IN THE SUPREME COURT OF FLORIDA

SERGIO CORONA,

Petitioner,

v.

CASE NO: SC06-1054

STATE OF FLORIDA,

Respondent.

* *

APPEAL FROM THE DISTRICT COURT
FIFTH DISTRICT, FLORIDA

* *

MR. CORONA'S AMENDED BRIEF ON MERITS

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THE RECORD

In this brief, the Petitioner, Sergio Corona, will be referred to as "Mr. Corona" or "Corona." The Respondent, State of Florida, will be referred to as the "state" or the "prosecution."

The (original) record prepared by the Clerk of the Circuit Court is six volumes consisting of court orders, pleadings, and hearing transcripts.[1] References to the record will be designated by the letter "R," followed by the volume number and a slash, followed by the appropriate page number, i.e., (R1/1). The trial transcripts (labeled Volumes I and II) will be designated by the letter "T," followed by the volume number and a slash, followed by the appropriate page number, i.e., (TI/1).

After the United States Supreme Court remanded, the Fifth District Court of Appeal required supplemental briefing. After all supplemental briefs were filed, the state requested that a supplemental record be created. See page 19, infra. References to that supplemental record will be designated by the letters "SR," followed by the volume number and a slash, followed by the page number, i.e., (SRI/1).

The second supplemental record created by the Clerk of the Fifth District Court of Appeal and this Court contains the pleadings and orders filed on

[1]The Fifth District Court Clerk returned the record to the Circuit Court Clerk where it remains.

appeal--but does not include the pleadings filed with the Supreme Court of the United States.

APPELLATE PROCEDURE

Mr. Corona was convicted and his life sentence was affirmed (via PCA) by the Fifth District Court of Appeal. *Corona v. State*, 853 So.2d 430 (Fla. 5th DCA 2003). Rehearing was denied, 2003 Fla.App.LEXIS 14256 on August 22, 2003.

Mr. Corona petitioned the Supreme Court of the United States for relief and the district court's affirmance was vacated. *Corona v. Florida*, 541 U.S. 930 (2004).

Additional briefing was ordered by the Court of Appeal, including on the issue of preservation. This was an interesting turn of events since the state readily and repeatedly conceded (both before the District Court of Appeal and the Supreme Court) that the Sixth Amendment issue was preserved. In fact, the hearsay testimony was repeatedly objected to (on confrontation grounds) at pre-trial and during the trial itself--to the point of annoying the trial judge.

Mr. Corona, via motion, is requesting that it be forwarded to this Court.

Nonetheless, the District Court ruled against Mr. Corona. The district court found that the Sixth Amendment claim was not preserved, and if preserved, Amy and Victoria were constitutionally unavailable and their pretrial depositions (that were not part of the record and not considered during the trial) constituted prior cross examination under "*Crawford*."[2] *Corona v. State*, 929 So.2d 588 (Fla. 5th DCA 2006), attached hereto as **Appendix A**.

Mr. Corona petitioned this court for review. The court ordered briefing on preservation and after reviewing the parties' submissions, accepted the case for review on the merits. *Corona v. State*, 2009 Fla. LEXIS 1598 (Fla. September 23, 2009).

TRIAL COURT PROCEDURE

Mr. Corona was charged with capital sexual battery (R5/163). At the time of his arrest in January 2002 he (allegedly) made statements to two Illinois police officers. Five months afterwards these statements were memorialized, reduced to writing, and disclosed to defense counsel (RI/6-50). On June 18, 2002, a discovery violation hearing was held based on this untimely disclosure. The court denied the defense motion to exclude the police officers' testimony (R2/56).

The state requested a continuance because it did not have Mr. Corona's wife and child under subpoena. The state proffered that Mrs. Corona was not

[2] *Crawford v. Washington*, 541 U.S. 36 (2004)

"cooperating" and would not appear (R2/52, 54). On July 19, 2002, the court granted the state's request to enter an interstate summons under Section 942.03, Florida Statutes (R3/64; R6/208-213).

On July 23, 2002, the defense filed a notice of expiration of speedy trial (R4/67). The state requested that the notice be recalled for a hearing on July 26. (R4/68). Under the state's interpretation that would give them additional time to try Mr. Corona before speedy trial lapsed (R4/68). Over objection, the hearing was continued (R4/68-69).

A (speedy trial) hearing was again held on July 26 (R5/77). The court set the case for trial on August 5, 2002 commenting that it may have to dismiss (under Rule 3.191, Fla.R.Crim.P.) if the state failed to procure its witnesses (R5/74).

The state's witnesses were not present on August 5. Instead, the prosecution filed an amended motion requesting that child hearsay be admitted (R6/224). Because the amended notice was untimely (it was only given to Mr. Corona that morning), the defense objected under Section 90.803(23), Florida Statutes (ten-day notice prior to trial requirement) (TI/4). Nonetheless, the state was permitted to proceed without its witnesses, relying upon hearsay as substantive evidence. Mr. Corona was convicted and sentenced to life imprisonment (R6/253-254).

TRIAL TESTIMONY

1. Elizabeth Salgado-Valenti

The state's first witness was Ms. Valenti, an investigator with the Cook County State Attorney's Office in Chicago. Although the court acknowledged that her testimony was tangential and irrelevant (to the truth of the allegations), it nonetheless overruled Mr. Corona's objection (TI/159-160).

Valenti testified that on July 31, 2002 (five days before trial) she was instructed to arrest Victoria and Amy Corona in Illinois to insure their appearance at trial in Florida (TI/161). She and her partner went to Mrs. Corona's last known address on numerous occasions and to her mother's home. They went to a building owned by Mr. Corona and left their cards with the tenants. They did not locate Victoria and Amy Corona.

Valenti spoke with Mrs. Corona on the telephone. She stated that Victoria was uncooperative--she said she was busy and was on her way to the Home Depot (TI/162-163). The police thought they might meet her at the Home Depot but this attempt failed. Later they called Mrs. Corona on her cellular telephone and she hung up. Valenti tried to meet with her by pretending to be a prospective tenant at an apartment Victoria Corona was renting. She was unsuccessful. Valenti could not definitively say that Victoria did not want to testify, and she was unaware of past problems the prosecution may have had with her (TI/169-170). Valenti thought that Victoria was screening her telephone calls.

Certified copies of the warrants issued for Victoria's and Amy's arrests were moved into evidence (TI/165).

2. Edward Lacey

Mr. Lacey is a deputy with the Orange County Sheriff's Office (TII/176). On January 25, 2002, he responded to a timeshare resort at 70101 Orange Gate Drive (TII/177). A woman, on the ground, was crying hysterically and spoke in Spanish (TII/177). Deputy Lacey understands very little Spanish. He did not speak with anyone (at the scene) because everyone spoke Spanish (TII/182). Therefore, Jocelyn Avilas, a Spanish-speaking deputy was called to the scene. A detective from the Sex Abuse Child Victims Unit was notified but did not respond (TII/180, 182).

Deputy Lacey did not take Amy Corona's clothing as evidence, nor did he collect any (DNA) samples (TII/181). He did not take Mrs. Corona and her daughter to the police station, the hospital, or the sex crisis' unit. No video or audio taped statements were obtained (TII/181).

3. Jocelyn Avilas

Jocelyn Avilas is also an Orange County deputy (TII/183). On January 25, 2002, she came into contact with a hysterical, Spanish-speaking female, Victoria Corona. Deputy Avilas testified that Mrs. Corona was saying please go get him, you need to go get him (TII/185). Corona's objection was overruled.

Deputy Avilas went to an upstairs apartment and found a little girl in the master bedroom (TII/187). The girl, Amy Corona, was wearing blue shorts. Deputy Avilas asked her about her shorts--would she be lying or speaking the truth if she said that the shorts were black or white?

Again, over objection, Deputy Avilas testified to what Amy told her. She spoke with Amy in Spanish. Amy said she was ten-and-a-half or eleven years old (TII/190). She said that she was on her bed painting and watching television. Her father put his hands on her shoulder and told her that she was pretty. He laid her down on the bed and pulled her panties to the side and put his mouth on her "toto" (TII/191-192). Deputy Avilas recognized this term to mean vagina. Amy said her mother came into the room and started screaming, hollering, and hitting her dad (TII/192). The room was a mess with broken glass.

Normally detectives interview a child victim (TII/194-195). Deputy Avilas was trained in general police investigations not sex crimes or child abuse (TII/195-196). Amy's statement was not recorded, video or audio. She was not taken to the police department or the hospital. Her clothes were not taken as evidence, nor was she examined by a nurse or doctor. No (DNA) samples were collected. Deputy Avilas was uncertain if saliva could produce DNA evidence. No follow up was made (TII/198).

The deputy testified that Mrs. Corona did not indicate that she and her

husband experienced any marital problems (TII/202). Again, Corona's objection was overruled.

4. Jerome Maikowski

Mr. Maikowski is a Chicago police officer (TII/205). On January 27, 2002, he assisted a state trooper on a Chicago highway. A van was blocked by a large crowd of people and several vehicles. People in the crowd were yelling at the man in the van--Sergio Corona (TII/207). Maikowski used a Spanish interpreter to speak with Mrs. Corona. They were unable to communicate in English (TII/217, 219-220). Maikowski put Mr. Corona in his squad car and Corona (allegedly) said, "I can't believe I did it. Why did I do it? That's my daughter." (TII/207). Corona made these statements in English and Maikowski understood him (TII/209).

After speaking with the people in the crowd, including an older Hispanic woman, Maikowski returned to his squad car, placed Mr. Corona in handcuffs, and read him his *Miranda* rights (TII/208). The *Miranda* warnings were read in English (TII/209). Maikowski transported Mr. Corona to the police station. On the way, Corona kept repeating that he could not believe he did it, that this was his family, and that he could not help himself (TII/212).

Mr. Corona was again read his *Miranda* rights at the police station. Again, the *Miranda* warnings were given in English. Mr. Corona never signed a *Miranda*

waiver form (TII/218). Mr. Corona said that he pulled his daughter's panties to the side and put his mouth on her genital area. After his wife came in, he got up, ran out, and went home (TII/215-216). These statements were never memorialized in any way (TII/216). In other words, no notes were created and the statements were neither taped nor reduced to writing (TII/217-218). The officer testified that he may be paraphrasing that Corona actually used the words "genital area" (TII/221).

5. Sue Ewald

Ms. Ewald is an Illinois state trooper (TII/224). She was called to a disturbance on the highway where she saw a black vehicle blocking a white Chevy van (TII/225). There were approximately ten people yelling and screaming. Trooper Ewald walked over to another officer's car and was provided Mr. Corona's drivers license (TII/227). For safety reasons she decided they should go to the Chicago police station (TII/228). Trooper Ewald spoke to Mrs. Corona at the station but because her English was difficult to understand, Mrs. Corona's sister was asked to translate (TII/229).

Trooper Ewald read Mr. Corona his *Miranda* rights (TII/230-231). Mr. Corona said that he was in the bedroom with his daughter and that he put his mouth on her vagina (TII/233). Ewald prepared a police report but did not indicate in the report that Mr. Corona made any admissions (TII/234). **One**

hundred thirty-six days after the fact (shortly before trial), Ewald created a report referencing Mr. Corona's statements (TII/239-240). Mr. Corona never used the word vagina. The trooper paraphrased his statement, she could not remember word for word what he had told her (TII/240).

6. Sergio Corona (Defense Witness)

Mr. Corona is a United States citizen and as of 2002 had lived in the country twenty years. He was employed in the construction industry (TII/248). His employees spoke Spanish and he has never had schooling in English (TII/267). He lived with his wife, Victoria, daughter, Amy, son, Kevin, and Victoria's cousin. At home, he and his family spoke Spanish. He thinks in Spanish--when asked a question he thinks of the answer in Spanish (TII/250). Victoria Corona disciplines the children (TII/253). Amy is afraid of Victoria.

Before January 25, 2002, the Coronas were having marital problems and they had discussed that he should move out (TII/250). The Coronas had two arguments while on vacation in Orlando (TII/252). One night Mr. Corona slept in his van. In the past (after arguing with his wife), Mr. Corona stayed at a hotel.

In January 2002 Mr. Corona came to Orlando with several members of Mrs. Corona's family. Mr. and Mrs. Corona and their daughter Amy shared a bedroom at the Westgate Resort apartment (TII/252). On January 25 they had been at the swimming pool and arrived back at the apartment at about 11:00 p.m. The adults

were on the patio. Amy was in the bedroom--the one closest to the living room (TII/254). After talking for a while, Mr. Corona went into the bedroom and brushed his teeth. Amy was on the bed in the corner (TII/255). Amy walked over to him, he hugged her with his arm and he was going to give her a kiss goodnight (TII/256). Victoria came in and started screaming and biting him (TII/257). He never put his mouth on his daughter's private parts.

On January 27 (in Chicago) Mr. Corona was pulled over by another car. Victoria Corona came over to his van and began hitting the window and screaming (TII/258-259). The police came and put him in handcuffs. Officer Maikowski never read him his rights (TII/260). While waiting in the police car, Mr. Corona said nothing. On the way to the police station Mr. Corona said that he could not believe he did it or words to that effect. He was referring to leaving his family in Florida (TII/260). He was not able to give the trooper his drivers license because his wife had it (TII/262). Mr. Corona's wife was the only person angry at the highway scene. The other people were walking around trying to calm her (TII/282).

Trooper Ewald never asked him what happened in Florida. He never told them that he put his mouth on his daughter's vagina (TII/263). He does not know the meaning of the term genital area (TII/263). When Mr. Corona was asked what term he uses to refer to the sexual area of a female's body he replied, "private

parts."

STANDARD OF REVIEW

In this case, the *Crawford*-confrontation issue presents a question of law and should be reviewed independently by the Court. See generally, *Hernandez v. State*, 946 So.2d 1270, 1277 (Fla. 2nd DCA 2007). Whether Mr. Corona is entitled to a judgment of acquittal should also be reviewed de novo. *Jackson v. State*, 2009 Fla. LEXIS 1578, *17 (Fla. 2009).

The prosecutorial misconduct claim, if not preserved, should be decided under the test announced in *Ruiz v. State*, 743 So.2d 1 (Fla. 1999).

Motions to suppress are reviewed under a mixed standard of review. Legal issues are reviewed independently. Findings of fact are accorded some deference (competent substantial evidence test), unless the facts are undisputed. *State v. Glatzmayer*, 789 So.2d 297, 301 (Fla. 2001); *Young v. State*, 803 So.2d 880, 882 (Fla. 5th DCA 2002); *State v. Scruggs*, 563 So.2d 717, 719 (Fla. 3rd DCA 1990) [unrefuted testimony].

SUMMARY OF ARGUMENT

This case is highly unusual because of the way in which it was prosecuted. Although Mr. Corona was accused of committing a sexual battery upon Amy Corona (who lives in Illinois), the state never issued a subpoena for her attendance

at trial.[3] Days before trial the state sought to have Amy and her mother taken into custody. Those efforts failed.

Because speedy trial had expired and the state was forced to move forward, it developed a clever but improper theory of prosecution. This began during voir dire. The state spoke to the jury about a parent's duty to defend and protect a child. This theme continued during the state's opening statement and throughout its case--where it told the jury that Mrs. Corona could not be located in Illinois and they should consider her lack of "cooperation" in finding Mr. Corona guilty. In closing the prosecutor argued that Mrs. Corona's and Amy's nonappearance was reflective of Mr. Corona's status as the dominating "power" in the family. This argument was wholly contrived.

The state chose to inflame the jury because it had no (independent) evidence that Mr. Corona committed a crime. See Point Two, Prosecutorial Misconduct, infra at 22. Rather, the state's case rested upon the hearsay statements of Amy and Victoria as parroted by the sheriff's deputy. The admission of these (hearsay) statements violated Mr. Corona's constitutional right to confront his accusers pursuant to the Sixth Amendment.

Under "*Crawford*" Mr. Corona had an absolute right to face his accusers. The two-part exception to this requires that the state establish unavailability and, if

[3]Out-of-state subpoenas may be issued (under the states' reciprocal compact) under Section 942.03, Florida Statutes. See also, Section 92.251, Florida Statutes.

established, prove that Mr. Corona had a prior opportunity to cross examine these witnesses. The term "unavailability" takes on constitutional significance. As pointed to by this Court in *State v. Contreras*, 979 So.2d 896 (Fla. 2008), the Supreme Court has not defined with clarity the meaning of this term. Surely the record here does not meet the standard. The failure to subpoena witnesses (who live 1000 miles away) followed by a request to have the witnesses arrested (five days before trial) is deficient under any definition of "unavailability."

The state has an even greater uphill battle when the second prong of the exception is considered. Mr. Corona had no prior opportunity to cross examine anyone. After this case was remanded by the Supreme Court, the Fifth District Court ordered supplemental briefing under *Crawford*. After all briefs were filed, the state requested that it be allowed to create a record by filing depositions with the trial clerk to be forwarded to the district court to support the state's deposition theory. It cannot be stated strongly enough that this was an abomination of the process and should not have occurred. In any event, depositions do not constitute prior cross examination under *Crawford*. See discussion, Point One, infra.

Without the hearsay statements the state was left solely with the admission attributed to Corona. These statements, standing alone, are insufficient to withstand a motion for judgment of acquittal. As a matter of professionalism the state should concede error.

The case focused upon admissions purportedly made by Mr. Corona when he was arrested in Illinois. Reports documenting these statements materialized out of nowhere--six months after his arrest, shortly before trial.

Although the trial judge never met or heard from Amy Corona, he found the hearsay statements (per the deputy's testimony) inherently reliable. The deputy, who had no background in sexual allegation investigations, spoke with Amy for a few minutes. None of the witnesses at the scene were interviewed, no audio or video taped recordings were made, Amy was not taken to the hospital and no (scientific) evidence was collected.

The state's "evidence" was insufficient to withstand a motion for judgment of acquittal. The case should be remanded with instructions to dismiss.

Two additional issues are presented here. Specifically, the trial court erred in admitting the statements of Mr. Corona without requiring the state to establish that the crime was committed--the *corpus delicti* doctrine, and because Mr. Corona was unlawfully seized in Illinois, the court erred in not suppressing the statements attributed to him.

ARGUMENT

POINT ONE
MR. CORONA'S CONFRONTATION RIGHTS WERE VIOLATED AND BECAUSE THE STATE'S HEARSAY WAS INADMISSIBLE, CORONA IS ENTITLED TO A JUDGMENT OF ACQUITTAL--OR, AT A MINIMUM, A NEW TRIAL

A. INSUFFICIENT EVIDENCE

Purportedly two witnesses, Victoria and Amy Corona, had knowledge that Mr. Corona committed a crime. The problem (a problem of constitutional proportions) is that neither witness appeared and testified against Mr. Corona. That fact should end the debate in this case.

Without evidence to satisfy the reasonable doubt standard, a judgment of acquittal should have been entered.[4] See *In re: Winship*, 397 U.S. 358 (1970); Fifth and Fourteenth Amendments, United States Constitution.

