IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 05-1767

STATE OF FLORIDA,

Petitioner,

vs.

RODOLFO CONTRERAS,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES/RULES

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.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner accepts the Respondent's Statement of Facts set forth in his Answer Brief and further relies on the Statement of Facts contained in Petitioner's initial brief on the merits.

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. 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.

I. THE FOURTH DISTRICT IMPROPERLY APPLIED *CRAWFORD* TO THE INSTANT CASE.

In his answer brief, Respondent argues that the Fourth District Court of Appeal properly applied Crawford v. Washington, 124 S.CT. 1354 (2004) to the facts of this case. Respondent relies upon Young v. State, 645 So. 2d 965 (Fla. 1994) arguing that this Court has previously found that video taped interviews of children are "testimonial in nature". Respondent has also argued that statements made by a child victim are not admissible despite the child's unavailability. Such an argument is contrary to the rationale of Crawford.

While it is true that this court did reason in Young v. State, 645 So. 2d 965 (Fla. 1994) that when introduced to prove sexual abuse, video interviews of children are self serving in the sense that they are testimonial in nature and assert the truth of the child statements, such a finding was made prior to this Court having the benefit of the Crawford decision. Moreover this Court did not address the video statement in the context of Sixth Amendment protections rather it was addressed

to analyze whether such a video could properly be given to the jury during deliberations pursuant to Fla. R. Crim P. 3.400. Id. at 966. Hence, Petitioners reliance upon Young is misplaced.

Since Crawford was decided, it cannot be said that all child victim hearsay statements must be considered testimonial, rather such a determination must be made on a case by case basis. In Crawford, 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." Crawford, 124 S.CT. at 1365.

Respondent further relies upon Flores v. State, 120 P.3d 1170 (Nev. Sup. Ct. 2005) as proof that child victim hearsay must automatically be deemed testimonial. However, in Flores, the Nevada Supreme Court stated that "Crawford requires trial and appellate courts around the country to determine on a case by case basis whether statements are testimonial". Id. at *23.

Specifically, Flores was charged with one count of first-degree murder by child abuse of Zoraida. The only eyewitness to these events was Flores's daughter, Sylvia. Sylvia later told child abuse investigators and her foster mother, Yolanda Diaz, that Flores struck Zoraida during a struggle in a bathroom

shower, that the blow caused the child to strike her head and lose consciousness, and that Zoraida never woke up. Accordingly, Sylvia did not testify at trial. Rather, the State introduced Sylvia's hearsay statements through the testimony of LVMPD child abuse investigator Sandy Durgin, Child Protective Services investigator Carolyn Godman, and Yolanda Diaz. Flores, 120 P.3d 1170, at *5.

The Flores Court reasoned as follows:

> The task set by the Court is not as daunting as claimed by judges and prosecutors in the wake of Crawford. The Court has simply redirected the analytics necessary to resolve issues under the Confrontation Clause. As discussed below, Crawford does not restrict the scope of the term "testimonial" to formalized statements made to authorities, as suggested by Professor Amar, and does not precisely restrict the term to statements made to authorities or others with the actual intent or anticipation that the statement be used in the prosecution or investigation of a crime, as suggested by Professor Friedman. These views, however, provide some context for these determinations. With this in mind, we now turn to an examination of whether Sylvia's statements were testimonial for the purposes of the Confrontation Clause. In this, we will utilize the illustrations provided by the Court in Crawford.
>
> As noted, the first illustration includes ex parte in-court testimony, functional equivalents such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially." n34 We conclude that

> Sylvia's statements to the three surrogates do not qualify as "testimonial" under the first illustration. First, the statements to the surrogates were not in the form of prior testimony or affidavits. Second, given Sylvia's age and relationship to Flores, it is unlikely that she intended to testify through the surrogates or that she "reasonably expected" that the statements would be used criminally against her mother. Likewise, none of her statements were in a form described in the Court's second illustration. They were not "'extrajudicial statements . . . contained in formalized testimonial materials.'"
>
> We conclude, however, that two of Sylvia's statements were "testimonial" under the third illustration, as they were statements that, under the circumstances of their making, "'would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Under the third illustration the Court impliedly establishes a "reasonable person" test for when a declarant has made a testimonial statement. Applying this third test, we conclude that the statements to Durgin and Godman were clearly testimonial under Crawford because both were either police operatives or were tasked with reporting instances of child abuse for prosecution. Thus, although the district court applied then current doctrine when it admitted Sylvia's hearsay statements, this admission runs afoul of Crawford, which we must apply under federal retroactivity rules. With regard to the child's statements to Ms. Diaz, we conclude that these statements, which were spontaneously made at home while Ms. Diaz was caring for the child, were not such that a reasonable person would anticipate their use for prosecutorial purposes.

Flores, 120 P.3d 1170, at *27-*29.

Hence, its is clear from this decision that the Nevada Supreme Court evaluated all the statements made by the child and found that certain statements were testimonial and others were not. Such a finding undermines Respondents argument that all child victim statements are inadmissible. Rather, said findings support the claim that the testimonial nature of a statement must be considered on a case by case basis.

In this case, it cannot be concluded from the record that a nine year old child reasonably expected that the statement she gave to Linda Davies would later be used at trial. Moreover, it has not been established that the sole purpose of the "government" involvement here was to develop a case against the accused. Rather, the record here reflects that Linda Davies was trying to determine if in fact there was any abuse (T. 531), and that while detective Jolly was present at the interview, he was dressed in civilian clothes and did not speak to the victim prior to the interview with Linda Davies (T. 595-596). Therefore the Fourth District Court of Appeal erroneously found that the video taped statement was testimonial in nature under Crawford. However, should this Court disagree, the state would submit, as it did in the merits brief, 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.

Respondent also argues that the Fourth District Court of Appeal properly found that the child was not unavailable and that generalized harm from testifying does not make a witness unavailable within the meaning of the Sixth Amendment. However Respondent fails to address the argument that the decision in Crawford in no way attacked the unavailability standard of Ohio v. Roberts[1]. Rather, Respondent simply asks this Court to adopt the view of the Fourth District Court of Appeal (AB 12). Hence, the undersigned will respectfully rely on her merits brief with respect to this argument.

Finally, Respondent argues that his Sixth Amendment rights were not satisfied by the discovery depositions which were conducted because he was not present at either deposition. Below, the Fourth District Court of Appeal found that the Fifth District Court of Appeal decision in Blanton1 did not save this case and certified conflict.

Respondent fails to address this conflict and relies upon State v. Basiliere, 353 So. 2d 820 (Fla. 1977). As the applicability of this case was addressed in the merits brief, the undersigned will respectfully rely on the arguments made

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[1] 448 U.S. 56 (1980)

1 880 So. 2d 798 (Fla. 5th DCA 2004)

therein.

II. THIS COURT SHOULD NOT DECLARE SECTION 90.803(23) UNCONSTITUTIONAL, NOR SHOULD IT OVERRULE *PEREZ* AND *TOWNSEND*

Respondent first argues that F.S. § 90.803 (23) is unconstitutional on it's face and as applied under Crawford. However, such an argument has never been raised below and has been improperly raised by the Respondent in this answer brief. While the Fourth District Court of Appeal stated that it is difficult to see how F.S. § 90.803 (23) is viable any longer, the Court did not go so far as to declare the statute unconstitutional. Contreras v. State, 30 Fla. L. Weekly D 2175 (Fla. 4th DCA Sept. 14, 2005). A facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if the error is fundamental. Trushin v. State, 425 So. 2d 1126 (Fla. 1982); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970). The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level. Trushin, 425 So. 2d at 1129. Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. Miami Gardens, Inc. v. Conway, 102 So.2d 622 (Fla. 1958); Vance v. Bliss Properties, Inc., 109 Fla. 388, 149 So. 370 (1933).

In this case, Respondent makes a blanket argument that this Court should declare F.S. § 90.803(23) unconstitutional as applied and on it face. Respondent fails make any argument or cite to any relevant case law supporting such a claim. Moreover, there is a strong presumption in favor of the constitutionality of statutes, and all doubt will be resolved in favor of the constitutionality of a statute. State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Courts are "obligated to interpret statutes in such a manner as to uphold their constitutionality if it is reasonably possible to do so." Dickerson v. State, 783 So. 2d 1144, 1146 (Fla. 4th DCA 2001). Hence, Respondent has failed to satisfy his burden and establish that F.S. § 90.803(23) is unconstitutional, both on it's face and as applied.

Furthermore, F.S. § 90.803(23)(a)(1) requires that after a hearing the trial court must determine that the time, content, and circumstances of the child statement provides sufficient safeguards of reliability. Crawford does not undermine this language, rather it merely changed the definition of reliability, requiring that to be deemed a reliable, the court must determine if a statement is testimonial in nature, and if a statement has been found to be testimonial, the defendant must be afforded an opportunity to confront the witness. Hence, this

Court should decline to declare F.S. § 90.803(23) unconstitutional.

Lastly, Respondent argues that this Court should overturn the decisions in 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). Respondent argues that because these cases were based upon Ohio v. Roberts, they must be reconsidered and overruled. However, the State submits that these cases are only subject to reconsideration to the extent that they rely upon the adequate indicia of reliability test because in Crawford, the Court receded from the reliability/trustworthiness standard of Roberts. Whereas the unavailability standards set out in both Townsend and Perez remain in tact because the Court in Crawford in no way attacked the unavailability standard announced in Roberts. Hence, there is no need to completely recede from the rationale of Townsend and Perez, and this Court should decline to do so.

III. ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Undersigned counsel will respectfully rely on the arguments as set forth in the Merits Brief.

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 HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner:s Reply Brief" has been furnished to Valentin Rodriguez, Jr., 318 Ninth Street, West Palm Beach, Fl 33401 this _____ day of _____, 2006

_____
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.

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MELANIE DALE SURBER