comply with this section. See comments.

Elements

Upon motion of any party, upon motion of a parent, guardian attorney, or guardian ad litem for a child under the age of 16, or upon its own motion, the court may enter any order necessary to protect a child under the age of 16 who is a victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the child is required to testify in open court.

What legal proceedings are covered by this section?

Such orders shall relate to the taking of testimony and shall include, but not be limited to:

1. Interviewing or the taking of depositions as part of a civil or criminal proceeding.

2. Examination and cross examination for the purpose of qualifying as a witness or testifying in any proceeding.

3. The use of testimony taken outside of the courtroom, including proceedings under ss. 92.53 and 92.54.

What factors shall the court take into consideration in ruling upon the motion?

1. The age of the child.

2. The nature of the offense or act.

3. The relationship of the child to the parties in the case or to the defendant in a criminal action.

4. The degree of emotional trauma that will result to the child as a consequence of the defendant's presence.

5. Any other fact that the court deems relevant.

What other types of orders may the judge enter on behalf of the child?

1. Orders limiting the number of times that a child may be interviewed.

2. Orders prohibiting depositions of a child.

3. Orders requiring the submission of questions prior to examination of a child.

4. Orders setting the place and conditions for interviewing a child.

5. Orders for conducting any other proceeding.

6. Orders permitting or prohibiting the attendance of any person at any proceeding.

7. The court shall enter any order necessary to protect the rights of all parties, including the defendant in any criminal action.

Comments

1. If a child is in serious need of special protection, the above measures should be utilized. Keep in mind, however, that you will lose the impact of having a living, breathing victim sitting right there before the jury. The interplay between the victim and the defendant in the courtroom is frequently your best evidence in front of the jury. In these cases, you want to personalize your victim as much as possible, and presenting it to the jury electronically depersonalizes to an extent.

2. It is crucial that you strictly follow the procedures laid out in the statute. It is a violation of the Confrontation Clause if the judge does not make complete detailed findings pursuant to the dictates of the statute. Most of the case law addresses whether the judge makes specific findings of facts as it applies to the trauma of the child. Do not let your judge make boilerplate rulings. It will almost certainly end in reversal. In reading the following cases, you will see that every time a judge got in a hurry, he made a reversible error. It is your job as a prosecutor to ensure that the judge makes appropriate findings of fact and does not stray from the dictates to the statute. When you file your motions, provide sufficient detail so that the judge can simply follow your outline in making his ruling. You may also want to provide an order for the judge.

3. The amount of mental or emotional harm suffered by your victim must be extensive. There is authority to suggest that the harm to the child must exceed his experience in the courtroom. The harm must have a lasting or permanent effect. see Fricke v. State, 561 So.2d 597 (Fla. 3d DCA 1990). There is also United States Supreme Court authority that it may be sufficient if the trauma simply prevents the child from being able to testify. see Maryland v. Craig

4. Case law has supported the use of a clinical social worker to establish likelihood and degree of trauma, but has ruled against a guardian ad litem.

5. F.S. 92.55 appears to be a catch-all section that allows a judge to protect a child in almost any situation if a sufficient degree of likely trauma is shown. The Florida Supreme Court has failed to recognize this statute because there was no enabling action or Court rule that put the statute into effect. The Court has, however, recognized that the trial court can do basically the same thing by virtue of its inherent authority to protect witnesses. State v. Ford, 626 So.2d 1338 (Fla. 1993).

6. Be extremely familiar with the following case law before you attempt to proceed under either of the above sections. If your judge tries to cut corners on these procedures you need to know how to immediately respond. There is nothing more traumatic to a child than having to live through the court system twice.

Cases

The cases in this chapter will be divided by statute. Supreme Court cases will be listed first, followed by District Courts of Appeal in descending order. Most of the issues discussed in videotaped testimony cases will equally apply to closed circuit testimony cases. Consequently, if a particular issue arises, cases from either of the discussed sections may apply. The current statute numbers have been in effect since July 1, 1985. Prior to that date, the subject was covered under F.S. 918.17 and F.S. 90.90. In 1985 there were significant changes to the language of the statute, including the terminology of the amount of trauma required. Prior to 1985, the statute required "severe emotional or mental distress. In 1993 the statute was amended to require that the child's trauma be caused not only by the courtroom environment, but by the actual presence of the defendant. I have chosen to list only those cases decided since the 1985 statutory change. This should assist in keeping the terminology consistent.

