IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,461

LARRY EUGENE CLARK,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

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STATEMENT OF CASE AND FACTS

The statement in the petitioner's merits brief (PB 1)[1] that "the defendant offered to sell the stolen pistol to Leroy Fisher" should stand because "[a]ll conflicts and reasonable inferences therefrom are resolved to support the judgment of conviction." E.Y. *v. State*, 390 So.2d 776, 778 (Fla. 3d DCA 1980) (citations omitted). *Cf. Tibbs v. State*, 397 So.2d 1120, 1123 (Fla. 1981); Shapiro *v. State*, 390 So.2d 344, 346 (Fla. 1980).

The defense spurious claims that Knight's answers at deposition were consistent (B 2). The record flies in the face of such a statement:

> Q Okay, did Larry Clark tell you he had a gun?
>
> A No.

(R 144).

Shortly thereafter, the following exchange took place:

> Q Well, wait a minute. Did Larry tell you, without you supposing this, of what he did with it that he had a gun?
>
> A Yeah.
>
> Q He did? Okay, well, that's what I asked you to begin with.

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[1] The parties will again be referred to as the state and the defendant. Documentary references will be: To the merits brief of the petitioner, "(PB and page)"; to the merits brief of the respondent, "(RB and page)"; to the record on appeal, "(R and page)".

ARGUMENT

Point One

THE ADMISSION INTO EVIDENCE OF THE DISCOVERY DEPOSITION DID NOT CONSTITUTE FUNDAMENTAL ERROR.

"[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." *Delaware v. Van Arsdall*, **475 U.S.** 673, 682, 106 S.Ct. **1431, 1437,** 89 **L.Ed.2d 674 (1986).**

The defense, as did the court below, relies upon the holding of this court in *State v. Brown*, **471 So.2d 6 (Fla. 1985).** However, the defense **does** not discuss, no less acknowledge, **the** different facts, rules of criminal procedure, **and** legal issues between that **case** and the instant case (RB 5). *Brown* simply does not control *(see* extended discussion in initial merits brief of petitioner (PB **7-8)).** The *Brown* court considered whether or not it was error to introduce the testimony presented at **a** deposition to perpetuate testimony pursuant to Florida Rule of Criminal Procedure 3.190(j), when no notice was given to the defendant personally and he was not brought to the deposition as required by the rule. This court **has** held that the admission of a discovery deposition as substantive **evidence** at trial is improper.[2] *State v. James*, **402 So.2d 1169 (Fla. 1981).** However,

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[2] Despite this acknowledgment, the state does *not* concede that the trial court erred in this case. To the contrary, as Judge Cobb pointed out in his dissenting opinion below, there was no error by the trial court because "[i]f 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." *Clark v. State*, **572** So.2d 929, **933** (Fla. 5th **DCA** 1990).

neither that case nor any other case from this court has held that the admission at trial of testimony from a discovery deposition for substantive purposes constitutes fundamental error. In fact, this court expressly declined to reach the constitutional claim in *James*. *Id*, 1171. Unlike rule 3.190(j), Florida Rule of Criminal Procedure **3.220**, which governs **the** taking of discovery depositions, requires neither notice upon the defendant personally, subsection (h)(1), nor the defendant's presence, unless stipulated to or allowed by the court upon good cause shown, subsection (h)(6).

In its discussion of *Brown*, the defense refers to the Florida Constitution (RB *5)*. **The** effect of the state constitution independently of the sixth amendment of the federal constitution is not properly before this court. "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). Although this court cited *State v. Basiliere* in *Brown*, at 7, it **was** to support the finding that "the state failed to comply with the rule governing taking depositions to perpetuate testimony", not for the state constitutional holding stated in the earlier case. The court below also cited *Basiliere*, when it noted that this court had **held** in that case "that the basis for excluding discovery depositions in criminal trials was to protect a defendant's Sixth Amendment right to confrontation." *Clark v. State, 572* **So.2d** 929, 931 (Fla. 5th DCA 1990). The district court opinion did not allude to **the** state constitution **at** any point. Until **the** defense

filed its merits brief in this court, it never raised a claim that the admission of the discovery deposition violated the Florida Constitution. In fact, the defense has never previously argued that it was constitutional error under either the state or the federal constitution. The defense contended in its initial brief below that the admission of the discovery deposition "was in direct violation of the *James, supra,* doctrine, and as such was reversible error." (IB 6). As pointed out above, this court declined to rule on the constitutional claim in *James.* The defense did not reply to the state's motion for rehearing below, in which the state advanced the arguments that are now before this court. Even if the state constitutional issue had not been repeatedly waived by the defense, the state constitution provides no right of confrontation greater than that under the sixth amendment. Research has revealed no case from this court that expressly holds that the federal and state constitutional counterparts regarding a defendant's right to confrontation are coextensive. Our constitution provides in material part that "[i]n all criminal prosecutions the accused . . . shall have the right . . . to confront adverse witnesses . . ." Fla. Const., Art. I, §16. The federal constitution provides that "[i]n all criminal prosecutions shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const. amend. VI. Clearly, the state and federal constitutional provisions are coextensive.

