IN THE SUPREME COURT OF FLORIDA

JESSIE L. BLANTON,

Petitioner,

v. CASE NO. SC04-1823

STATE OF FLORIDA,

Respondent.
_____/

AMICUS BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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I PRELIMINARY STATEMENT

This brief is being filed by the Florida Association of Criminal Defense Lawyers (AFACDL@) in support of the Petitioner, JESSIE L. BLANTON.

FACDL is a statewide organization representing over 1400 members, all of whom are criminal defense practitioners. FACDL has an interest in the issue before the Court as there is a conflict among the District Courts as to whether the use of pretrial discovery depositions as substantive evidence violates a defendant=s confrontation rights when the declarant is unavailable at trial, the issue has constitutional implications as well as practical implications on pretrial discovery practices, and it potentially affects numerous criminal prosecutions.

II SUMMARY OF ARGUMENT

The Confrontation Clause of the Sixth Amendment guarantees the right of a defendant to confront an accuser face to face. *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* holds that the Confrontation Clause requires a Aprevious opportunity to cross-examine@ before an out-of-court testimonial statement of a witness, who is not available for trial, is admitted at trial. Florida Rule of Criminal Procedure 3.220(h) allows defendants to depose witnesses, but pretrial discovery depositions do not constitute a Aprevious opportunity for cross-examination.@ Significantly, defendants are not allowed to be physically present at depositions and confront deposed witnesses face to face. In addition, there are different motives in taking Ainformation seeking@ depositions and in cross-examining witnesses for impeachment or to challenge the accuracy of their statements. Finally, allowing depositions to be used as a substitute for in-court testimony would severely curtail the use of discovery depositions in the resolution of cases and the search for truth. Based on the *Crawford* Court=s analysis of the right to face to face confrontation and this Court=s interpretation of the discovery rules, it is clear that pretrial discovery depositions are not the equivalent of in-court trial testimony and do not satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*.

III ARGUMENT

ISSUE PRESENTED

THE DISTRICT COURT ERRED BY DECIDING THAT BECAUSE PETITIONER HAD THE OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT IN PRETRIAL DEPOSITIONS, THE ADMISSION OF CHILD VICTIM HEARSAY STATEMENTS AT TRIAL DID NOT VIOLATE THE PETITIONER=S CONFRONTATION RIGHTS.[1]

Crawford v. Washington, 541 U.S. 36 (2004), governs the use of testimonial hearsay at trial. *Crawford* held that the Confrontation Clause of the Sixth Amendment places no constraints at all on the use of a declarant=s prior testimonial statements if the declarant testifies at trial and is subject to cross-examination. However, when the prosecution offers evidence of out-of-court statements of a declarant who does not testify, and the statements constitute Atestimonial hearsay,@ the Confrontation Clause requires 1) that the declarant be unavailable and 2) a prior opportunity to cross-examine the declarant. The *Crawford* Court did not specifically define the Aopportunity to cross examine.@ The question before this Court is whether a routine discovery deposition satisfies that requirement. FACDL submits the answer is found in *Crawford*=s exhaustive discussion of Aface to face@ confrontation and in Florida=s application of the discovery rules.

[1] The standard of review is *de novo*.

In *Crawford*, when examining the historical roots of the Confrontation Clause and English law, the Supreme Court focused on the right of a defendant to confront an accuser Aface to face.@ For example, the Supreme Court explained that England, at times, adopted elements of a civil-law practice where justices of the peace examined witnesses before trial and the examinations were sometimes read in court in lieu of live testimony B Aa practice that >occasioned frequent demands by the prisoner to have his accusers, i.e. the witnesses against him, brought before him *face to face*.=@ 541 U.S. at 43 (quoting 1 J. Stephen, History of the Criminal Law of England 326 (1883)) (emphasis added). The Supreme Court also focused on the 1603 treason trial of Sir Walter Raleigh, and quoted Raleigh as saying, A[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser *before my face* . . . .@ 541 U.S. at 44 (quoting Raleigh=s Case, 2 How. St. Tr. 1, 15-16 (1603)) (emphasis added).[2] Partly due to the outcry of the unfairness of Raleigh=s trial, English law developed a right of confrontation. AFor example, treason statutes required witnesses to confront the accused >*face to face*= at his arraignment.@ *Id.* at 44 (citing 13 Car. 2, c. 1, ' 5 (1661)) (emphasis added).