VIDEOTAPED TESTIMONY

United States Supreme Court

Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798 (1988):

> Placement of screen between defendant and child sexual assault victims during their testimony at trial violated defendant's right to face to face confrontation under confrontation clause.
>
> Discussion: This case is frequently cited by Florida courts to justify F.S. 92.53 and 92.54 under the Confrontation Clause. Although Justice Scalia, writing for the majority, denounced the Iowa statute which allowed for a screen to be placed between the defendant and the traumatized victim, he did recognize that the defendant's right to confront his accuser is not absolute. The door was left open for states to formulate statutes which further an important public policy. These procedures must provide for an individualized finding that the particular witness needs special protection. Justice Scalia appears to be very negative on such procedures, and thus, the Florida Supreme Courts requires a highly particularized finding of needed protection for each child in each case. Justice O'Conner writes a concurring opinion which is much more favorable to the protection of the child. In her opinion, she discusses the various similar statutes around the country that provide for protection of traumatized children. She even mentions Florida Statute 92.54 as being valid. It is a good reference for research. It should be noted, that the Iowa statute did not require a particular finding of trauma, but created a presumption of trauma by virtue of statute. This is the primary reason for the statute's downfall.

Florida Supreme Court

Young v. State, 645 So.2d 965 Fla. 1994):

In response to a certified question, the Florida Supreme Court held that where videotaped out of court interviews with child victims of sexual batteries had been introduced into evidence, it was error to allow the videotapes to go the jury room during deliberations. Should jury wish to see such video testimony again, court may consider this as they would with respect to any other request to have testimony reread.

Feller v. State, 637 So.2d 911 (Fla. 1994):

Failure to make case-specific findings mandated by statute, permitting videotaping of testimony of victim or witness in sexual abuse case upon finding that there is substantial likelihood that victim or witness who is under the age of 16 would suffer at least moderate emotional or mental harm if required to testify in open court, constitutes a ground for reversal. Failure to makes such a finding is not fundamental error and therefore, the defendant waives any error by failing to make appropriate objections.

Discussion: Defense counsel objected at the pretrial hearing, but failed to renew the objection at trial. The error made by the judge was not preserved for appellate review. As in child hearsay rulings, the Court made it clear that a trial judge cannot make boilerplate rulings under this section, even if the evidentiary record speaks for itself.

Leggett v. State, 565 So.2d 315 (Fla. 1990):

Testimony of clinical social worker was sufficient for court to have concluded that child abuse victim would suffer at least moderate emotional or mental harm if he were required to testify in open court, for purposes of videotaping child's testimony.

That child victim of physical or sexual abuse would suffer discomfort or even fright upon testifying in court, without more, is insufficient to warrant videotaping of child's testimony.

Trial court's failure to make specific finding that there was substantial likelihood that child abuse victim would suffer at least moderate psychological or mental harm if he were required to testify in open court rendered videotaping of child's testimony reversible error.

Discussion: The witness for the State appears to have qualifications similar to the counselor's at the Phoenix Center. Parts of the counselor's testimony are listed in the opinion. The degree of potential harm discussed by this witness does not appear to be exceptionally great, but it was apparently enough to satisfy the Florida Supreme Court.

Glendening v. State, 536 So.2d 212 (Fla. 1988):

Allowing child sexual abuse victim's testimony to be videotaped and shown to jury rather than given live in open court did not violate defendant's right to confront witness; evidence showed that child would have suffered emotional and mental harm had the child been forced to testify in court, and defendant was permitted to watch testimony behind two-way mirror and conduct full cross examination of child.

1st DCA:

Ritchie v. State, 720 So.2d 261 (Fla. 1st DCA 1998):

Error to admit videotaped testimony of victim without statutorily sufficient, individualized determination of necessity that child victim's testimony be presented at trial by means of videotaped deposition, as opposed to live, in-court testimony in presence of defendant.

Finding which merely ratified hearing testimony of mental health counselor insufficient.

Recitation of boilerplate language of statute that child would suffer at least moderate emotional harm is not sufficient.

Deficiency in findings could not be cured at trial by successor judge making findings based upon reading of transcript of testimony given at hearing before predecessor judge. A reviewing court cannot determine which of the facts the trial court relied upon in reaching the ultimate conclusion of harm to the child unless the trial court states on the record its findings as to pertinent evidentiary facts.

Familial context coupled with additional similarities of identical time frame, location, gender, and acts alleged to have been committed, sufficient to permit admission of evidence of acts committed against another child.

Discussion: The finding of the judge who ruled on the 92.53 motion was quoted in the opinion:

> *I have listened to the testimony, and I have evaluated the relationship of the mental health professional with the child, and I also have put my common sense into the equations, and conclude that the child would in fact suffer at least moderate emotional harm as testified to by the mental health counselor. And I think that the State has met its burden under the statute.*

> As noted above, this finding was insufficient. The similarities which went into the Williams rule ruling were that both victims were sons of the appellant, living with him at the time of the alleged abuse, and each episode of alleged abuse occurred in the appellant's home. Additionally, the time periods during which the abuse allegedly occurred are identical, although the sexual acts perpetrated upon the four year old in this case were not identical to those involving the twelve year old Williams rule witness. In both instances, the fondling of the victims' genitalia by the appellant was a prelude to the sexual act.

Barton v. State, 704 So.2d 569 (Fla. 1st DCA 1997):

> The failure to make findings under 92.53(7) is not fundamental error. Defendant's claim that trial court failed to make required statutory findings to support presentation of victim's testimony by videotape not preserved for appeal where defendant's objection made at hearing on state's motion to videotape testimony was not renewed at trial when testimony was offered.
>
> Trial court abused discretion in apparent determination that victim was competent to testify where judge before whom victim's testimony was videotaped questioned victim, but made no finding that victim was competent to testify, and trial judge accepted this without making any further inquiry or findings.

