

19-5006

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CASE NO.

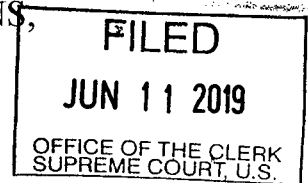
IN THE SUPREME COURT UNITED STATES

PETER JOSEPH ROSATO JR.,
PETITIONER,

v.

ORIGINAL

SECRETARY, DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA
RESPONDENT(S)



APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT
18-13983-D

PETITION WRIT OF CERTORARI

PETER JOSEPH ROSATO JR.
SUMTER CORRECTIONAL INSTITUTION
9544 CR 476-B
BUSHNELL, FLORIDA 33515

QUESTION(S) PRESENTED

DOES A WAIVER OF A CITIZENS CONSTITUTIONAL RIGHT HAVE TO APPEAR ON THE RECORD EITHER WRITTEN OR ORALLY IN ORDER TO ESTABLISH A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER TO BE PRESENT DURING A VIDEOTAPED DEPOSITION TO PERPETUATE TESTIMONY TO CONFRONT THEIR ACCUSER ?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Attorney General, State of Florida (counsel for Respondent)
PL-01 The Capitol
Tallahassee, Florida 32399-2500

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Rules and Statutes

§ 2254 (d) (1) (2)

28 U.S.C.A. § 1254 (1)

Constitutional Provisions

Sixth Amendment of the United States Constitution

Fourteenth Amendment of the United States Constitution

**IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below:

OPINION BELOW

The opinion of Eleventh Circuit Court of Appeals appears at Appendix A to this petition and is

[x] Reported at 18-13983-D

The opinion of United States Middle District Court of Appeals appears at Appendix B to this petition and is

[x] Reported at 8:14-cv-03040

The opinion of the highest state court of the Second District Court of Appeals appears at Appendix C to this petition and is

[x] Unpublished

The opinion of Circuit Court of the Sixth Judicial Circuit Pinellas, County appears at Appendix D to this petition and is

[x] Unpublished

JURISDICTION

The date which the United States Court of Appeals decided this case was March 14, 2019

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petitioner was denied his right to be present during a critical stage of proceedings to confront the witness against him in the absence of a knowing, intelligent, voluntary on the record waiver in violation of the Sixth and Fourteenth Amendment of the United States Constitution.

Pursuant to AEDPA, Federal Habeas relief may not be granted with respect to a claim adjudicated on the merits in State Court unless the adjudication of the claim:

- (1) Resulted in a decision that was contrary, to or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court; or
- (2) Resulted in a decision that was based on an unreasonable determine of facts in light of the evidence presented in the State Court proceeding.

STATEMENTS OF THE CASE

The petitioner was charged in June 1998, for Burglary with a Battery (count one) Attempted Sexual Battery (count two) against Maajte Lewis (Ex. A). The State moved to take Ms. Lewis's videotaped deposition to perpetuate her testimony pursuant to Fla. R. Crim. P. 3.190 (j) (Ex. B). The deposition was taken November 17, 1998, and present was defense Counsel Mr. Robert McClure. The petitioner appeared to assist in the deposition and was told not to attend by McClure. Having no input in trial preparation, the petitioner failed to appear for trial in 1999. Upon being rearrested in 2008, the state moved to use the videotaped deposition at trial because Ms. Lewis had passed away. (Ex. C). Trial counsel later deposed McClure on March 13, 2009 (Ex. D). Following the deposition trial counsel moved to suppress the videotaped deposition on Confrontation Clause grounds. (Ex. E). The suppression hearing was held on April 3, 2009 where both the petitioner and McClure testified. (Ex F). McClure testified at deposition and the motion hearing that he was aware that the state had DNA evidence. (Ex. D pg. 4-5); (Ex. E pg. 10). At the hearing McClure testified that he advised the petitioner not to attend the deposition because identity was an issue and "believed" the petitioner had an understanding of his rights and waived that right. McClure "thought" the petitioner understood his rights and "thought" the petitioner followed his advice to not be present. McClure "assumed" that he had explained the petitioner's rights and

“believed” that he had discussed the nature of the deposition. (Ex. F pg. 14-15). At deposition (Ex. D pg. 10-11) McClure was asked: “Do you recall Mr. Rosato signing any kind of waiver?” He answered, “No I do not.” So it’s your position he waived on the record? He answered: “No that’s not my position.” At the hearing (Ex. F pg.21) McClure was asked: “Do you know or have any knowledge on the record Mr. Rosato waived his right,” he answered: “As I said, I don’t know the answer to that, no I don’t recall.”

The petitioner testified McClure never inform him of his rights and that he had never waived his right. On cross-examination the petitioner repeated three times that he wanted to be present and had questions to ask and that there was never a discussion concerning identification. (Ex. F pg. 25-27). At the close of the hearing the State Court directed from both parties to submit final written arguments. (Ex. G Defense). (Ex. H State). After reviewing said arguments, “conflicting testimony” and weighing the credibility, the court found the petitioner waived his right. (Ex. I).

