IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,461

LARRY EUGENE CLARK,

Respondent.
_____/

MERITS BRIEF OF PETITIONER

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STATEMENT OF CASE AND FACTS

On October 9, 1988, at approximately 5:30 P.M. Deputy Walthers left his marked patrol car unattended (R 19).[1] There was a utility bag containing a 9 millimeter handgun in the car (R 20). While he was gone a witness, Maxine Campbell, was across the street when she observed the defendant open the rear door on the driver's side (R 29-30). She had known him for more than 10 years (R 31), and was absolutely certain that it was him (R 33; 42). The defendant reached forward and opened the front door. He took something off of the front seat and left (R 30; 35-36). Ms. Campbell remained at the same location until the officer returned to his patrol car (R 46). The officer later obtained information from this witness implicating the defendant in the crimes (R 21).

The defendant offered to sell the stolen pistol to Leroy Fisher (R 56). This man had known the defendant for some 20 years. *Id.*

The defendant was charged by information with burglary and grand theft (R 121).

Immediately before trial the prosecutor indicated that he wanted to introduce the deposition testimony of an absent state witness. He offered it purportedly pursuant to §90.804(2)(a). (R 8). The only objection voiced by the defense was that there was not an adequate showing of unavailability (R 11-13; this

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[1] The parties are referred to as the defendant and the state. References to the record are indicated "(R and page)"; those to the initial brief, if any, are denoted "(B and page)".

issue was not raised on appeal. *Clark v. State*, 572 So.2d 929, 933, n. 1 (Cobb, J., dissenting). The court found that reasonable efforts had been made to secure the attendance of the witness and indicated that the deposition would be admitted (R 13).

In addition to the witnesses at trial whose testimony founded the facts surrounding the crimes and some of the defendant's later actions stated above, the deposition testimony of Leon Knight was introduced into evidence (R 52). The defense voiced no specific objection. Counsel merely asked the judge to tell the jury that Knight was unavailable (R 53). After a tape recording of the deposition had been played, the prosecutor moved to introduce a transcript of the proceeding. The defense attorney stated: "No objection to that being offered outside my standing objection earlier." (R 54). No standing objection had been made.

The transcript of the Knight deposition is contained in the record **(R 142-149)**. Knight first claimed that he had not seen the gun and that the defendant never said he had one (R 143-144). He later completely changed his position by testifying that the defendant had said that he had a gun (R **147)**.

The defendant was convicted on bath counts (R 150).

An appeal was taken to the Fifth District Court of Appeal. The district court reversed and remanded for a new trial. *Clark v. State*, 572 So.2d 929 (Fla. 5th DCA 1990). The following question was certified as one of great public importance:

IN A CASE WHERE THE DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED

> BY THE IMPROPER ADMISSION OF A DISCOVERY DEPOSITION IN A CRIMINAL TRIAL AS SUBSTANTIVE EVIDENCE, MAY THE APPELLATE COURT APPLY THE HARMLESS ERROR DOCTRINE AS INDICATED IN *CHAPMAN* AND *DIGUILIO*?

Id., **932.**

The state timely filed a motion for rehearing motion for rehearing *en banc*, and a motion for certification of a second question. In the motion for rehearing the state argued that the error was not fundamental and, therefore, a contemporaneous objection was required to preserve the ground. The state further argued that if a proper objection had been raised in the trial court, the application of the harmless error analysis would have been proper.

The state argued in the motion for rehearing en *banc* that the decision was of exceptional public importance. It was also pointed out that the decision was contrary to the previous decision rendered by the district court in *A.C.S. v. State*, **518 So.2d 457** (Fla. 5th DCA 1988), in which a harmless error analysis had been conducted regarding the admission of a discovery deposition as substantive evidence.

The state also asked the district court to certify a second question to this court:

> IN A CASE IN WHICH THE DEFENDANT'S SIXTH AMENDMENT RIGHTS **ARE** VIOLATED BY **THE** IMPROPER **ADMISSION** OF A DISCOVERY DEPOSITION **IN A** CRIMINAL TRIAL AS SUBSTANTIVE EVIDENCE, DOES THE DEFENDANT WAIVE APPELLATE REVIEW

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2 *Chapman v. California, 386* U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 **(1967)**; *State v. DiGuilio*, 491 So.2d 1129 (Fla. **1986).**

OF THE ISSUE WHEN NO PROPER OBJECTION IS VOICED AT TRIAL?

The district court denied all of the state's alternate motions. The state timely filed a notice invoking the discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

Point One: The admission of a discovery deposition as substantive evidence in a criminal trial is not fundamental error. The admission of a discovery deposition, particularly one such as Knight's that contains conflicting testimony, does not amount to a denial of due process.[3]

Point Two: Although the alleged error below was constitutional in nature, it was waived by the failure of the defense to voice a contemporaneous objection based upon the ground that was later advanced on appeal.