Savage v. State, 643 So.2d 1211 (Fla. 1st DCA 1995):

> Defense counsel's objections to videotaping procedure and to presentation of videotape evidence properly preserved issue of adequacy of factual findings supporting videotaped testimony of alleged victims of lewd and lascivious assault. Error to admit videotaped testimony without finding that victims would suffer emotional or mental harm if required to testify in presence of defendant.

Chambers v. State, 504 So.2d 476 (Fla. 1st DCA 1987):

> Limiting defendant's presence at videotaped hearing to viewing child witness behind two way mirror was not an unconstitutional abridgement of defendant's Sixth Amendment right to confrontation.

Washington v. State, 452 So.2d 82 (Fla. 1st DCA 1984):

> Allowing videotaped testimony by the victim in prosecution for sexual battery upon a person eleven years of age or younger was not an abuse of discretion given evidence that victim was under a severe emotional strain and reacted physically and emotionally when informed of having to testify in court.

Discussion: This case was decided under F.S. 918.17, which had slightly different language than the current 92.53. I have primarily chosen to discuss only those cases decided under the new version of the statute, but this case is so helpful I chose to include it. It can probably be argued successfully in court.

2nd DCA

Gaither v. State, 581 So.2d 922 (Fla. 2d DCA 1991):

Trial court erred in failing to make statutorily required case specific findings of fact on the record in granting State's motion to use videotaped testimony in lieu of live testimony in sexual battery prosecution involving child victim.

In asking to use videotaped or closed circuit testimony in lieu of live testimony in sexual abuse prosecution involving child victim, State should assure that trial court makes statutorily required case specific findings of fact on the record.

Discussion: This case is interesting in that it instructs the State to ensure that the court make an appropriate record. The objection by defense was very general, but the court held it was sufficient to preserve its record. Contrast this case with Feller v. State, 637 So.2d 911 (Fla. 1994), which held that defense counsel had to make appropriate objections to preserve its record.

Poukner v. State, 556 So.2d 1231 (Fla. 2d DCA 1990):

Erroneous admission of videotaped testimony of one child sexual offense victim without making individualized finding that there was substantial likelihood that victim would suffer emotional or mental harm if required to testify in open court was rendered harmless by defendant's confession to commission of sexual battery, which provided overwhelming evidence of his guilt.

Jaggers v. State 536 So.2d 321 (Fla. 2d DCA 1988):

Trial court's failure to set forth reasons supported by evidence in record which led to finding that two child witnesses would suffer at least moderate emotional or mental harm if they were required to testify in open court against father accused of sexually assaulting them was reversible error; fact that witnesses were shielded from sight of father may have created improper influence through inference by jury that children were afraid of him, which could have carried over to charge involving defendant's niece.

Discussion: The Court seems to reject the use of a guardian ad litem to establish the level of mental or emotional harm likely to be suffered by the child. The court specifically notes that "The only testimony before the trial court in this regard was a statement by the guardian ad litem, who was not qualified with any expertise, that 'it

would be in the best interest of the children for them to testify by way of video tape.'" The court also notes that "There was no psychological or other testimony to show what effects, if any, those statements had on the children, nor regarding their emotional ability to testify at trial.

3rd DCA:

Castellanos v. Department of Health and Rehabilitative Services, 545 So.2d 455 (Fla. 3d DCA 1989):

Particularized determination that taking testimony from minor outside presence of mother and counsel is necessary to protect child from emotional or mental harm is not prerequisite to in-camera examination of child in juvenile dependency proceeding.

Discussion: The court makes an important distinction that F.S. 92.53 and 92.54 apply only to situations where the child must testify in open court.

4th DCA

State v. Asfour, 555 So.2d 1280 (Fla. 4th DCA 1990):

Statute 92.53 is not applicable to already existing hearsay statements, such as videotaped police interview of allegedly abused child

Discussion: Many police officers tell the victims that they will never have to testify in court because their statements can be admitted. This case will assist you in explaining to the victims why we cannot admit their videotapes in lieu of personal testimony. It should be noted that the investigative videos may be admitted, if the proper predicated is established, under 90.803(23).

5th DCA

Disinger v. State, 569 So.2d 824 (Fla. 5th DCA 1990):

Use of screen when 14 year old victim testified against defendant violated defendant's right to confrontation, absent any showing of possible harm to victim from face to face confrontation.

Discussion: The court relies on the Iowa v. Coy decision to rule that the procedure in this case was unconstitutional. The trial court never made a specific finding of likely trauma. The court points out that there is no procedure in Florida for using such screens. It recommends using videos or closed circuit as provided by statute.

