IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs.

SC Case No. 05-1767
DCA Case No. 4D 03-1683

RODOLFO CONTRERAS,

Appellee
_____/

ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL

RESPONDENT/APPELLEE'S ANSWER BRIEF ON THE MERITS

VALENTIN RODRIGUEZ, JR.
Valentin Rodriguez, P.A.
601 N. Dixie Highway, Suite C
West Palm Beach, Florida 33401
Fla Bar No. 047661
(561) 832-7510
Court-Appointed Counsel for Respondent/Appellee

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STATEMENT OF THE CASE AND FACTS

Respondent/Appellee, hereinafter referred to as the "Respondent," for purposes of this appeal, generally agrees with the recitation of facts in this appeal, insofar as those facts were properly recited by the district court in its well-reasoned, detailed opinion.

Respondent further relies upon the finding of facts contained in the opinion issued by the Fourth District Court of Appeal in this case. Most important to this analysis is an understanding of how the child-victim hearsay was admitted in this case. In February 1999, the coordinator of a Child Protection Team (CPT) working with the Sheriff of Palm Beach County took a statement of the child-victim regarding allegations of sexual molestation. The statement was taken at a local shelter for victims of domestic violence and other crimes. The statement was videotaped. A police detective was in another room but connected electronically to the coordinator to suggest questions. In substance, the child stated that the defendant had committed acts of sexual activity with her on one particular night. A few weeks later, in March 1999, defendant was charged with capital sexual battery on his daughter, who was born June 29, 1989. *State v. Contreras*, 910 So.2d 901, 902-03 (Fla. 4th DCA 2005). The trial court eventually found the child unavailable and allowed the case to proceed to trial without the child-victim testifying. The facts of that finding of unavailability are thoroughly discussed in the opinion.

At trial, the State's case consisted of the child's ex parte video-taped statement and the father's confession to "molestation" and perhaps union but not penetration. The mother testified to seeing them in differing stages of undress afterward. The CPT coordinator corroborated the substance of the statement. A doctor found no physical evidence of molestation. *Id.* at 904.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in this case should not be reversed because it was based on sound reasoning and principles of law. However, this Court should recognize the conflict of its previous decisions in *Townsend* and *Perez*, as certified by the Fourth District Court of Appeal in this case, and accordingly declare Section 90.803(23), Florida Statutes, unconstitutional as applied to the facts of this case, and therefore unconstitutional on its face. Respondent's constitutional right to confrontation was not satisfied in this capital sexual battery case because the statements made by the child-victim, to the Child Protective Team, which was fulfilling its statutory duty to aid law enforcement in the investigation of alleged child abuse, were quintessentially "testimonial" in nature. There was also no proper finding that the child-victim was not available to testify, although Respondent argues that such a finding would not satisfy the States United Supreme Court's interpretation of the breadth of the confrontation clause in *Crawford*. Respondent's constitutional right to confrontation is paramount to any of the concerns of the State regarding the nature of the child-victim's testimony in this case.

Furthermore, the error was not harmless because it was not clear from

Respondent's statements to law enforcement, which were not a confession to the crime alleged, that such statements would have been admissible in the absence of the *ex parte* statements. Respondent acknowledged doing something wrong, and nothing more. The crux of the State's case rested in the child-hearsay statements that were improperly admitted over objection. There was no meaningful opportunity to cross-examine the witness who provided, via hearsay, the single most important piece of evidence in this case. Affirmance is therefore appropriate.

