IN THE SUPREME COURT OF FLORIDA

JESSE L. BLANTON,	)	
	)	
Petitioner,	)	
	)	
versus	)	CASE NO. SC04-1823
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSE M. LEVERING
Assistant Public Defender
Florida Bar No. 480665
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 386/252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

The Fifth District was asked to decide, in the light of the recent decision in Crawford v. Washington, 541 U. S. 36 (2004), whether an audio-taped statement made by a child to police investigators and subsequently admitted at trial under the child victim hearsay exception in Section 90.803(23), Florida Statutes, impermissibly infringed on the Defendant/Appellant's confrontation rights. The court held that the constitutionally mandated "prior opportunity to cross-examine" the declarant, who did not testify at trial, satisfied the Appellant's confrontation rights, because he had taken a discovery deposition of that person, and also that he had, but did not utilize, the opportunity to take that person's deposition to perpetuate testimony. The Crawford decision was issued after the trial below.

The Petitioner respectfully requests that this court reject both contentions, and in doing so, adopt the reasoning of other district courts in Florida that have certified conflict with the instant case on this issue and quash the decision below.

The defendant has a right to an effective cross-examination, that is, one which is both meaningful and adequate. That certainly did not occur in the case below. The right of cross-examination is essentially a trial right. The overwhelming body of case law which informs our understanding of confrontation rights suggests that deposition questioning has such a different function from

cross-examination conducted before a trier of fact that it can never be adequate to meet the objectives of the confrontation clause. The purpose, motivations and incentives involved in conducting depositions are far different from those involved in adversarial cross-examination in trial-like settings. The objectives of the confrontation clause are not met by pretrial depositions.

Additionally, the Petitioner contends that the error below was not harmless, as the trial court additionally found. The constitutional violation is so serious that the error would be fundamental, and therefore harmful.

ARGUMENT

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.

Cross-examination must be meaningful and adequate.

The Respondent summarizes the Petitioner's position to be "that only a vigorous cross-examination at trial would satisfy the requirements of the Confrontation Clause." (Respondent's Brief on the Merits, p. 6) Petitioner asserts that to satisfy a defendant's confrontation rights, cross-examination must be adequate and meaningful, and that precedent shows us that it is in trial-like settings that this condition is generally met. Specifically, Petitioner's position is that neither a discovery deposition, nor an unexercised opportunity to take a deposition to perpetuate testimony, can satisfy a defendant's confrontation rights.

The Respondent cites to two cases for the proposition that the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective. However, those cases are not relevant to the case below. Both United States v. Owens, 484 U.S. 554 (1988), and State v. Miller, 30

Fla. L. Weekly D2793 (Dec. 12 2005), which cites Owens, involved the use at trial of a prior statement of identification from a witness with an impaired memory. Significantly, in both cases, the witness was present and testified at trial. The concern on appeal was the adequacy of the cross-examination *at the trial*, given the witness' memory loss. Miller rejected a confrontation challenge outright, noting that Crawford made it clear that when a declarant appears for cross-examination at trial, the Confrontation Clause places "no constraints at all" on the use of his prior testimonial statements. Owens, of course, was decided pre-Crawford. Justice Scalia, writing for the majority (and foreshadowing his later, more sweeping opinion in Crawford) rejected the trial court's belief that the Constitution required the witness' potential testimony to be examined for indicia of reliability or particularized guarantees of trustworthiness, and stated:

> We do not think such an inquiry is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination. In that situation, as the Court recognized in [California v.] Green, the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements. 399 U.S., at 158-161, 90 S.Ct., at 1935-36. We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect.

U.S. v. Owens, 484 U.S. 554, 560 (1988). If anything, it would seem that Owens supports Petitioner's position that cross-examination must be meaningful, with its reference to the "traditional safeguards" of "oath, cross-examination, and opportunity for the jury to observe the witness' demeanor." All these safeguards are missing from the case below.

