IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.05-1767

STATE OF FLORIDA,

Petitioner,

vs.

RODOLFO CONTRERAS,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS..iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT.......................................9

ARGUMENT...10

THE FOURTH DISTRICT COURT OF APPEALS IMPROPERLY REVERSED AND REMANDED THIS CASE WHERE THE COURT FOUND THAT THE VIDEO STATEMENT OF THE CHILD VICTIM, WHICH WAS PLAYED FOR THE JURY, FAILED TO SATISFY THE REQUIREMENTS OF THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION.

CONCLUSION...27

CERTIFICATE OF TYPE SIZE.....................................27

CERTIFICATE OF SERVICE.......................................28

TABLE OF AUTHORITIES

FEDERAL CASES

Crawford v. Washington, 124 S.CT. 1354 (2004) 10,11,15,17,19,20

Ohio v. Roberts, 488 U.S. 56 (1982) 10, 11, 15, 17

STATE CASES

Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004) 8, 20, 23

Contreras v. State, 30 Fla. L. Weekly D 2175 . 2,3,4,7,15,17,21

Gore v. State, 599 So. 2d 978 (Fla. 1992) 22, 23

Jones v. State, 571 So. 2d 1374 (Fla. 1st DCA 1990) 24

Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004) 21

People v. Sisavath, 118 Cal. App. 4th 1396, 13 Cal.Rptr. 3d 753 (2004) 14

People v. Vigil, 104 P.3d 258 (Colo. App. 2004), cert. granted, No. 2004 Colo. LEXIS 1030 , 04SC532, 2004 WL 2926003 (Colo. Dec. 20, 2004) 14, 25

Perez v. State, 536 So. 2d 206 (Fla. 1988)(Appendix 1)8, 15, 17, 18, 1

Rodriquez v. State, 436 So. 2d 219 (Fla. 3d DCA 1983) 24

Snowden v. State, 156 Md. App. 139, 846 A.2d 36 (Md. App. 2004) 14

State v. Basiliere, 353 So. 2d 820 (Fla. 1977) 21, 22

State v. Belien, 379 So. 2d 446 (Fla. 3d DCA 1980) 24

State v. Contreras, 793 So. 2d 51 (Fla. 4th DCA 2001) 25

State v. Courtney, 682 N.W.2d 185 (Minn. App. 2004) 13

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) 26

State v. Jordan, 630 So. 2d 1171 (Fla. 5th DCA 1993) 24

State v. Townsend, 635 So. 2d 949 (Fla. 2004) 8, 15, 17, 18, 19

STATUTES/RULES

F.S. § 90.803(23) 19

Fla. R. App. P. 9.210 28

Fla. R. Crim. P. 3.190(j)(3) 22

PRELIMINARY STATEMENT

The Petitioner was the Prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

On September 14, 2005, the Fourth District Court of Appeals reversed this case for a new trial, finding that the video statement of the child victim in this case failed to satisfy the confrontation clause of the United States Constitution. Contreras v. State, 30 Fla. L. Weekly D 2175 (Fla. 4th DCA Sept. 14, 2005).

In February 1999, the coordinator of the Child Protection Team (CPT), Linda Davies, working with the Sheriff of Palm Beach County took an unsworn video taped statement of the victim regarding allegations of sexual molestation (T. 461-462). No law enforcement was in the room during the interview, but a detective was in another room connected electronically to the coordinator (T. 470-471). The child told Davies that her mother did not tell her what to say during the interview (T. 482). The child told the interviewer that her father had touched her, kissed her all over, and touched her with his private part (T. 483, 486-488). The child stated to Davies that she had not met the man who was waiting with her mom (T. 529). Detective Jolly was waiting with the child's mother. Detective Jolly testified that he did not talk to the child before she sat with Linda Davies (T. 595).

Defense counsel conducted two video taped depositions.

During the first deposition the child indicated that she could not recall any episodes of molestation before the charged incident. The victim said that she had watched the taped statement she gave to the social worker and reiterated that statement. The child did not state that penetration occurred during the molestation. Contreras v. State, 30 Fla. L. Weekly D 2175 (Fla. 4th DCA Sept. 14, 2005)[1].