ARGUMENT

The Fourth District Court of Appeals Properly Reversed and Remanded the Case for a New Trial Where the Court Interpreted *Crawford* to Mean that the Video-taped Child Hearsay Statement Introduced into Evidence Failed to Satisfy the Respondent's Constitutional Rights under the Confrontation Clause of the United States Constitution; and Therefore There is a Conflict with *Townsend* and *Perez* Which Compels this Court to Declare Section 90.803(23), Florida Statutes Unconstitutional as Applied and On its Face (Restated)

I. The District Court Properly Applied *Crawford* to the Facts of this Case

The Sixth Amendment instructs that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. The United States Supreme Court determined in *Crawford v. Washington*, 541 U.S. 68, 124 U.S. 1354, 1374 (2004), that prior testimonial statements may be admitted only if the declarant is unavailable ***and*** the defendant had a prior opportunity to cross-examine the declarant. Critical to this Court's affirmance of the Fourth District Court of Appeal's decision is that in deciding *Crawford,* the United States Supreme Court overruled its prior holding in *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 2539 (1980), wherein statements of a witness unavailable at trial used to be admitted if the hearsay bore adequate

"indicia of reliability." In doing so, the United States Supreme Court explained that, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Crawford,* 541 U.S. at 61, 124 S.Ct. at 1370.

The Fourth District Court of Appeal in this case correctly interpreted *Crawford* in light of the facts of this case, because that Court extensively examined the right to confrontation in the context of child-hearsay statements, and concluded particularly that the CPT interview of the victim, admitted as an *ex parte* statement, constituted a police interrogation. The court was keenly aware of the fact that the CPT interview was clearly indistinguishable from an ordinary police interrogation, and that pursuant to Section 39.306, Florida Statutes, the CPT is by contract part of the local police investigation and prosecution of child sexual abuse cases. Indeed, at oral argument in this case, the court inquired extensively about how Section 39.306, Florida Statutes, played an important role in its assessment of whether the interview was "testimonial" in nature *See* Section 39.306, Florida Statutes ("The department shall enter into agreements with the jurisdictionally responsible county sheriffs' offices and local police departments that will assume the lead in conducting any potential criminal investigations arising from allegations

of child abuse, abandonment, or neglect. The written agreement must specify how the requirements of this chapter will be met."). Hence, the court surmised that "[i]f the team is part of the police investigation, the interview is in fact police interrogation." *Contreras*, 901 So.2d at 905.

The fact that the court determined that the CPT video was testimonial in nature is well-supported by this Court. For example, in *Young v. State*, 645 So.2d 965(Fla. 1994), this Court was faced with the question about whether a child's videotaped statement, received into evidence, should be allowed into the jury room during deliberation. The reason this case is significant is because this Court noted that there is "significant distinction between videotaped confessions and videotapes of interviews of children suspected of having been sexually abused." *Id.* at 967. Accordingly, that court aptly noted that:

> When introduced to prove sexual abuse, the videotaped interviews of children are self-serving in the sense that ***they are testimonial in nature*** and assert the truth of the children's statements. They are more akin to depositions *de bene esse* in which testimony is preserved for later introduction at the trial.

Id. (emphasis added).[1] In *Young*, this Court was referring to the videotaped Child Protection Team interviews of the girls, which is exactly what was introduced into

[1] The Court also noted that when faced with a similar issue, the Wyoming Supreme Court reached the same conclusion, citing *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986); *contra*. *State v. Kraushaar*, 470 N.W.2d 509 (Minn. 1991).

evidence in the instant case. This Court used the phrase "testimonial in nature" in its opinion. *See also Jassan v. State*, 749 So.2d 511, 512 (Fla. 2d DCA 1999) ("[b]ecause videotaped interviews with child victims, when introduced to prove allegations of sexual abuse, are self-serving, ***testimonial***, and deny an accused the right of cross-examination, they are not permitted in jury rooms during deliberations," citing *Young, supra*.) (emphasis added); *cf. McLevy v. State*, 849 So.2d 431 (Fla. 1st DCA 2003) (out-of-court interviews with child victims of sexual abuse are not allowed into jury room and for counsel to allow such may rise to level of ineffective assistance of counsel); *Wells v. State*, 492 So.2d 712, 716 (Fla. 1st DCA 1996) ("[w]e also reject the state's argument that the tape recording of [the victim's] statement was 'real evidence,' not 'testimonial,' and thus not objectionable hearsay.").

