IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

LARRY EUGENE CLARK,

Respondent.

CASE NO. 77,461

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts except for the following:

In the second paragraph of the Petitioner's statement of case and facts the state contends "the defendant offered to sell the stolen pistol to Leroy Fisher (R56)." At the time Respondent offered to sell a gun to Leroy Fisher, he did not present a gun nor give any details as to where the gun had come from. (R60) The Respondent asserts that since Leroy Fisher never saw a gun and the Respondent never admitted to Mr. Fisher that the gun was stolen that paragraph two should read "the defendant offered to sell a gun to Leroy Fisher in October of 1989. (R56)"

Paragraph six should be changed to read as follows: The transcript of the Knight deposition is contained in the

record. (R142-49) In the Knight deposition Leon Knight was first asked if he had talked to Sanford Police Officers and whether the defendant had told him that he had a 9 millimeter gun. (R143) Leon Knight stated that he did not say that to the police. **(R144)** The next question was "Okay. Well, tell me what you told them: that's all I need to know." (R144) The next ten answers given by Mr. Knight in the deposition were in the context of what he had originally told officers before he had any knowledge about the gun and Larry Clark's involvement with the gun. **(R144-46)** With no inconsistencies whatsoever, Knight then detailed his contact with the Respondent and relayed the defendant's admission that he had possession of a gun and that he knew that it was Officer Walter's gun. (R146-7) In closing argument the state characterized Knight's deposition as a confession by the defendant ("his testimony was introduced because of what this defendant told him which indeed was a full confession of the fact that he in fact did take the gun or he had possession of the officer's gun.'') (R78)

SUMMARY OF ARGUMENT

POINT I: The admission of a discovery deposition as substantive evidence in a criminal trial is fundamental error where the evidence contained therein included a confession by the defendant. Such a procedure was a denial of the Sixth Amendment to the United States Constitution, Florida Declaration of Rights, and Due Process of Law.

POINT 11: The admission of a discovery deposition as substantive evidence is an express violation of Criminal Procedure Rules that this Honorable Court has stated may not occur during a criminal trial. Absolute denial of confrontation and cross-examination can not be subject to harmless error analysis. Where there is an absolute denial of confrontation and cross-examination it is tantamount to ineffectiveness of counsel which is per se reversible.

POINT 111: The admission of a discovery deposition which contains claims that the defendant confessed to the crime where the remaining evidence was merely circumstantial cannot be held to be harmless beyond a reasonable doubt.

POINT I

THE ADMISSION OF THE DISCOVERY DEPOSITION IN THE INSTANT CASE AS SUBSTANTIVE EVIDENCE WAS FUNDAMENTAL ERROR.

The state urges this Court to hold that both the denial of the Respondent's right to confront Leon Knight and cross-examine him where the evidence presented by his deposition was a confession of guilt by the Respondent should not be characterized as fundamental. Looking at the whole record, the only evidence directly linking respondent to Officer Walter's gun was the Knight deposition. The two state witnesses that testified at trial established that the defendant had a gun for sale, the general time the gun was reported missing, and that the defendant had opened Office Walter's police car and removed something the day the gun was noticed missing. The record is completely silent as to whether the missing gun was ever recovered. Therefore, in the context of this case, the admission of the defendant's confession to Leon Knight through deposition was fundamental error.

The rationale for the above is grounded on both federal and state law. First, the Sixth Amendment to the United States Constitution gives a criminal defendant the right "to be confronted with the witnesses against him." Coy v. Iowa, 487 U.S. 1012 at 1016 (1988). Article I, Section 16 of the Florida Constitution provides in pertinent part "In all criminal prosecutions the accused . . . shall have the right . . . to

confront at trial adverse witnesses." This Court has held in State v. Brown, 471 So.2d 6 (Fla. 1985) that a defendant's deprivation of his constitutional right to confront and cross-examine the witnesses against him create a fundamental error, in that, "There is no way to correct this error, and we must grant Brown a new trial." Brown at 6. Although this Honorable Court in Brown did not refer to which constitution it was referring, Brown's reliance on State v. Basiliere, 353 So.2d 820 (Fla. 1977) would suggest that the Brown court was relying upon Florida Constitutional guarantees. See Basiliere at 822. Third, the U.S. Supreme Court has held that the right of cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965). This Honorable Court is in accord. See State v. Brown.

