IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC05-88**

MORONI LOPEZ,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

JAMIE SPIVEY
FLORIDA BAR NO. 0850901
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FL 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC05-88**

MORONI LOPEZ,

Respondent.
_____/

RESPONDENT=S ANSWER BRIEF

PRELIMINARY STATEMENT

Petitioner, the State of Florida, Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Moroni Lopez, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The symbol “R” will refer to the record on appeal and the symbol “T” will refer to the transcript of the trial court proceedings. “IB@ will designate Appellant=s Initial Brief. “PB” will designate Petitioner=s initial Brief in this Court. Each symbol is followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's "Statement of the Case and Facts" as reasonably supported by the record.

SUMMARY OF THE ARGUMENT

ISSUE I

This Court should affirm the decision of the First District Court of Appeal in Lopez and quash the decision in Blanton because, 1) discovery depositions do not provide defendants with notice that the witness will not appear at trial, 2) discovery depositions do not allow the defendant to be present in order to confront his accuser, 3) while discovery depositions afford the means to discover the basis for a witness= testimony, they do not provide the opportunity to challenge the witness and, 4) discovery depositions do not allow the finder of fact the opportunity to gauge the witness= tone and demeanor which is necessary to evaluate their credibility. Accordingly, because the pretrial deposition did not satisfy Respondent=s constitutional right to confront his accuser, and Ruiz did not testify at trial giving Respondent no opportunity for cross-examination, his conviction should be reversed by this Court.

ISSUE II

This Court should affirm the First District Court of Appeal in Lopez and quash Blanton because Ruiz= statements were testimonial in violation of Crawford v. Washington.

Although deemed an excited utterance and therefore reliable by the lower court, an out of court hearsay statement introduced as substantive evidence cannot satisfy the confrontation concerns raised by Crawford v. Washington. Rather, even hearsay statements which would otherwise be admissible under an exception to the hearsay rule are inadmissible under Crawford v. Washington if their testimonial nature deprives the defendant of his right to confront his accuser. In this case, Ruiz's statement was testimonial because it was made to an investigating police officer at the scene of the crime. Because Ruiz must have known his statement would be used to identify and prosecute Respondent for this crime, and because the statement was the sole evidence that a crime was committed, it was testimonial and therefore inadmissible, despite the fact that it might have been otherwise admissible under a hearsay exception.

ARGUMENT

ISSUE I

WHETHER THE ADMISSION OF A HEARSAY STATEMENT BY A DECLARANT THAT WAS DEPOSED BUT DID NOT TESTIFY AT TRIAL VIOLATES THE DEFENDANT=S RIGHT OF CONFRONTATION UNDER CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004)

Jurisdiction

This case comes to this Court under discretionary review as a certified conflict with Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). Blanton held that a prior deposition satisfied the dictates of Crawford v. Washington, 541 U.S. 36 (2004) in that a discovery deposition per Rule 3.220(h), Florida Rules of Criminal Procedure, provides a defendant with the Aopportunity@ to confront his or her accuser. This Court has jurisdiction. See, Article V, Section 3(b)(3) of the Florida Constitution.

Merits

The First District Court of Appeal held that a discovery deposition does not provide a meaningful opportunity to cross-examine or confront one=s accuser because 1) defendants do not know that a deposition will be their only opportunity to confront the witness and do not conduct the type of cross-examination that would satisfy

the right to confrontation, citing State v. Basiliere, 353 So. 2d 820 (Fla. 1977) and State v. Green, 667 So. 2d 756 (Fla. 1995); and 2) defendants do not have a right to attend discovery depositions, citing John F. Yetter, Wrestling with Crawford v. Washington and the New Constitutional Law of Confrontation, Fla. B. J., Oct. 2004, at 26, 30. See, Lopez v. State, 888 So. 2d 693, 700, 701 (Fla. 1st DCA 2004).

Petitioner argues that Respondent's right to confrontation was not violated by the admission of witness Ruiz' hearsay statements because Respondent knew about Ruiz's statements before trial and had the opportunity to cross-examine those statements at a pre-trial deposition.

Petitioner's analysis fails to consider that there were several issues needing cross-examination. Trial counsel argued the statements were not reliable because Respondent had accused his employer, Mr. Morqucho, of committing a sexual battery on him the night before Ruiz made his statements to the police. Trial counsel proffered that Ruiz was Morqucho's employee and that, "this whole case was a frame-up, set-up, basically put together by Mr. Morqucho to put Mr. Lopez in a bad light." (T 26, 27)

This information would not be available in a police report. The deposition served as an opportunity to

discover what Ruiz would say under oath about his bias for Morqucho against Lopez. The time to challenge Ruiz with the evidence of bias and his relationship to Mr. Morqucho would be at a face to face encounter in front of the jury deciding Respondent=s fate, not at a deposition where a jury could not gauge Ruiz= reaction and credibility. And finally, without Ruiz= testimony at trial, the defense had no opportunity to introduce the evidence of bias to the jury.1

In these respects, discovery depositions per Rule 3.220(h), Fla. R. Crim. P., simply do not provide defendants with an "opportunity" to confront an accuser within the meaning of Crawford. And with the reasonable expectation that every witness will appear for trial, a defendant does not know that a deposition to perpetuate testimony per Rule 3.190(j) is needed.