The defense points out that the cases from the United States Supreme Court relied upon by the state are factually dissimilar

from the instant case (RB 5). Such an observation is equally true of the cases relied upon by the defense. In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the issue was whether the trial court could prohibit the defense from inquiring of a crucial state witness regarding his juvenile record. At the trial of the defendant in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965), the testimony of his codefendant that was presented at a preliminary hearing during which neither man had counsel was introduced against him at trial. Not only are the facts different, but the legal analysis by the Court is of an entirely different nature because trial counsel for both Davis and Pointer, unlike trial counsel below, timely voiced a proper objection. U.S. at 311, S.Ct. at 1108; U.S. at 401, S.Ct. at 1067.

Paradoxically, the defense also quotes from *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 674 (1988). The Court in that case remanded the case to the Iowa Supreme Court for the express purpose of deciding whether the denial of face-to-face confrontation was harmless error. S.Ct. at 2803. The Court explained the proper means of conducting a harmless error analysis when considering whether the denial of the sixth amendment right to confrontation was prejudicial:

> An assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence.

Id.

This test is somewhat different than that which this court has established, "Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986). Irrespective of which test is applied, the instant defendant cannot prevail. Other than merely restating the evidence in summary fashion and advancing its conclusion that the error was fundamental, the defense simply fails to analyze the evidence under this or either of the other two points it argues. The state, to the contrary, has considered at length all of the evidence (PB 15-16). As will be discussed under point three, *infra*, these simply is no reasonable possibility that the admission at the trial below of the internally inconsistent deposition testimony affected the verdict (see *also* point four of the initial merits brief of petitioner).

Although the defense does not meaningfully evaluate the evidence, it raises by implication the circumstantial evidence rule. It claims that "the only evidence directly linking respondent to Officer Walter's gun was the Knight deposition." (RB 4). Accepting that observation, *arguendo*, "[t]he state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." *State v. Law*, 559 So.2d 187, 189

(Fla. 1989) (citation and footnote omitted). Even the court below concluded that "the circumstantial evidence of Clark's guilt is extremely strong." *Clark v. State*, 572 So.2d 929, 932 (Fla. 5th DCA 1991); *see* point three, *infra*, and point four of the initial brief for detailed discussion.

The defense speciously concludes that the repeated holdings of the Supreme Court that sixth amendment violations are subject to a harmless error test "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 . . ." (RB 5, defense emphasis). Particularly significant in this case is the fact that *only* defense counsel appeared at the deposition. Because no one appeared on behalf of the state, the defense controlled the entire examination of Knight. Counsel was in fact able to obtain diametrically opposed testimony from the potential state witness (*cf.* R 144 vis-a-vis R 146-147). Moreover, the degree of confrontation in most of the cases relied upon by the state was significantly less than that allowed the defense in this case. For example, in *Puiatti v. State*, 521 So.2d 1106 (Fla. 1988), this court held that the harmless error test is applicable when a non-testifying codefendant's confession is introduced against a defendant at trial. The United States Supreme Court held similarly in *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972), and in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726 (1969). The defendants in those cases had *absolutely* no opportunity to examine the codefendants, whereas Clark's counsel exercised his opportunity to exclusively examine Knight.

The defense argues that Knight testified in depositions [sic] that the Respondent confessed to the crime . . ." (RB 6). There are a number of flaws with this contention. First of all, the testimony of the deponent amounted to, at most, an admission, not a confession.[3]

Even if the deposition testimony of Knight could be viewed as a confession by Clark, the United States Supreme Court has very recently held:

> When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

Arizona v. Fulminante, ___ U.S. ___, 111 S.Ct. 1246, 1265 (1991) (Rehnquist, C.J., Part II of opinion; O'Connor, Kennedy, Souter, Scalia, JJ., join); *see* opinion generally for discussion of myriad of cases involving constitutional errors to which the harmless error test is applicable.

Thus, even if the testimony could be viewed as imparting to the jury a confession, the harmless error analysis is still appropriate.

Nor does the admission of the discovery deposition go "to both the foundation of the case and the merits of the case" (RB 6). The Court pointed out in an earlier case that:

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[3] "A confession is a statement admitting or acknowledging all facts necessary for conviction of the crime. An admission, on the other hand, is an acknowledgment of a fact or facts tending to prove guilt which falls short of an acknowledgment of all essential elements of a crime. *Black's Law Dictionary*, (5th ed. 1979), p. 269 (citations omitted).

> We have permitted **harmless** error analysis in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to **the** erroneous admission of particular evidence at trial.

***Satterwhits** v. Texas*, **486 U.S. 249, ___, 108 S.Ct. 1792, 1798 100** L.Ed.2d **284 (1988).**

In short, the admission at the trial below of the discovery deposition as substantive evidence did not constitute fundamental error. **As** the instant sixth amendment claim involves nothing **more than the** erroneous admission of evidence, it is subject to the application of the harmless **error** test.