In May 2000, nearly 10 months after deposition I, new defense counsel sought permission to take another discovery deposition of the victim, saying that prior defense counsel had destroyed his discovery notes. The Defense also argued that the second deposition was necessary to protect Appellant's right to confrontation (R. 92-95). The trial judge allowed the second discovery deposition, but only with limitations and with the judge watching it from another room by closed circuit television to rule on any objections arising during the questioning. In substance, deposition II elicited the following testimony from the victim.

> She expected that she would have to be questioned again before trial and at trial. She did not expect to be nervous at trial because defense counsel would probably be asking her the same questions. Before deposition II she asked to see the videotape

[1]Copies of the Depositions were provided to the Fourth District Court of Appeal as exhibits to the record.

> of her statement because she "didn't have such a good memory" of the incident, and was having problems remembering what happened. She had tried to tell the CPT interviewer what she wanted to hear. She watched the videotape before the deposition because, if she could not remember, then she could just say the same thing she had said before. She does not remember Dr. Banta or speaking to her about the incident. She learned the meaning of the word "vagina" after the incident, so she did not know the difference then between "vagina" and "pee pee". But she knows the difference now. She does not know what "penetration" means. Her father did not stick "himself inside of her". She has a better idea of how to describe the incident now because she knows her anatomy better. She knows it is not her fault and that it happens to a lot of young girls. She has related the incident to different people (law enforcement, therapists, attorneys). She does remember talking to someone--maybe it was Dr. Banta--and did not want to tell the truth because her mom was present.

Contreras v. State, 30 Fla. L. Weekly D 2175 (Fla. 4th DCA Sept. 14, 2005).

The record reflects that on May 15, 2000, the defendant filed a "Notice of Intent to Offer Hearsay" in the form of the victim's deposition "taken under supervision of the Court on May 12, 2000 (R. 292-294). Before trial, the State moved to present the victim's trial testimony by videotape, or from outside the courtroom by closed-circuit live television. The State amended its request and asked to have the child declared unavailable for trial entirely and to use the ex parte video statement instead (R. 425-426). The State arranged for the child to be evaluated

by a psychologist, Dr. Rahaim who opined that she would suffer severe "emotional and psychological harm" if she testified in person (R. 430-435, R. Vol 5, Dr. Rahaim’s report). The trial judge found her unavailable because of the expert's opinion and allowed the use of the ex parte statement(R. 430-435).

At trial, the State introduced the original videotaped interview of the child. When the defense raised the lack of opportunity to cross examine the child, in his first motion for judgment of acquittal, the court commented:

> And without, for a moment discontinuing [sic] the importance of the Sixth Amendment right to confrontation, I find that the State has done a commendable job in eliciting testimony and evidence which confirmed the accuracies of everything the child said. And for that reason, I find that the child's videotape statement is highly credible; indeed totally credible. And that cross-examination of the child, had it been possible without traumatizing her, would not have yielded any concessions by her that would have lessened or significantly altered her statement.

(T. 661).

In addition to the videotaped statement of the victim, the State provided testimony from a coworker, Melvin Robinson, of the defendant. He testified the defendant told him that he had molested his daughter after a bachelor party and needed help (T. 567). The State also admitted the defendant's statement to law enforcement in which he admitted molesting, but not committing a

sexual battery on his daughter(T. 609-611). Furthermore, Loni Contreras, the victim's mother walked in and saw the Appellant molesting the victim (T. 347-354).

At the close of the State's case, defendant moved for a judgment of acquittal, arguing:

> "The State has not proved a prima facie case ... [that Defendant] committed an act in which the sexual organ of the defendant penetrated or had union with the vagina of the victim. The evidence used to deduce this element of the crime alleged was a video . . . that we were not able to cross examine based upon the ruling that the child was unavailable. ... His Sixth Amendment right to confrontation has been fundamentally affected such that the evidence certainly cannot be considered as prima facie evidence."

(T. 649-650).

The trial judge denied the motion, explaining:

> "Obviously, when the circumstances permit some form of confrontational cross examination, the child has the videotape or one-way mirror set up. That is the more preferable option; certainly preferable to having a jury hear a statement by a child which is not and has not been subject to cross examination. But in this situation, I think that we have a great deal of evidence which totally corroborates what the child said. ... I find that the child's testimony is extremely credible. ... And without for a

> moment discounting the importance of the Sixth Amendment right to confrontation, I find that the State has done a commendable job in eliciting testimony and evidence which confirmed the accuracies of everything the child said. And for that reason, I find that the child's videotape statement is highly credible--indeed totally credible. And that cross examination of the child, had it been possible without traumatizing her, would not have yielded any concessions by her that would have lessened or significantly altered her statement."

(T. 655-656).

When defense counsel renewed the motion at the close of all the evidence, the trial judge said:

> "I would like to ask counsel about your recollection as to the subsequent videotape or recorded statement of the victim that--that Defense, I think for good reason, chose not to bring in because I don't think it would have been helpful to the Defense to do so. ... So at the time, Ms. Lynch had the opportunity to cross-examine.... At that time of the second statement, the videotape of the victim, the Public Defender's office ... certainly had the opportunity to cross-examine and the bottom line there simply was that the victim, herself, was consistent and credible to the point where I think the defense wisely realized that it would be no good to the defendant to bring that second statement in because it

> would do primarily harm to the defendant by reiterating what she said in the earlier statement. And I do want to make it a note on the record that the defendant was not denied the right of cross-examination of that victim, but having had the opportunity ... simply faced with a credible recitation that pretty much reiterated the earlier one. And, accordingly, there has been no denial of the right of confrontation, but simply a choice by Defense counsel as to the inadvisability of utilizing that second video at trial... I want to note that the State's case ... contains a tremendous amount of credible and consistent evidence, each of the State witnesses corroborating each of the other...."

(T. 846-849); Contreras v. State, 30 Fla. L. Weekly D 2175 (Fla. 4th DCA Sept. 14, 2005). The jury returned a guilty verdict on one count of sexual battery and one count of lewd and lascivious molestation. The Fourth District Court of Appeal reversed and remanded the case for a new trial, and certified conflict with the Florida Supreme Court Decisions of State v. Townsend, 635 So. 2d 949 (Fla. 2004), and Perez v. State, 536 So. 2d 206 (Fla. 1988)(Appendix 1). The Fourth District Court of Appeals also certified conflict with Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). Id.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals improperly reversed this case. The Defendants right to confrontation was satisfied. The statements made by the child victim in this case were not testimonial in nature because the child did not make the statements with a reasonable expectation that they would be used prosecutorially. Moreover, the trial court properly found that child was unavailable to testify at trial. In this case the record reflects that the child would have suffered severe mental and emotional harm if she was required to testify. Additionally, the defendant's right to confrontation was satisfied where he was afforded two opportunities to cross examine the victim at pre trial depositions set by the defense. Lastly, any error is harmless beyond a reasonable doubt.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEALS IMPROPERLY REVERSED AND REMANDED THIS CASE WHERE THE COURT FOUND THAT THE VIDEO STATEMENT OF THE CHILD VICTIM, WHICH WAS PLAYED FOR THE JURY, FAILED TO SATISFY THE REQUIREMENTS OF THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION. (RESTATED).

I. The child victim statement is not testimonial.

The state submits that the statements made by the child victim in this case were not testimonial in nature because the child victim in this case could not have made the statements with a reasonable expectation that they would be used prosecutorially. In Crawford v. Washington, 124 S.CT. 1354 (2004) the U.S. Supreme Court found that the admission of "testimonial" hearsay statements pursuant to the "adequate indicia of reliability" test, espoused in Ohio v. Roberts, 488 U.S. 56 (1982), violated the Confrontation Clause.

> The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause

> that make no claim to be a surrogate means of assessing reliability. . . . The [Roberts] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. . . . The unpardonable vice of the Roberts test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.

124 S.CT. at 1365-1366. The Court held that the test in Roberts was "unpredictable and inconsistent." Crawford, 124 S.CT. at 1365.