The State argues that the First District Court of Appeal overlooked key language from Basiliere finding that a deposition did not satisfy the right of confrontation A[only] when a defense attorney is discovering facts and circumstances for the first time.@ (PB 14) This analysis

1 Petitioner should not have to waive his right to remain silent in order to preserve his right to confront his accuser. Even if Petitioner had offered this evidence himself, it would not have the same credibility as it would coming from Ruiz.

incorrectly assumes that Basiliere did not have access to such discovery documents, or that the First District=s opinion was based on this fact alone. Yet, plainly, Basiliere did participate in discovery (hence, the deposition in that case), and the First District=s opinion was based on more than a perceived need for preparation necessary to conduct an effective cross-examination.

The First District also ruled as did the U.S. Supreme Court in Crawford that satisfying the right to confrontation must include the defendant=s physical presence at the proceeding. The State dismisses this requirement, citing only Commonwealth v. McClendon, 874 A.2d 1223 (2005). Petitioner fails to mention that the videotaped deposition in McClendon was taken only after the trial court ruled the witness would not be available for trial. Hence, that deposition was taken for the very purpose of being admitted at trial, thereby alleviating all of the Confrontation Clause concerns raised in this case. Id., at 1233, 1234.

The State cites Contreras v. State, 910 So. 2d 901 (Fla. 4th DCA 2005) in support of its cause. Yet, the Fourth District clearly indicated its belief that, to satisfy confrontation concerns, any pretrial deposition used as substantive evidence would have to be taken in the

defendant=s presence with the intention of being used at trial.

> We can envision circumstances where a 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.

Id., at 909. The Fourth District held that the average discovery deposition does not satisfy the requirements of Crawford, and certified conflict with Blanton.

In sum, this Court should affirm the holding of the First District Court of Appeal in Lopez and quash the Fourth District=s decision in Blanton. Respondent=s constitutional right to confrontation under both Article 1, Section 16 of the Florida Constitution and Amendments VI & XIV of the United States Constitution, requires reversal of this conviction which is based solely on a hearsay statement that he could not confront in front of his jury.

ISSUE II

WHETHER THE APPELLATE COURT ERRED BY FINDING THAT THE VICTIM=S EXCITED UTTERANCE CONSTITUTED A TESTIMONIAL STATEMENT AS DEFINED BY CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004).

Jurisdiction

This case comes to this Court under discretionary review as a certified conflict with Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). Blanton held that a prior deposition satisfied the dictates of Crawford v. Washington, 541 U.S. 36 (2004) in that a discovery deposition per Rule 3.220(h), provides defendants with the Aopportunity@ to confront their accusers. This Court has jurisdiction. See, Article V, Section 3(b)(3) of the Florida Constitution.

Merits

The First District Court of Appeal held that Ruiz=s statement to Officer Gaston was an excited utterance and, therefore, not inadmissible under the rule excluding hearsay. See, Section 90.801, Fla. Stat.; and Lopez v. State, 888 So. 2d 693, 700 (Fla. 1st DCA 2004). Nonetheless, the court ruled the statement inadmissible because it was deemed testimonial and, therefore, violated Crawford v. Washington, 541 U.S. 36 (2004). The court reasoned that a statement=s character as testimonial was

unaffected by its reliability, and specifically, that under Crawford, evidence code reliability was not a sufficient guarantee of a defendant=s right to confrontation.

The State argues that the First District is wrong and asserts that an excited utterance may never be deemed testimonial. AAn excited utterance by its very nature cannot be testimonial.@ (PB 24) Petitioner cites various cases in support, most of which have been overturned and/or are readily distinguishable from the facts of this case.

The holdings in Fowler v. State, 809 N.E. 2d 960 (Ind. Ct. App. 2004); Rogers v. State, 814 N.E. 2d 695 (Ind. Ct. App. 2004); and Hammon v. State, 809 N.E. 2d 945 (Ind. Ct. App. 2004), that an excited utterance can never be hearsay have been overturned by Indiana=s Supreme Court in Hammon v. State, 829 N.E. 2d 444 (Ind. 2005). Hammon held that the victim=s oral statements to police were not testimonial, but their written affidavits were testimonial and inadmissible under Crawford. These cases are also distinguished by the facts that the broken furniture and/or bloody nose of these domestic violence victims (Fowler and Hammon) gave ample evidence that a crime had been committed and that the defendant likely committed it. In Rogers, the officers found the victim with a cut on his head and found the defendant nearby, pounding and kicking doors in a men=s

restroom.[2] In contrast, Ruiz=s statements were the only evidence that a crime had been committed and that Respondent committed it.