Young v. State, 506 So.2d 13 (Fla. 5th DCA 1987):

Allowing State to introduce videotape of victim's testimony, which was taken before State amended information to allege lewd assault in addition to sexual battery, did not deprive defendant of due process and confrontational rights, as added charge was lesser included offense of original charge, and as defendant had opportunity to cross examine victim during taping of testimony.

CLOSED CIRCUIT TESTIMONY

United States Supreme Court

Maryland v. Craig, 110 S.Ct. 3157 (1990):

Face to Face confrontation with witnesses is not an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers.

If the State makes an adequate showing of necessity, the State's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure permitting a child witness in abuse cases to testify at trial in the absence of face to face confrontation with the defendant.

Determination of whether use of procedure permitting a child witness to testify in a child abuse case without face to face confrontation with the defendant is justified by the State's interest in protecting witness from the trauma of testifying must be made on a case specific basis; trial court must determine whether use of one way closed circuit television procedure is necessary to protect welfare of particular child witness, must find that child witness would be traumatized by the presence of the defendant, not by the courtroom generally, and must find that the emotional distress suffered by child witness in presence of defendant is more than mere nervousness, excitement or reluctance to testify.

Discussion: This case is cited frequently by the Florida courts as authority for not only closed circuit testimony, but also video testimony and the inherent power of courts to protect children. Read it carefully if you confront a similar issue.

Florida Supreme Court

Hopkins v. State, 632 So.2d 1372 (Fla. 1994):

Trial court failed to comply with requirement of making specific findings of fact on the record as to basis for allowing child to testify by closed circuit television, where court merely adopted and rationalized hearing testimony of child's mother and psychiatrist without specifying each evidentiary fact that supported its ruling.

Issue of whether trial court made sufficient findings to admit out of court statements of child victim was preserved for appeal, though it would have been preferable for defense counsel to object each time hearsay testimony was introduced, where trial court was put on notice of potential error by pretrial hearing and by defense counsel's request for continued objections during trial.

Discussion: The trial court made the following finding as to the likelihood of trauma: "The Court makes a finding of fact that based on the testimony of the mother of the child, and Dr. Michael DeMaria, there is a substantial likelihood that the child will suffer more than moderate emotional harm if she were required to testify in open court in the presence of the defendant. And further the Court hereby adopts and ratifies as findings of fact the Direct Examination Testimony of the mother and Dr. Michael DeMaria, a copy of which is attached." Although the State apparently did their job in presenting evidence, they did not do their job in ensuring that the trial court make a proper record.

Myles v. State, 602 So.2d 1278 (Fla. 1992):

Oral relay system used to enable defendant to communicate with counsel while victim of alleged sexual battery upon child was examined by counsel via closed circuit television from judge's chambers violated defendant's right to assistance of counsel, due to delay inherent in system that required defendant to communicate with counsel by oral messages delivered to chambers by bailiff. It also clearly infringed upon privacy of attorney-client communications and could have resulted in violation of attorney-client privilege, given bailiff's status as officer of state.

Before ordering closed circuit testimony from child witness in criminal matter, trial court must conduct inquiry in which evidence is received on whether closed circuit procedure is necessary to protect welfare of particular child, must find that child witness will be traumatized, not by courtroom generally, but by presence of defendant, and must find that emotional distress suffered by child witness in presence of defendant was more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify.

Discussion: The Court rules that instantaneous electronic communication must be available to the defendant when closed circuit testimony is utilized. This provision is in the statute. Any sort of conveying of messages between attorney and client will result in reversal. The Court also says that a trial judge's finding of a necessity of closed circuit testimony must precisely follow not only the statute, but also the dictates of Maryland v. Craig, which holds that the trauma must be caused by the presence of the defendant. It should be noted that in 1993, F.S. 92.54 was amended to specifically require that the harm be caused not only by being in court, but by the presence of the defendant.

1st DCA

Lewis v. State, 626 So.2d 1073 (Fla. 1993):

> Testimony by child victim and her mother that child would be frightened if required to testify in presence of defendant, charged with sexual battery on person under 12 and lewd and lascivious assault, was insufficient to permit child to testify by closed circuit television outside of presence of defendant during trial; evidence did not demonstrate that if child were to testify in presence of defendant, resulting trauma would impair child's ability to communicate.
>
> Discussion: This case represents a unique position relating to the required degree of trauma necessary to justify closed circuit testimony. The case cites The United States Supreme Court in the Maryland v. Craig decision. The Craig decision recognized that a closed circuit television procedure is appropriate upon a showing that if the child were to testify in the direct presence of the defendant, the resulting trauma would "impair the child's ability to communicate." The Court reasoned that if face to face confrontation causes such significant emotional distress in a child witness as to affect the child's ability to communicate, there is evidence that such confrontation would in fact disserve the Confrontation Clause's truth seeking goal.

Sigmon v. State, 622 So.2d 57 (Fla. 1st DCA 1993):

> Defendant in sexual battery prosecution failed to preserve for appellate review claim that trial court improperly allowed child victim's testimony to be videotaped outside of defendant's presence without making required findings, as defendant did not present argument in trial court; it would have been unreasonable to require retrial or new evidentiary hearing on state's motion to present videotaped testimony, with attendant cost to state, inconvenience to witnesses, and trauma to victim, on basis of deficiency which would have been timely cured if brought to trial court's attention.
>
> Discussion: This case was affirmed by the Florida Supreme Court in Sigmon v. State, 19 Fla. L. Weekly S311 (Fla. June 9, 1994).

Sampson v. State, 541 So.2d 733 (Fla. 1st DCA 1989):

> Allowing defendant's stepdaughter, one victim, to testify by closed circuit television outside of defendant's presence did not violate confrontation clause where individualized findings were made as to necessity for protecting stepdaughter.
>
> Discussion: The primary significance of this case is that it allows for one victim to testify in open court and for the other to testify by closed circuit. This is interesting when compared to Spoerri v. State, 561 So.2d 604 (Fla. 3d DCA 1990) which ruled that a child could not begin her testimony in open court and then complete it in the judge's chambers. The court felt that removing the child from the courtroom highlighted her fear of the

defendant and was thus prejudicial. The Sampson court must not feel that singling out one victim to testify by closed circuit draws the attention of the jury to that victim's fear.

3rd DCA

State v. Villarreal, 33 Fla. L. Weekly D2152 (Fla. 3rd DCA 2008):

Trial court departed from essential requirements of law in granting defendant's motion to allow his two minor children to testify via satellite from Ecuador in defendant's trial for false imprisonment and sexual battery of his wife, where children are living with defendant's family in Ecuador and have failed to return to the US despite a family court order.

F.S. 92.54 is inapplicable because defendant's motion did not allege "harm" children would suffer as a result of testifying in presence of defendant.

Children are not unavailable as defined by section 90.804(1) , because children's inability to be present is due to defendant's own wrongdoing in refusing to execute necessary documents to permit children to return to the US.

Manning v. State, 643 So.2d 654 (Fla. 3d DCA 1994):

A relay system employed at trial whereby the defendant was accompanied by a certified legal intern who could carry messages to defense counsel during closed circuit testimony was inadequate and violated the defendant's constitutional right to the assistance of counsel.

Seaman v. State, 608 So.2d 71 (Fla. 3d DCA 1992):

Trial court's finding that child victim of sexual abuse was unavailable, so as to permit child victim's hearsay statements to be introduced into evidence in trial on charge of sexual battery was supported by competent substantial evidence, even though defendant argued that child could have testified via closed circuit television, where child psychologist had opined that child would suffer severe emotional harm not only by testifying in open court, but also by testifying via closed circuit television.

Generalized finding that allowing child to testify via television would protect her from emotional impact of testifying in open court did not satisfy statute requiring case specific finding of necessity.

Discussion: This case provides an excellent overview of the United States Supreme Court's rulings on this subject. It also provides a detailed discussion on the amount of

trauma that needs to be shown in the State's motion and hearing. The court implies that the trauma needs to be more than transient fear, but must be permanent in nature. A certain amount of fear is beneficial to ensure the witness is truthful. References are cited. It should be noted that this case was overruled by the Supreme Court in Seifert v. Florida, 636 So.2d 716 (Fla. 1994), as it pertains to a child hearsay issue. The rest of the case is still good law.

Spoerri v. State, 561 So.2d 604 (Fla. 3d DCA 1990):

Starting child victim's testimony in courtroom and then removing child to complete her testimony from judge's chambers, thereby highlighting child's fear of defendant, prejudiced defendant's right to fair trial in sexual abuse prosecution, particularly where defendant took stand and testified in his own behalf about his version of circumstances surrounding statement obtained from him by police; inference that child needed to be shielded from sight of defendant cast negative aspersion upon defendant's credibility and created appearance that judge felt that child was afraid of defendant.

Trial court was required to make specific finding, in record, that there was substantial likelihood that child sexual abuse victim would suffer at least moderate emotional or mental harm if required to testify in open court before permitting child to testify through use of closed circuit television.

Discussion: The State moved the court to allow closed circuit testimony for the victim prior to trial. Apparently the State then decided to see how well the child would perform in open court. After realizing that the child was not going to make it, the State requested to avail itself of the closed circuit option.

Sanders v. State, 568 So.2d 1014 (Fla. 3d DCA 1990):

Even if trial court did not make specific, on the record findings required by statute to allow minor sexual battery victim to testify via closed circuit television, there was no reversible error, as neither physician's fact specific testimony to that effect, which court adopted, nor trial judge's findings were contemporaneously challenged for competency or sufficiency.

Discussion: It appears that the State sufficiently proved the statutory requirements, but the judge simply made a boilerplate ruling which would have been reversed had defense counsel made appropriate objections. Since the failure to make the specific findings was not fundamental error, it cannot be addressed for the first time on appeal.

4th DCA

Cann v. State, 32 Fla. L. Weekly D1467 (Fla. 4th DCA 2007):

Trial court's denial of defendant's request to have child victim testify in the presence of the jury was not an abuse of discretion, in prosecution for sexual battery on a person less than twelve years of age and lewd and lascivious molestation; psychologist testified that child would suffer considerable trauma from both testifying in court and testifying in the presence of defendant, child's testimony was presented by closed circuit television, and the closed circuit television allowed the jury to observe the demeanor of victim in making its credibility determinations.

Dooley v. State, 743 So.2d 65 (Fla. 4th DCA 1999):

Error to allow child victim to testify via closed circuit television without making required findings pursuant to F.S.92.54.

Slawinski v. State, 30 Fla. L. Weekly D391 (Fla. 4th DCA 2005):

A party who wishes to present the testimony of a witness by satellite transmission must demonstrate that the witness is beyond the territorial jurisdiction of the court or unable to attend the trial, and that the testimony is material and necessary. The fact that a witness resides in a state other than Florida does not mean that the witness is beyond the territorial jurisdiction of Florida.

No abuse of discretion when the trial court concluded that, because of the frail condition of the victim, which necessitated that the victim's son care for him personally as well as run his business, the requirement that the witness be unable to attend was satisfied.

Discussion: This is not actually a closed-circuit case, but it is a similar concept.

Dennis v. State, 26 Fla. L. Weekly D863 (Fla. 4th DCA 2001):

Trial court’s ruling to allow closed circuit testimony, which merely adopted and ratified the hearing testimony of psychologist without specifying each evidentiary fact that supported its ruling, did not make the required “specific findings of fact” as required by 92.54(5).

Trial court’s error was not preserved for appellate review, where defendant failed to renew objection prior to child victim’s testimony via closed circuit television.

5th DCA

Lewine v. State, 619 So.2d 334 (Fla. 5th DCA 1993):

Defendant's constitutional right to conduct his own defense in prosecution for committing lewd act or assault in presence of child was not infringed when defendant was denied

right to conduct cross examination of child personally, but instead was advised he could exercise right of cross examination by telling his standby counsel what questions to ask child, who testified via closed circuit television, where defendant otherwise had fair chance to present his case in his own way.

D.A.D. v. State, 566 So.2d 257 (Fla 5th DCA 1990):

Procedure whereby child's testimony in lewd assault case was taken in chambers outside presence of defendant denied defendant his constitutional right to confront witnesses against him and violated governing statute; there was no finding of substantial likelihood that the child would suffer at least moderate emotional or mental harm if required to testify in open court, court permitted use of speaker only rather than closed circuit television, judge failed to insure that he, persons in room where child was testifying, and defendant, could communicate by any appropriate electronic method, and child was permitted to testify in such a way that the speaker system was practically useless.

Discussion: The entire procedure in this case was a disaster. If your child victim is unable to testify in front of the defendant, stick to the statutorily defined procedures of video or closed circuit. Since a constitutional right to confrontation is at stake, strict compliance of procedures is essential. If you allow the court to wing it, you will likely be retrying it.

SPECIAL PROTECTIONS

State v. Tarrago, 26 Fla. L. Weekly D2609 (Fla. 3d DCA 2001):

Even though the 17-year-old victim did not technically qualify to have her testimony presented via closed-circuit television pursuant to F.S. 92.54, the trial court should have authorized the procedure by exercising its inherent authority and discretion to protect a child witness.

Discussion: The defendant poured gasoline on her 15 year old daughter, causing severe burns and disfigurement. At the time of trial, the victim was 17 years of age, had an IQ of 73, and the cognitive, intellectual and emotional age of a 10 year old. The evidence was undisputed that the victim would suffer "at least moderate emotional or mental harm" if forced to testify in the presence of her mother, but the trial court ruled that since the victim was over 16 years of age and not technically retarded as required by F.S. 92.54, he was precluded from allowing the child to testify via closed circuit television. The appellate court held that the trial judge was incorrect in his legal analysis because F.S. 92.54 does not provide the sole means by which a trial court may exercise its inherent authority and its discretion to protect a child witness.

Hernandez v. State, 626 So.2d 1349 (Fla. 1993):

Defendant's right to confrontation was not violated in murder prosecution when victim's minor children were permitted to testify by one way closed circuit television, in view of important public policy in preventing emotional harm that children would suffer if they were required to testify in presence of defendant, and indicia of testimony's reliability as indicated by children's competency, their giving testimony under oath, defendant's opportunity for contemporaneous cross examination, and ability of judge, jury, and defendant to observe their demeanor.

Discussion: This is a case from Broward County that presents a different twist on the closed circuit testimony line of cases. The children in this case were not victims. They were simply witnesses to the murder of their mother. Because this situation does not fall within section 92.54, the Court required a separate finding of reliability. The rationale for extension of this rule is based on the important public policy of protecting children form emotional and mental harm. The Court follows its ruling in State v. Ford, 626 So.2d 1338 (Fla. 1993). See this case for a more thorough analysis of the issue.

State v. Ford, 626 So.2d 1338 (Fla. 1993):

Trial court in criminal case may employ procedure even absent appropriate authority if that procedure is necessary to further important public policy interest.