Deposition testimony and confrontation rights

The Respondent also cites two federal cases concerning Crawford challenges to the use of deposition testimony. Petitioner notes that one case, United States v. Williams, 116 Fed. Appx. 890 (9th Cir. 2004), is not only unpublished but also contains a dissenting opinion. That court held that the district court did not clearly err by finding that the defendant's failure to appear at a videotaped deposition of a prosecution witness constituted a waiver of his right to be present, and so his confrontation rights were not violated. Id. at 891. In addition, the court found that defense counsel was present at the deposition and had "an adequate opportunity" to effectively cross-examine the witness; also that the defendant did not point to any facts his counsel failed to bring out due as a result of his absence. Id.

Liggins v. Graves, also cited by the Respondent, involved a unique fact situation wherein a district court reviewed a habeas appeal after a retrial involving

the use of deposition testimony (submitted at both trials) of a mentally infirm witness. The district court found that the defendant did not successfully rebut the factual findings supporting the lower courts' ruling that the witness was unavailable to testify in the second trial and also that his counsel had both the opportunity and motive to cross-examine the witness at the deposition. Liggins v. Graves, 2004 WL 729111 (S.D. Iowa 2004).

The real relevance these cases have to the case below is to emphasize the fact that where deposition testimony is allowed as substantive evidence at trial, confrontation requires that there must have been not only adequate and effective cross-examination, but also that the motive to cross-examine at the deposition must have been similar to the motive to cross at trial. In the case below, neither side took a deposition to perpetuate testimony, which might have been admissible as substantive evidence at trial. The issue of whether such deposition testimony, if offered at trial, might have satisfied Petitioner's confrontation rights is not squarely before this Court. These cases have no bearing on the related issue raised below, that is, the question of whether the Petitioner waived his right to confront his accuser by forgoing the opportunity to depose that person with the formalities required to perpetuate her testimony. It would be particularly unjust to consider this a waiver of confrontation rights considering the fact that Crawford was not

decided until after the trial below, so there was no way the Petitioner might have been alerted that this might become a confrontation issue. There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was ‘‘an intentional relinquishment or abandonment of a known right or privilege.’’ Brookhart v. Janis, 384 U.S. 1, 4 (1966) (citations omitted).

Forfeiture by wrongdoing

Respondent argues that even if this Court finds that the Petitioner was denied his right to confront his accuser, the court should apply the principle of forfeiture by wrongdoing to extinguish his confrontation claim because it was his own conduct which made the child witness unavailable for trial. The Crawford court does accept the principle of forfeiture by wrongdoing. It references that rule as an example of exceptions to the Confrontation Clause that make no claim to be a "surrogate means of assessing reliability." Crawford, 541 U.S.at 62. The court (and the Respondent) cite Reynolds v. United States, 98 U. S. 145, 158-159 (1879), as a case applying the rule of forfeiture. Petitioner asserts that this rule should be applied only in cases where the defendant actually intended to procure the unavailability of the witness. This was the case in Reynolds, where the

forfeiture rule was applied to a defendant who actively blocked service of a subpoena on a witness at his trial. To not condition the use of this type of hearsay on the defendant's motivation to make the witness unavailable would be, in many cases, to prejudge the defendant's guilt. The presumption of innocence should prohibit a decision to allow testimony that is based on the assumption that the defendant committed the offense for which he is being tried.

The Respondent cites United States v. Garcia-Meza, 403 F. 3d 364 (6th Cir. 2005), as an example of a case where the court rejected the argument that the defendant had to intend to exclude the witness when committing his actions. This case is distinguishable from the case below. Garcia-Meza is not only a murder case, but in that case the defendant, who was accused of murdering his wife, admitted the murder. (The dispute at trial was not whether the defendant killed her, but whether his actions were premeditated. The prosecution sought to use the wife's earlier statements to the police.) Id. at 370.

Petitioner urges this Court to consider the reasoning expressed by the court in People v. Melchor, 2005 WL 3041536 (Ill. App. Nov. 14, 2005). That court exhaustively traced the development of rule of forfeiture in both state and federal courts and concluded that the intent or motive of a defendant in engaging in the conduct he does *is* relevant to whether the forfeiture by wrongdoing rule is

invoked. The court noted that the recent federal rule codifying the principle of forfeiture by wrongdoing requires intent. See Rule 804(b)(6), Federal Rules of Evidence. The court discovered that the majority of state jurisdictions addressing the question required that the defendant have the intent to procure the witness' unavailability or be motivated by the desire to prevent the witness from testifying. It found only one state case to the contrary; that case involved the admission of a murder victim/witness' statement regarding the identity of the shooter. The Melchor court specifically declined to follow Garcia-Meza. Because it found that the forfeiture rule has generally been invoked where, as in Garcia-Meza, the defendant is accused of murdering the potential witness, the court ultimately concluded that the defendant's intent or motive in engaging in the alleged misconduct is relevant in all cases other than those where the defendant is on trial for the murder of the potential witness. The rule should not be applied in the instant case.

Harmless error

Respondent further maintains that any error below is harmless in light of the evidence produced at trial. Petitioner respectfully disagrees. The Respondent argues that the child made statements to her mother about Petitioner's abuse.

(Respondent's Brief on the Merits, p. 16) Respondent does not include the fact that these statements were made at the hearing on the child hearsay motion, and were not repeated at the trial. Since the statements were not offered in evidence at the trial (even though this was a bench trial), they should not be considered as a factor in determining the existence of harmless error. [1]

Regarding the considerable photographic evidence introduced at the trial, as previously suggested, its introduction was inextricably intertwined with the child's hearsay statements. As presented at trial, it is difficult to separate the photographic evidence from the challenged statements. Even if a reviewing court could separate the photographic and videotaped evidence from the context in which they were presented, it is questionable whether, standing alone, they would support each of the four sexual battery counts and thirteen promoting a sexual performance counts of which the Petitioner was ultimately convicted.

Petitioner would also note that only one of the several photographs introduced in evidence reveals a face other than the child's, and that was offered to support counts for which the Petitioner was acquitted. The child's mother identified the face in State's Exhibit 14 as the defendant's. (T 48) This exhibit,

[1] Petitioner would also direct the Court's attention to the fact that the mother's testimony at the motion hearing is very vague about what the abuse

also referred to as “photograph 20," was entered as State’s Exhibit “O.” (R 107) That exhibit was used to represent counts 6 and 23. (T 32) However, the defendant was found not guilty of the counts represented by that photograph. The written judgment shows the defendant is not guilty of counts 6 and 23 as well as 16 and 23. [2] (R 112)

Petitioner also reaffirms his position that the constitutional violation is so serious that the error is fundamental, and therefore harmful.

---

consisted of, as well as implicating others who had inappropriately touched the child. (T118-121)

[2] The court considered that photograph in determining guilt on counts 23 and 6. (T 62-63) After ascertaining that “Count 23 and 6 are the same photograph,” the court stated it had “reasonable doubt as to 16 and 23," and found the defendant not guilty. (T 63-64) Given the context, it is possible the reference to count “16" was transcribed incorrectly and should read “6.”

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court quash the District Court's decision in this cause, and remand with instructions to vacate the Petitioner's convictions and sentence and order a new trial.

Respectfully submitted,

JAMES S. PURDY
SEVENTH JUDICIAL CIRCUIT

ROSE M. LEVERING
Assistant Public Defender
Florida Bar No. 480665
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 386 - 252 - 3367
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE

I CERTIFY that a copy hereof has been furnished to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Jesse Lee Blanton, Inmate No. X-23917, #C2-103-U, Hardee Correctional Institution, 6901 State Road # 62, Bowling Green, Florida 33834-9505, on this _____ day of January, 2006.

I FURTHER CERTIFY that the size and style of type used in this brief is 14-point "Times New Roman."

_____
ROSE M. LEVERING
Assistant Public Defender