IN THE SUPREME COURT OF FLORIDA

JESSIE L. BLANTON,

Petitioner,

v. CASE NO.: SC04-1823

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #773026

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #618550
FIFTH FLOOR
444 SEABREEZE BLVD.
DAYTONA BEACH, FL 32118
(904) 238-4990/FAX 238-4997

COUNSEL FOR RESPONDENT

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STATEMENT OF CASE AND FACTS

In addition to the facts given by Petitioner, the State offers the following relevant facts, some of which have been repeated for the sake of continuity:

FACTS:

Petitioner was charged in a twenty-four count information with nine counts of capital sexual battery and fifteen counts of promoting a sexual performance by a child in violation of sections 794.011(2) and 827.071(3), Florida Statutes, (1999). (Vol. I, R25-29) The State filed a Notice and Motion for Child Hearsay pursuant to section 90.803(23), Florida Statutes, which was sealed. (Vol. I, R86) A hearing on the motion took place on April 6th and 13th of 2001.

The out-of-court statement that the State was attempting to have admitted was made to Detective Tom Harrison of the Orange County Sheriff's Office on May 17, 1999, when the child was eleven years old. (Vol. II, T79) In the statement, the child identified several photographs in addition to a videotape that had been seized from Petitioner's residence as a result of a search warrant. (Vol. II, T80; 85)

At the time of the hearing, the child was 13 years old and living in a psychiatric treatment facility. (Vol. II, T105) Barbara Mara conducted a psychological evaluation of the child

on April 19 and May 1, 2000. (Vol. II, T125) Ms. Mara testified that at the time of testing the child had a very severely compromised psychological status. (Vol. II, T126) She was extremely confused, emotional, and extremely moody. (Vol. II, T127) She had low self-esteem, poor concentration, difficulty dealing with any emotional or everyday task and was viewed as high-risk for self-destructive behaviors. (Vol. II, T128) She had attempted suicide five to seven times. (Vol. II, T129) Ms. Mara had reviewed the child's current status and testified that her current behavior had deteriorated even more. (Vol. II, T130) In her opinion, the child would be severely emotionally harmed by any participation in a trial and could not present anything coherent. (Vol. II, T132; 133)

Dr. Rahoul Mehra, a psychiatrist currently treating the child, also testified. (Vol. II, T152; 155) He stated that if the child participated in a trial, she would be at tremendous high-risk for reactivation and/or worsening of her symptoms of clinical depression, anxiety, suspiciousness, paranoia and suicidal thoughts. (Vol. II, T156-157) There was a substantial likelihood that she would suffer severe emotional or mental harm. (Vol. II, T157-158) Dr. Mehra also said that the child was at a very critical time in her treatment and that her prognosis was very poor and guarded. (Vol. II, T158-159)

The trial court found the statement to be admissible and said that "this just looks like the case that was made for this statute." (Vol. II, T189; 191)

Petitioner waived his right to a jury trial and was tried before the Honorable O.H. Eaton, Jr., on April 24, 2001. (Vol. I, T87) Just prior to trial, the State *nolle prosed* counts one through four. (Vol. II, T8-9) Officer Harrison, Investigator Frank Parker, and the child's mother were the only state witnesses called. The child hearsay statement was admitted during the testimony of Harrison over defense objection. (Vol. II, T6; 10; 9-34) Harrison testified that he showed the child the various photos and videotape of herself. (Vol. II, T5) In the audiotape of his interview with the child, the child identified all the photos, stated that the photos were either of just her or both her and Petitioner, that either she or Petitioner took the photographs, and that she was eleven years old at the time the photos were taken. (Vol. II, T9-34) She also said in the interview that Petitioner took the videotape of both of them, that they had intercourse in the video and that she was eleven years old at the time. (Vol. II, T35-38)

The trial court found Petitioner not guilty on counts six, sixteen, and twenty-three, and guilty of all remaining counts. (Vol. I, R112-113; Vol. II, T64) He was sentenced to life

imprisonment for each sexual battery count and fifteen years for each count of promoting a sexual performance by a child, all counts to be served concurrently. (Vol. I, R119-122; Vol. II, T65-66)

CASE:

Petitioner appealed, and while the appeal was pending, the United States Supreme Court issued Crawford v. Washington, 541 U.S. 36 (2004). Supplemental briefs were filed, and the Fifth District Court of Appeal affirmed the judgments and sentences. The child hearsay statements at issue in this case were found to be testimonial, and the declarant was unavailable for trial leaving the only issue to be decided to be whether the defense had had an opportunity to cross-examination the declarant. The Fifth District Court of Appeal held the statements in the instant case were admissible given that the victim had been deposed which meant that the defense had been provided with the opportunity for cross-examination. Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). Petitioner sought discretionary review by this Court which was initially denied; however, this Court eventually accepted jurisdiction leading to the instant appeal.

SUMMARY OF ARGUMENT

The issue before this Court is whether the opportunity to cross-examine a witness at depositions satisfies the requirements of the Confrontation Clause of the Sixth Amendment as interpreted by Crawford. The State's position is that all that is required is an opportunity, and depositions satisfy this requirement.

Additionally, even if error is found by this Court, the error should be found to be harmless as was found by the district court of appeal.

ARGUMENT

POINT OF LAW

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT DEPOSITIONS SATISFY THE SIXTH AMENDMENT'S CONFRONTATION RIGHT.

Petitioner's position seems to be that only a vigorous cross-examination at trial would satisfy the requirements of the Confrontation Clause. The State disagrees with this position.

The trial in this case was conducted prior to the United States Supreme Court opinion in Crawford v. Washington, 541 U.S. 36 (Fla. 2004). The child hearsay evidence at issue involved statements made by the victim when she was 11 years old; however, Petitioner was not tried until the victim was 13 years old. Section 90.803(23), provides:

> (23)Hearsay exception; statement of child victim.--
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in

> any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
>
> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

The child in the instant case did not testify. The defense had argued that the statute required the declarant to be age 11 or less at the time of trial instead of at the time of the statement. The Fifth District Court of Appeal found otherwise.

However, supplemental briefs were filed by each side addressing the application of the Crawford decision to the facts of the instant case. The Fifth District Court of Appeal

ultimately held that the deposition satisfied Crawford's opportunity to cross-examine requirement, and the State submits this is the correct interpretation.[1]

The Crawford opinion details the development of the Confrontation Clause tracing it from its origin in Roman law through its adoption in the Sixth Amendment of the United States Constitution to present day case treatment. The Confrontation Clause was included to protect an accused person from anonymous accusations. The Court wrote, "[t]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." Crawford, 541 U.S. at 50.[2] In Crawford, the Court took exception with the line of statutory and case law that had evolved after Ohio v. Roberts, 448 U.S. 56 (1980). The development of law which allowed hearsay to be admissible if it was found to be reliable without regard to the requirements of the Confrontation Clause was rejected by the Court in Crawford.

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[1]The First District Court of Appeal and the Fourth District Court of Appeal have disagreed with this conclusion and certified conflict with Blanton. See Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004); Contreras v. State, 910 So. 2d 901 (Fla. 4th DCA 2005).

[2]In 1965, the United States Supreme Court found that this right applied to State prosecutions. Pointer v. Texas, 380 U.S. 400 (1965)

The Court in Crawford wrote:

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: **unavailability** and **a prior opportunity for cross-examination**. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68; (emphasis added). Therefore, if a witness is unavailable to testify and the evidence is found to be testimonial and the defense had no prior opportunity to cross-examine the witness, the evidence would be inadmissible.

Clearly, Crawford would not be applicable if the declarant testified at trial since the opportunity to confront and cross-examine one's accuser would be met. If the declarant is not available, the analysis turns to whether the statements are testimonial. The majority of recent case law addressing Crawford seems to be attempting to define testimonial.[3] The

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[3]For example, the dissent in Contreras set out a list of courts across the nation which have found victim's statements to law enforcement not to be testimonial:

> Anderson v. State, 111 P.3d 350 (Alaska Ct. App. 2005) (victim's statement to officer at scene was

Court noted that it would “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” Id. In the instant case, the testimonial nature of the statements was conceded.

The remaining determination is whether Petitioner had an opportunity to cross-examine the victim. Clearly, the victim was deposed. The Fifth District Court of Appeal found that this satisfied the Confrontation Clause and Crawford. Petitioner admits to this Court that the opportunity was clearly there; however, its position is the Confrontation Clause mandates that

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"nontestimonial"); Spencer v. State, 162 S.W.3d 877 (Tex. Crim. App. 2005) (domestic assault victim's statements to police concerning her attack were not testimonial in nature, and thus deputies' hearsay testimony relating the statements did not violate the confrontation clause under Crawford); Commonwealth v. Gray, 2005 PA Super 22, 867 A.2d 560 (Pa. Super. Ct. 2005) (out-of-court statements made to police at the scene by the victim's daughter constituted excited utterances and did not fall "under the third classification of testimonial statements, namely, 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (quoting Crawford, 541 U.S. at 52)); People v. King, 121 P.3d 234, 2005 Colo. App. LEXIS 111, 02-CA0201, 2005 WL 170727 (Colo. Ct. App. Jan. 27, 2005) (victim's statements to police were made spontaneously in reaction to her assault and resulting injuries; statements were excited utterances not made in a custodial setting, without an indicia of formality, and were "nontestimonial interrogation under Crawford"); State v. Davis, 364 S.C. 364, 613 S.E.2d 760 (S.C. Ct. App. 2005) (defendant's associate's statement that witness should not buy the defendant's shotgun because it had been used to kill the victim was "nontestimonial").

Contreras 910 So. 2d at 912-913.

the cross-examination be meaningful, adequate, and effective. Such is not guaranteed by the Confrontation Clause. In United States v. Owens, 484 U.S. 554, 559 (1988), the United States Supreme Court wrote, "The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[4]

Petitioner asserts that the very motive for depositions is discovery and not to confront and challenge a witness.[5] The State would admit that such is often the case; however, depositions also can be conducted by aggressive questioning which serves the dual purpose of revealing information as well as showing that a witness will not "hold-up" to the pressures of testifying at trial. This could lead the State to attempt a plea agreement. Simply because a defense attorney may decide that his client is better served by a more laid back approach at deposition than at trial does not change the fact the

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[4]This principle was very recently applied by the First District Court of Appeal in rejecting a Crawford challenge in the situation in which a witness had been hit in the head by a barbell and did not remember the details of his earlier statement. State v. Miller, 2005 Fla. App. Lexis 19539 (Fla. 1st DCA Dec. 12, 2005).

[5]Many jurisdictions do not even permit depositions such as the federal courts, and their use in Florida is even limited, especially in misdemeanor cases. See Florida Rule of Criminal Procedure 3.220(h).

opportunity was there. Even at trial, many defense attorneys struggle with the strategy of just how aggressively they should cross-examine child victims.

Petitioner also submits that depositions are insufficient to satisfy the Confrontation Clause since defendants are often not present. The defense is correct that Florida Rule of Criminal Procedure 3.220(h)(7) provides:

> (7) *Defendant's Physical Presence.* – A 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. The court may consider (A) the need for the physical presence of the defendant to obtain effective discovery, (B) the intimidating effect of the defendant's presence on the witness, if any, (C) any cost or inconvenience which may result, and (D) any alternative electronic or audio/visual means available.

Obviously, this rule was adopted prior to Crawford. However, even as worded, the rule allows a defendant to attend upon a showing of good cause. In the instant case, it does not appear that Petitioner ever moved to attend the deposition. Additionally, Florida Rule of Criminal Procedure 3.190(j) even provides a method to conduct a deposition which can be used substantively at a pending trial. (Otherwise, use of a deposition is limited to impeachment). When perpetuating

testimony, the rule sets out that a defendant will attend. Again, the opportunity was present for the defense; it just did not utilize it.

This exact point was recognized in United States v. Williams, 116 Fed. Appx. 890 (9th Cir. 2004). A videotaped deposition was admitted at the defendant's trial. He submitted that it violated his rights under the Confrontation Clause. The court wrote:

> We find that the government satisfactorily established Jackson's unavailability at trial. We also find that Williams, through his counsel, had an adequate opportunity to cross-examine Jackson at her deposition. Williams argues that his personal knowledge of the facts was essential to effectively cross-examine Jackson. But Williams points to no facts that his counsel failed to bring out on cross-examination in Williams's absence. ... Accordingly, we hold that Jackson's deposition satisfied the requirements of Crawford and that William's Confrontation Clause rights were not violated by its use at trial.

Id. at 891; see also Liggins v. Graves, 2004 U.S. Dist. Lexis 4889 (S.D. Iowa 2004) (In a habeas case, the federal court found that the presence of the defendant's counsel at the deposition satisfied the requirements of Crawford).

Clearly, the defense in this case had several tools with which to confront and cross-examine this victim. Defendants

often make different tactical decisions as how to exercise their constitutional rights, but simply because Petitioner chose not to avail himself of his opportunities should not mean that Crawford was not satisfied.

Even if this Court finds that Petitioner was denied his right to confront his accuser, the State submits Crawford still should not apply because it was the defendant's own conduct which made the child unavailable for trial. The Crawford court stated, "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds..." Id. at 62. Dr. Mehra, a psychiatric consultant at Tampa Bay Academy who treated the child for eight months, testified at the child hearsay motion hearing, that the child was admitted soon after giving her deposition. (Vol. II, T177-179) Her deposition was given on August 3, 2000, and she was admitted to the facility on August 29, 2000. The week preceding her admission, the child was acutely suicidal. (Vol. II, T179) Clearly, it was Petitioner's conduct which resulted in the child's post-traumatic stress disorder. The child, who was still living in a secured facility at the time of the hearing, was described as physically violent to her siblings and her mother, belligerent, aggressive, angry, extremely confused, extremely moody, severely depressed and a high risk for self-

destructive behavior. (Vol. II, T126-128, 138-139) Dr. Mehra testified that the child suffered from post-traumatic stress disorder and major depression. (Vol. II, T156) It appears that behavior problems began when the child went to live with Petitioner in 1996. (Vol. II, T105-122) There was no testimony that the child was having suicidal thoughts and tendencies prior to being sent to live with Petitioner.

Clearly, Petitioner's destructive actions caused the victim to be unavailable. In such situations a defendant is not permitted to invoke a constitutional protection that he himself created; he has basically forfeited his right by his conduct. This principle was discussed in Reynolds v. United States, 98 U.S. 145, 158 (1878):

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; **but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away**. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights

have been violated.

(emphasis added); see also United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005)(Court applied this principle and rejected the defense's argument that the defendant had to intend to exclude the witness when committing his actions).

Furthermore, any error in the admission of the out-of-court statement should be found to be harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The Fifth District Court of Appeal expressly found that any error would be harmless given the other evidence in this case. For example, the child made statements to her mother of the sexual abuse by Petitioner. (Vol. II, T118-121) Those statements cannot be said to be "testimonial" in nature as they were not given to "bear testimony" against Petitioner. The Court noted:

> An accuser who makes a formal statement to government officers bear testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Crawford at 52. While telling her mother that she was sexually abused by Petitioner was certainly not a "casual remark" it also most certainly was not a formal statement to a government officer.

In addition to the above, there are many pictures as well as a videotape of the 11 year old victim having intercourse, the

11 year old victim having oral sex, the 11 year old lewdly exhibiting her genitals and many other acts. (Vol. I, R66-76) Petitioner's face is visible in one of the pictures, and the child's mother testified that it was Petitioner's voice on the videotape. (Vol. II, T48; 51) Investigator Frank Parker also testified as to seeing the same background wall with a distinct color design in the pictures and in the master bedroom of the house Petitioner lived at during the time of the abuse. (Vol. II, T42-43) Any error should be found to be harmless.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(386) 238-4990
FAX: (386)238-4997

COUNSEL FOR RESPONDENT

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0773026
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(386) 238-4990
FAX: (386)238-4997

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Rose M. Levering, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of December 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL