

IN THE SUPREME COURT OF FLORIDA

JESSE L. BLANTON,)
)
 Petitioner,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. SC04-1823

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

JAMES S. PURDEY,
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The Petitioner was the Defendant and the Respondent was the prosecution in the Criminal Division of the Circuit Court, Eighteenth Judicial Circuit, in and for Seminole County, Florida. In this Brief the Respondent will be referred to as “the State” and the Petitioner will be referred to both by his name and as he appears before this Honorable Court.

In the brief the following symbols will be used:

“R” - the symbol “R” will designate pages in the record on appeal contained within Volume I of that record, consisting of documents filed in the trial court.

“T” - the symbol “T” will designate pages in the record on appeal contained within Volume II of that record, consisting of transcripts of trial and motion hearings.

STATEMENT OF THE CASE

The Petitioner was charged by an information filed with the Circuit Court in Seminole County, Florida, with nine counts of sexual battery (Counts 1-9), in violation of Section 794.011(2), Florida Statutes, and 15 counts of promoting a sexual performance by a child (Counts 10-24), in violation of Section 827.071(3), Florida Statutes. (R 25-29)

On April 6 and 13, 2001, the trial court heard argument on the State's motion to allow child hearsay statements at trial. (R 64, 79, T 68-192) The hearsay at issue consisted of audio-taped statements made by the child victim to a Sheriff's investigator. On April 13, ten days before the trial, the court granted the State's motion. (T 191, R 81-85)

A bench trial was held April 24, 2001. At trial, Counts 1 through 4 were dismissed by the State. (T 9) The court found the Petitioner not guilty on Counts 6, 16 and 23. (T 62-64, R 112) The Petitioner was found guilty on the remaining counts. (R 113-117) The Petitioner was sentenced to life imprisonment on Counts 5, 7, 8 and 9, the remaining sexual battery counts. He was sentenced to 15 years in prison on the remaining counts of promoting a sexual performance (excluding, as stated, Counts 16 and 23), all sentences to run concurrent. (T 65-66, R 118-123)

Petitioner appealed his convictions in the in the Fifth District Court of

Appeal. While the appeal was pending, he was given leave to brief a supplemental point on the issue of the admission of the child's hearsay statements in light of the just issued U.S. Supreme Court's decision in Crawford v. Washington, 541 U. S. 36 (2004). On August 13, 2004, the appellate court denied relief.

Petitioner's notice to invoke this Honorable Court's discretionary jurisdiction was filed in the District Court on September 13, 2004. This Court accepted jurisdiction on September 8, 2005.

STATEMENT OF THE FACTS

The Petitioner was charged with multiple counts of committing sexual battery on and promoting a sexual performance by a child. (R 25-29) The child is his adoptive daughter. (T 35) The child was 11 years old at the time of the alleged offenses and at the time she made allegations of abuse. She was 13 years old at the time of the trial. (T 72, 105, 117)

Petitioner argued at trial that the court erred by admitting certain hearsay statements by the child victim. The statements in question were contained in an audio-taped interview of the child by an Orange County Sheriff's detective. (T 3-5) A detective with the Oviedo Police Department was also present at the interview and asked some questions. (T 34-35) The admissibility of the tape was the subject of a hearing on the State's motion for admission of child hearsay which concluded ten days before the trial. (T 68-192) The trial court found, pursuant to Section 90.803(23), Florida Statutes, that the child was unavailable for trial because her participation would result in a substantial likelihood of severe emotional or mental harm and that the circumstances surrounding the statement provided sufficient safeguards of reliability. (R 81-85) The child did not testify at the trial.

At trial, the audio tape of the police interview with the child and a transcript of that tape were admitted in evidence over renewed defense objections. (T 5-8)

The audio tape was played at the trial during the testimony of the Sheriff's deputy who had taken the statements. (T 9-38) The audio-taped session consisted of a sequence of questions and answers as the investigator showed the child a series of photographs and also a video-tape. Those items had been seized from Petitioner's residence. (T 80) Most photos depicted a girl in sexually explicit poses. Some photos showed portions of a male's anatomy as well. (T 95-107) In the taped interview, the child was asked, with little variation, a series of questions: who was in the photograph, who took the photograph, when and where it was taken, the age of the person (the child) in the photographs and, when applicable, who was in the photograph with her. The child answered each question, generally identifying herself, and in a few cases, herself and Petitioner, and stating that the photos were taken at 2121 Alafaya Trail in Oviedo. (T 9-38)

As the tape was played at trial, the State would interrupt the tape as each photograph was identified and ask the testifying officer to match the photograph just identified to the corresponding State's exhibit. That photograph was then offered into evidence. (T 9-38) Defense was allowed a continuing objection to the admission of the photographs. (T 10) The State continued in this manner to authenticate the photographs and to link 15 photographs with specific counts. (T 6-38) Defense counsel unsuccessfully objected to the admission of the photographs because they were used to buttress the child's statements, and because

they were authenticated by the very statements objected to as being hearsay. (T. 10)

The audio-taped interview was also used at trial in similar fashion to authenticate the seized video tape, and to identify the Petitioner as the perpetrator. In the taped interview, the child confirmed that in the video, she was directed by Jesse and that she was engaging in sexual intercourse with him. (T 35-38) The video tape was also admitted over defense objection. (T 39)

Aside from the child's statements on the audio tape, there was little direct evidence to link the Petitioner to most of the counts. The child's mother testified that in 1996 the child lived with the Petitioner at the Alafaya Trail address. (T 46-47) She identified her daughter in four of the photos; State's exhibits 8, 9, 10 and 15. (T 48-49) She identified the Petitioner in only one photo, State's exhibit 14, but did not identify her daughter in the photo. (T 48) With regard to the video, the child's mother positively identified her daughter, but did not directly identify the male who appeared on the tape, but whose face was not visible. She identified a male voice on the video as the Petitioner's. (T 51)

The trial court found the Petitioner guilty on four of the sexual battery counts and thirteen of the promoting a sexual performance counts. (T 66)

While the case was on appeal in the Fifth District Court of Appeal, the U.S. Supreme Court decided Crawford v. Washington, 541 U. S. 36 (2004), which held

that the right of confrontation found in the Sixth Amendment to the United States Constitution requires that “testimonial” hearsay in criminal proceedings is admissible when the declarant is unavailable only if the defendant had a prior opportunity to cross-examine the declarant, regardless of whether such statements are deemed reliable by the court. The District Court allowed the Appellant to file a supplemental point on this issue. Subsequently, in Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004), the court determined that there was no Crawford violation, finding that the “prior opportunity to cross-examine” requirement was satisfied because the defendant had taken a discovery deposition. The court also found that the defendant had the opportunity to take a deposition to perpetuate testimony, but did not do so.

SUMMARY OF THE ARGUMENT

The Fifth District was asked to decide, in the light of the recent decision in Crawford v. Washington, 541 U. S. 36 (2004), whether an audio-taped statement made by a child to police investigators and subsequently admitted at trial under the child victim hearsay exception in Section 90.803(23), Florida Statutes, impermissibly infringed on the Defendant/Appellant's confrontation rights. The court held that the constitutionally mandated "prior opportunity to cross-examine" the declarant, who did not testify at trial, satisfied the Appellant's confrontation rights, because he had taken a discovery deposition of that person, and also that he had, but did not utilize, the opportunity to take that person's deposition to perpetuate testimony. The Crawford decision was issued after the trial below.

The Petitioner respectfully requests that this court reject both contentions, and in doing so, adopt the reasoning of other district courts in Florida that have certified conflict with the instant case on this issue and quash the decision below.

The defendant has a right to an effective cross-examination, that is, one which is both meaningful and adequate. That certainly did not occur in the case below. The right of cross-examination is essentially a trial right. The overwhelming body of case law which informs our understanding of confrontation rights suggests that deposition questioning has such a different function from cross-examination conducted before a trier of fact that it can never be adequate to

meet the objectives of the confrontation clause. The purpose, motivations and incentives involved in conducting depositions are far different from those involved in adversarial cross-examination in trial-like settings. The objectives of the confrontation clause are not met by pretrial depositions.

Additionally, the Petitioner contends that the error below was not harmless, as the trial court additionally found. The constitutional violation is so serious that the error would be fundamental, and therefore harmful.

ARGUMENT

THE DISTRICT COURT ERRED BY DECIDING THAT BECAUSE PETITIONER HAD THE OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT IN PRETRIAL DEPOSITIONS, THE ADMISSION OF CHILD VICTIM HEARSAY STATEMENTS AT TRIAL DID NOT VIOLATE THE PETITIONER'S CONFRONTATION RIGHTS.

Standard of Review

The standard of review for pure questions of law is *de novo*. Demps v. State, 761 So. 2d 302, 305 (Fla. 2000), Armstrong v. Harris, 773 So.2d 7 (Fla.2000). The right of a criminal defendant to confront witnesses against him is guaranteed by the Sixth Amendment of the U. S. Constitution, and made applicable in state proceedings through the Fourteenth Amendment. Davis v. Alaska, 415 U.S. 308, 315 (1974).

Issue Presented

The Fifth District was asked to decide, in the light of the recent decision in Crawford v. Washington, 541 U. S. 36 (2004), whether an audio-taped statement made by a child to police investigators and subsequently admitted at trial under the child victim hearsay exception in Section 90.803(23), Florida Statutes, impermissibly infringed on the Defendant/Appellant's confrontation rights. The child did not testify at trial. Crawford had not been decided at the time of the trial;

this issue was raised for the first time on appeal.

Crawford held that out-of-court “testimonial” hearsay is admissible when the declarant is unavailable only if the defendant had a prior opportunity to cross-examine the declarant, regardless of whether such statements are deemed reliable by the court. Id. at 36. In doing so, the court expressly overruled its holding in Ohio v. Roberts, 448 U. S. 56 (1980), which held that certain hearsay statements could be introduced at trial if the declaration bore “adequate indicia of reliability,” that is, it was either (1) a “firmly rooted” hearsay exception or (2) bore particular guarantees of trustworthiness.” Id. at 66. The Crawford court rejected those subjective tests for the admission of testimonial statements in criminal trials. The court stated that, at least for testimonial statements, reliability must be tested “in the crucible of cross-examination,” and should not be admitted based merely on judicial determinations of reliability. Crawford, 541 U. S. at 61.

In the instant case, it was undisputed that the child’s audio-taped statements, which were made in an interview with a Sheriff’s investigator, were testimonial.¹ Blanton v. State, 880 So. 2d 798, 801 (Fla. 5th DCA 2004). The case is attached

¹ Although the court did not give an exclusive definition of what might constitute a “testimonial” statement, the Crawford court made it clear that statements taken by police officers in the course of interrogations are testimonial even under a narrow standard. In that context, the standard is whether the declarant might reasonably expect the statement to be used at trial. Crawford, 541 U. S. at 52-53.

hereto as Appendix “A.” Therefore, the only issue for the District Court’s consideration became whether the defendant had a “prior opportunity to cross-examine” the victim. Because the Appellant had taken a discovery deposition of the child, the court held that the Appellant’s confrontation rights were not violated. The court rejected the Appellant’s arguments that the discovery examination was not meaningful or adequate, stating that it is only the “opportunity” for examination which is required. The court asserted that a primary goal of the confrontation clause is met when the accused is provided with a notice of the charges, a copy of the statement and “a reasonable opportunity to test the veracity of the statement *by deposition.*” *Id.* (emphasis added). This statement goes beyond the holding (or dicta) in Crawford.

The Fifth District found no merit in Petitioner’s argument that defense counsel’s motivation in conducting a discovery deposition would have differed from that in conducting a cross-examination at trial. Or, as the court characterized it, “Appellant’s second contention is that his counsel was not as zealous in conducting the discovery deposition as his cross-examination would have been at trial.” Blanton, 880 So. 2d at 802. In fact, the record shows that the child was fragile emotionally. It was a psychiatrist’s assessment of the child’s emotional health which formed the basis of the court decision to allow the hearsay. (T 157, R 83-85) At the motion hearing on the admission of the hearsay, defense counsel

stated he did not “force certain issues” at the deposition because it was “emotionally upsetting.” All the same, he pointed out that the child had given more details to law enforcement, and seemed capable of testifying at trial, and to not call her violated Mr. Blanton’s right of confrontation and cross-examination. (T 186-187) At the same hearing, the prosecutor agreed that “the deposition wasn’t a very thorough deposition so (sic) she didn’t want to go forward...” (T 74) Defense counsel’s reasons for not conducting a heavy “cross-examination” of the child at her deposition were justified both legally and morally. Yet, in rejecting the argument that this deposition was not a substitute for meaningful cross-examination, the Fifth District stated “...we emphasize that Crawford mandates only the “opportunity” for cross-examination and that the Appellant “should not be heard to complain about “an opportunity squandered.” Id.

The Petitioner also unsuccessfully argued on appeal that the discovery deposition could not have been introduced as substantive evidence at trial, and that the Petitioner had not taken a deposition to perpetuate testimony pursuant to Rule 3.190(j), Florida Rules of Criminal Procedure, which would have allowed its introduction. The district court stated that the Petitioner had the “opportunity” to depose the victim under that rule but made no such attempt. The court also pointed out that the discovery deposition could have been used to impeach the child’s hearsay statements under Section 90.608, Florida Statutes. Id.

The court's reasoning reflects a profound misapprehension of the traditional purpose and use of pretrial depositions. To hold that a deposition of a witness might satisfy a defendant's confrontation rights is a radical departure from the line of cases interpreting confrontation rights, including those referenced in the Crawford court's lengthy historical analysis of the development of confrontation rights. The court below does not cite to any cases supporting its contention.

Examination of witnesses during pretrial depositions is done with different motives than cross-examination during trial. If the opportunity to cross-examine at the original proceeding is to be deemed a meaningful substitute for the opportunity to cross-examine in subsequent trial, the purpose for which the testimony was originally offered and the purpose for which it is offered at trial must be so similar in nature that the incentive to cross-examine and the motive of the cross-examination are substantially the same at each proceeding. Lyon v. U.S., 413 F. 2d 186 (5th Cir. 1969). This Honorable Court has stated that the knowledge that a deposition witness's testimony may be used as substantive evidence at trial "may have a chilling effect" on the lawyer's questioning of that witness. State v. Green, 667 So. 2d 756, 759 (Fla. 1995).

Even preliminary hearing testimony taken before a judicial tribunal may be rejected on confrontation grounds if it is not given in circumstances "closely approximating those surrounding a typical trial." California v. Green, 339 U. S.

149, 165 (1970). The Supreme Court of Colorado, *en banc*, recently examined the issue of using preliminary hearing testimony at trial in light of the Crawford decision. That court emphasized that “the right to confrontation is basically a trial right,” including both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. It said also, a preliminary hearing is ordinarily “a much less searching exploration into the merits of the case than a trial,” because its function is more limited. People v. Fry, 92 P. 3d 970, 977 (Colo. 2004), citing Barber v. Page, 390 U. S. 719, 725 (1968). It is Petitioner’s position that deposition questioning has such a different function from cross-examination conducted before a trier of fact that it can never be adequate to meet the objectives of the confrontation clause.

Two other district courts have rejected the Fifth District’s decision that the opportunity for cross-examination at deposition satisfies a defendant’s right of confrontation and have certified conflict with Blanton. See, Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004), Contreras v. State, 910 So. 2d 901 (4th DCA 2005). Petitioner urges this court to adopt the reasoning in Lopez (which case is also pending before this court on conflict jurisdiction, in case number SC05-88), and hold that neither the fact that Petitioner took a discovery deposition, nor the fact that he had an opportunity to take a deposition to perpetuate testimony, but did not do so, satisfied his constitutional right to confront his accuser.

Lopez dealt with the admission at trial of a statement made by a kidnaping victim to the police. The parties were not able to serve the victim with a subpoena for trial and the statement was admitted as an excited utterance. Defense counsel had the opportunity to question the victim at a discovery deposition. The First District engaged in a lengthy discussion of whether that opportunity might satisfy the defendant's confrontation rights in light of Crawford. The court examined the role of discovery depositions, which are authorized by Rule 3.220(h), Florida Rules of Criminal Procedure. Judge Padovano, writing for the court, stated that the rule was designed to provide an opportunity for discovery, "not an opportunity to engage in an adversarial testing of the evidence against the defendant." He noted that the rule enables a defendant to prepare for trial and make an informed decision in plea negotiations, and that depositions are used by most good defense attorneys merely to attempt to learn what the testimony will be. Lopez, 888 So. 2d at 700.

The Lopez court also draws our attention to this Honorable Court's opinions in State v. Basiliere, 353 So. 2d 820 (Fla. 1977) and State v. Green, 667 So. 2d 756 (Fla. 1995), for the propositions that discovery depositions do not satisfy a defendant's confrontation rights, and that they are not admissible as substantive evidence at trial. The Lopez court concluded that if a discovery deposition is not admissible because it does not afford the defendant the right of cross-examination,

it cannot cure the confrontation problem presented by the use of a statement made to a third party. Lopez, 888 So. 2d. at 700-701.

Contreras involved the admission of an alleged child victim's statement to the State's Child Protection Team worker, admitted at trial (as was the statement in the instant case) under Section 90.803(23), Florida Statutes. The Contreras court examined and rejected the "Blanton contention" that a defendant's discovery deposition is a satisfactory substitute for the right of confrontation at trial.

Contreras, 910 So. 2d. at 908.² That court made the further point that the State did not seek to admit the deposition at trial, and the court reminded us that it is the State who has the burden of proof:

Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the State's case in chief, all the while insisting that the State's proof satisfy constitutional requirements.

Id.

The Fourth District's opinion does not shrink from questioning the continued viability of the statutorily created hearsay exception for statements of child victims in the wake of Crawford. The court takes the position that the trial court's finding that the child was unavailable to testify because of the potential of

² Although it is in Contreras that the court certifies conflict with Blanton, the Fourth had previously, in Belvin v. State, 30 Fla. Law Weekly D1421 (Fla. 4th DCA June 8, 2005), aligned itself with Lopez on this issue.

severe emotional or mental harm (a statutory prerequisite to the admission of the hearsay statement) does not satisfy the confrontation clause requirement of physical unavailability. The Petitioner agrees with that court that “This subjective method of determining when a witness is unavailable does not survive Crawford.” Contreras, 910 So. 2d at 907-908.

At least one other state court has arrived at a similar conclusion. In State v. Snowden, 867 A. 2d 314 (Md. 2005), the court decided that in light of Crawford, statements of certain child abuse victims to a social worker, admitted at trial under that State’s tender years hearsay exception,³ ran afoul of the confrontation clause. Citing Coy v. Iowa, 487 U.S. 1012, 1017 (U. S. 1988), the court determined that in a criminal trial, the State is required to place the defendant’s accusers on the stand so that the defendant may both hear the accusations against him in open court and have the opportunity to confront those witnesses. It stated that the State had circumvented that right, through use of the tender years statutory framework, by having the social worker testify instead of the children. Snowden, 867 A. 2d at 332.

In Blanton, the appellate court also rejected the additional argument that the discovery deposition would not have satisfied the defendant’s right to confront the

³ Maryland Code of Criminal Procedure, § 11-304, “Out of court statements of certain child victims.”

child, as it was likely the defendant was not present. The court is correct that the record is silent on that point. However, it would certainly be a rarity that a defendant accused of sexual battery on a child would ever be present at the alleged victim's deposition. Rule 3.220(h)(7), Florida Rules of Criminal Procedure, states that a defendant shall not be present at a discovery deposition except on the stipulation of the parties or by court order, on a showing of good cause. The Committee Notes to the Rule's 1989 amendment make it clear that this provision arose out of concerns that children and rape victims would be intimidated by the presence of the defendant. A decision by this court that pretrial discovery depositions could satisfy confrontation rights would therefore have far-reaching repercussions in the way criminal trials are conducted in this state. Professor Yetter examined some of the problems that the constraints of Florida's discovery rules would impose on the requirement that the defendant have an opportunity for cross-examination, and suggested the State will have to provide a "procedural option." John F. Yetter, *Wrestling with Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 Fla. Bar J. 26, 30-31 (2004).

Because of the differences between deposition questioning and cross-examination of witnesses in trial-like settings, as presented above, the Petitioner asserts that even had he been present, that the discovery deposition would not have satisfied his right of confrontation. However, on the chance that this court is

inclined to make a decision based on whether he was present for the deposition, Petitioner is requesting, in a motion filed concurrent with this brief, the opportunity to supplement the record with an affidavit attesting to the fact that he was not present.

The court in Blanton addresses in a footnote the Petitioner's claim that his opportunity for prior cross-examination was not meaningful or adequate. It notes that although the Crawford court does not expressly address whether the opportunity must be meaningful, that "common sense suggests this notion is implicit in Crawford." Blanton, 880 So. 2d at 801 n. 3. This is certainly true. Regarding confrontation rights, the Supreme Court has previously held that a criminal defendant has a right to an "effective" cross-examination. Davis v. Alaska, 415 U. S. 308, 318 (1974). *See also* Pointer v. Texas, 380 U. S. 400, 407 (1965) ("The case before us would be quite a different one had [the witness'] statement been taken at a full fledged hearing at which Petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine.")

Crawford itself emphasizes the importance of an "adequate" opportunity to confront and cross-examine adverse witnesses, and cites several later cases which conform to the court's earlier holding in Mattox v. United States, 156 U. S. 237 (1895), which held that prior trial or preliminary hearing testimony is admissible

only if the defendant had an *adequate* opportunity to cross-examine. Crawford, 541 U. S. at 57 (emphasis added, citations omitted).

Florida courts (any courts) should be wary of straying too far from the proposition that the right of cross-examination is basically a trial right. The Supreme Court has emphasized that the right to confront one's accuser includes more than a "personal examination." It has made clear that it is the combined effects of "the elements of confrontation" - physical presence, oath, cross-examination and observation of demeanor by the trier of fact - that serve the purposes of the confrontation clause. Maryland v. Craig, 497 U. S. 836, 837(1990) (citations omitted).

The Supreme Court did not retreat from that position in Crawford. The Crawford court recognized, as it has in the past, that public policy concerns have made inroads on confrontation rights, balancing infringement against the reliability of the statement. But, as stated, Crawford rejects, at least as far as the admissibility of testimonial statements is concerned, any judicial determinations of reliability. The test is now whether there was adequate opportunity for cross-examination.

Based on the above, Petitioner urges this court to reject the proposition that a pretrial discovery deposition, or the mere existence of the opportunity to take either a discovery deposition or a deposition to perpetuate testimony, can satisfy a

defendant's confrontation rights.

The court below also determined that even if the statement should have been excluded, any error was harmless. Blanton, 880 So. 2d at 802. Petitioner respectfully disagrees. The audio-taped statements were the linchpin of the trial. The statements were used not only as a means to have the child identify the defendant but also to authenticate the photos and video tape, which were the State's primary evidence against the defendant, before admitting them into evidence. The State orchestrated the introduction of the testimony of the other witnesses, the child's mother and the two law enforcement investigators, around that physical evidence.

As the opinion states, there was circumstantial proof from the officers that the photos and video were taken at the Petitioner's home. However, the opinion also states that the mother's testimony was "substantively synonymous" to the child's statement. Id. This is correct only in that the mother was able to identify her daughter in four of the many photos and in the video. She identified the defendant only in one photograph. (T 48-49) With regard to the video, the mother did not directly identify the Petitioner as the male on the tape engaged in intercourse. Rather, she identified a male voice on the video as the Petitioner's. (T 51) It is highly questionable whether her testimony, without the child's, was sufficient to support convictions for four separate counts of capital sexual battery

and thirteen counts of promoting a sexual performance.

Petitioner contends, in any case, that the failure below to comply with constitutional requirements concerning cross-examination should be considered fundamental error. *Cf. Brown v. State*, 471 So. 2d 6 (Fla. 1985), where this court held that the State's failure to give notice of taking a deposition to perpetuate testimony, thereby depriving defendant of the right to cross-examine witness, created fundamental error. All fundamental error is harmful error. *Reed v. State*, 837 So. 2 366, 370 (Fla. 2002). The U. S. Supreme Court has emphasized that the denial of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis*, 415 U. S. at 318 (citations omitted).

The decision below should be quashed.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court quash the District Court's decision in this cause, and remand with instructions to vacate the Petitioner's convictions and sentence and order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE

I CERTIFY that a copy hereof has been furnished to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Jesse Lee Blanton, Inmate No. X-23917, #C2-103-U, Hardee Correctional Institution, 6901 State Road # 62, Bowling Green, Florida 33834-9505, on this _____ day of November, 2005.

I FURTHER CERTIFY that the size and style of type used in this brief is 14-point "Times New Roman."

ROSE M. LEVERING