The Court differentiated between nontestimonial and testimonial hearsay:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framer' design to afford the States flexibility in their development of hearsay law - as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

124 S.CT. at 1366. The Supreme Court expressly decided not to comprehensively define testimonial hearsay finding only that "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." Id. at 1365. It did offer some guidance, however. First,"testimonial" statements need not necessarily be ones given under oath; unsworn statements may

also be "testimonial." Id. at 1364-65. Second, the Court gave the following examples of "testimonial" statements:

> Ex parte in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that **declarants would reasonably expect** to be used prosecutorially . . . extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . 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.

Id. at 1364 (citations omitted)(emphasis added).

In this case, the record reflects that Linda Davies, "Davies", the case coordinator of the Child Protection Team of Palm Beach, testified regarding the purpose behind her interview with the victim in this case. Davies job is to take recommendations from the Department of Children and Families regarding child abuse or neglect and conduct interviews with the alleged victims, or she might complete a psychological assessment of that child around different family members (T. 462). Davies also coordinates all of the medical examinations (T. 463). Although Davis testified that before she interviews the child victim, she does speak to the Department of Children and Families, as well as any law enforcement involved in the

case, the purpose of video taping the interview is for Davies to be able to go back and look at the tape before she writes any formal reports, as well as to aid in cutting down the number of times the child will have to be interviewed(T. 470). Davies never testified that the purpose of the interview and the videotape was so that it could be used in court in lieu of testimony. On cross examination, Davies clarified that the detective and the case workers are not simultaneously questioning the child before the taped interview (T. 531)[2]. Davies testified that although she is aware of the allegations of abuse she goes into the interview with an open mind (T. 531). Davies stated that although she has an earpiece and Detective Jolly could say things to her, in this case she does not recall anything he said to her (T. 533).

In this case, it cannot be concluded that a nine year old child reasonably expected that the statement she gave to Linda Davies would later be used at trial. In this case, it cannot be said that the sole purpose of "government" involvement was to develop a case against the accused. Rather, as reflected by the testimony of Ms. Davies, her involvement was to find what abuse,

[2] Detective Jolly testified although he scheduled the appointment at Home Safe, his position is totally different from Ms. Davies as he is there to investigate the allegations (T. 594). Detective Jolly never questioned or met with the child at Home Safe.

if any, actually occurred, not simply to build a case against the accused.

Other states with functional equivalents of Florida's child protective teams have held that similar statements are testimonial. _See_ _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 holding in Crawford); _People v. Sisavath_, 118 Cal. App. 4th 1396, 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_, 156 Md. App. 139, 846 A.2d 36, 47 (Md. App. 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), _cert. granted_, No. 2004 Colo. LEXIS 1030 , 04SC532, 2004 WL 2926003 (Colo. Dec. 20, 2004) (videotaped interview of child victim of sexual abuse by police officer trained in interviewing child victims held testimonial under Crawford). However, the

common factor in all of these cases is that they contain specific facts detailing the purpose of the interviews. The State would submit that such a factual determination must be conducted at the trial court level.

In this case the trial court was never given the opportunity to determine if the 9 year old child reasonably expected the statement to be used prosecutorially, if the defendant was arrested or charged prior to the child making the statement, when and to whom was the abuse reported, if law enforcement spoke to the child before she spoke to Linda Davies, and finally, the purpose of taking the statement. Detective Jolly, the officer involved in this case did not speak to the victim before the interview with Davies took place (T. 595). Moreover, Jolly testified that he was dressed in civilian clothes so that the child would not know that he was a police officer (T. 595-596). Hence the state would submit that at the very least this case should be remanded so that the trial court could conduct a proper hearing to determine if the video taped statement should in fact be considered testimonial.

II. The Child Victim was Unavailable

In this case, the Fourth District Court of Appeal reasoned that the state reliance upon State v. Townsend, 635 So. 2d 949 (Fla. 1994) and Perez v. State, 536 So. 2d 206 (Fla.1988), cert.

denied, 492 U.S. 923, 106 L. Ed. 2d 599, 109 S. Ct. 3253 (1989) is misplaced because both are squarely founded on Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), and the problem with Roberts is that its rationale was explicitly overruled in Crawford. Contreras, 30 Fla. L. Weekly D 2175.

Additionally, the Fourth District Court of Appeal stated:

> We do not believe the trial court's finding that the child was unavailable to testify satisfies the Confrontation Clause requirement of physical unavailability. Generalized "harm" from testifying does not make a witness unavailable within the meaning of the Sixth Amendment. 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.
>
> In addition to Crawford, defendant also argues that the child victim was not legally unavailable to testify within the meaning of section 90.803(23). He points out that in finding her unavailable the trial court erroneously relied on the opinion of a child psychologist as to some general, unspecified harm that might result if she testified. He argues that the court did not explore something less than total unavailability--such as having the child testify by closed

> circuit television, rather than live in the courtroom.
>
> We agree that the record does not support the trial court's finding of unavailability. The child victim's testimony at the discovery deposition demonstrates 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).
>
> Under section 90.803(23)(a)(2)(b), a trial judge may find that a child is unavailable as a witness because the "child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm." This subjective method of determining unavailability does not survive Crawford. These are the types of "vague standards" that Crawford criticizes as "manipulable." 541 U.S. at 68. 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. We certify that our decision today--compelled, as it is, by Crawford and the Supremacy Clause--conflicts with Townsend and Perez.

Contreras, 30 Fla. L. Weekly D 2175.

The Fourth District Court of Appeal has improperly reasoned that Crawford requires some new standard to determine

unavailability. However, in Crawford, 124 S.Ct at 1370, the United States Supreme Court found 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." The Court also stated that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation". Id. at 1371. In Crawford, the Court simply receded from the Roberts reliability/trustworthiness standard, the Court in no way attacked the unavailability standard.

Both Townsend and Perez stand for the proposition that a child is "unavailable" as a witness if the court finds, based on expert testimony, that a substantial likelihood exists that the child will suffer severe emotional or mental harm if the child testifies. This standard is not vague and manipulable as reasoned by the Fourth District, rather it requires a particularized finding of harm to the child. Hence the Fourth District's reasoning is misplaced and this Court's decisions in Townsend and Perez remain constitutionally sound.

Furthermore, in this case, the record clearly reflects that this child would have suffered a particular, severe emotional and mental harm if she was required to testify at trial. Dr.

Rahaim met with the child, her mother, her guardian ad litem, the Assistant State Attorney handling the case and reviewed all available reports (R. 431). Dr. Rahaim determined that at age 13, 4 years after the crime occurred, the child suffered from Post Traumatic Stress Disorder, and is tormented because she has a continuing love for her father and feels that she is responsible for the fact that her father is not there with her and her siblings (R. 432). Dr. Rahaim testified that the trauma of the incident is rekindled every time she is required to address the facts of the crime (R. 432). The child told Dr. Rahaim that when she has been deposed or interviewed or otherwise reminded of the case she has fantasies about the death of people, including her father (R. 432). Dr. Rahaim reported that the child "becomes depressed, intrusive, had obsessional disturbing thoughts, feels guilty, and experiences periods of depersonalization or dissociation" (R. 432). Additionally, the child's fantasies include her being dead and viewing the world as though she is not in it (R. 433). Dr. Rahaim found that the child was so disturbed she could not take the stand and to require her to do so would create the ultimate emotional and mental trauma (R. 433). Hence, it is apparent from the facts adduced below that this was not a case where there was testimony regarding "generalized" harm, as characterized by the Fourth

District, rather it was a particularized trauma suffered by the child in this case, as required by this court's decisions in Townsend and Perez.

Lastly, the Fourth District's finding that because she was 13 years old at the time of trial, the victim no longer qualified for unavailability under section 90.803(23), is erroneous[3]. Such a finding is improper where F.S. § 90.803(23) states that an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less could be admissible. In this case, it can be inferred from Dr. Rahaim's evaluation that the child clearly has a mental, emotional, or developmental age of less than 11. Hence, the Fourth District Court of Appeal erroneously found that the child in this case was unavailable.

