No. 22-5247

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

LUCKENS PETIT,
Petitioner,

versus

ATTORNEY GENERAL OF FLORIDA, Ashley Moody,
Respondent(s).

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Luckens Petit, DC# L64367
Petitioner, *pro se*
Desoto Annex
13617 South East Highway 70
Arcadia, Florida 34266-7800

QUESTION PRESENTED

I. WHETHER THE FLORIDA ARTHUR[1]/BOND HEARING SATISFIES THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE REQUIREMENT AS EXPLAINED IN CRAWFORD V. WASHINGTON, 541 U.S. 36, 124 S.Ct. 1354 (2004)?

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1 *State v. Arthur*, 390 So.2d 717 (Fla. 1980)

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari is issued to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court of last resort, i.e., the Fourth District Court of Appeal of Florida, to review the merits appears at Appendix "A" to this petition and is unpublished. Because the Fourth District Court of Appeal of Florida issued its denial order without a written opinion, Petitioner did not nor could have sought discretionary review in the Florida Supreme Court.

The opinion of the Fourth District Court of Appeal of Florida on direct appeal appears at Appendix "D" to the petition and is published at *Petit v. State*, 92 So.3d 906 (Fla. 4th DCA 2012).

JURISDICTION

The date on which the highest state court with jurisdiction, i.e., the Fourth District Court of Appeal of Florida, decided my case was March 17, 2022. A copy of that decision appears at Appendix A.

A timely motion for rehearing was filed and the Fourth District Court of Appeal of Florida denied the same on April 25, 2022. A copy of that order appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 9, Clause 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

United States Constitution Amendment VI, "In all criminal prosecutions, the accused shall enjoy the right [....] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV, Section I, "No State shall make or enforce any law which [...] shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code Annotated Title 28, §1257: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATEMENT OF THE CASE[2]

Petitioner was arrested and charged with robbery and automobile collision. Sometime after the alleged robbery, one of the victims, Edder Joseph, became victim of a shooting, which he survived. Joseph testified at Petitioner's bond hearing. Defense counsel cross-examined Joseph. Petitioner inquired of counsel whether he intended to question Joseph about the robbery. Counsel told Petitioner that she intended to do so at trial. At the close of the hearing, the judge then asked defense counsel whether he had any further question for Joseph. Counsel replied "I will save them for trial." The state then conducted re-direct examination that was not subject to cross-examination. Prior to trial, however, Joseph became unavailable and the court admitted Joseph's testimony from Petitioner's bond hearing into evidence at Petitioner's trial over defense counsel's objection.

Relying on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Petitioner's counsel objected to the admission of Joseph's bond hearing testimony at Petitioner's trial, arguing that it violated the Confrontation Clause. The trial court overruled counsel's objection, finding that the state demonstrated that Joseph was unavailable. Joseph's testimony at the bond hearing was read into the evidence from Petitioner's trial because the victim refused to testify.

On direct appeal, Petitioner argued, inter alia, that the unavailable witness's statements at the Petitioner's bond hearing were impermissibly admitted at his

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[2] Unless requested, to avoid unnecessary and voluminous appendix, the concise facts in this petition are cited as referenced in Petitioner's Initial Brief attached as Appendix F.

trial because they violated his Sixth Amendment right to confront witnesses as explained in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because he did not have a full and meaningful opportunity to cross-examine the witness at the bond hearing.

The Fourth District Court of Appeal of Florida concluded "We can find no Florida case addressing whether a bond hearing satisfies the requirement of an opportunity for the cross-examination as explained in Crawford. Therefore, we turn to relevant federal cases for guidance then held that "[the unavailable witness's] statements were testimonial and therefore fell within the ambit of Crawford's application of the Confrontation Clause. However, the state demonstrated that Joseph was unavailable for trial, and Petitioner had an opportunity to cross-examine Joseph at the bond hearing, which his counsel took. Therefore, Crawford was satisfied". *Petit*, 92 So.3d at 913.

On August 27, 2019, Petitioner received a sworn affidavit from one of the alleged robbery victims who called 911 on the day of the alleged robbery. There, the alleged victim stated that he was never robbed. He called 911 and falsely reported he was robbed in an attempt to recover his properties he had lost to Petitioner while gambling. (Appendix F, pg 7).