Later in the opinion, the Supreme Court referred to its previous holding in *Mattox v. United States*, 156 U.S. 237 (1895), which involved a deceased witness=s prior

[2] Notably, Raleigh=s request for face to face confrontation was refused. *See* 2 How. St. Tr. at 24.

testimony. The Supreme Court explained that in allowing the statement to be admitted in *Mattox*, the Court "relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: 'The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness *face to face*, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . .'" *Id.* at 244." *Crawford*, 541 U.S. at 57 (emphasis added).

The Supreme Court in *Crawford* also referred to the propriety of reading a previous deposition at trial in lieu of live testimony. The Supreme Court noted that the issue was discussed in the trial of Sir John Fenwick, wherein Fenwick's counsel objected to such a procedure: "'[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him . . . . [O]ur constitution is, that the person shall see his accuser.'" 541 U.S. at 45-46 (quoting *Fenwick's Case*, 13 How. St. Tr. 537, 592 (H.C. 1696) (Shower)).

The Supreme Court also cited to state court decisions rendered shortly after the Sixth Amendment was adopted. For example, the Supreme Court cited *State v. Webb*, 2 N.C. 103 (Super. L. & Eq. 1794) (per curiam), which held that depositions could be read against an accused only if they were taken in his presence. *See Crawford*, 541 U.S. at 49. The Supreme Court also cited *State v. Campbell*, 30 S.C.L. 124, 125, 1844 WL

2558 (App. L. 1844), wherein South Carolina=s highest law court excluded a deposition taken by a coroner in the absence of the accused, holding: A[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are ex parte, and, therefore, utterly incompetent.@ *See Crawford*, 541 U.S. at 49. The Supreme Court explained that the South Carolina court held that Aone of the >indispensable conditions= implicitly guaranteed by the State Constitution was that >prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his *personal examination*.=@ *Id*. at 49-50 (quoting *Campbell*, 30 S.C.L. at 125) (emphasis added).[3]

The Florida Rules of Criminal Procedure allow a party to take a deposition of designated witnesses after the filing of the charging document. *See* Fla. R. Crim. P. 3.220(h). Defendants are not allowed to be present at discovery depositions, and depositions taken under this rule are not admissible at trial but may be used for

[3] The Supreme Court also noted that A[s]ome early cases went so far as to hold that prior testimony was inadmissible in criminal cases even if the accused had a previous opportunity to cross-examine.@ *Crawford*, 541 U.S. at 50 (citing *Finn v. Commonwealth*, 26 Va. 701, 708 (1827); *State v. Atkins*, 1 Tenn. 229 (Super. L. & Eq. 1807) (per curiam)).

impeachment under section 90.608(1), Florida Statutes. A deposition may be used as substantive evidence at trial only when it is taken to perpetuate testimony, in accordance with Florida Rule of Criminal Procedure 3.190(j). The express purpose of this rule is to protect a defendant=s face to face confrontation rights under the Sixth Amendment to the United States Constitution and Article I, Section 16, of the Florida Constitution. *See Basiliere v. State*, 353 So. 2d 820 (Fla. 1978).

In *Basiliere*, this Court addressed two certified questions:

> Whether the use of the deposition testimony at trial violates defendant=s confrontation rights under the Sixth Amendment to the United States Constitution and under Article I, Section 16, Florida Constitution, inasmuch as the defendant was not present during the taking of the deposition by his attorney and defendant received no notice that said deposition could be used at his trial.
>
> Whether Fla. R. Crim. P. 3.220(d),[4] which provides for discovery depositions and says that they >may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness,= yet does not provide, as does the comparable Fla. R. Civ. P. 1.330(a)(3), for the use of said deposition as evidence at trial upon a finding of unavailability of the witness, precludes the use of deposition testimony as evidence at trial upon the finding of unavailability of the witness.

353 So. 2d at 822. *Basiliere* involved the use of a victim=s discovery deposition in a trial where the victim had died between the time the deposition was taken and the trial was held. Basiliere was in custody and was not present at the deposition, and the deposition

[4] This is the equivalent of present rule 3.220(h).

was not taken to perpetuate the victim=s testimony pursuant to rule 3.190(j). The Court first noted that when a defendant has been confronted with the witnesses against him in a former trial of the same cause, and has had an opportunity to fully cross-examine the witnesses, and it is satisfactorily shown that the witnesses are not available for trial, admission of the witnesses= testimony at trial Adoes not violate the organic right of an accused to meet the witnesses against him face to face.@ 353 So. 2d at 823 (quoting *Blackwell v. State*, 79 Fla. 709, 86 So. 224 (1920)). The Court noted that, unlike former trial testimony, defendants are not present at discovery depositions, nor is there notice that the deposition will be used against him at trial. The Court further explained that there are different motives in taking depositions and cross-examining witnesses at trial, and said that when a defendant deposes a witness in the discovery process, it is to ascertain facts upon which the charge was based and not necessarily to examine and challenge the accuracy of the witnesses= statements. The Court reasoned that because the defendant was Aunaware that [the] deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent=s statements,@ defense counsel Acould not have been expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the taking of the deposition.@ *Id.* at 824-25. The Court concluded that impeachment is the exclusive use of depositions in a criminal proceeding, unless the deposition is taken to perpetuate testimony under rule 3.190(j).

Even when a deposition is taken to perpetuate testimony under rule 3.190(j), its

use at trial is prohibited unless the defendant is present, or voluntarily waives his or her presence at the deposition. AThe use of a deposition, taken in the involuntary absence of a defendant, as evidence against him violates the defendant=s right to be personally present during his trial and his Sixth Amendment right to confront witnesses.@ *Wilson v. State*, 479 So. 2d 273, 274 (Fla. 2d DCA 1985). *Accord Brown v. State*, 471 So. 2d 6 (Fla. 1985). The point is that a defendant has the right to be present when testimony is given against him, to confront his accuser=s face to face, and to conduct meaningful cross-examination.

Based on the foregoing, it is apparent that a pretrial discovery deposition in Florida is not the equivalent of in-court trial testimony, nor is it sufficient to satisfy the right of confrontation set forth in the Sixth Amendment. In his recent article, Professor John Yetter points out that the discovery rule prohibits the presence of the defendant at discovery depositions without a court order or a stipulation between the state attorney and the defense counsel. *See* John F. Yetter, AWrestling With *Crawford v. Washington* and the New Constitutional Law of Confrontation,@ 78 Fla. Bar J. 26, 30 (Oct. 2004). *See also* Fla. R. Crim. P. 3.220(h)(7) (2004) (AA defendant shall not be physically present at a deposition except on stipulation of the parties or as provided by this rule. The court may order the physical presence of the defendant on a showing of good cause.@).[5]

In *Contreras v. State*, 910 So. 2d 901, 908 (Fla. 4th DCA 2005), the Fourth District explained that previous decisions from this Court Ahold that the admission of discovery depositions against a defendant who was not personally present during the deposition violates the Confrontation Clause.@ *See State v. Clark*, 614 So. 2d 453 (Fla.

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[5] In his article, Professor Yetter states:

> An initial problem is that the Florida discovery rule was amended in 1989 to prohibit the presence of the defendant at discovery depositions without a court order or stipulation of the parties. Thus, if a discovery deposition is to have any chance of substitution for at-trial confrontation, the prosecution will at least have to offer to stipulate to the attendance of the defendant, who, in turn, will have to be given the opportunity to attend.

78 Fla. Bar. J. at 30.

1992); *Basiliere*. The Fourth District also pointed out that Aprior decisions curtail the use of discovery depositions to impeachment only.@ *Contreras*, 910 So. 2d at 908-09 (citing *State v. Green*, 667 So. 2d 756 (Fla. 1995); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992)). As Professor Yetter concludes in his article:

> it seems clear that if the defendant=s confrontation of the witness at a discovery deposition is to substitute for cross-examination at trial, then the deposition testimony will have to be admissible as substantive proof to the same extent as it would be if solicited on cross-examination at trial. Because the Florida decisions categorically prohibit this result, the only option for the state would seem to be to anticipate and try to avoid the impediment by waiving on the record, and in advance of the deposition, any objection to the defendant=s substantive use of the discovery deposition.

78 FLA. BAR J. at 30-31.

For all of these reasons, the Fourth District in *Contreras* held that a discovery deposition is not sufficient to satisfy the requirements of the Sixth Amendment: AIf a statement is >testimonial= under *Crawford*, a >prior opportunity for cross examination= under the Sixth Amendment requires *face-to-face confrontation* of a defendant and a witness against him.@ *Contreras*, 910 So. 2d at 909 (emphasis added).[6] Discovery depositions in Florida do not permit Aface to face@ confrontation and therefore violate the

[6] The Fourth District in *Contreras* left open the possibility that some discovery depositions could satisfy the right of confrontation: AWe can envision circumstances where defendant is aware of the State=s intention to use a prior testimonial statement, is present at a deposition, and so conducts the cross examination of the witness that it might satisfy *Crawford*.@ *Contreras*, 910 So. 2d at 909.

Confrontation Clause and the holding set forth in *Crawford.*

Consistent with *Contreras,* FACDL urges the Court to hold that discovery depositions are no substitute for the right of confrontation afforded to a criminal defendant pursuant to face to face cross-examination at trial. The only exception would be where the defendant is aware of the State=s intention to use a prior testimonial statement, is present at a deposition, and so conducts the cross-examination of the witness consistent with the principles set forth in *Crawford* (which, in essence, would be the equivalent of a deposition to perpetuate testimony pursuant to Florida Rule of Criminal Procedure 3.190(j)).

FACDL further submits that there will be far-reaching ramifications if the Court determines that a discovery deposition is sufficient to satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*. The most obvious implication of such a holding would be that the Court would need to amend rule 3.220(h)(7) to allow the presence of a criminal defendant at all depositions.[7] But more importantly, such a holding would drastically change the purpose of discovery depositions in this state. Currently, the purpose of a discovery deposition is to gain information about the case. It is routine for

[7] It therefore follows that any new rule/holding announced by this Court would be prospective only (i.e., the rule/holding would only be effective for depositions that occur after the date of this Court=s new rule/holding). For depositions that took place prior to such a new rule/holding, the previous opportunity to confront and cross-examine would not have been satisfied because rule 3.220(h)(7) would have prevented the defendant from being present at the deposition.

attorneys to ask broad questions during discovery depositions, and the answers to such questions often involve testimony that would be inadmissible at trial. However, if the Court holds that such depositions could be used at trial, the ruling would have a chilling effect on an attorney=s ability to conduct a thorough deposition. Arguably, an attorney would be hesitant to ask Ainformation seeking@ questions, because the answers to such questions may contain harmful or damaging information, and by asking the questions, the attorney will potentially invite the error or open the door to the information being admitted at trial. An attorney conducting an Ainformation seeking@ deposition will simply ask different types of questions than an attorney conducting a deposition with the purpose of cross-examining, confronting, and perhaps impeaching a witness.[8]

In *Binger v. King Pest Control*, 401 So. 2d 1310, 1313 (1981), this Court stated the following regarding the goals of discovery in this state:

> Although *Rose* [*v. Yuille*, 88 So. 2d 318 (Fla. 1956),] is somewhat dated, the general policy of full and open disclosure underlying the decision has been carried forward in Florida=s rules of discovery. The goals of these procedural rules are Ato eliminate surprise, to encourage settlement, and to assist in arriving at the truth.@ *Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. 4th DCA 1975) (Downey, J., concurring). We recently reiterated those goals.
>
> > A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than

[8] This is in contrast to a deposition to perpetuate testimony, where all parties are on notice that the deposition will be used at trial.

gamesmanship, surprise, or superior trial tactics.

Dodson v. Persell, 390 So. 2d 704, 707 (Fla. 1980).

For the reasons set forth above, it would be contrary to the Ageneral policy of full and open disclosure@ to hold that a discovery deposition is sufficient to satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*.

Finally, if the Court determines that a discovery deposition is sufficient to satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*, the holding will create the possibility for witness and/or prosecutorial misconduct. Depending on the circumstances of the case and the witnesses involved, prosecution witnesses will be less likely to show up at trial, and prosecutors will be more likely to argue that witnesses are unavailable at trial. On the other hand, if discovery depositions are deemed insufficient to satisfy the requirement of Aprevious opportunity to cross-examine,@ prosecutors will still have the opportunity to take depositions to perpetuate testimony if they anticipate that a witness will become unavailable. The state did not avail itself of that opportunity in this case.

FACDL therefore urges this Court to quash the decision of the court below and hold that the substantive use of discovery depositions at trial, other than depositions taken to perpetuate testimony and taken in the defendant=s presence pursuant to Florida Rule of Criminal Procedure 3.190(j), violates the defendant=s confrontation rights under *Crawford*.

IV CONCLUSION

For all the foregoing reasons, FACDL respectfully requests that this Court quash the District Court=s decision in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished b U.S. Mail to Rose Levering, Asst. Public Defender,112 Orange Ave., Ste. A, Daytona Beach, FL 32114; Wesley Heidt, Asst. Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, and to petitioner, Jessie Blanton, #X23917, Hardee Correctional Institution, 6901 State Rd. 62, Bowling Green, FL 33834, on this ____ day of November, 2005.

CERTIFICATE OF FONT SIZE

Pursuant to the Florida Supreme Court=s Administrative Order dated July 13, 1998, this brief has been printed in Times New Roman (14 point) proportionately spaced.

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PAULA S. SAUNDERS