III. The Defendant's Sixth Amendment Rights were Satisfied

Should this court find that the unsworn statement is in fact testimonial, such a finding is irrelevant where the Defendant had two opportunities to cross examine the child, hence satisfying Crawford and the Sixth Amendment. Furthermore, during these two depositions, the defense obtained exculpatory evidence refuting the sexual battery charge. The ruling in

[3]Such a claim was never raised at the trial level, nor was it raised on appeal by the defendant.

Crawford merely requires that a defendant have an opportunity at some time prior to trial to cross-examine the witness. Crawford, 124 S. Ct. at 1363; See Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004)(finding no Crawford violation in a situation where the State introduced evidence from an eleven-year-old witness in the form of an audiotape of a statement she made to the police since the defendant had been given an opportunity, prior to trial, to cross-examine the witness).

Below, the Fourth District Court of Appeal found that the Fifth District Court of Appeal decision in Blanton did not save this case. The Court found as follows:

> The contention is that under Blanton the defendant's discovery deposition is a satisfactory substitute for the right of confrontation at trial. We might agree with that proposition if the deposition had been admitted into evidence along with the statement by the CPT. But there was no attempt by the State to do so. It had a choice between adducing evidence that had faced the cross-examination required by the Confrontation Clause or instead, standing on an ex parte statement to a CPT. It is the State who has the burden of proof, not the defendant. It is the State who failed to introduce this confrontation evidence. Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements. We certify conflict with Blanton.

***

> We do not go as far as Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004) and hold that a criminal discovery deposition could never satisfy Crawford's "prior cross examination" requirement. The Florida Supreme Court has held 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). [*23] The court reasoned that because the defendant was "unaware that [the] deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements," the defense attorney "could 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." 353 So. 2d at 824-25. We 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, 30 Fla. L. Weekly at D2176.

Below, the Court also reasoned that the record does not indicate that Contreras was present at either deposition, thereby he was not afforded the right to face his accuser. Id.

In State v. Basiliere, 353 So. 2d 820 (Fla. 1977), this Court held that, because the defendant was not present at the discovery deposition and had no notice that the deposition testimony could be used at trial, using the deposition as substantive evidence violated the Sixth Amendment. However this

case in inapplicable to the facts of the instant case.

Rather, the State would rely upon Gore v. State, 599 So. 2d 978, 985 (Fla. 1992), wherein this Court found that:

> Gore's claim that he had a right to be present at the deposition would have merit had the deposition been taken by the State to be used against him at trial. See State v. Basiliere, 353 So. 2d 820 (Fla. 1977) (Confrontation Clause mandates presence of defendant where deposition will be admitted as substantive evidence against him at trial); Fla. R. Crim. P. 3.190(j)(3). However, this deposition was neither taken on the application of the State nor used against Gore at trial. The deposition was introduced into evidence by Gore. While the deposition was ordered at the suggestion of the State, in order to get around the continuance problem, this was not a State deposition. The State would have been quite content if the defense had decided not to take the deposition at all, since this testimony directly contradicted the State's case. While a defendant does have the right to be present when a witness testifies against him, no rule of criminal procedure, statute, or judicial decision has ever expanded this right into a right to be present at the deposition of a defense witness, and we decline to do so now.

In the instant case, the defendant had two opportunities to "cross examine" the child. Both depositions were set by the defendant in an effort to refute the video taped statement made to Linda Davies. On April 13, 2000, the Defendant filed a "Motion to Redepose the Alleged Victim", and argued that because the State intended to admit child hearsay at trial, he was

entitled to a second deposition to preserve his right to confrontation (R. 92-95). The defendant intended use the second video deposition in an effort to preserve his right to confrontation however changed his mind at trial. The second deposition, established that the child's memory of the incident was decreasing and that penetration may not have occurred, hence refuting the sexual battery charge. Furthermore, the child admitted telling Linda Davies what she thought Davies wanted to hear thereby impeaching the child's credibility. This was a defense deposition and the testimony was exculpatory and impeaching.

As in Gore, Contreras did not have a constitutional right to be present at the defense depositions as the were taken by the defense in an effort to confront the accuser (R. 92-95). Hence, the Fourth District Court of Appeals ruling is contrary to this Court's precedent in Gore and must be reversed and the rationale in Blanton must be applied to the instant case.