Point Two[4]

THE CERTIFIED QUESTION SHOULD BE ANSWERED AFFIRMATIVELY.

The Supreme Court stated that "[w]e have recognized that other types of violations of the Confrontation Clause are subject to th[e] harmless error analysis, . . . and see no reason why denial of face-to-face confrontation should not be treated the same." *Coy, supra*, 108 S.Ct. at 2803.

The defense under this point goes to great lengths to distinguish the cases relied upon by the state from the instant case (RB 78). However, as pointed out above, the cases it relies upon are distinguishable as well. Significantly, however, the state has provided this court with a number of United States Supreme Court decisions that hold that violations of sixth amendment rights are subject to a harmless error analysis. Conversely, the defense has not provided one authority that holds that the erroneous admission of particular evidence constituted fundamental error under the sixth amendment.

The defense again argues that the admission of the discovery deposition was error, That contention begs the appropriate issue, *i.e.*, "may the appellate court apply the harmless error doctrine as indicated in *Chapman* and *DiGuilio*?" *Clark, supra*, 933. To merely allege that there was error is but the first step in the analysis. Indeed, it is only upon a showing of error that the harmless error analysis is begun.

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[4] *See* point three in initial brief of petitioner; the defense presents no argument that a proper objection was voiced at trial.

The federal doctrine of "adequate state grounds" (RB 9) has absolutely no application at this juncture. Federal procedural rules have no bearing upon whether this court has jurisdiction to consider a federal constitutional issue. The Supreme Court has "consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, ___ U.S. ___, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990) (citations omitted); *see* Art. V, §3(b)(3), Fla. Const.

The defense mistakenly argues that "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*." (RB 10). That simply is not so. *DiGuilio* was decided in 1986. *Puiatti*, *supra*, involved the use of a non-testifying codefendant, and was decided in 1988. The defense contends summarily that "the admission of a non-testifying co-defendant's confession has no applicability here." (RB 8). No authority or rationale is presented in support. As already discussed, in such a case there is even less confrontation than in this case because the trial defense counsel below conducted exclusive examination at deposition because no one appeared on behalf of the state.

The defense contends that the harmless error test is inapplicable in this case because deposition testimony is always unreliable (RB 12-13). This conjecture begs the issue. Accepting, *arguendo*, that the testimony was unreliable, nonetheless the material issue in this proceeding remains whether

"there is a reasonable possibility that the error affected the verdict." *DiGuilio*, 1139.

The second reason advanced by the defense is procedurally barred. It claims that the admission of the deposition testimony "is tantamount to denying a defendant effective assistance of counsel" (RB 13). As this argument has neither been advanced before nor discussed in the opinion of the court below, it should not be considered by this court. Moreover, in order to prevail on an ineffectiveness of counsel claim the defense must show both deficient representation and prejudice. *Strichland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Hence, the harmless error test remains viable despite this defense contention.

In short, the mere fact that the introduction of the deposition testimony may have violated a procedural rule does not support the defense theory that the certified question should be answered negatively. The Supreme Court has consistently held that such an analysis is appropriate when the sixth amendment right to confrontation has been denied. This court should hold likewise and answer the certified question affirmatively.

Paint Three

THE ADMISSION OF THE DEPOSITION TESTIMONY AT THE TRIAL BELOW CONSTITUTED, AT MOST, HARMLESS ERROR.

"The question is whether there is a reasonable possibility that the error affected the verdict." *DiGuilio*, *supra*. The primary shortcoming with the defense argument is that there is discussion of neither the permissible evidence nor of the deposition testimony introduced at Clark's trial (**RB 15-16**). The deposition testimony presented by Knight was internally inconsistent. The relevant portions of the examination of the witness by defense counsel follow:

> Q Okay, did Larry Clark tell you he had a gun?
>
> A **No.**

(R 144).

Shortly thereafter, the following exchange took place:

> Q Well, wait a minute. Did Larry tell you, without you supposing this, of what he did with it that he had a gun?
>
> A Yeah.
>
> Q He did? Okay, well, that's what I asked you to begin with.
>
> . . .
>
> Q About the gun. What did he say that made you believe that he had the gun?
>
> A Well, he said he had it and he --
>
> Q He had **the** gun.
>
> A Yeah. . . .

(R 146-147).

The above represents an obvious contradiction in Knight's deposition testimony regarding that which could, at most, be interpreted as an admission by the defendant. A reasonable jury would have found it incredible, Therefore, when it is considered in conjunction with the circumstantial evidence found to be extremely strong by the district court, it clear beyond any reasonable doubt that the deposition testimony did not affect the verdict.

CONCLUSION

The portion of the district court opinion concerning the "ADMISSIBILITY OF THE DISCOVERY DEPOSITION AND HARMLESS ERROR", *Clark*, 931-932, should be quashed and the certified question answered affirmatively.

Respectfully submitted,

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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 6th day of May, 1991.

ASSISTANT ATTORNEY GENERAL