The evidence against Corona was far more scanty than that which this court found (constitutionally) insufficient in *Baugh v. State*, 961 So.2d 198 (Fla. 2007). There, the child made an extremely detailed factual accounting that she was made to perform fellatio on Raymond Baugh. Baugh also told the child's mother (his girlfriend) that he in fact wanted the child to perform fellatio on him and that after she watched, Baugh would have sex with her (the girlfriend). An inmate testified that he overheard Baugh making statements to female prison visitors that he had to get the child to recant otherwise he would go to prison for life. A family friend testified that the girl reiterated that the sexual acts occurred and that her mother was pressuring her to change her story. The child testified at trial but recanted her allegations. This Court remanded the case for the entry of a judgment of acquittal.

[4]Defense counsel moved for a JOA arguing the insufficiency of the evidence (TII/243).

Compare the facts in *Baugh* to those in *Corona*. There was no recantation because Amy never testified. There was no physical evidence and no corroborating evidence of any kind. The Corona jury merely heard statements[5] purportedly made by Mr. Corona in Illinois–statements which magically surfaced shortly before trial. Corona, like Baugh, is entitled to a judgment of acquittal.

In any event, an admission or confession standing alone is insufficient to sustain a criminal charge. See *Geiger v. State*, 907 So.2d 668, 675-676 (Fla. 2nd DCA 2005). See also, *B.P. v. State*, 815 So.2d 728 (Fla. 5th DCA 2002) [where confession was only evidence that offense was committed, it was insufficient to sustain conviction for sexual offense]; *Chaparro v. State*, 873 So.2d 631 (Fla. 2nd DCA 2004). Therefore, without the inadmissible hearsay, the statements attributed to Corona, standing alone, are insufficient to establish the elements of the offense.

B. RIGHT TO CONFRONTATION

The Sixth Amendment strictly requires that a defendant be allowed to face and confront his accusers. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531-2532 (2009); *Giles v. California*, 128 S.Ct. 2678 (2008); *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

The face-to-face confrontation requirement afforded all criminal defendants

[5]The defense presented a two-fold challenge to the admissibility of these statements-- the *corpus delecti* doctrine and that they were the result of an unconstitutional seizure. See Points

does include a two-prong exception. In Corona's case, the state cannot establish either prong much less both. The state failed to establish that the witnesses (Victoria and Amy Corona) were ("constitutionally") unavailable or that Mr. Corona had a prior opportunity to cross examine them. *Melendez-Diaz*, 129 S.Ct. at 2531; *Crawford*, 541 U.S. at 54.

By any definition these witnesses were not "unavailable" for trial. An attorney cannot risk waiting five days before trial to issue subpoenas, and the inability to serve subpoenas on short notice does not constitute unavailability. The term unavailability cannot be equated with a lack of due diligence or apathy on the part of the state in securing the attendance of its witnesses. *Lawrence v. State*, 691 So.2d 1068, 1077 (Fla. 1997). If inaction or negligence on the part of an attorney supported unavailability (under *Crawford*), the first prong of the exception would be rendered nugatory--it would be too easily satisfied. The precedent and import of *Crawford* would be meaningless.

It is also significant that the requirements of unavailability be gauged in light of the Sixth Amendment as written and the historical underpinnings of *Crawford*. Clearly, in reading *Crawford*, the state's actions in *Corona* did not satisfy this requirement. In writing for the court Justice Scalia made a point to note that historically, strict rules governed unavailability.

Three and Four discussed infra.

> Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's* case, 6 How.St.Tr. 769, 770-771 (H.L. 1666); 2 Hale, supra at 284; 1 Stephen, supra at 358.

Crawford, 541 U.S. at 45.

Here, there was no evidence that Victoria or Amy Corona were mentally or physically incapacitated, that they were dead, or that Mr. Corona prevented their attendance at trial through improper motive. See discussion in *Giles v. California*, 128 S.Ct. 2678 (2008). Therefore, these witnesses were not constitutionally "unavailable" within the meaning of the Sixth Amendment and *Crawford*.

Of equal import is the second prong--the prior opportunity to cross examine a witness. In reading the history of this case one might conclude that the issue of "depositions" was an integral aspect of the trial court proceedings against Corona. The reader would be wrong in so concluding. The state manufactured and created this issue well after the fact.

Neither party used nor filed the depositions of Amy or Victoria for use at trial. The depositions issue was never brought up during the trial. Instead, Mr. Corona was convicted, his case was appealed, and the district court entered a PCA. Long after the case was remanded by the Supreme Court, the state decided to create a record on this issue. In fact, <u>all</u> supplemental briefs were filed in the second round of briefing at the district court before the state's motion to

supplement (a misnomer) was filed. Although the depositions were not part of the trial court record, the district court granted the state's motion and accepted the depositions of Amy and Victoria as record evidence against Mr. Corona.

This attorney strenuously argued against the creation of a new record. This was not a supplement to an existing record. It was a new record created on appeal. The Attorney General's office simply contacted the State Attorney's office to have the depositions filed with the clerk of the trial court more than two years after Mr. Corona's conviction. Clearly this was not this court's intent when it created the rule to allow a supplemental record.

> While the rule grants the parties an opportunity to supplement the record by providing existing materials that have not yet been submitted, or by allowing the parties to reconstruct a material part of the record by stipulation, **it should not be construed to allow a party to avoid the obligation to make a record in the first instance.** The committee notes specifically state that the rule is not intended "to cure inadequacies in the record that result from the failure of a party to properly make a record during the proceedings in the lower tribunal."

PHILIP J. PADAVANO, *FLORIDA APPELLATE PRACTICE,* §13.9 (2004).[6]

The district court violated basic notions of due process by permitting this practice. Fifth and Fourteenth Amendments, United States Constitution.

Although the pleadings filed relative to the state's request to supplement (including Mr. Corona's objections thereto) are recorded on the district court's docket sheet, they were not provided to this Court pursuant to its order to transmit

[6]All emphasis in this brief has been added unless otherwise noted.

the record. Therefore, a copy of Mr. Corona's response in opposition to the state's motion to supplement (as well as his addendum thereto) is attached here as Composite **Appendix B**.

But, even if this process (of creating a record after the fact) was permissible, it has since been settled that a deposition cannot act as a surrogate or substitute for cross examination under the Sixth Amendment.[7] See *State v. Contreras*, 979 So.2d 896, 908-911 (Fla. 2008); *State v. Lopez*, 974 So.2d 340, 347-350 (Fla. 2008).