Point Three: The harmless error doctrine is applicable when a discovery deposition is admitted for substantive purposes. Denial of the opportunity to cross-examine an adverse witness is not prejudicial in every case. Therefore, the certified question should be answered affirmatively.

Point Four: Because there was no contemporaneous objection voiced contending that the discovery deposition was inadmissible, no error was committed by the trial court. Accepting error, ***arguendo,*** it was nonetheless harmless.

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[3] The instant case requires resolution of four separate, albeit related, issues. Although the district court certified only one question, this court's "scope of review encompasses the decision of the court below, not merely the certified question." ***Reed*** *v.* ***State,*** **470** So.2d 1382 (Fla. 1985) (citations omitted). "Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented." *Tillman v.* ***State,*** 471 So.2d 32, **34** (Fla. 1985) (citation omitted). All four issues raised in the instant brief were both properly preserved and presented.

ARGUMENT

Point One

THE ADMISSION OF A DISCOVERY DEPOSITION AS SUBSTANTIVE EVIDENCE IS NOT FUNDAMENTAL ERROR.

"Fundamental error has been defined as 'error which goes to the foundation of the case or goes to the merits of the cause of action.'" *Ray v. State*, 403 So.2d 956, 960 (Fla. 1981) (citation omitted); *Smith v. State*, 521 So.2d 106, 108 (Fla. 1988), *citing Ray*. The United States Supreme Court has held that "[a]n error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Young v. United States, ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810, 107 S.Ct. 2124, 2139, 95 L.Ed.2d 740 (1987). The sixth amendment right to confront adverse witnesses at issue in the instant case does not fall within either definition.

The Supreme Court recently pointed out that its "precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial[.]'" *Maryland v. Craig*, ___ U.S. ___, 110 S.Ct. 3157, 3165 (1990) (emphasis in opinion), *citing Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980). Similarly, the Court has stated that "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *California v. Green*, 399 U.S. 149, 156, 90 S.Ct. 1930, 1934 (1970).

In *Delaware v.* Van *Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), the defense at trial had been precluded from

cross-examining a state witness about an agreement that resulted in the dropping of certain charges against him in exchange for his testimony. The case was remanded to the Delaware Supreme Court for the purpose of determining whether or not the error was harmless. The Court expressly stated:

> [T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case.

Id., U.S. at 682, S.Ct. at 1437.

The majority below held the admission of the discovery deposition to be fundamental error on the authority of *Brown v. State*, 471 So.2d 6 (Fla. 1985). That case did not compel such a holding in this case. Judge Cobb focused on the flaw in court's rationale:

> *Brown v. State*, 471 So.2d 6 (Fla. 1985) is distinguishable on the basis that it involved the use at trial of a deposition taken by the state in violation of the express notice requirements of Florida Rule of Criminal Procedure 3.190(j). In the instant case, the deposition in dispute was taken by the defense, and there was no breach of any notice requirement on the part of the state. Moreover, in light of the more recent case of *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), the continued viability of *Brown* is dubious.

Clark v. State, 572 So.2d 929, 933 (Fla. 5th DCA 1990) (Cobb, J., dissenting).

In addition to the failure to give notice to Brown, he was not taken to the deposition by his jailers as required by rule 3.190(j)(3). *Brown*, 7. That was not at issue in this case

because the deposition was taken by the defense without any appearance by the state **(R 142).**

The majority **below** wrote: "Significantly, the ***Brown*** court did not consider or apply the 'harmless error' doctrine." ***Clark*, 932.** The absence **of** a harmless error analysis in the ***Brown*** opinion is not in and of itself remarkable, particularly in light of the fact that ***Brown*** predated *DiGuilio*. Even if the sequence had been reversed, no significance can be attached to the lack of discussion on harmless error in the *Brown* opinion. The state may have simply failed to raise the issue. ***See,*** *e.g.*, Hitchcock ***v. Dugger*, 481 U.S. 393, 399, 107** S.Ct. **1821, 1824, 95** L.Ed.2d **347 (1987).** Even if the issue **had** been raised, this court may have **found** the argument to be without merit and simply felt it unnecessary to address the contention in the opinion. *Cf. Whipple* ***v. State*, 431** So.2d **1011, 1013** (Fla. **2d DCA 1983).**

This court instructed in ***Ray, supra:***

> The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error 'very guardedly.' We agree . . . that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests the interests of justice present a compelling demand for its application.

Id., **960** (citations omitted).

The majority below did not heed this caution. The admission of the discovery deposition was not jurisdictional. Nor did the interests of justice demand application of the fundamental error doctrine. The deposition testimony was internally inconsistent

and, as will be discussed in more detail under point four, it is clear beyond any reasonable doubt that any alleged error was harmless.

As Judge Cobb stated in his dissent below:

> Merely because testimony is objectionable on a constitutional ground does not mean its admission without objection rises to the level of fundamental error. Otherwise, every case wherein hearsay was admitted without objection would be automatically reversible on appeal - and that obviously is not the rule.

Clark, 933.

In short, the admission of a discovery deposition as substantive evidence is not fundamental error. There are cases, such as the this one, in which it is clear that the defendant is not unfairly prejudiced by the alleged error. The admission of the deposition testimony at the trial below did not go to the foundation of the case and did not undermine confidence in the integrity of the proceeding.

Point Two

THE ISSUE OF WHETHER A DISCOVERY DEPOSITION WAS IMPROPERLY USED AS SUBSTANTIVE EVIDENCE WAS IMPROPERLY CONSIDERED BY THE DISTRICT COURT BECAUSE IT HAD BEEN DEFAULTED IN THE TRIAL COURT.

"Normally the failure to object to error, even constitutional error, results in a waiver of appellate review." *D'Oleo-Valdez v. State*, 531 So.2d 1347, 1348 (Fla. 1988). See *also Gibson v. State*, 533 So.2d 338, 339 (Fla. 5th DCA 1988) (citations omitted); *Cook v. State*, 548 So.2d 257 (Fla. 5th DCA 1989). "In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." *Bertolotti v. State*, 514 So.2d 1095, 1096 (Fla. 1987) (citation omitted).

Immediately before the trial in the instant case the prosecutar indicated that he wanted to introduce the deposition testimony of an absent state witness. He offered it purportedly pursuant to §90.804(2)(a). (R. 8). The only objection voiced by the defense was that there was not an adequate showing of unavailability (R 11-13; this issue was not raised on appeal. *Clark*, 933, n. 1). The court found that reasonable efforts had been made to secure the attendance of the witness and indicated that the deposition would be admitted (R 13). Even if the defense had stated an objection at this pretrial juncture on the same ground that was later raised on appeal it would not have preserved the issue unless it was again raised when the state attempted to introduce the evidence during the trial. *Cf. Correll v. State*, 523 So.2d 562, 566 (Fla. 1988).

When the deposition testimony of Leon Knight was introduced into evidence the defense voiced no specific objection (R 52). Counsel merely asked the judge to tell the jury that Knight was unavailable (R 53). *After* a tape recording of the deposition had been played to the jury the prosecutor sought additionally to introduce a transcript of the proceedings. Defense counsel stated that he had "[n]o objection to that being offered outside my standing objection earlier." (R 54). First of all, the record reveals no *standing* objection. Secondly, even if there had been a standing objection voiced, as the trial court appears to have thought (R 55), the objection was not based upon the same ground advanced on appeal. Thirdly, even if the same ground had been voiced during the pretrial hearing, the renewed objection was not timely because it was voiced after the jury had already heard the tape recording of the deposition.

The district court should not have considered the defense argument that the discovery deposition was improperly admitted as substantive evidence because that ground was not presented to the trial court. As discussed under point one, the district court erroneously considered the error to be fundamental in nature.

Point Three

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The district court certified the following question to one of great public importance:

> IN A CASE WHERE THE DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED BY THE IMPROPER ADMISSION OF A DISCOVERY DEPOSITION IN A CRIMINAL TRIAL AS SUBSTANTIVE EVIDENCE, MAY THE APPELLATE COURT APPLY THE HARMLESS ERROR DOCTRINE AS INDICATED IN *CHAPMAN* AND *DIGUILIO*?[4]

Clark, **932.**

The certified question should be answered affirmatively although the state **agrees** with Judge Cobb's view:

> If the admission of Knight's deposition testimony was not fundamental error, then it was not error at all, given the absence of **any** valid objection to its admissibility. Thus, there is no reason to consider the harmless error doctrine in this case.

***Id.*, 933** (footnote omitted).

Nonetheless, in response to the certified question, rulings of the United States Supreme Court regarding the confrontation **clause** in different contexts reveal that the **harmless** error doctrine is properly applied in sixth amendment cases such as **this. In** *Van Arsdall, supra*, the Court stated:

> Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing

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[4] *Chapman v. California*, **386** U.S. **18, 87** S.Ct. **824,** 17 L.Ed.2d 705 **(1967); *State v. DiGuilio*, 491 So.2d** 1129 **(Fla.** 1986).

> court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.

475 U.S. at 681, 106 S.Ct. at 1436 (citations omitted).

Similarly, in *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), the Court considered whether a harmless error analysis was appropriate when a defendant had been denied his right to confront his accusers who had been obscured from his vision by a large screen. The Court held in relevant part:

> We have recognized that other types of violations of the Confrontation Clause are subject to that harmless error analysis, . . . and see no reason why denial of face-to-face confrontation should not be treated the same.

Id., S.Ct. at *2803*.

This court addressed the same issue in *Glendening v. State*, 536 So.2d 212 (Fla. 1988). After observing that "the confrontation clause does reflect a *preference* for face-to-face confrontation at trial", id., 217 (emphasis in opinion), the error was found to have been harmless. *Id.*, 218.