Similarly, in North Carolina v. Forrest, 596 S.E. 2d 22 (N.C. Ct. App. 2004), the excited utterance made to responding officers occurred only after officers had observed the defendant holding the victim at knifepoint. In Cassidy v. State, 2004 Tex. App. LEXIS 4519 (Tex. Ct. App. 2004), the declarant had a knife wound. In People v. Mackey, 785 N.Y.S. 2d 870 (N.Y. Crim. Ct. 2004), a mother with obvious bruises, approached police seeking protection for herself and her children. In contrast, Ruiz=s statements were the only evidence that a crime had been committed or that Respondent committed it. Compare State v. Allen, 614 S.E. 2d 361, 366 (N.C. Ct. App. 2005), holding that an excited utterance made in response to an officer=s questions is testimonial and inadmissible under Crawford. ABased on the particular circumstances of a case, statements that could be characterized as excited utterances may or may not be testimonial@ Id., at n. 2. And unlike the mother/victim in Mackey, Ruiz did not call or seek out police. Rather,

[2] As recently noticed by Petitioner, these cases have been granted certiorari review by the United States Supreme Court.

the police were called by a third party and Ruiz responded to their questions.

In Demons v. State, 595 S.E. 2d 76 (Ga. 2004), the excited utterance of the victim that his ex-boyfriend wanted to kill him, as the ex-boyfriend was banging on hotel room doors looking for him, did not violate Crawford because it was deemed not testimonial. Similarly, in State v. Orndorff, 95 P. 3d 406 (Wash. Ct. App. 2004), the excited utterance was made to another witness, not police. Indeed, statements made to someone other than an investigating officer lack the necessary testimonial intent or knowledge that they will be used for prosecution. In contrast, Ruiz' statement was made to a responding officer.

In Leavitt v. Arave, 371 F. 3d 663 (9th Cir. 2004), the victim=s statements were made the night before her murder, offering her suspicions about the identity of a prowler. The statements were deemed not testimonial because the victim had no way of knowing her statements would be used in a prosecution for her own murder. Similarly, in State v. Barnes, 2004 Me. LEXIS 124 (Me. 2004), the victim=s statements were made to police well before she could know they would be used to prosecute her own murderer. Similarly, in Wilson v. State, 151 S.W. 3d 694 (Tex. App. 2004), the excited utterance named the defendant as the

driver of a car connected with an earlier robbery, but offered no evidence of whether the defendant actually committed the robbery for which he was ultimately convicted. In contrast, Ruiz's statement named Respondent as the perpetrator of the crime for which he was convicted (possession of a firearm by a convicted felon). Indeed, Ruiz's statement was the only evidence that any crime was committed.

Additionally, the cases cited by Petitioner place too much emphasis on the fact that an excited utterance is "reliable" when finding those statements to be "not testimonial." As the First District held in Lopez:

> In our view, the findings necessary to support a conclusion that a statement was an excited utterance do not conflict with those that are necessary to support a conclusion that it was testimonial. A statement made in the excitement of a startling event is likely to be more reliable given the fact that the declarant had little time to make up a story. But, under Crawford, reliability has no bearing on the question of whether a statement was testimonial. Some testimonial statements are reliable and others are not.

Lopez, at 699. Indeed, Crawford held that the reliability of hearsay statements is no longer a reasonable basis to ensure a defendant's right of confrontation, receding from Ohio v. Roberts, 448 U.S. 56 (1980):

> Where testimonial statements are involved, we do not think the Framers

> meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of reliability. Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. [cite omitted]
>
> 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.

Crawford v. Washington, 124 S.Ct. at 1370 (2004). Hence, an excited utterance which is made under circumstances in which a declarant should reasonably expect that it will be used in litigation is a testimonial statement in violation

of the right to confrontation, without regard to its reliability.

In this case, Ruiz did not call the police for help, but was approached by the police about a call made by someone else. See, State v. Wright, 701 N.W.2d 802 (Minn. 2005)(fact that declarant called the police made statement more likely to be deemed non-testimonial). Ruiz' statement was made in response to questioning by police officers about a reported crime, circumstances under which Ruiz surely knew his statement would be used to incriminate Respondent. See, U.S. v. Hinton, 423 F.3d 355 (3d Cir. 2005)(excited utterance made to responding police officers was testimonial and inadmissible under Crawford).

Finally, there was no other evidence that a crime had been committed or that Respondent was the person who committed it. Because Respondent could not have been convicted but for Ruiz' statement, the statement bears an increased testimonial character. Consequently, admitting Ruiz' statement violated Respondent:s right to confront his accuser under Article 1, Section 16 of the Florida Constitution; and Amendments VI & XIV of the United States Constitution, and his resulting conviction should be reversed.

CONCLUSION

Based on the foregoing analysis, caselaw and other citations of authority, Respondent requests this Honorable Court to affirm the decision of the First District Court of Appeal, and quash the decision of the Fifth District Court of Appeal in Blanton.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Felicia Wilcox, Assistant Attorney General, by U.S. mail to The Capitol, Criminal Appeals Division, PL01, Tallahassee, FL 32399-1050; Mr. Moroni Lopez, Released September 21, 2005 with no forwarding address, on this ____ day of November, 2005.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font require- ments of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

JAMIE SPIVEY 0850901
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
301 S. MONROE ST. Suite 401
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR appellant