Employing unauthorized procedure of videotaping testimony of child witness in judge's chambers,in order to protect traumatized child witness, was not per se reversible error.

Videotaped testimony has sufficient indicia of reliability to be admissible if defense is given full and fair opportunity to cross examine witness to probe and expose infirmities in witness' testimony, if witness testifies under oath, and if trier of fact has opportunity to examine witness' demeanor as witness testifies.

Written order of trial court which required that defense counsel questioning child witness in murder prosecution ask as few questions as possible in interest of justice and that questions be asked in "gentle, patient, and nonaggressive manner" placed reasonable limits, that were necessary as a result of child's

emotional and mental maturity, and which provided defense counsel with full and fair opportunity to question child.

Although defendant had full and fair opportunity to question child witness during videotaped interview, reliability element was not satisfied so that admission of testimony in murder prosecution was error; child witness was not given oath before giving testimony and there was not inquiry to determine if she understood importance of telling truth at time of videotaping.

Videotaped testimony of child, which occurred during interview in judge's chambers, should not have been admitted in murder prosecution where finding of competency was not made immediately before interview, even though one was made at earlier time, particularly where child had given many conflicting accounts about victim's death; where child witness changed testimony without trial court giving instruction on importance of telling truth and without proper determination of child's competency, videotaped testimony was not reliable.

Discussion: The facts in this case involved a murder in which a child witnessed her stepfather shoot her mother. The State and the guardian moved pursuant to F.S. 92.55 to have the child's testimony videotaped outside the presence of the defendant. The Supreme Court ruled that F.S. 92.55 was nonoperative because there was no enabling action or court rule that put the statute into effect. The trial court could, however, rely on its inherent authority to act to protect the child witness. The Court lays out a step by step analysis to ensure that such procedures meet the dictates of Maryland v. Craig. This case should be read carefully prior to attempting to use such a procedure.

I

N THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO: *

Plaintiff,

JUDGE: *

vs.

*

MOTION FOR ORDER TO PRESENT VICTIM'S TESTIMONY VIA VIDEOTAPE

Defendant.

________________________________/

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and moves this Court pursuant to F.S. 92.53, for an Order to present the victim's testimony at trial through the use of videotape and as grounds therefore, would state as follows:

The State proposes to have the testimony of the victim, _1_, videotaped pursuant to F.S. 92.53. Present at the videotaping will be the child, a guardian ad litem, the Assistant State Attorney, the Defense Counsel and the Judge or a Special Master specifically appointed by the court. The defendant shall view the testimony outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can observe and hear the testimony of the child in person, but that the child cannot hear or see the defendant. The defendant and his attorney will be able to communicate by any appropriate private method.

The videotaped testimony shall be admissible as evidence in the trial in lieu of trial testimony in open court; however, such testimony shall not be admissible in any trial or proceeding in which the child testifies by the use of closed circuit television pursuant to F.S. 92.54.

As grounds for the presentation of the victim's testimony through the use of videotaped procedures as outlined above, the State alleges the following:

1. That the defendant,_2_, is charged by information with _3_ upon _4_.

2. That the said victim is _5_ years of age.

3. That the victim is reluctant to discuss the sexual acts that were performed on her by the defendant, _6_.

4. That there is a substantial likelihood that the victim would suffer at least moderate emotional or mental harm due to the presence of the defendant if the child is required to testify in open court.

5. That defendant is in a position to intimidate or frighten the child by his mere presence, by virtue of _7_.

6. The resulting trauma from testifying in the presence of the defendant would impair the child's ability to communicate.

Section 92.53 of the Florida Statutes provides for the testimony of a child victim or witness under 16 years of age to be videotaped and presented at trial in lieu of live, open court testimony upon a finding that there is a substantial likelihood that the victim or witness would suffer at least moderate emotional or mental harm due to the presence of the defendant if the child is required to testify in open court. In order to implement this statute, the court must make specific findings of fact, on the record, as to the basis for its ruling under this section.

The United States Supreme Court has ruled that the Sixth Amendment Confrontation Clause is not violated by use of closed circuit testimony if the procedure is justified by the State's interest in protecting a witness from the trauma of testifying. Maryland v. Craig, 110 S.Ct. 3157 ((1990). The same rationale has been extended to videotaped testimony by the Florida Supreme Court. Glendening v. State, 536 So.2d 212 (Fla. 1988). The Craig decision ruled that in order to make this finding, the trial court must determine the following facts on a case specific basis:

1. Whether the use of the procedure is necessary to protect the welfare of a particular child witness.

2. The court must find that the child witness would be traumatized by the presence of the defendant, not by the courtroom generally.

3. The court must find that the emotional distress suffered by a child witness in the presence of the defendant is more than mere nervousness, excitement or reluctance to testify.

The standard set forth by the United States Supreme Court is adequately addressed by F.S. 92.53 and has been accepted by the Florida Supreme Court.