Before advancing to Mr. Corona's next argument a final point must be made. Mr. Corona's conviction stemmed from the illegal and unconstitutional use of Section 90.803(23), Florida Statutes. If any case illustrates the arbitrariness and misuse of that statute, this is it. Here the trial court made a finding that the hearsay statements (from a minor child) were reliable without any knowledge of the child herself. At its core it was hearsay upon hearsay. In other words, what Amy and Victoria said to a road patrol deputy was then repeated (upon recollection) to the trial judge. The issue becomes more exacerbated knowing that the trial judge found that the witnesses were unavailable despite the state's transparent and wilfully inept attempts to serve the witnesses. The due process

[7]As noted in Mr. Corona's response in opposition to the motion to supplement the record and in the depositions themselves, Corona not only did not attend these depositions but the Fifth District Court of Appeal reversed a trial court order which allowed a defendant to attend a deposition (SRI/290). *State v. Talbert*, 836 So.2d 1077 (Fla. 5th DCA 2003).

abuse was compounded when the trial court allowed the state to present testimony from the Chicago police officer who sought to serve the Coronas. See further discussion in Point II, supra.

Mr. Corona has been in prison for more than seven years. Surprisingly, Section 90.803(23) is still codified. Mr. Corona respectfully requests that the court declare the statute unconstitutional as a violation of *Crawford* and the Sixth Amendment. Its time has passed.

A reading of *Crawford* undermines the validity of statutes such as Section 90.803(23). The following quotes illustrate the high court's predisposition.

> One case arguably in contention with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, 502 U.S. 346, 116 L.Ed.2D 848, 112 S.Ct. 736 (1992), which involved, inter alia, statements of a child victim to an investigating police officer admitted as spontaneous declarations. [Citation omitted]. **It is questionable** whether testimonial statements would ever had been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all,...

Crawford, 541 U.S. at 58, n. 8.

* * * *

> In *White*, we considered the first proposal and rejected it. [Citation omitted]. **Although our analysis in this case casts doubt on that holding,** we need not definitively resolve whether it survives our decision today,...

Crawford, 541 U.S. at 61.

Section 90.803(23) is founded upon *White v. Illinois*, 502 U.S. 346 (1992)

and findings of "reliability." Based upon *Crawford* that foundation has crumbled.

In fact, in *State v. Hosty*, 944 So.2d 255, 260-261 (Fla. 2006) this court seemed to indicate that Section 90.803(23) was unconstitutional, at least as applied to testimonial statements. When the court invalidated §90.803(24), as applied to testimonial statements, it noted that §90.803(23) was nearly identical.

The constitutional validity or invalidity of Section 90.803(23) is raised as an alternative ground in support of a new trial as opposed to the JOA and independent *Crawford* arguments discussed above. Nonetheless, it is respectfully suggested that allowing this statute to remain on the books does a disservice to the efficient administration of justice. Rather than attempting to rework or rewrite the statute by directing the trial courts to only apply it to non-testimonial statements is confusing--at best. If the statute is to survive, it should be rewritten by the legislature.

POINT TWO
PROSECUTORIAL MISCONDUCT

The state devised a clever but manipulative theory of prosecution. The theme was simple--Mrs. Corona was unwilling to "cooperate" in the prosecution of her husband and was dodging the police to prevent her daughter from testifying. In assuming the role of a surrogate parent, the state's job was to insure that justice was done--that is, insuring Mr. Corona's conviction.

This theory was impermissible for a number of reasons. It was nothing more than a rhetorical and inflammatory appeal to the bias and passion of the jury. It was entirely irrelevant; it acted to shift the burden of proof; it was based upon conjecture; there was no (admissible) evidence supporting it; and it involved improper bolstering, vouching, and opinion testimony on the part of the prosecutor. See Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, the prosecutor argued that this information was material in finding Mr. Corona guilty.

The prosecutor set the stage by asking the venire panel about a parent's role in protecting children.

> Ms. Davis: Ms. Torres, let me ask you a question. What do you think the duty of a parent is to protect their child? Or **how far should a parent go to protect their child?**
>
> Juror Torres: As far as they can.
>
> * * * *
>
> Ms. Davis: Anyone disagree with that, that it's the duty of a parent to protect their child **no matter who hurts them?**

(TI/124).

The state followed this question by asking the venire how far they thought the state should go in seeking justice.

> Ms. Davis: Ms. Wilmeth? How far do you think the state should go to ensure that justice is done in a case?
>
> Juror Wilmeth: As far as they can.

* * * *

Ms. Davis: Ms. Tanner, how far do you think the state should go to ensure justice is done in a case?

Juror Tanner: As far as, legally, as they possibly can.

(TI/125).

The state then created a "strawman"--to knock down.[8] The strawman was Mrs. Corona--the absentee parent who refused to protect her child at the expense of justice. As the theory went, Mrs. Corona was dodging the police because she was a wife under the domination and control of her husband. The rhetoric that followed was grossly inflammatory and permeated every aspect of the trial beginning with voir dire, continuing in opening statement, through state testimony, and during closing argument. It was calculated and purposely done from the outset of this trial.

The state made the following comments in opening.

> In this case, this case is going to be a little unusual, ladies and gentlemen of the jury, because what you're going to hear, you're going to hear the words Amy Corona but **you are not going to see Amy Corona because Mrs. Corona has refused to participate in this case.**
>
> The state will present evidence as to what we discuss, what steps were taken to secure her participation. But it has failed.

[8]Strawman arguments have been repeatedly condemned. *Morgan v. State*, 700 So.2d 29 (Fla. 2nd DCA 1997); *Lane v. State*, 459 So.2d 1145 (Fla. 3rd DCA 1984); *Bayshore v. State*, 437 So.2d 198 (Fla. 3rd DCA 1983).

(TI/153).

* * * *

> And she will tell you about the efforts they have made in the last few days and weeks, or so, to get Mrs. Corona to come down here to testify in this case, **and bring her child**. What you'll hear, she refused to cooperate, and was not cooperating.

(TI/158).

This theory was crucial to the state's case because its first witness was an investigator from Chicago who recounted her efforts to have Mrs. Corona and her daughter arrested (TI/160-166). The state went so far as to move the (so-called) arrest paperwork into evidence. The defense objected and the court, while acknowledging that the testimony was tangential and irrelevant nonetheless overruled the objection.

> It's very clear what the witness is going to testify to.
> **Acknowledged, it's really tangential to any of the allegations;**
> certainly goes to the effort to find the victim not as to the substantive truth of the allegations made.
>
> So I'm going to deny, overrule the objection.