Although the precise issue involved in this case has yet to be ruled upon,[5] an analogous line of cases exists involving the use of a non-testifying codefendant's confession. The use of such evidence was held to deprive an individual of his sixth amendment right to confrontation in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). However, the Supreme Court found such an error to be harmless in *Harrington v. California*,

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[5] As discussed under the first point, *Brown, supra*, involved different questions of law.

395 U.S. 250, 89 S.Ct. 1726 (1969) and in *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). This court held similarly that:

> Once such a confession is introduced, the reviewing court must determine whether indicia of reliability exist or whether the introduction of a codefendant's confession meets the harmless error test.

Puiatti v. State, 521 So.2d 1106, 1108 (Fla. 1988).

As with other errors that violate the sixth amendment, a harmless error analysis is properly conducted by a reviewing court when a discovery deposition is introduced as substantive evidence at trial.

Point Four

ACCEPTING, *ARGUENDO*, ERROR BY THE TRIAL COURT BELOW, IT WAS NONETHELESS HARMLESS.

In conducting a harmless error analysis, "[t]he question is whether there is a reasonable possibility that the error affected the verdict." *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986). When the instant record is considered, including an "even closer examination of the impermissible evidence which might have passibly influenced the jury verdict, *id.*, 1138, there is no reasonable doubt that the defendant would have been convicted had the deposition testimony not been introduced.

On October 9, 1988, at approximately 5:30 P.M. Deputy Walthers left his marked patrol car unattended (R 19). There was a utility bag containing a 9 millimeter handgun in the car (R 20). While he was gone a witness, Maxine Campbell, who was across the street when she observed the defendant open the rear door on the driver's side (R 29-30). She had known him for more than 10 years (R 31), and was absolutely certain that it was him (R 33; 42). The defendant reached forward and opened the front door. He took something off of the front seat and left (R 30; 35-36). Ms. Campbell remained at the same location until the officer returned to his patrol car (R 46). The officer later obtained information from this witness implicating the defendant in the crimes (R 21).

The defendant offered to sell the stolen pistol to Leroy Fisher (R 56). This man had known the defendant for some 20 years. Id.

In addition to the trial testimony of these witnesses, the discovery deposition testimony of Leon Knight was introduced at trial (R 52). A copy of the deposition transcript is contained in the record (R 142-149). Knight initially claimed that he had not seen any weapon and that the defendant had not said that he had one (R 143-144). He later completely changed his testimony when he testified that the defendant had said that he had a gun (R 147). The deposition testimony can at most be characterized as cumulative to the testimony offered by the state witnesses who testified at trial. Any reasonable juror, however, would have viewed Knight as incredible and discounted his testimony because it was internally inconsistent.

The permissible evidence, on the other hand was credible. The two civilian witnesses had known the defendan, for extended periods of time. If they had any bias, it was favorable to him; the reluctance of both in testifying is readily gleaned from the record. Nonetheless, one was an eyewitness to the commission of the crimes and the other testified with certainty that the defendant had offered to sell him a gun. Even the majority below observed: "Were we to apply the harmless error test in this case, we might reach a different conclusion, because the circumstantial evidence of Clark's guilt is extremely strong." *Clark*, 932.

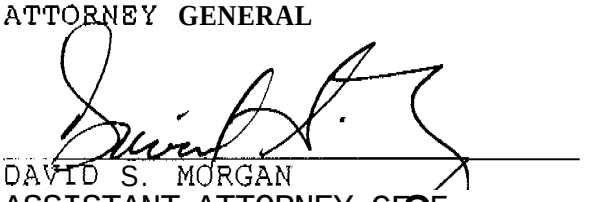
There simply is no reasonable possibility that the alleged error affected the verdict. The defendant would have been convicted even if the discovery deposition testimony had not been admitted as substantive evidence.

CONCLUSION

The portion of the district court opinion concerning the "ADMISSIBILITY OF THE DISCOVERY DEPOSITION AND HARMLESS ERROR", *Clark*, 931-932, should be quashed. The trial court committed no error because there was no contemporaneous objection voiced that presented to the trial court the issue that was later raised on appeal. Consideration of the issue by the district court was, therefore, improper because fundamental error had not occurred. when a **proper** objection is voiced to the admission of a discovery deposition as substantive evidence at trial, a reviewing court should conduct a harmless error analysis when the issue is raised by the state, as it was in this case. Even if the defense had preserved its claim in **the** trial court below, any error was nonetheless harmless.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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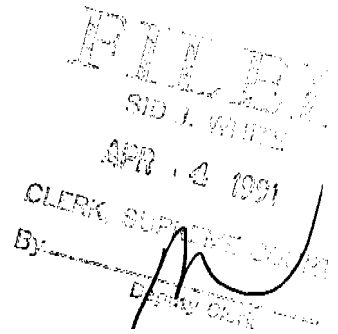
CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to George D.E. Burden, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 25th day of March, 1991.

DAVID S. MORGAN
ASSISTANT ATTORNEY GENERAL



IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,461

LARRY EUGENE CLARK,

Respondent.