Additionally, the Fourth District reasoned that Contreras could not be held responsible for failing to introduce the depositions at trial because such would put responsibility upon the defendant to prove his innocence. However, such an analysis begs the question in this case as to whether or not the defendant's right to confrontation was actually violated. Such

an analysis screams out as a “gotcha” tactic, because the defendant had planned on admitting the exculpatory evidence at trial, yet affirmatively withdrew his request to introduce the deposition at trial. It can be gleaned from the record that the defense chose not to admit the deposition because although it did contained exculpatory evidence, the child’s recollection and testimony remained consistent with the original taped statement.

A complete switch in a defense counsel’s position should alert this Court to a potential “gotcha” litigation tactic. See Rodriquez v. State, 436 So. 2d 219, 221 (Fla. 3d DCA 1983). Defendants should not be able to sit on their rights and say nothing until after a jury verdict or court determination is rendered. See Jones v. State, 571 So. 2d 1374 (Fla. 1st DCA 1990). Defense counsel cannot promote the court or the prosecutor to act, and then after it has acted, employ a duplicitous “gotcha” strategy to gain an advantage or nullify the action. See State v. Jordan, 630 So. 2d 1171, 1171 (Fla. 5th DCA 1993). “‘[G]otcha!’ maneuvers will not be permitted to succeed in criminal, any more than in civil litigation.” State v. Belien, 379 So. 2d 446, 447 (Fla. 3d DCA 1980).

In this case, defense counsel made a tactical decision not to admit the video deposition. The trial court reasoned as such

in denying Appellant’s second motion for judgment of acquittal, when it found that the Defendant in fact had an opportunity to cross examine the victim during the second video deposition yet chose not to admit the testimony at trial (T. 846-848). The State cannot now be held responsible for failing to admit the video deposition. Such reasoning clearly puts the state in a catch-22 situation because the victims original statement was admitted there is no theory under which a second cumulative statement could have been admitted below. Rather, had the Trial Court admitted the second deposition at the state’s request, the defense could have argued that the testimony was cumulative and improperly bolstered the victim’s original statement. The Fourth District Court of Appeal decision must be reversed.

IV. ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Alternatively, should this court agree that Appellant's right to confrontation was violated, any error is harmless. Below the Fourth District Court of Appeal found as follows:

> 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. It is not clear from defendant's confession that it would have been admissible in the absence of the ex parte statement. As the Vigil court said under very similar circumstances while applying a Goodwin harmless error analysis, "although there was unquestionably other corroborating evidence presented, we cannot say that the

> erroneous admission of the single most persuasive evidence of defendant's guilt was harmless beyond a reasonable doubt." 104 P.3d at 264-65.

In this case, the propriety of Appellant's confession has previously been argued before the Fourth District Court of Appeal and found to be admissible. See State v. Contreras, 793 So. 2d 51 (Fla. 4th DCA 2001). The state is at a loss as to how the admission of the child victim hearsay relates to the admissibility of Appellant's confession.

Turning to the merits, the focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

Loni Contreras, the victims mother testified that she walked into her daughter, the victims, room while Appellant was abusing the child (T. 347-354). The victim made non-testimonial statements(excited utterances) to her mother immediately after the crime occurred and told Loni that the abuse had happened before (T. 352). Loni Contreras testified that there was semen on her daughters leg as well as in her bed (T. 353-355). Melvin Robinson testified that Appellant admitted to molesting the child (T. 567).

Moreover, the Appellant's confession was taped and played for

the jury (T. 605, 609-611).

In this case, there is no reasonable possibility, in light of the testimony of Loni Contreras, Melvin Robinson, and the Appellants own confession, that any error regarding the video tape of the child's statements affected the verdict. Rather, the child victim hearsay statement was cumulative at best. This Court must reverse the Fourth Districts decision below and affirm the conviction and sentence.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to REVERSE the opinion of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Melanie Dale Surber, certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Valentin

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____

Melanie Dale Surber

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

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