(TI/159-160).

In closing, the prosecutor engaged in a rhetorical tirade--the purpose of which was to convince the jury that it must protect Amy Corona from her parents who were unwilling to protect their child. Neither the defense nor the court voiced an objection.[9]

[9]Even absent an objection from the defense, the court has an obligation to step in when a

In a case as tenuous as this, the argument strikes at the heart of the verdict.

I admit to you that Mrs. Corona is not here, nor Amy. And of course it's logical to assume that if you can't get the mother, you can't get Amy to come. She's refused to come[10]. We've done what we could to get her here.

In the jury selection I asked did you have any problem with the state doing what we needed to do to ensure that justice is done. And I believe the jurors all said that anything that the state can legally do is fine. We did everything legally we could do to get her here. We put a warrant out, we had investigators looking for her. She spoke to them and refused to cooperate.

Think about that, why she refused to cooperate? Because Victoria did make the point he is her, her sole support; he has all the money, he has all the assets, he has all the property, all the cars are in his name. He has everything. She is a housewife, she takes care of the kids. Who has, where is the equal there? There is no equal there, he's got it. **He's got all the power.**

If you convict him of this, all of the sudden her sole support is gone. The person who owns the house is gone, the person who does the work is gone, the person whose name the car is in is gone.

So think about that, think about why it is she isn't here. Because she's--it's important, the fact that he is the person with the power, he's the one who supports her. She's the one that takes care of her kids, he's the one that makes sure she does not have to work and that she can stay home and be a mother to the kids. If he's not there, that support is gone. That support is gone. **So there were reasons why she <u>probably</u> didn't come here.**

---

defendant's due process rights are violated. *D'Ambrosio v. State*, 736 So.2d 44 (Fla. 5th DCA 1999).

[10]The question of a witness's unavailability is a legal issue to be decided by a judge. It is not a question of fact to be decided by the jury nor is it an element of the offense. The Chicago investigator should have never been permitted to testify. Moreover, these comments were patently improper and should not have been made by an experienced prosecutor such as the one here--a prosecutor assigned to a specialized unit, the Sex Crimes Unit.

> **You can take into consideration** the fact that he's the sole support and the person who has all the assets in this case.

(TII/316-317).

A few pages later in the transcript the prosecutor repeats the theme--convict Mr. Corona because he has the power and that was "probably" why Mrs. Corona did not appear and why she was not protecting her daughter.

> Remember, ladies and gentlemen, that we did everything we could to get her here.

(TI/320).

> There is the fact that yes, Mrs. Corona needs Mr. Corona; that he's the one that has the power. And when you have the power you do things that normally you won't do. For example, putting your mouth on your daughter while mom is right out the door.

(TII/321).

Defense counsel objected to the admission of the Chicago investigator's testimony but did not object to the other statements in voir dire, opening or closing. Therefore, the question arises, was the issue adequately preserved or, in the alternative, did it constitute fundamental error? In considering whether it constitutes fundamental error, which has been defined as (among other things) an error that reaches the heart of the verdict, the court can consider the cumulative effect of the error with the other errors in the case. *Fuller v. State*, 540 So.2d 182, 184, n. 3 (Fla. 5th DCA 1989) [state's improper argument constituted fundamental error].

Over the last decade there have been a great number of Florida cases reversed based upon improper tactics employed by prosecutors--tactics deemed fundamental error. *Ruiz v. State*, 743 So.2d 1 (Fla. 1999); *Gore v. State*, 719 So.2d 1197 (Fla. 1998); *Fullmer v. State*, 790 So.2d 480 (Fla. 5th DCA 2001); *Caraballo v. State*, 762 So.2d 542 (Fla. 5th DCA 2000); *D'Ambrosio v, State*, 736 So.2d 44 (Fla. 5th DCA 1999); *Henry v. State*, 743 So.2d 52 (Fla. 5th DCA 1999); *Freeman v. State*, 717 So.2d 105 (Fla. 5th DCA 1998); *Boyer v. State*, 713 So.2d 1133 (Fla. 5th DCA 1998). See also, *Berger v. United States*, 295 U.S. 78 (1935); *McKeown v. State*, 16 So.3d 247 (Fla. 4th DCA 2009) [defense did not open door to testimony since prosecutor elicited testimony and presented theory first]; *Williams v. State*, 10 So.3d 218, 220 (Fla. 3rd DCA 2009) [excellent discussion from Judge Ramirez in concurrence]; Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The prosecutor was keenly aware that the case against Mr. Corona was tenuous. Thus, she resorted to improper tactics. The creation of the strawman and the argument that the prosecutor was there to protect Amy Corona and seek justice was a deliberate attempt to inflame the jury and convict Mr. Corona based upon pathos rather than the rule of law. *Skanes v. State*, 821 So.2d 1102 (Fla. 5th DCA 2002); *Tindal v. State*, 803 So.2d 806 (Fla. 4th DCA 2001) [argument without evidentiary foundation as to why a witness failed to testify improper]; *State v.*

Cutler, 785 So.2d 1288 (5th DCA 2001); *Adams v. State*, 585 So.2d 1092 (Fla. 3rd DCA 1991) [facts not in evidence or reasonably inferred therefrom].

An additional tactic the prosecutor employed merits reversal. It is well-established that it is improper to ask a witness if another witness is a liar.

> During cross-examination of a key defense witness, the prosecutor skillfully established the differences between the witnesses testimony and that of earlier state witnesses. Up to this point, the cross-examination was perfectly legitimate. Then, over defense objection, the prosecutor asked the witness whether each of the earlier witnesses had been lying. This effort to isolate and thereby discredit the witness is improper for a number of reasons. It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. (Citation omitted). Thus, it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness. (Citation omitted). Moreover, the fact that two witnesses disagree does not necessarily establish that one is lying. Lying is the making of a false statement with intent to deceive. Absent some evidence showing that the witness is privy to the thought processes of the other, the first witness is not competent to pass on the other's state of mind.

Boatwright v. State, 452 So.2d 666, 668 (Fla. 4th DCA 1984); *Acosta v. State*, 798 So.2d 809 (Fla. 4th DCA 2001); *Page v. State*, 733 So.2d 1079 (Fla. 4th DCA 1999); *McKinney v. State*, 579 So.2d 393 (Fla. 3rd DCA 1991); *Whitfield v. State*, 549 So.2d 1202 (Fla. 3rd DCA 1989).