REASON FOR GRANTING PETITION

The law of the land regarding the admissibility of a testimonial hearsay statement is found in *Crawford v. Washington*, 541 U.S. 36 (2004). This court ruled that the admission of a hearsay statement made by a declarant who does not testify at trial violates the sixth amendment if: (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked a prior opportunity for cross-examination. The *Crawford* court re-affirmed the principles of law established in the case of *Mattox v. United States*, 156 U.S. 237, 243 (1895) that involved a deceased witnesses prior testimony. Whether to allow the statement the Court relied upon the fact that the defendant had had, a prior opportunity to confront the witness. The court stated:

“The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and subjecting him to the ordeal of cross-examination. This the law says, under no circumstances shall he be deprived of...” 541 U.S. at 57

In this case, all three *Crawford* requirements are met. (1) Ms. Lewis’ out of Court statement is clearly testimonial. (2) It was the state’s intent to use the deposition as substantive evidence should she become unavailable, which occurred. (She is deceased). (3) The petitioner lacked a prior opportunity for cross-examination. Perpetuated testimony produced pursuant to rule 3.190 (j) clearly qualifies as testimonial hearsay under *Crawford* See e.g., *Blanton v. State*, 978 So 2d 149 (Fla.2008). In order to show a waiver of a defendant’s right to confrontation during

a rule 3.190 (j) perpetuation of testimony, the record must show that the defendant waived that right. *Blanton* at 155 quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938). The rule permitting a deposition to perpetuate testimony requires the presence of the defendant unless the defendant who is not in custody waives his right to appear. *State v. Dolan*, 390 So 2d 407 (1980). The law requires that the record must demonstrate that the defendant made a knowing, intelligent, and voluntary waiver of his right to be present at essential stages of proceeding against him. *Savino v. State*, 555 So 2d 1237 (1989); *Lewis v. United States*, 13 S.Ct. 136. There is a presumption against the waiver of constitutional rights. *Glasser v. United States*, 315 U.S. 60, 70-71 (1942). For a waiver to be effective it must be clearly established according to the standards as enunciated in *Johnson* and requires “an intentional relinquishment of a known right. It follows that unless the petitioner did actually waive his right his federal constitutional right under the Sixth Amendment has been denied.

The entire case hinges on the record testimony of the petitioner and McClure during the April 3rd hearing. The record is clear that the petitioner was present at the day of the deposition but did not attend. McClure testified that he told the petitioner not to go into the room based upon his concern that Ms. Lewis might identify him if he was present. In response to the prosecutors question as to whether McClure thought the petitioner understood his right McClure responded “I think so” McClure “thought” that the petitioner understood his right to be present, and “believed” that

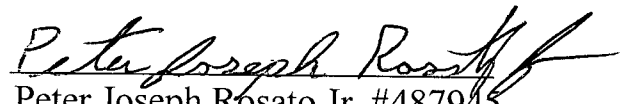
the petitioner waived his right. McClure made it clear that it was his decision the petitioner not be present so that Ms. Lewis would not be tempted to identify him. McClure's obsession with the identification of the petitioner was illogical because he was aware that the prosecution had DNA evidence, therefore, whether Ms. Lewis could identify the petitioner was irrelevant. McClure clearly established that he prevented the petitioner from attending but does little more than support a "belief" or a "thought" that the petitioner had waived his right. Especially when McClure did not recall the petitioner signing a waiver. (Ex. D pg. 10-11) and had no knowledge that the petitioner waived his right on the record. (Ex. F pg.21) The petitioner testified at the hearing that he told McClure that he wanted to be present and had a list of questions to ask. McClure told him that he did not believe he should be present and never explained that he had a constitutional right to confront Ms. Lewis that only he could waive.

To date no court has conclusively pointed to any portion of the record showing a waiver, and neither the testimony of McClure nor the record supports a finding that the petitioner intentionally waived his right or even that he knew he had such a right. McClure's testimony is certainly insufficient to support a finding that the petitioner's failure to attend the perpetuated testimony was "an intentional relinquishment of a known right."

CONCLUSION

Because the *Crawford* requirement of prior opportunity for cross-examination has not been satisfied, the admission of Ms. Lewis' deposition violates the Confrontation Clause of the Sixth Amendment. The deposition took place without the petitioner and at no time does the record reflect a knowing, intelligent, and voluntary waiver. Therefore, the state courts decision to allow the deposition was an abuse of discretion. This error was not harmless and affected the fundamental fairness at trial having a substantial and injurious effect or influence in determining the jury's verdict.

Wherefore, the petitioner request this Honorable Court to grant a Writ of Certiorari and to enter an order reversing the order sought to be reviewed.


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