The Fourth District Court of Appeal even relied on secondary sources from law journals to support its opinion. For example, the court noted that Professor John Yetter had written on the criteria for ascertaining which statements are testimonial for purposes of the Confrontation Clause, and that his analysis in *Wrestling With Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 Fla. Bar J. 26, 28 (Oct.2004), reflected agreement with the court's opinion:

the scenario that comes immediately to mind as very possibly producing testimonial statements is the interviewing of complainants of sexual abuse by members of child protection units and similar personnel. These events are motivated in large part by the search for evidence and they are the type of repetitive procedural events that are defined by their context and not by the evanescent expectations of the participants. Furthermore, the personnel of these units have been treated as members of the

extended prosecutorial team.

8 Fla. Bar J. at 28-29. The court aptly noted that the "scenario [Prof. Yetter] cites is the very one we confront today." *Contreras*, 901 So.2d at 906. This court was extremely thorough in its analysis of the issue, and accordingly found that in cases since *Crawford*, other states with functional equivalents of Florida's child protective teams have held that similar statements are testimonial, citing *State v. Courtney*, 682 N.W.2d 185 (Minn.App.2004) (video tape of statement given by child victim of sexual abuse to child protection worker, during which police officer observed questioning by satellite and interrupted interview to advise child protection worker as to specific questions to propound, deemed testimonial within the holding in *Crawford*); *People v. Sisavath*, 13 Cal.Rptr.3d 753 (2004) (holding as testimonial under *Crawford* interview of child victim of sexual abuse taken and videotaped at county facility designed and staffed for interviewing children suspected of being victims of sexual abuse); *Snowden v. State*, 846 A.2d 36, 47 (2004) (testimony of licensed social worker employed by County Child Protective Services as to statements made by child sexual abuse victim held testimonial under *Crawford*); *People v. Vigil*, 104 P.3d 258 (Colo.App.2004) (videotaped interview of child victim of sexual abuse by police officer trained in interviewing child victims held testimonial under *Crawford*).

More recently, and after the Fourth District Court of Appeal issued its opinion, the Nevada Supreme Court had to tackle a similar *Crawford* issue involving statements to a similar child protective team. In *Flores v. State*, 120 P.3d 1170 (Nev.Sup.Ct. October 20, 2005), the Nevada high court had to grapple with the following facts: a postmortem finding confirmed that the child-victim had been physically abused, that her death was caused by blunt-force trauma to the head, and that defendant Flores was present during the events surrounding the child's death. Flores, however, denied any wrongdoing in connection with the child's death. *Id.* at 1175. The only direct proof in support of the State's theory of murder by child abuse came in the form of surrogate hearsay testimony, whereby the State introduced her hearsay statements through the testimony of a child abuse investigator and Child Protective Services investigator. The Court stressed that admissibility of testimonial evidence should not be subject to what it characterized as amorphous and highly subjective judicial determinations of reliability because of the strong language of Crawford. *Id.* at 1176. The Nevada high court found that *Crawford* clearly rejects the notion that reliability determinations may serve as a substitute for cross-examination of "testimonial" hearsay, and that:

> with regard to such statements, *Crawford* attempts to preserve the distinction between hearsay evidentiary principles and the right of confrontation under the Sixth Amendment. While the protections afforded by the hearsay rules and the Confrontation Clause overlap and generally protect similar values, their protections are not, as demonstrated in *Crawford*, exactly congruent.

Id. More importantly, the Nevada high court recognized the exact problem highlighted by the State in its brief in this case:

> The [*Crawford*] Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.' " But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, is covered by the new rule. They need them now, not months or years from now

Id. 1177. It found that such statements by the child-victim were clearly not admissible, despite the obvious unavailability of that child.

Furthermore, the Fourth District Court of Appeal did not "believe the trial court's finding that the child was unavailable to testify satisfies the Confrontation Clause requirement of physical unavailability," because it noted that generalized harm from testifying does not make a witness *unavailable* within the meaning of the Sixth Amendment. *Contreras*, 901 So.2d at 906. Indeed, the court noted that:

> the act of testifying in a public courtroom is indeed for most people a trauma, and for none more surely than young children. But the essential attribute of our accusatory system established by the Confrontation Clause is the right of the defendant to confront the testimony of live witnesses in court. If

> witnesses are unavailable for Confrontation Clause purposes merely because of subjective mental anguish and emotional scarring from testimony, this protection would cease to have the certainty and categorical effect that *Crawford* holds it was designed to have.[2]

The State argues in its brief that there was sufficient evidence that the child-victim was unavailable. Respondent argues that availability is no longer an issue given *Crawford*, but even it had remained an issue, the Fourth District Court of Appeal properly recited to facts in the Record which indicated availability. Accordingly, the State's dispute over the availability of the child-victim is not relevant to this Court's review of the case. But even if it were an issue, this Court should adopt the view of the Fourth District Court of Appeal:

> The Sixth Amendment is a "categorical constitutional guarantee[ ]" requiring more stringent standards for determining when a witness is unavailable so that out of court testimony may be utilized.

The Fourth District Court of Appeal certified that its decision was compelled by *Crawford* and the Supremacy Clause, but conflicted with this Court's precedent in *Townsend* and *Perez*.

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[2] The Fourth District Court Appeal also agreed with Respondent that the record did not support the trial court's finding of unavailability. The child victim's testimony at the discovery deposition demonstrated "beyond any doubt that the child recognized she would have to testify at trial, that she was prepared for it, that none of this was her fault, and that she understood the events well enough to state her evidence clearly. Nothing in the psychologist's opinion testimony indicates that he considered the child's own testimony as to her ability to testify at trial. She was also 13 at the time of trial, and thus she no longer qualified for unavailability under section 90.803(23)." *Id.* at 906.

Finally, the court noted that *Crawford* contained strong language favoring the overriding principle of confrontation: "the principal evil at which the [Confrontation] Clause was directed was the civil-law mode of criminal procedure, [and] particularly the use of ex parte examinations as evidence against the accused." *Crawford*, 541 U.S. at 50, 124 S.Ct. 1354, "ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354. The Fourth District Court of Appeal found inapplicable those cases which hold that the admission of discovery depositions against a defendant who was not personally present during the deposition violates the Confrontation Clause. Indeed, the Record is clear that Respondent was not present at either of the depositions. This is an important factor because the United States Supreme Court's review of the history prior to the adoption of the Sixth Amendment emphasizes the importance of a defendant's presence when a witness gives testimony. *Crawford*, 541 U.S. at 42-50, 124 S.Ct. 1354. Perhaps this is why this Court reasoned that a criminal discovery deposition is inadmissible at a criminal trial even where the deponent dies after the deposition because it does not satisfy the Sixth Amendment. *State v. Basiliere*, 353 So.2d 820 (Fla.1977).

II. Section 90.803(23), in Unconstitutional and a Conflict Exists

Because the district court certified that its decision obviously conflicted with *Townsend* and *Perez*, it is Respondent's position that this Court should certify the conflict and take the next step, which is to declare Section 90.803(23), Florida, unconstitutional as applied and on its face under *Crawford*. In *State v. Perez*, 536 So.2d 206 (Fla. 1989), this Court analyzed 90.803(23), in terms whether its application was constitutional in light of *Ohio v. Roberts*, noting that it was constitutional because *Roberts* adopted the view that the confrontation clause had to be balanced with the competing interests such as a "jurisdiction's strong interest in effective law enforcement and precise formulation of the rules of evidence applicable in criminal proceedings [which] may warrant dispensing with confrontation at trial. Id at 208. This Court also noted that *Bourjaily v. U.S.*, 483 U.S. 171, 107 S.Ct. 2775, 2782 (1987), has "attempted to harmonize the goal of the Clause – placing limits on the kind of evidence that may be received against a defendant – with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements." Perez should be overruled, because this Court supported the crux of its analysis on Roberts, which *Crawford* specifically overruled. Hence, each of Perez' arguments regarding Section 90.803(23), have to

be re-considered in light of *Crawford*.