In direct examination, Mr. Corona was asked if the police officers were lying about whether he made certain statements to them (TII/264). Although the prosecutor did not initiate this line of questioning, she picked up on it and

reinforced it in cross examination. The court overruled the defense attorney's objection on speculation grounds (TII/285). The following exchange occurred.

> Ms. Davis: Let me ask it again. When the officer said you said I can't believe I did that to my daughter, they're making that up, correct? Is that what you're telling this jury today?
>
> Mr. Corona: Yes.

(TII/285).

* * * *

> Ms. Davis: And when Officer Maikowski says you said those things, he's also lying, correct?
>
> Mr. Corona: They don't say the truth.
>
> Ms. Davis: Everybody's lying but you, correct?
>
> Mr. Corona: Yes.

(TII/288).

The prosecutor also incorporated this issue into her closing argument.

> He wants you to believe that the police officers are making all of this up just because. He wants you to believe that this officer Maikowski is making all of this up just because. That the only person in here telling the truth is him, the one with the biggest interest with what happens in this case, the one what wants to find him not guilty.

(TII/318).

Although it was error for defense counsel to ask Mr. Corona this same type of question, the prosecutor's conduct was equally improper.

Finally, the prosecutor exacerbated the issue by arguing that the issue in the case was whether Mr. Corona was telling the truth or whether Amy Corona (who did not testify) was telling the truth--through her hearsay statements (TII/309). This is a misstatement of the law--the question is not whether the jury believes one witness over another, but whether the case as a whole has been proven beyond a reasonable doubt. See *Clewis v. State*, 605 So.2d 974 (Fla. 3rd DCA 1992); *Rodriguez v. State*, 493 So.2d 1067 (Fla. 3rd DCA 1986).

Based upon these grounds, Mr. Corona is entitled to a new trial. See Fifth and Fourteenth Amendments to the United States Constitution.

POINT THREE
CORONA'S STATEMENTS WERE INADMISSIBLE BECAUSE THE STATE FAILED TO SATISFY THE *CORPUS DELICTI* DOCTRINE OR SECTION 92.565, FLORIDA STATUTES

At the pretrial hearing on the admission of the hearsay statements defense counsel objected that Mr. Corona's statements could not be admitted unless the state first proved *corpus delicti*. *Burks v. State*, 613 So.2d 441 (Fla. 1993). Once this *corpus* objection was made, it was incumbent upon the court to conduct a hearing requiring the state to establish that the elements of the offense could be proven without Mr. Corona's statements or, in the alternative, to conduct a hearing as required under Section 92.565, Florida Statutes. *Peterson v. State*, 810 So.2d 1095 (Fla. 5th DCA 2002). Here, the court conducted neither a hearing to

establish *corpus delicti*, nor a hearing to determine compliance with the statute.

Under the circumstances, the statements should have been excluded and the charges dismissed. *B.P. v. State*, 815 So.2d 728 (Fla. 5th DCA 2002) [where confession was only evidence that offense was committed, it was insufficient to sustain conviction for sexual offense]; *Chaparro v. State*, 873 So.2d 631 (Fla. 2nd DCA 2004).

POINT FOUR
THE LOWER COURT ERRONEOUSLY DENIED MR. CORONA'S MOTION TO SUPPRESS

A. FACTS

On June 19, 2002, an evidentiary hearing was held on Mr. Corona's motion to suppress (R5/77, 179-184). In his motion, Mr. Corona requested that the court find that there was no probable cause to take him into custody in Illinois, therefore, any evidence derived subsequent to this event was inadmissible, e.g., Mr. Corona's statements (R5/179-184). Fourth, Fifth and Fourteenth Amendments, United States Constitution.

Taking us back to the incident in Chicago, Officer Maikowski came into contact with Mr. Corona on January 27, 2002 (R5/83). There were approximately four vehicles and a large crowd of people on the side of the highway--some were yelling and some were crying, trying to get at a man in a van (R5/84). Maikowski took Mr. Corona out of his vehicle and put him in the back of his squad car

(R5/85). While there Corona said I can't believe I did it, why did I do it? (R5/85). Maikowski parked his car and exited the vehicle, leaving Mr. Corona in the car (R5/86). He determined that the people were angry at Mr. Corona based upon the allegation he committed a sexual assault in Florida (R5/87). After learning this information, Maikowski went back to his squad car and placed handcuffs on Corona (R5/87). He read Corona *Miranda* warnings (R5/88). He did not question Corona at that time (R5/90). He transported Corona to the police department. While at the police department (and after *Miranda*) Corona made a number of statements (R5/96).

When Maikowski first arrived at the highway scene, Corona's van was blocked by a sports utility vehicle and there was no way Corona could have driven away. At that point the officer took control of Corona and put him in the back of his squad car. Although the officer (at first) contended that Corona was not in custody, he conceded that Corona was not free to leave because he would have been unable to open the door of the squad car.

Q. So once you put him in your squad car, would he have been free to leave at that point?

A. He would not have been able to open up the door himself.

Q. Okay. Would he have been free to leave? If he had said, thank you, I don't need your protection, I want to go now, would he have been able to leave?

A. I would have wanted to find out what was going down on the scene.

Q. Okay. So he was not free to leave at that point; is that right?

A. Not at that point. Once he's put in the squad car, I'm going to ask questions. I'm just not going to break up a fight and say, okay, you can leave, I don't want to know what happened.

(R5/98).

Q. Okay. Again, my question is: When you put him in the back of your squad car, the very first time you stuck him there, was he free to leave, yes or no?

A. No.

(R5/98-99).

In fact, prior to putting Corona in the back of the squad car, Corona was told, "Sir, come with me, come on over here." (R5/100).

When Trooper Ewald arrived on the scene, Corona was already in the back of the squad car (R5/115). After making contact with and speaking to the people at the scene, Ewald approached Corona in the squad car and asked for his identification (R5/117). She took his drivers license and kept it (R5/118). Ewald agreed that anytime someone is in the back of a police car, they are not free to leave (R5/129). Corona could not have exited the vehicle (R5/130). He was in custody approximately two hours before she read him his *Miranda* rights at the police station (R5/130).

After hearing argument the court denied Mr. Corona's motion (R6/191-203).

B. **LAW**

The trial court's ruling was erroneous for two principal reasons. First, there was no legal basis for Officer Maikowski to take Mr. Corona into custody and place him in a locked squad car. The law is static that an arrest without probable cause invalidates the seizure of evidence acquired thereafter. Second, the Illinois police did not have probable cause nor jurisdiction or authority to arrest Mr. Corona for an offense which (allegedly) occurred in Florida--where no warrant or process had been issued for his arrest.

An analogous case is *Springle v. State*, 613 So.2d 65 (Fla. 4th DCA 1993), disapproved on other grounds, *State v. Smith*, 641 So.2d 849 (Fla. 1994). There, after stopping Springle for speeding, Springle and his companion were ordered to sit in the back of the police car for their safety. As with any police vehicle, the back doors and windows could not be opened from the inside and there was a cage between the front and back seats. Based upon this, the court held that the defendants were **incarcerated without probable cause**. Since Springle's seizure was illegal, the surreptitious tape recording of the defendants (where they stated they threw the cocaine out the window of the car) was equally tainted.

Additional cases which support Mr. Corona's position are *State v. Rivas-Marmol*, 679 So.2d 808 (Fla. 3d DCA 1996) [from an objective standpoint, Rivas-Marmol was arrested when he was placed in the back seat of a marked police car, taken to the police station, and subsequently handcuffed]; *London v.*

State, 540 So.2d 211, 213 (Fla. 2d DCA 1989) [London was effectively under arrest when he was handcuffed, held at gunpoint and placed in the patrol car--irrespective of whether he was formally told that he was under arrest]; *Tennyson v. State*, 469 So.2d 133, 135 (Fla. 5th DCA 1985) [after Tennyson was excluded as a robbery suspect, it was illegal to continue to confine him in the police cruiser--pills, marijuana and hashish suppressed]; *State v. Coron*, 411 So.2d 237, 239 (Fla. 3d DCA 1982) [although Coron was not told he was under arrest, the conduct of the police officer in handcuffing him, telling him he was not free to leave, and placing him in the patrol car, clearly showed that he was in fact under arrest].

Once it is determined that the police violated Corona's Fourth Amendment rights, it was incumbent upon the state to establish by clear and convincing evidence that Corona's statements were freely and voluntarily made and not tainted by the subsequent illegal police conduct. *Norman v. State*, 379 So.2d 643, 647 (Fla. 1980); *Thomasset v. State*, 761 So.2d 383 (Fla. 2nd DCA 2000); *Langley v. State*, 735 So.2d 606 (Fla. 2nd DCA 1999). The state can rarely overcome this burden, and it did not here.

Mr. Corona's motion to suppress should have been granted and this case should be remanded accordingly.

POINT FIVE
ERRORS WHICH OCCURRED DURING VOIR DIRE

ENTITLE MR. CORONA TO A NEW TRIAL

The trial judge made three errors during voir dire which entitle Mr. Corona to a new trial. First, he improperly restricted defense counsel from questioning the panel on reasonable doubt. Second, he improperly commented on Mr. Corona's right to remain silent. And, finally, the court made a gratuitous comment to the O.J. Simpson trial--which he referred to as the "California model of jury selection." Fifth, Sixth and Fourteenth Amendments, United States Constitution.

The court failed to explain why it did not allow questioning about reasonable doubt, it simply stated that the jury was required to follow the law and the instructions the court provided them.

> Defense Counsel: Ms. Black, what does reasonable doubt mean to you?
>
> The Court: I don't allow that question.
>
> Defense Counsel: Okay.
>
> The Court: The question is whether they could follow the law that the court gives them on reasonable doubt.

(TI/126).

The court's policy restricting questioning on reasonable doubt is erroneous. This is a core issue to which defense counsel has an absolute right to inquire. *Campbell v. State*, 812 So.2d 540 (Fla. 4th DCA 2002).

In its questioning of the venire panel the court provided some of the standard jury instructions in criminal cases. However, at one point it began an improper discussion of the accused's right to remain silent.

> Some people come in and say I'd like to hear both sides of the story. That might be, but that's not what the law is.
>
> So my question to you: Is there anyone that just feels so strongly about wanting to hear both sides of the story they cannot follow the law that says you can't consider that decision not to testify against the defendant? Anybody?

(TI/106-107).

This line of questioning was improper. See *Lawrence v. State*, 829 So.2d 955 (Fla. 3rd DCA 2002); Fifth and Fourteenth Amendments, United States Constitution.

Finally, the court made a rather transparent reference to the O.J. Simpson case when it stated it would not be conducting the "California model" of jury selection. This comment was gratuitous, unnecessary, and inflammatory.

> The Court: There are a couple ways we can go about this process this morning, one of which I have termed the California model. Are you all familiar with that? You're not. You take three months to pick the jury. Or, we can use the Central Florida model and get the jury picked this afternoon. I'll tell you, that's the way we're going to do this, to go about doing this.

(TI/75).

Referring to an emotionally charged case such as that of O.J. Simpson was

not only unnecessary but lessens the citizenry's confidence in the system. These types of comparisons should not be made. See generally, *Freeman v. State*, 717 So.2d 105 (Fla. 5th DCA 1998) [prosecutor's reference to Mark Furhman from the O.J. Simpson case]; *DeFreitas v. State*, 701 So.2d 593 (Fla. 4th DCA 1997) [prosecutor's reference to, among other things, O.J. Simpson]; *Ryan v. State*, 457 So.2d 1084 (Fla. 4th DCA 1984) [prosecutor's reference to Patty Hearst case].

POINT SIX
THE JURY INSTRUCTIONS WERE FUNDAMENTALLY FLAWED IN THAT THEY DID NOT SPECIFICALLY LIST AND REQUIRE THE STATE TO PROVE THAT CORONA WAS EIGHTEEN YEARS OF AGE OR OLDER

The jury instructions in this case did not list the age of Mr. Corona (18 years or older) as an element of the offense (R6/238). Mr. Corona's age is an essential element required to be proven beyond a reasonable doubt (R5/163). *D'Ambrosio v. State*, 736 So.2d 44 (Fla. 5th DCA 1999). Because the jury instructions were fundamentally flawed, Mr. Corona's conviction must be reversed. Fifth, Sixth and Fourteenth Amendments, United States Constitution. *Glover v. State*, 863 So.2d 236 (Fla. 2003).

CONCLUSION

The admission of the bulk hearsay violated the Sixth Amendment. Without the hearsay, the case was insufficient as a matter of law. Therefore, the case should be remanded for the entry of a judgment of acquittal. At a minimum, Mr.

Corona deserves a new trial.

Respectfully submitted this 5th day of November 2009.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by U.S. Mail to **WESLEY HEIDT, ESQUIRE**, Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 and the original and seven copies to the **CLERK OF COURT,** Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925 this 5th day of November 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is formatted in Times New Roman, 14 point type.

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