On September 13, 2019, Petitioner filed a Rule 3.850(b)(1) motion based on newly discovered evidence as stated in alleged victim's sworn affidavit and attached as exhibit in support of the motion. Id. There, Petitioner argued, inter alia, that the court should revisit the constitutionality of its holding in Petitioner's direct appeal,

where the court erroneously relied on distinguishable precedent dealing with a confrontation clause issue in the context of an adversarial preliminary hearing and the newly discovered evidence is material to determine whether Petitioner's constitutional rights under state and federal constitutions were violated where the courts have misapplied the law that violated Petitioner's constitutional rights to confront his accuser under the Sixth and Fourteenth Amendments to the United States Constitution. (Id. 14-15)

On December 12, 2019, the state filed its response. (R. 20-23). On April 30, 2021, the postconviction court issued its final order, summarily denying all grounds in Petitioner's postconviction motion based on newly discovered evidence, by simply adopting the state's response, without an evidentiary hearing or attached any portions of the record conclusively refuting Petitioner's claims or made specific findings in support of its order. Id at 8.

On June 1, 2021, Appellant timely filed an amended motion for rehearing which the court denied on August 30, 2021. Id. Petitioner timely appealed to the Fourth District Court of Appeal of Florida. On March 17, 2022, The Fourth DCA per curiam affirmed without a written opinion; and subsequently denied Petitioner's timely motion for rehearing on April 25, 2022, and this petition ensues.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant certiorari because Florida Arthur/Bond Hearing on its face and/or as applied is unconstitutional; thus, testimony from an Arthur/Bond Hearing cannot satisfy the mandate of the Confrontation clause to the United States Constitution. Further, attorneys in Florida are being misled to believe that they may defer cross-examination of a witness on critical issues for trial rather then doing so at the Arthur/Bond Hearing since the Confrontation Clause and the Sixth Amendment only apply to the guilt phase, penalty phase, and sentencing. This Court has yet to address this constitutional issue of great public importance that is being promulgated without guidance from this Honorable Court and while evading effective review. And, as an issue of first impression in Florida, the decision of the state court of last resort in Petitioner's case is in conflict with other Florida court of last resort which presents a timely opportunity for this Court to resolve these conflicts. Failure to address these conflicts will allow the state court to propagate its erroneous and conflictive decision. Hence, this case presents a unique and timely opportunity to provide clear guidance on this important constitutional issue.

I. The Florida Arthur/Bond Hearing, On Its Face And/Or As Applied, Is Unconstitutional.

It is well established that "Where testimonial evidence is at issue, [...], the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. [...]. Whatever else the term covers, *it applies at a minimum to* ***prior testimony at a preliminary hearing, before a grand***

jury, or at a former trial; and to police interrogations." *Crawford v. Washington*, 541 U.S. 36, 68; 124 S.Ct. 1354, 1374 (2004).

It is well settled in Florida that the procedure to obtain pre-trial release is conducted through an Arthur/Bond Hearing. Equally well established in Florida is that evidence at an Arthur/Bond hearing can be entirely hearsay evidence, such as the evidence relied upon by the grand jury or the state attorney in charging the crime, transcripts, or affidavits. See *State v. Arthur*, 390 So.2d 717 (Fla. 1980); see also *Mininni v. Gillum*, 477 So.2d 1013, 1014 (Fla. 2nd DCA 1985). Further, the guarantee of the right to confront witnesses does *not* apply to bond hearings and the holding in *Crawford* does *not* apply to issues of pretrial release. See *Godwin v. Johnson,* 957 So.2d 39, 39-40 (Fla. 1st DCA 2007) (The confrontation clause of the Sixth Amendment expressly applies in criminal prosecutions); see also *Bleiweiss v. State*, 24 So.3d 1215, 1218 (Fla. 4th DCA 2009) ("[Arthur/Bond] hearings are not formal trials. [...]. Indeed, the constitutional right of confrontation does not apply to pretrial release proceedings").

Here, at Petitioner's Arthur/Bond hearing, Petitioner's trial counsel objected to hearsay testimony being elicited from the alleged victim. The presiding judge told Petitioner's counsel "this is a Arthur Hearing" ... implying that it is axiomatic and counsel should have known that hearsay are admissible at an Arthur/Bond hearing then overruled counsel's objection. (See Appendix E, pg. 2). The court also informed Petitioner's counsel that the state has the burden of proof, (Id at 1), which led counsel to believe and advise Petitioner during the Arthur/Bond Hearing that she

did not have to cross-examine the alleged victim about the alleged robbery at the Arthur/Bond hearing but will do so at trial. Hence, the alleged victim's testimony from Petitioner's Arthur/Bond Hearing cannot pass muster under the confrontation clause of the 6th Amendment of the United States Constitution as explained in Crawford.