Likewise, *State v. Townsend*, 635 So.2d 949 (Fla. 1994), should also be expressly overruled, to the extent that this Court relied on *Roberts* in that opinion, also relied upon *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139 (1990). In *Townsend*, this Court determined that Section 90.803(23), Florida Statutes, properly protected the confrontational rights of the accused, if a particular procedure were followed by a trial court in order to determine reliability of child-hearsay statements. Because *Crawford* has directly addressed such procedures, and has determined that the reliability test no longer is balanced with the Confrontation Clause, this Court should interpret *Crawford* to also overrule *Townsend*.

III. The Constitutional Error was Not Harmless

The Fourth District Court of Appeal began its harmless error analysis by acknowledging that any reviewing court must resist the temptation to make its own determination of whether a guilty verdict could be sustained by excluding the impermissible evidence and examining only the permissible evidence because "[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a

substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result." *Goodwin v. State*, 751 So.2d 537, 542 (Fla.1999).

The court noted that the State's harmless error argument does little more than point to strong evidence of guilt, when the real test is whether the error could have conduced to a guilty verdict. Respondent argues that the district court properly analyzed the harmless error issue. Indeed, the court cited *People v. Vigil*, 104 P.3d 258, 264 (Col. App. 2004), where another court was faced with a similar situation where a father had indicated to another individual that he "knew he had done something wrong." The Colorado appellate court noted that "although there was unquestionably other corroborating evidence . . . we cannot sayt that the erroneous admission of the simple most persuasive evidence of defendant's guilt was harmless beyond a reasonable doubt." There, the court surmised that even a confession about "doing something wrong" does not pass the harmless error test where a defendant has no effective opportunity of cross-examining a child-victim. Indeed, the Nevada Supreme Court, after the issuance of the instant opinion, analyzed harmless error in *Flores v. State*, 120 P.3d 1170, 1180 (Nev.Sup.Ct. October 20, 2005), and determined that:

> Admittedly, the State's case against Flores was convincing, including substantial evidence of physical abuse; blunt trauma to the head; testimony from a neighbor of repeated loud verbal altercations with expressions of terror coming from the children; testimony from Zoraida's teacher concerning visible signs of abuse and Flores's admitted angst toward this child. We conclude, however, that the error requires reversal because the sole direct evidence of the assault came in the form of hearsay statements, two of which were admitted in violation of *Crawford* 's interpretation of the Confrontation Clause

Because it is not clear from Respondent's statements that they would have been admissible in the absence of the ex parte statements, this Court cannot determine that the admission of the child-hearsay statements was harmless *beyond a reasonable doubt.* Furthermore, the sole direct evidence of the capital sexual battery in this case also came in the form of hearsay, which should lead this Court to affirm the Fourth District Court of Appeal's harmless error analysis.

CONCLUSION

The opinion of the Fourth District Court of Appeal should not be disturbed because its rests on solid constitutional foundation, and it aptly interprets the meaning of *Crawford* as applied to child-hearsay. However, because a conflict exists with two controlling cases from this Court, *Townsend* and *Perez,* Respondent requests the following relief: 1) this Court should first expressly overrule *Townsend* and *Perez, and 2)* declare Section 90.803(23), Florida Statutes, unconstitutional as applied to the facts of this case, *and* 3) remand for a new trial

therein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by U.S. Mail to: Melanie Dale Surber, Esq., Office of the Attorney General, Department of Legal Affairs, 1515 Flagler Drive, Suite 900, West Palm Beach, Florida 33401, on this 16th day of December, 2005.

Respectfully submitted,

_____

VALENTIN RODRIGUEZ, ESQ.
Valentin Rodriguez, P.A.
601 N. Dixie Highway, Suite C
West Palm Beach, FL 33401
(561) 832-7510
(561) 514-0610 (fax)
Fla Bar No. 047661

Counsel for Appellee/Respondent

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this brief complies with the type-volume limitation set forth by this Court's local rules and Fla.R.App.P. 9.210, and that the instant brief has been prepared with Times New Roman, 14 point typeface.

Respectfully submitted,

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VALENTIN RODRIGUEZ, ESQ.