The state's argument is that in some cases, factually dissimilar to the case sub judice, the U.S. Supreme Court has held that various subsets of Sixth Amendment protections can be held to harmless error analysis. See Delaware v. Van Arsdall, 475 U.S. 673 (1986); Maryland v. Craig, __ U.S. __, 110 S.Ct. 3157, __ L.Ed.2d __ (1990). It is by no means persuasive to the proposition that absolute denial of both confrontation and cross-examination of a key state witness does not constitute fundamental error under either Florida law or federal law.

The Respondent strongly contends that the absolute denial of confrontation and cross-examination guaranteed by the

Florida and U.S. Constitutions, of a key state witness that testified in depositions that the Respondent confessed to the crime is an error of the first magnitude which *goes* to both the foundation of the case and the merits of the case. See Davis V. Alaska, 415 U.S. 308, 316 (1974); Ray V. State, 403 So.2d 956, 960 (Fla. 1981). As such, the admission of such evidence was fundamental error and denial of due process as guaranteed by the U.S. Constitution and the Constitution of Florida.

POINT 11

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

> ~~Per se~~ reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." (citation omitted). In other words, those errors which are always harmful. The test of whether a given type of error can be properly characterized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to characterize the error as per se reversible."

State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986) (emphasis in original).

Here a discovery deposition was taken by defense counsel who justifiably did not anticipate it being used as substantive evidence. The improper use of this discovery tool resulted in denial of:

1. face to face confrontation;
2. cross-examination;
3. oath;
4. observation and demeanor of witness;
5. the purpose of the entire cluster of rights above, i.e., the reliability of the evidence.

The state urges that since the Supreme Court held that aspects of the Sixth Amendment are subject to harmless error analysis it should be applied herein.

The state first relies on Delaware v. Van Arsdall, supra, wherein the high court held that where the trial court

restricts cross-examination of an individual witness concerning bias in violation of the Sixth Amendment confrontation clause, such a violation is subject to harmless error analysis. Van Arsdall is distinguished from the instant case in that the defendant was permitted face-to-face confrontation, cross-examination on the merits of witnesses testimony, oath, observation, and demeanor of witness by the jury; and, a virtual reliability on the evidence presented.

The state next relies upon Cov v. Iowa, supra, wherein the high court held that the denial of face-to-face confrontation in the context of a competing state interest (i.e., protection of child rape victims) can be subject to harmless error analysis. *Coy,* along with Marvland v. Craig, supra, are distinguishable in that the "victims" involved children of tender age and the defendant was permitted to confront an adverse witness through a screen or on a video picture; cross-examination; oath; observation and demeanor of the witness by the jury; and virtual reliability of evidence presented.

The state's final point concerning the admission of a non-testifying co-defendant's confession has no applicability here. The Defendant argues that appellate courts cannot apply harmless error analysis where there are improper admissions of discovery depositions because it is prohibited by state law, and/or the application of Chapman/DiGuilio.

I. State Grounds:

The U.S. Supreme Court and lower federal courts do not

enforce state constitutional guarantees or pass upon the correctness of the state court interpretation of such guarantees. See Reitman v. Mulkey, 387 U.S. 369 **(1967).** The doctrine **of** "adequate state grounds" provides that if a state constitutional determination rests on state grounds or on both federal and state grounds it is normally unreviewable by the United States Supreme Court. Where a state constitutional determination sustains the judgment, it will be upheld **even if under federal** constitutional law it would not be, because U.S. Supreme Court adjudication of the federal constitution issue would not change the result. Caldwell v. Mississippi, **472** U.S. 320 **(1985).**

In the case **sub** judice the trial court permitted over objection, albeit not the technically correct objection, a discovery deposition as substantive evidence in violation of state constitutional rights and the Florida Rules of Criminal Procedure. This Court has considered this precise issue in James v. State, **402 So.2d** 1169 (Fla. **1981).** In James there is an analogous situation where the Fifth District Court certified the following question:

> IS A DISCOVERY DEPOSITION TAKEN UNDER FLORIDA RULES OF CRIMINAL PROCEDURE 3.220(D) BY DEFENSE COUNSEL, WITH DEFENDANT PRESENT OR WITH HIS PRESENCE WAIVED ADMISSIBLE INTO EVIDENCE AGAINST DEFENDANT AT THE TRIAL. . . IN LIGHT OF OHIO V. ROBERTS, **448** U.S. 56 **(1980).**

The state in James argued that their interpretation of Ohio **v.** Roberts dispensed with the Sixth Amendment confrontation clause violation; therefore the rules should permit the use of

the deposition. James at **1169, 1170.** In answering the above certified question in the negative, this Honorable Court declined to respond to the state's constitutional arguments and focused on the violation of the state criminal procedure rules:

> Under the present rules of criminal procedure, deposition was **used** for an improper purpose. **. .** we hold that discovery depositions may not be used as substantive evidence in a criminal trial. Since this holding is dispositive of the case, we decline to rule on the assertion that the use of the deposition in this case violates the confrontation clause of the Sixth Amendment.

James at **1170.**

In the instant case, the trial court failed to follow the express holding of James, where this Court properly held that discovery depositions may not be used as substantive evidence in a criminal trial. Automatic reversal red-flags this unlawful practice for the edification of all trial judges. This holding is consistent with this Court's long-standing application of the Florida Criminal Procedure Rules and the discovery procedures specifically. **See** Richardson v. State, **246** So.2d **771** (Fla. **1971)** (failure to conduct hearing concerning alleged discovery violation is per se reversible error).

11. Chapman/DiGuilio:

The complete denial of a defendant's right to confront, cross-examine, and have the jury **observe** an adverse witness is of first impression in view of this Court's ruling in DiGuilio. Prior to DiGuilio, but subsequent to Chapman v. California, 386

U.S. 18 (1967) this Court held that such a complete denial was fundamental error and per se reversible in Brown. The essential question is what change in the judicial landscape has DiGuilio brought that impacts on the instant case.

Chapman stated that not all constitutional errors are **per se** reversible:

> Automatic reversal of a conviction is only appropriate when the constitutional right which is violated vitiates the right to a fair trial.

DiGuilio at 1134. Moreover:

> In comparing the **per se** reversible **rule** and the harmless error rule, in determining their applicability, it is useful first to recognize that both rules are concerned with the due process right to a fair trial. The problem which we face in applying the rule is to develop a principled analysis which will **afford** the accused a fair trial at the same time not making a mockery of criminal prosecutions by elevating form over substance.

DiGuilio at 1135. The question of whether the error in the case sub judice was constitutional is irrefutable. Deposition testimony that the defendant confessed to the crime was permitted as substantive evidence in violation of the Sixth Amendment to the United States Supreme Court and the Florida Declaration of Rights. Nonetheless, the defendant acknowledges that making a showing that the error has a constitutional dimension is not in and of itself sufficient under Chapman/DiGuilio. Rather, as stated earlier:

> The test of whether a **given type** of error can be properly characterized as

> **per se** reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to characterize the error as **per se** reversible. If application of the test results in the finding that the type of error involved is not always harmful, then it is improper to characterize the error as **per se** reversible.

DiGiulio at 1135.

Applying the DiGuilio test to the instant case the defendant asserts the admission of the discovery deposition as substantive evidence is always harmful. The reasons are two-fold.

First, the admission of a discovery deposition as substantive evidence **ensures** that per se unreliable evidence will be **used** to obtain convictions. See Marvland v. Craig, supra, Justice Scalia's dissent at page **689**. Such evidence is per se unreliable because it lacks "cross-examination. . . the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, **316** (1974). Also, such evidence is unreliable because:

> It is more difficult to tell a lie about a person **"to** his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The confrontation clause does not, of course, compel the witness to fix his eyes upon the defendant: he may studiously look elsewhere. But the trier of fact will draw its own conclusions.

Coy, supra at 1019.

If this Court granted the state's relief and permitted per se unreliable evidence to convict, would the state object if the defense wished to present sworn taped affidavits of individuals claiming alibi that the accused was with the affiant at the time of the crime? We think not, and for good reason. Such evidence is patently unreliable and therefore harmful. It will always be so regardless of the specific circumstances of a particular case.

Second, permitting the admission of a discovery deposition as substantive evidence is tantamount to denying a defendant effective assistance of counsel. The discovery deposition process is like a sponge trying to absorb all the information from a witness for the purpose of preparing for trial. Knowing that the deposition will not be used as substantive evidence, attorneys ask questions geared to elicit relevant information that may or may not be admissible at trial. At trial, the purpose of questioning witnesses is quite different. It is simply to elicit only competent, relevant evidence.