Contrary to an Arthur/Bond Hearing, it is well established in Florida that hearsay is inadmissible at a Preliminary Hearing. *Pierce v. Mims*, 418 So.2d 273, 274 (Fla. 2nd DCA 1982). At a Preliminary Hearing, the court must issue subpoenas for the attendance of witnesses. The witnesses may be sequestered upon the request of either party. The accused must be present and be afforded the right of cross examination. The accused may testify at the hearing or remain silent. The accused must be warned in advance that anything said during the hearing can be used against him at a subsequent trial. The accused is subject to cross examination like any other witness. See *Willinsky v. State*, 360 So.2d 760, 763 (Fla. 1978).

Furthermore, unlike at an Arthur/Bond Hearing, the accused's presence is mandatory at an adversary preliminary hearing like in criminal proceedings. See Florida Rule of Criminal Procedure 3.180(a); see also *Johnson v. Strickland*, 300 So.2d 50, 52 (Fla. 2nd DCA 1974). Further, while Arthur/Bond hearings can provide the defense with some discovery, an Arthur/Bond hearing is <u>not</u> an ***adversary preliminary hearing***. See Fla. R. of Crim. Pr. 3.133(b); see also *Coffield v. State*, 316 So.3d 369, 371 (Fla. 4th DCA 2021) (An Arthur/Bond hearing is not a substitute for an adversary preliminary hearing); *Perry v. Bradshaw*, 43 So.3d 180, 181 (Fla. 4th

DCA 2010) (Hearsay could not be used as the basis for a finding of probable cause at an adversary preliminary hearing); *Davis v. Junior*, 300 So.3d 307 (Fla. 3rd DCA 2020); Florida Criminal Practice and Procedure § 3.23 "Hearing on Motion for Modification of Conditions of Release".

Therefore, the Florida Arthur/Bond Hearing on its face and/or as applied is unconstitutional. As such, a Florida Arthur/Bond Hearing cannot satisfy the constitutional mandate of the Confrontation clause to the United States Constitution as explained in *Crawford*. Consequently, the admission of an unavailable witness's testimony from a Florida Arthur/Bond Hearing at trial as substantive evidence violates the Confrontation clause to the United States Constitution. Further, attorneys in Florida are being misled to believe that they may defer cross-examining witness(es) at an Arthur/Bond Hearing on critical issues until trial, since the confrontation clause and the 6th Amendment right to effective assistance of counsel do not apply to an Arthur/Bond Hearing.

II. The State Court Erroneously Applied *Crawford v. Washington*, 541 U.S. 36 (2004).

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court established that ""Where testimonial evidence is at issue, [...], the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. [...]. Whatever else the term covers, it applies at a minimum to prior testimony at a ***preliminary hearing***, ***before a grand jury***, or at a ***former trial***; and to ***police interrogations***. *Crawford*, 541 U.S. at 68; 124 S.Ct. at 1374.

Here, over *Crawford* Confrontation Clause objections, the trial court admitted the unavailable alleged victim's testimony from Petitioner's Arthur/Bond Hearing as substantive evidence. And, inconsistent to the general understanding of attorneys in Florida and as a matter of first impression[3], the state court of last resort relied on federal preliminary hearing procedure likened it to Florida's Arthur/Bond Hearing procedure then concluded that the admission of an unavailable witness's testimony from an Arthur/Bond Hearing at trial does not violate the confrontation clause as explained by this Court's holding in *Crawford v. Washington*, 541 U.S. 36; 124 S.Ct. 1354; (2004). See *Petit v. State*, 92 So.3d 906, 913 (Fla. 4th DCA 2012). This conclusion, however, is erroneous and cannot be allowed to stand because Florida Rule of Criminal Procedure 3.133(b) makes it abundantly clear that ***an Arthur/Bond hearing is not an adversary preliminary hearing*** **where the Confrontation Clause is applicable.** See *Coffield v. State*, 316 So.3d 369, 371 (Fla. 4th DCA 2021) (An Arthur/Bond hearing is not a substitute for an adversary preliminary hearing). (*Emphasis added*).

Moreover, the state court of last resort and other courts have since relied on this erroneous decision in Petitioner's direct appeal as precedent to deny relief to others. See *Moscatiello v. state*, 247 So.3d 11 (Fla. 4th DCA 2018); *Camacho v. State*, 192 So.3d 568 (Fla. 4th DCA 2019); *Collins v. Jones*, 2017 U.S. Dist. Lexis 64913 at 26 (11th Cir. 2017). Thus, this Court is presented with a unique and timely

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3 "We can find no Florida case addressing whether a bond hearing satisfies the requirement of an opportunity for the cross-examination as explained in Crawford." *Petit v. State*, 92 So.3d at 912.

opportunity to consider this important constitutional issue and set clear guidance on this issue. Further, its inaction will allow this erroneous decision to continue to promulgate without guidance from this Honorable Court and while evading effective review.

III. The State Court's Application of *Crawford v. Washington*, 541 U.S. 36 (2004) Conflicts with Other State Courts of Last Resort.

In *Godwin v. State,* 957 So.2d 39 (Fla. 1st DCA 2007), "The petitioners [were] charged with second-degree murder, [...]. The state sought to preclude pretrial release on grounds that the proof of the defendants' guilt was evident or the presumption was great. At a hearing on the issue, the state's evidence was presented exclusively through the [hearsay] testimony of an investigator [...]. The [petitioners] made objections based on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), contending that the state's evidence was violative of the confrontation clause contained in the Sixth Amendment to the United States Constitution [...]...." *Godwin v. Johnson,* 957 So.2d at 39-40.

The First District Court of Appeal of Florida ("First DCA") held:

> "Crawford did not change the types of proceedings where the confrontation clause does or does not apply. Instead, it provides guidance on how the clause is to be implemented when it is applicable. [...] Thus, an unstated, but necessary premise of the Arthur decision is that **the *confrontation clause does not apply in this type of proceeding and we conclude that principle continues to be the law in Florida after Crawford. The confrontation clause of the Sixth Amendment expressly applies in 'criminal prosecutions.'*** We agree with the reasoning and conclusion of *State v. Engel*, 99 N.J. 453, 493 A.2d 1217 (1985) that this does not include proceedings on the issue of pretrial release." Id at 40.

The First DCA ruled against the petitioners concluding that they had no right to the Confrontation Clause at a bond hearing.

Here, Petitioner objected to the admission of the unavailable witness's statements from his Arthur/Bond Hearing based on the Confrontation Clause mandate as explained in Crawford. Petitioner then argued in his direct appeal, in the Fourth District Court of Appeal of Florida ("Fourth DCA") that the unavailable witness's statements from the Arthur/Bond Hearing were impermissibly admitted because the Arthur/Bond Hearing did not satisfy the Confrontation Clause mandate as explained in Crawford. As the First DCA explained, in conflict with the Fourth DCA's conclusion in Petitioner's direct appeal, an Arthur/Bond Hearing is not protected nor covered by the 6th Amendment Clause. See also *Box v. State*, 993 So.2d 135, 137-38 (Fla. 5th DCA 2008) (holding that the Confrontation Clause only apply to the *guilt phase*, the *penalty phase*, and *sentencing phases* of a capital case). Hence, as it stands, this Court should seize this unique and timely opportunity and address these conflicts among the state courts of last resort in Florida on this important constitutional issue and set viable precedent and bring uniformity in the courts in their application of its Confrontation Clause mandate as explained in *Crawford*.

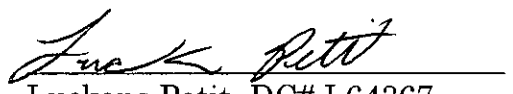
In sum, the Florida Arthur/Bond Hearing is unconstitutional on its face and/or as applied, misleading attorneys in Florida to believe that, as trial strategy, they may defer cross-examination of a witness at the Arthur/Bond Hearing on critical issues for trial rather then doing so at Arthur/Bond Hearing, since the

Confrontation Clause and the Sixth Amendment are inapplicable at an Arthur/Bond Hearing in Florida. Further, the decision of the state court of last is erroneous and is in conflict with other state court of last resort on this constitutional question of great public importance that is being promulgated without guidance from this Honorable Court and while evading effective review.

CONCLUSION

Wherefore, based on the foregoing, the Honorable Court should grant this petition for a writ of certiorari.

Respectfully submitted,



Luckens Petit, DC# L64367
Petitioner, Pro se

Date: July 4, 2022