In Leggett v. State, 565 So.2d 315 (Fla. 1990), the Florida Supreme Court ruled that the

testimony of a clinical social worker was sufficient for court to have concluded that a child abuse victim would suffer at least moderate emotional or mental harm if he were required to testify in open court, for purposes of videotaping child's testimony.

In the case at bar, the State has met, in its proposal, all of the elements and purposes of section 92.53 of the Florida Statutes and the Confrontation Clause of the United States Constitution.

The State therefore requests this Honorable Court to issue an order to allow the victim , 8 to have her trial testimony presented via videotape.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/hand delivery to _____________, attorney for the defendant, on this ______ day of __________, 199__.

MICHAEL J. SATZ
State Attorney

By:____________________________
Assistant State Attorney
201 S.E. 6th Street
Suite 568
Ft. Lauderdale, Florida 33301
Florida Bar #

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1. Name of victim.
2. Name of defendant.
3. X counts of (name charges)
4. Name of victim.
5. Age of victim.
6. Name of defendant.
7. Defendant's relationship to child.
8. Name of victim.

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO: *

JUDGE: *

vs.

*

Defendant.

________________________________/

MOTION FOR ORDER TO PRESENT VICTIM'S TESTIMONY AT TRIAL VIA CLOSED CIRCUIT TELEVISION

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and moves this Court pursuant to F.S. 92.54, for an Order to present the victim's testimony at trial through the use of closed circuit television and as grounds therefore, would state as follows:

The State proposes to have the live testimony of the victim, __1__, take place outside the courtroom while the defendant remains present in the courtroom. All relevant parties, as enumerated in F.S. 92.54, will be present in the designated room during the testimony of the child. The courtroom will be equipped with a large-screen television monitor that will simultaneously broadcast the testimony of the victim who will be examined and cross-examined in another room. The courtroom will contain the normal court personnel, the jury, persons responsible for operating the closed circuit equipment and those deemed necessary by the Court.

The defendant shall be able to observe and hear the testimony of the child, but the child shall neither see nor hear the defendant. The defendant shall be afforded the opportunity to contemporaneously communicate with his counsel by means of appropriate electronic method.

As grounds for the presentation of the victim's testimony through the use of video equipment as outlined above, the State alleges the following:

1. That the defendant, __2__, is charged by information with __3__ upon __4__.

2. That the said victim is __5__ years of age.

3. That the victim is reluctant to discuss the sexual acts that were performed on her by the defendant, __6__.

4. That there is a substantial likelihood that the victim would suffer at least moderate emotional or mental harm due to the presence of the defendant if the child is required to testify in open court.

5. That defendant is in a position to intimidate or frighten the child by his mere presence, by virtue of __7__.

6. The resulting trauma from testifying in the presence of the defendant would impair the child's ability to communicate.

Section 92.54 of the Florida Statutes provides for the testimony of a child victim or witness under 16 years of age to be presented via closed circuit television upon a finding that there is a substantial likelihood that the victim or witness would suffer at least moderate emotional or mental harm due to the presence of the defendant if the child is required to testify in open court. In order to implement this statute, the court must make specific findings of fact, on the record, as to the basis for its ruling under this section.

The United States Supreme Court has ruled that the Sixth Amendment Confrontation Clause is not violated by use of closed circuit testimony if the procedure is justified by the State's interest in protecting a witness from the trauma of testifying. Maryland v. Craig, 110 S.Ct. 3157 ((1990). In order to make this finding, the trial court must determine the following facts on a case specific basis:

1. Whether the use of one way closed circuit television is necessary to protect welfare of a particular child witness.

2. The court must find that the child witness would be traumatized by the presence of the defendant, not by the courtroom generally.

3. The court must find that the emotional distress suffered by a child witness in the presence of the defendant is more than mere nervousness, excitement or reluctance to testify.

The standard set forth by the United States Supreme Court is adequately addressed by F.S. 92.54 and has been accepted by the Florida Supreme Court in the case of Myles v. State, 602 So.2d 1278 (Fla. 1992).

In Leggett v. State, 565 So.2d 315 (Fla. 1990), the Florida Supreme Court ruled that the

testimony of a clinical social worker was sufficient for court to have concluded that a child abuse victim would suffer at least moderate emotional or mental harm if he were required to testify in open court, for purposes of videotaping child's testimony.

In the case at bar, the State has met, in its proposal, all of the elements and purposes of section 92.54 of the Florida Statutes and the Confrontation Clause of the United States Constitution.

The State therefore requests this Honorable Court to issue an order to allow the victim , 8 to testify at trial via closed circuit television.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/hand delivery to _____________, attorney for the defendant, on this ______ day of __________, 199__.

MICHAEL J. SATZ
State Attorney

By:______________________________________

Assistant State Attorney
201 S.E. 6th Street
Suite 568
Ft. Lauderdale, Florida 33301
Florida Bar #

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1. Name of victim.
2. Name of defendant.
3. X counts of (name charges)
4. Name of victim.
5. Age of victim.
6. Name of defendant.
7. Defendant's relationship to child.

8. Name of victim.