APPENDIX TO MERITS BRIEF

Clark v. State, 572 So.2d 929 (Fla. 5th DCA 1990).

Respectfully submitted,

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6. Husband and Wife ⇐19(1, 18), 278(1)

Party's obligation of support during coverture includes liability, determined by need and ability to pay, for prejudgment attorney's fees and cannot be contracted away.

Alan Jay Hodin, Lawrence & Daniels and Adam Lawrence, Miami, for appellant.

Harold M. Braxton, Miami, for appellee.

Before NESBITT, BASKIN and GODERICH, JJ.

ON MOTION FOR REHEARING OR CLARIFICATION

PER CURIAM.

Appellant's motion for clarification is granted.

The opinion issued October 16, 1990 is withdrawn and the following opinion is substituted in lieu thereof.

Husband appeals the amount of child support awarded. Wife appeals the termination of rehabilitative alimony and the denial of her motion for attorney's fees. We affirm in part and reverse in part.

[1] The trial judge did not abuse his discretion in increasing the child support to be provided by the husband. The judge determined that since the execution of the marital settlement agreement two and one-half years prior to the final judgment of dissolution, substantial changes had occurred which required modification of the agreement's child support provisions. The court concluded that the needs of the children had increased significantly and the husband's financial condition had improved substantially and that the husband has the ability to pay an increased amount of child support. *Smith v. Smith*, 474 So.2d 1212 (Fla. 2d DCA 1985), *review denied*, 486 So.2d 597 (Fla.1986).

[2] We do, however, find several expenses, claimed by the wife and upon which the trial judge based his award, necessitate modification of the amount of child support awarded. First, the wife claimed an expense of $500 per month for federal income taxes. Child support payments, however, are not considered income nor are they taxable to the recipient spouse under the Internal Revenue Code. *See* 26 U.S.C. § 71(c)(1) (1989). Accordingly, the monthly child support award should be reduced by that amount.

[3] Second, in her estimate of expenses the wife included $162.68 she paid to the State of Florida for the children's future college tuition. Under the parties' settlement agreement, each parent agreed to pay "one-half of the expenses related to the college education for each child, based upon the then-prevailing expenses at a state university in Florida." The trial court incorporated this paragraph into the final dissolution decree. The $162.68 expense entry considered by the court was inflated by the $81.34 one-half share of the cost of prepaid tuition the wife had voluntarily assumed as her own obligation. Correspondingly, we conclude that the support payment ordered to be paid by the husband should be reduced by $81.34 so as to correctly reflect only that portion of the voluntary obligation assumed by the father. This modification takes into account the wife's salary in excess of $23,000 a year and thus her ability to contribute to this expense.

Third, the final judgment provides prospectively that the wife should pay for the children's therapy sessions with Dr. Crown. Notwithstanding that provision, the trial judge awarded the full amount of the child support sought by the wife, this amount expressly including $600 for Dr. Crown. Accordingly, the amount ordered to be paid by the husband should be further reduced by $600 monthly. We note that as to payments due Dr. Crown for the children's therapy sessions held prior to the October 10, 1989 final judgment, the terms of the settlement agreement control the obligations of the parties.

[4, 5] Finally, while the marital settlement provided that the husband pay a specific amount for the wife's attorney's fees and the wife be responsible for additional fees, the settlement also informed each party of the court's power to modify the terms of the agreement, particularly with reference to matters of child support and alimony. It was the husband who moved for termination of rehabilitative alimony and modification of child support. *See Mulkern v. Mulkern*, 446 So.2d 1124 (Fla. 4th DCA) (provision of settlement agreement should be considered in conjunction with usual criteria relative to financial circumstances of the parties), *review denied*, 455 So.2d 1033 (Fla.1984); *see also Hughes v. Hughes*, 553 So.2d 197 (Fla. 2d DCA 1989) (marital settlement agreement provision wherein parties agreed to pay own attorney's fees not intended to reach proceedings to modify child support). A party's obligation of support during coverture includes liability, determined by need and ability to pay, for prejudgment attorney's fees and cannot be contracted away. *Fechtel v. Fechtel*, 556 So.2d 520 (Fla. 5th DCA 1990). Thus, considering the nature of the fees incurred and the husband's superior assets and earning capacity, it is clear that he should have been required to pay the wife's attorney's fees. *See Nisbeth v. Nisbeth*, 568 So.2d 461 (Fla. 3d DCA 1990); *Martinez-Cid v. Martinez-Cid*, 559 So.2d 1177 (Fla. 3d DCA 1990); *Kuse v. Kuse*, 533 So.2d 828 (Fla. 3d DCA 1988). Therefore, we reverse the trial court's denial of the wife's motion for attorney's fees.

Accordingly, upon remand, the trial court should reduce the monthly child support ordered by $1,181.34 and determine reasonable attorney's fees to be awarded the wife. *See Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828, 835 (Fla.1990); *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985); *Frechter v. Frechter*, 548 So.2d 712 (Fla. 3d DCA 1989).

Affirmed in part, reversed in part, and remanded.

Larry CLARK, Appellant,

v.

STATE of Florida, Appellee.

Nos. 89-1503, 89-1748.

District Court of Appeal of Florida, Fifth District.

Nov. 16, 1990.

Rehearing Denied Jan. 17, 1991.

Defendant was convicted in the Circuit Court, Seminole County, C. Vernon Mize, Jr., J., of armed burglary of conveyance and grand theft, and defendant appealed. The District Court of Appeal, W. Sharp, J., held that admission of discovery deposition as substantive evidence was fundamental error requiring reversal.

Reversed and remanded.

Cobb, J., dissented and filed opinion.

1. Criminal Law ⇐627.2

Discovery depositions are not admissible in criminal trials as substantive evidence, and they may only be used to contradict or impeach deponent's testimony; only depositions taken to perpetuate testimony are admissible in criminal trials as substantive evidence. West's F.S.A. RCrP Rules 3.190(j), 3.220.

2. Criminal Law ⇐1035(2), 1166(10.10)

Introduction of discovery deposition in trial of defendant charged with armed burglary of conveyance and grand theft was fundamental error, requiring reversal without consideration of harmless error doctrines, and despite failure to object at trial.

3. Criminal Law ⇐1245(1), 1287(4)

Arrests and charges of criminal activity which have not culminated in convictions may not be used for scoring or departure reasons when determining sentence.

4. Criminal Law ⇐1280

Fact that victim of burglary and theft was active duty police officer engaged in police duties would be valid reason to depart upward from recommended sentence;

police officer's duty vehicle and equipment are entitled to special protection by society since, should officer be placed in danger because of disabling or harming of vehicle or because of loss of backup weapon, officer's ability to perform official duties would be impaired.

James B. Gibson, Public Defender, and George D.E. Burden, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Rebecca R. Wall, Asst. Atty. Gen., Daytona Beach, for appellee.

W. SHARP, Judge.

Clark appeals his sentences and convictions for armed burglary [1] of a conveyance and grand theft.[2] He argues the court erred when it admitted as substantive evidence at trial the discovery deposition of a state witness who was unavailable at the time of the jury trial. He also argues on appeal that the reasons the trial court imposed a "departure sentence" [3] were legally insufficient. One reason was because Clark burglarized an on-duty police deputy's car and stole the deputy's personal backup handgun. We agree on the first point, and reverse and remand for a new trial.

At the trial, the state presented three witnesses and the discovery deposition. Deputy Walthers testified he parked his patrol car in front of the Harlem Pleasant Cafe in Sanford, Florida, and went into the neighborhood on foot to search for a person for whom arrest warrants had been issued. Walthers thought he locked the patrol car.

When Walthers returned, some thirty minutes later, he discovered his 9 millimeter semiautomatic handgun was missing. Walthers kept his handgun in a green bag between the front seats of the car. He began questioning people he saw in the vicinity. Two were Maxine Campbell and Knight.

Campbell testified she was having dinner on her upstairs porch when she saw the deputy drive up and park across the street from her, with the rear of the car facing her. After he left, she saw Clark go to the rear door on the driver's side, reach in, and open the front door. She saw him grab something off the seat, and leave. But she did not see what he took.

Pursuant to section 90.804(2)(a), Florida Statutes (1987), the state then proffered a discovery deposition given by Knight. That provision, a part of Florida's Evidence Code, states that if a declarant is unavailable as a witness, his testimony will not be considered to be hearsay, if it was:

> [G]iven as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Defense counsel argued only that Knight was not shown by the state to be "unavailable." The prosecutor had merely failed to locate him at his rooming house and had not made adequate efforts to subpoena him for trial. The trial judge recessed the trial to consider how effective and bona fide the prosecutor's efforts had been to subpoena Knight. No record was made of the judge's inquiries, but he later announced he had ruled that Knight was "unavailable."

Just prior to the playing of the tape of the deposition for the jury, defense counsel again objected. But his sole point was that the court should instruct the jury that Knight was unavailable, and thus his earlier deposition was being used in place of a live appearance. The trial judge agreed to do so.

Knight's discovery deposition had been taken a few months before the trial pursuant to Florida Rule of Criminal Procedure 3.220 by defense counsel. Clark was not present. In his deposition, Knight reported

1. § 810.02(2), Fla.Stat. (1987).

2. § 812.014(2)(c)3, Fla.Stat. (1987).

3. Fla.R.Crim.P. 3.701.d.11.

what he had heard "from the street" or "people talking." However, Knight did say Clark told him that he had had the stolen gun; and that he "got rid of it." Knight did not see the gun, and Clark did not admit to Knight that he stole it from the deputy.

The last state witness was Fisher, a man who lived in the neighborhood. He testified that shortly after the burglary, Clark offered to sell him a gun for $100.00. Fisher refused because he did not need it.

The next day policemen came to Fisher's home. They assumed Fisher either had the stolen gun or knew its whereabouts. They questioned him about Walther's 9 millimeter gun. Fisher testified he did not see the gun Clark tried to sell him, and he did not know if it was Walther's stolen weapon.

The jury returned guilty verdicts as to armed burglary and grand theft. The guidelines presumptive sentencing bracket was 3½ to 4½ years. At the sentencing hearing the trial judge imposed concurrent sentences of 8 years and 5½ years. Since the offenses in this case took place after October 1, 1988, the trial court could have gone up to 5½ years (the top of the permitted range) without giving reasons for his "departure." Fla.R.Crim.P. 3.988. The reasons for the departure sentence were: The victim was a law enforcement officer and the offense was committed while the defendant had pending an unrelated criminal case.

I. ADMISSIBILITY OF THE DISCOVERY DEPOSITION AND HARMLESS ERROR

[1] It is now well-established that discovery depositions taken pursuant to Florida Rule of Criminal Procedure 3.220 are not admissible in criminal trials as substantive evidence, and they may be used only as the rule provides, to contradict or impeach the deponent's testimony. *State v. Basiliere*, 353 So.2d 820 (Fla.1977); *James v. State*, 400 So.2d 571 (Fla. 5th DCA 1980), *affirmed*, 402 So.2d 1169 (Fla.1981). Section 90.804(2)(a) of the evidence code does not change this rule in criminal cases. Only depositions taken pursuant to Florida Rule of Criminal Procedure 3.190(j) to perpetuate testimony are admissible in criminal trials as substantive evidence. *Campos v. State*, 489 So.2d 1238 (Fla. 3d DCA 1986); *Jackson v. State*, 458 So.2d 456 (Fla. 4th DCA 1984); *Terrell v. State*, 407 So.2d 1039 (Fla. 1st DCA 1981); *Robidoux v. State*, 405 So.2d 267 (Fla. 4th DCA 1981).

The admission of Knight's deposition in this case was error. However, defense counsel failed to raise the proper objection to its admissibility at trial. Therefore, we can only consider this issue on appeal if the error is "fundamental" or one of constitutional stature involving fundamental rights. *Steinhorst v. State*, 412 So.2d 332 (Fla.1982); *Hines v. State*, 425 So.2d 589 (Fla. 3d DCA 1982), *rev. denied*, 430 So.2d 452 (Fla.1983); *Brady v. State*, 518 So.2d 1305, 1308 (Fla. 3d DCA 1987), *rev. denied*, 523 So.2d 576 (Fla.1988).

The Florida Supreme Court held in *Basiliere* that the basis for excluding discovery depositions in criminal trials was to protect a defendant's Sixth Amendment right to cross-examine and confront witnesses against him.[4] In *Basiliere*, as in this case, defense counsel conducted the discovery deposition which was admitted at trial as substantive evidence. The court said it is unrealistic to expect defense counsel to conduct a vigorous or adequate cross-examination of a witness when counsel has no idea the witness will not be available at trial, and he is merely trying to discover the basis for the charges against his client.[5]

In *Brown v. State*, 471 So.2d 6 (Fla. 1985), the court held that the erroneous admission of a discovery deposition at a criminal trial constituted fundamental error

4. *See also State v. Dolen*, 390 So.2d 407 (Fla. 5th DCA 1980).

5. Some other courts that have considered this problem when defense counsel takes a witness' deposition, have concluded the defendant's right of cross-examination is not violated. *See* McCormick on Evidence, 3d Ed. Ch. 25, § 255 (1984); *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (preliminary hearing testimony).

in the sense that no timely objection at trial was necessary in order to preserve the point on appeal. The court said:

> There is no way to correct this error, and we must grant Brown a new trial.

Id. at 7. Significantly, the *Brown* court did not consider or apply the "harmless error" doctrine.

However, in *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986), decided one year after *Brown*, the court held that the harmless error doctrine should be applied to violation of a defendant's Fifth Amendment rights (comment at trial on the defendant's post-arrest silence). It followed *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967):

> Automatic reversal of a conviction is only appropriate when the constitutional right which is violated vitiates the right to a fair trial. *Chapman* holds that comment on the failure to testify is not constitutionally subject to automatic reversal because it does not always vitiate the right to a fair trial and the harmless error analysis should be applied. [C]onstitutional errors, with rare exception, are subject to the harmless error analysis.

Id. at 1134.

[2] Were we to apply the harmless error test in this case, we might reach a different conclusion, because the circumstantial evidence of Clark's guilt is extremely strong. Relying on *Brown*, we hold that fundamental error occurred below, no timely objection was required to preserve the point on appeal, and this cause must be reversed for a new trial without consideration of the harmless error doctrine. However, because we are in doubt on that latter point, we certify the following question to the supreme court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(B)(i), as one of great public importance.

> IN A CASE WHERE THE DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED BY THE IMPROPER ADMISSION OF A DISCOVERY DEPOSITION IN A CRIMINAL TRIAL AS SUBSTANTIVE EVIDENCE, MAY THE APPELLATE COURT APPLY *THE* HARMLESS ERROB DOCTRINE AS INDICATED IN *CHAPMAN* AND *DIGUILIO*?

II. SENTENCING

[3] Since Clark's convictions must be reversed and a new trial granted, the departure sentences likewise are quashed, and we need not address the validity of the reasons for departure given by the trial court. However, by way of guidance in the event of a retrial, we note that one reason given by the trial judge was clearly invalid: the unrelated pending criminal cases. The guidelines prohibit use of arrests and charges of criminal activity which have not culminated in *convictions*[4] for scoring or departure reasons. *Sellers v. State*, 499 So.2d 43, 44 (Fla. 1st DCA 1986).

[4] The second reason given by the trial court might be legally sufficient, however. Basically, a harsher punishment was imposed because the victim of the burglary and theft was an active police officer *engaged* in his police duties. In *Roberts v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977), the United States Supreme Court recognized that the states have a legitimate interest in *affording* special protection to law enforcement officers. Accordingly, our supreme court ruled in *State v. Baker*, 488 So.2d 423 (Fla.1986) that shooting a uniformed police officer was a valid reason to depart upwards because of the victim's status and job.

In this case, unlike *Roberts* and *Baker*, the police officer was not shot or personally threatened with violence. His official car was burglarized and his personal weapon was stolen. However, burglarizing a deputy's car and stealing the deputy's backup weapon while he is engaged in his official duties appears to us almost as much a threat to the officer's ability to function in his job as personally threatening him with violence.

It is but a shade less grave. Should the deputy's car have been harmed or disabled, or should the deputy have been placed in danger because of the loss of his backup weapon, his ability to perform his official duties would have been impaired. The fact that these crimes did not harm the deputy or impair his ability to function in this case was purely fortuitous. These acts could have placed him in peril or impaired his ability to function.

For these reasons, we think a police officer's duty vehicle and equipment are also entitled to special protection by society. This is part of the *quid pro quo* for the dangerous but essential job police officers are asked to perform for society's benefit. In this day and age of motor cars, to be effective police officers must be more than "foot-soldiers." *See Roberts* at 97 S.Ct. 1993, 1996 and 1998 (Blackmun and Rehnquist, JJ., dissenting).

REVERSED and REMANDED for new trial; QUESTION CERTIFIED.

GOSHORN, J., concurs.

COBB, J., dissents with opinion.

COBB, Judge, dissenting.

The issue here is whether the admission at trial of the discovery deposition of a witness, as opposed to a deposition to perpetuate testimony, constituted fundamental error—*i.e.*, one "which goes to the foundation of the case or goes to the merits of the cause of action." *See Ray v. State*, 403 So.2d 956, 960 (Fla.1981); *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla.1970). The imprecision of this definition affords the prospect for disparate applications, dependent upon varying individual notions of fair play among reviewing judges. It is my notion that the admission of Knight's deposition testimony without objection (at least, without relevant objection) does *not* constitute fundamental error.

Knight's counsel took the discovery deposition and did not object to its admissibility at trial on the basis of any denial of confrontation or full cross-examination. The majority's reliance on *State v. Basiliere*, 353 So.2d 820 (Fla.1977) is misplaced. That case did not deal with the doctrine of fundamental error, but rather with the admissibility *vel non* of a discovery deposition at trial, which was the issue raised before the trial court and certified to the Florida Supreme Court. Merely because testimony is objectionable on a constitutional ground does not mean its admission without objection rises to the level of fundamental error. Otherwise, every case wherein hearsay was admitted without objection would be automatically reversible on appeal—and that obviously is not the rule.

Brown v. State, 471 So.2d 6 (Fla.1985) is distinguishable on the basis that it involved the use at trial of a deposition taken by the state in violation of the express notice requirements of Florida Rule of Criminal Procedure 3.190(j). In the instant case, the deposition in dispute was taken by the defense, and there was no breach of any notice requirement on the part of the state. Moreover, in light of the more recent case of *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), the continued viability of *Brown* is dubious.

If the admission of Knight's deposition testimony was not fundamental error, then it was not error at all, given the absence of any valid objection to its admissibility.[1] Thus, there is no reason to consider the harmless error doctrine in this case.

I would affirm.

INTERNATIONAL SURPLUS LINES INSURANCE COMPANY, Appellant,

v.

SEAGRAVE HOUSE, INC., et al., Appellees.

No. 90–1029.

District Court of Appeal of Florida, Fifth District.

Nov. 21, 1990.

Rehearing Denied Jan. 11, 1991.

Insurer under malpractice policy providing professional liability coverage to

4. Fla.R.Crim.P. 3.701.d.5. and 11.

1. The only possibility of non-fundamental error by the trial court would be a showing on appeal that the trial court erred in its ruling on Knight's unavailability as a witness at trial. But that point has not been raised on appeal.