In the case **sub** judice a taped deposition was introduced as substantive evidence. This deposition included rank hearsay, an alleged confession of the crime by the defendant. Through this procedure, the defendant was denied the right of having his defense counsel object to the questions, object to the witnesses' answers or ask questions of the witness. This is tantamount to not being provided effective assistance of

counsel.

Where there is a denial of effective assistance of counsel, this Court has found such denial per se reversible. See Jennings V. State, 413 So.2d 24 (Fla. 1982). Furthermore, the U.S. Supreme Court in Chapman stated that the right to counsel is "so basic to a fair trial that (its) infraction can never be treated as harmless error." Chapman at 23. See also Satterwhite v. Texas, 486 U.S. 249 (1988). Moreover, the high court held that "when a defendant is deprived of the presence and assistance of an attorney during a critical stage of the trial . . . reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978).

The defendant submits that the playing of a taped discovery deposition is tantamount to being denied the assistance of counsel and that the conviction must be reversed even if no particular prejudice is shown and even if a defendant was clearly guilty. Chaaman at 43.

POINT III

ACCEPTING, ARGUENDO, HARMLESS ERROR ANALYSIS APPLIES, THE ERROR IN THIS CASE WAS REVERSIBLE.

The error in the instant case was reversible under the harmless error test in Chapman/DiGuilio. The defendant urges this Honorable Court to apply the reasoning of the Rhode Island Supreme Court in State v. Manocchio, 523 A.2d 827 (R.I. 1987).

Prior to the United States Supreme Court's ruling in Delaware v. Van Arsdall, the Rhode Island Supreme Court consistently reviewed the improper denial of a defendant's right of cross-examination under the per se error standard. See State v. Parillo, 480 A.2d 1349, 1357 (R.I. 1984); State v. Freeman, 473 A.2d 1149, 1154 (R.I. 1984); State v. DeBarros, 441 A.2d 549, 552 (R.I. 1982). In State v. Manocchio, 475 U.S. 1114 (1987), the U.S. Supreme Court directed the Rhode Island Supreme Court, on remand, to reconsider its earlier decision in light of the high court's decision in Van Arsdall.

As a matter of background, in 1969 the state indicted Luigi Manocchio on charges of accessory before the fact and of conspiracy to commit murder. Manocchio evaded arraignment and prosecution in 1969 by fleeing the jurisdiction, but he returned to Rhode Island for arraignment in 1979. The state relied upon John Kelly, a participant in the crime, as its principle witness. At trial, Kelly, then 68 years old, testified to events that had occurred fifteen years earlier. At an evidence suppression hearing, Kelly testified he suffered from premature Alzheimer's

disease which affected his ability to think and recall certain events. The defendant then sought to question his competence to testify.

At trial, the judge permitted defense counsel to establish that Kelly had a problem with his memory. The court precluded counsel, however, from fully exploring for the benefit of the jury Kelly's mental condition and the effects of Alzheimer's disease on Kelly's memory. Thereafter, the jury convicted Manocchio on all charges.

On appeal, Manocchio argued his convictions resulted from the denial of his Sixth Amendment right of confrontation. After the Supreme Court of Rhode Island reversed the conviction, the United States Supreme Court granted certiorari. The Supreme Court remanded the case to the Rhode Island court for review citing this decision in Delaware v. Van Arsdall.

Reconsidering its earlier decision, the Supreme Court of Rhode Island concluded that the extent of the restriction on Manocchio's right of cross-examination constituted reversible error under the Chapman v. California harmless error analysis, and that the error was extremely harmful to the development of Manocchio's case.

In the instant case, the admission of a discovery deposition which contains claims that the defendant confessed to the crime where the remaining evidence was merely circumstantial cannot be held to be "harmless beyond a reasonable doubt" and thus would require reversal.

CONCLUSION

Based on the foregoing cases, argument and authorities, Respondent respectfully **requests** this Honorable Court to affirm the Fifth District Court's order reversing his conviction and remanding the cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite **447**, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Larry Eugene Clark, #742048, P.O. Box 99, Clermont, Fla. 34712 on this 15th day of April, 1991.

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER