CASE NO.: 23-5443

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT L. HUSS — PETITIONER,

vs.

THE STATE OF FLORIDA — RESPONDENT

ON REVIEW FROM THE SIXTH DISTRICT COURT
OF APPEALS, STATE OF FLORIDA

NO: _____

PETITION FOR WRIT OF CERTIORARI

SCOTT L. HUSS
DC # Y45598
Tomoka Correctional Institution
3950 Tiger Bay Rd.
Daytona Beach, FL 32124

Petitioner, Pro Se

QUESTION(S) PRESENTED

Is it a federal due process, confrontation, and equal application violation as guaranteed by the 5th, 6th, and 14th Amendments (U.S. Const.) when a state trial court commits these violations at trial and the state "court of last resorts" rules in direct conflict, upon appeal, with that state's Supreme Court and sister District Courts for precisely the same state and federal constitutional violations AND in a way that conflicts with relevant decisions of this Court?

The question presented in this petition arose from the proceedings below.

Petitioner raised the 6th Amendment constitutional "confrontation" violation including the due process and equal application violations in a Habeas Corpus petition in the 6th District Court of Appeals (DCA), State of Florida. The 6th DCA is the court of last resort in Florida when the DCA provides no opinion, citation, or certification for Florida Supreme Court conflict review. The 6th DCA denied Petitioner's claim without opinion, citation, or certification preventing Florida Supreme Court review. See *Scott L. Huss v. Florida Department of Corrections Secretary Ricky Dixon*, No.: 6D23-1759 (Fla. 6th DCA 2023).

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OPINIONS BELOW

The opinion of the highest State Court to review the merits appears at Appendix A to the petition and is reported at Scott *Huss v. Ricky D. Dixon, Secretary of the Florida Department of Corrections,* No. 6D23-1759 (Fla. 6th DCA 2023).

STATEMENT OF JURISDICTION

The date of which the highest state court decided Petitioner's case was on April 6, 2023. A copy of that decision appears at Appendix B, from the Sixth District Court of Appeals denying petition.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment, U.S. Constitution - "no person shall be deprived ... without due process of law."
2. Sixth Amendment, U.S. Constitution - "in all criminal prosecutions the accused shall ... be confronted with the witnesses against him."
3. Fourteenth Amendment, U.S. Constitution - "no state shall deprive any person ... the equal protection of the laws."
4. Fla. Stat. § 90.803 (23)(b) – provisions regarding "unavailability" of witnesses at trial.

STATEMENT OF THE CASE

1. Petitioner, SCOTT L. HUSS (Mr. Huss) was charged by information in April, 2007 for 2nd Degree Murder of his Russian immigrant wife, Yana Huss, placed in county jail, and was denied bond.
2. Mr. Huss hired defense counsel, pled Not Guilty to the charge and requested an interview with the FBI.
3. Six months later, in October 2007, the State prosecutor requested and conducted a discovery deposition of their alleged eye witness, 8 year old Piter Shalin, stepson of Mr. Huss. Defense counsel informed Mr. Huss that he (Mr. Huss) could not attend the deposition.
4. The discovery deposition took place in October 2007 and was videotaped. Mr. Huss was prohibited from attending the deposition pursuant to Florida Rules of Court, (Fla. R. Crim. P. 3.220(h)(7)) and Mr. Huss was again advised by counsel that he could not attend.
5. The deposition of the State's sole accuser was taken over three years preceding the trial where significant additional discovery had been obtained following the deposition and certainly required testimony and meaningful cross-examination of the state's only "eye witness," following introduction of new discovery.
6. Mr. Huss' trial was delayed for nearly 45 months and the State repeatedly held that this "witness" would be at trial.
7. The court finally decided to hold the trial in Nov./Dec., 2010 just weeks before the minor child turned 12 years old, the age where the 'emotional trauma' hearsay exception no longer applies.

8. At trial, the prosecutor then said the child was unavailable claiming the Russian caretakers stated he would be emotionally traumatized and the prosecutor requested to introduce the edited videotaped discovery deposition as substantive testimonial evidence at trial. See T @ C 2, 3, 21, 22 in Appendix C[1]
9. Mr. Huss' defense counsel strongly objected to the improper admission and use of the deposition and requested a suitable remedy including a proper remote testimony or a lawful deposition to perpetuate testimony as ruled in Fla. R. Crim. P. 3.190(i)(3) that compels Mr. Huss' attendance and satisfies his 6th Amendment "right to confront." See T @ C 16, 17 In Appendix C, Fla. R. Crim. P. 3.190(i)(3).
10. The trial court overruled Mr. Huss' counsel's objection, denied all request for suitable constitutional remedies, and allowed the introduction of the videotaped deposition. See T @ C 2, 16, 17 in Appendix C.
11. The jury was significantly and irrevocably prejudiced by not being allowed to see lawful examination and meaningful cross-examination of the state's only witness.
12. The court's errors involved due process violations, confrontation violations, and equal protection violations as guaranteed by the 5th, 6th, and 14th Amendments, U.S. Constitution, completely delegitimizing the trial.

Appellate Proceedings:

Mr. Huss' appellate counsels overlooked the confrontation violation in their initial state appellate petitions leaving Mr. Huss with a State Habeas Corpus petition as his only vehicle to raise this fundamental Constitutional violation. The 6th District Court of Appeals(DCA) denied Mr. Huss' appeal without opinion resulting in Mr. Huss being

1 T designates the trial transcript included in Appendix C

denied "conflict" review in Florida's Supreme Court. By rule, the 6th DCA was Mr. Huss' "court of last resort" in Florida's appellate system. See Appendix A.

In Mr. Huss' Habeas petition, Mr. Huss clearly argued the federal and State Constitutional, confrontation, due process, and equal protection violations that prejudiced Mr. Huss and his jury.

Crawford Violation:

Following *Crawford*, the United States Supreme Court held that a statement [introduced at trial] made by a declarant who does not testify at trial [allowing cross-examination before a jury] violates a defendant's 6th Amendment "right to confront" and requires a reversal and a new trial. See *Crawford v. Washington*, 541 US 25, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Florida law consistently holds to the standards set forth in *Crawford* holding that a discovery deposition is NOT a suitable substitute for confrontation following *Crawford*. Florida case law concerning 5th, 6th, and 14th Amendment violations will be further discussed following the U.S. Supreme Court and federal cases cited below.

U.S. Supreme Court and Federal cases:

In *Williams*, the U.S. Supreme Court held that "testimonial statements of witnesses absent from trial can be admitted only where the declarant is unavailable, **and only where the defendant has had a prior opportunity to cross-examine.**" (emphasis added). See *Williams v. Illinois*, 567 U.S. 50 (June 18, 2012). "The confrontation clause, as interpreted in *Crawford* bars admission of testimonial statements by declarants who are not subject to cross examination." *Crawford*, supra.

The U.S. Supreme Court has "held that this bedrock procedural guarantee applies to both federal and state prosecutions," through the 14th Amendment. See *Veach v. Dixon*, U.S. Dist. Lexis 76027, (Jan. 31, 2022).

In *Hemphill*, the U.S. Supreme Court held that the trial court's admission of the transcript of Morris' plea allocution over Hemphill's objection violated Hemphill's 6th Amendment "right to confront the witness against him." The court also held that *Hemphill* adequately presented a confrontation clause claim by arguing at the state proceedings that the admission of an unavailable party's [plea allocution] violated his 6th Amendment rights and it was not for the judge to determine otherwise. See *Hemphill v. New York*, 142 S. Ct. 681; 211 L. Ed. 2d 534.

Instant Case Analysis:

The question is whether the admission of the videotaped discovery deposition under Florida's hearsay exception rules violated Mr. Huss' 6th Amendment right to confront the witnesses against him WHEN Mr. Huss was (1) prohibited from attending the deposition, was (2) NOT informed that the deposition may be used at trial, was (3) NOT provided the contents of the deposition prior to trial, was (4) NOT provided with a copy of other hearsay statements made by that witness NOT included in the deposition, and was (5) NEVER provided any opportunity to cross-examine that sole accuser.

As stated, Mr. Huss' trial counsel vehemently objected to the admission of the deposition and requested live remote testimony or a deposition to perpetuate testimony to remedy Mr. Huss' "right to confront" violation. The judge overruled the objection, denied any resolution requested by Mr. Huss, and allowed admission of the deposition

without providing Mr. Huss any opportunity to cross-examine. See T @ C 2, 3, 16, 17, 21, 22 in Appendix C.

It is worth noting in *Bryant*, the U.S. Supreme Court noted that "the statement at issue had the primary purpose of accusing the targeted individual" for the "primary purpose of creating an out-of-court substitute for trial testimony." See *Michigan v. Bryant*, 562 U.S. 131 S. Ct. 1143, 179 L. Ed. 93, 107. It remains suspicious as to the motives of Mr. Huss' trial court considering the court held that the witness would be at trial for nearly four years and at trial, suddenly announced the unavailability of the witness and the request to admit the deposition as substantive testimonial evidence at trial.

The Federal rules regarding hearsay exceptions clearly require that a "party [had] an opportunity and similar motive to develop, cross, or redirect examination." See Federal Rule 804(b)(1)(A),(B).

Mr. Huss' trial record indicates that the witness, Piter Shalin, had made additional statements to other witnesses that testified at trial. In Federal rule 803 (1), (2) those statements may qualify as (1) present sense impressions, or (2) excited utterance testimony AND clearly conflicted with statements made in the discovery deposition. See T @ C 5, 7-12 in Appendix C.

NOTE: MR. Huss did NOT forfeit his right to confront and fully expected to be able to confront all witnesses at trial as a mater of due process.

In *Arsdell*, the U.S. Supreme Court held "to show a Confrontation Clause violation of the 6th Amendment to the U.S. Constitution a defendant must prove that he was 'prohibited from engaging in otherwise appropriate cross-examination' and [a]

'reasonable jury might have received a significantly different impression of [the witnesses'] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination.'" See *Delaware v. Arsdell*, 475 U.S. @ 680, 275 U.S. 673, 678 (1986).

As outlined, the meaningful cross-examination of the State's witness, Piter Shalin, never took place and there is beyond a reasonable probability that the jury would have received a significantly different impression of the witnesses' credibility following lawful cross-examination.

The U.S Supreme Court vacated and remanded *Giles* case, after *Giles* was convicted of 1st degree murder after the victims out of court statements were admitted because the court and state argued that *Giles* forfeited his right to confront because "he had committed the murder." See *Giles v. California*, 534 U.S. 353 (June 25, 2008).

In the instant case, the fact that the witness was out of the country and the court held that emotional trauma may occur if the child were to attend trial does not cause or imply that Mr. Huss "waived" his "right to confront" or allow the admission of the deposition, providing no opportunity to cross-examine.

In *Stuart, Justice* Gorsuch, with whom Justice Sotomayor joins, stated [that] "because cross-examination may be 'the greatest legal engine ever invented for the discovery of truth,' 'Where the Constitution promises every person accused of a crime the right to confront his accuser,' and 'to guard against mistake and the risk of false conviction, our criminal justice system depends on adversarial testing and cross-examination.'" See *Stuart v. Alabama*, 139 s. Ct. 36 (Nov. 19, 2018); *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

Of particular note, the child witness, Piter Shalin's primary language was Russian. Mr. Huss taught Piter English and Mr. Huss was likely the best person to navigate effective communication to and from Piter in any testimonial examination. Certainly, Mr. Huss should have been provided an opportunity to participate, either remotely, or through some type of technology. Huss also asserts his innocence and believes that proper and exhaustive examination of Piter would likely have more clearly defined who the actual perpetrators were.

Petitioner has demonstrated that the State "court of last resort" had a fair opportunity to address the federal question that is presented here. The Florida 6th DCA failed to offer opinion, citation, or certification, preventing Mr. Huss from obtaining conflict review in Florida's Supreme Court.

Florida State case law supporting 6th Amendment U.S. Constitutional violations:

In January, 2022 the Fla. Supremer Court reversed *Avsenew* for a 6th Amendment violation because the witness was unable to see the defendant during live video testimony at trial. See *Avsenew v. State*, S.C. 18-1629 (Jan. 2022). As stated, Mr. Huss was not even entitled to be present during the discovery deposition preventing any opportunity for meaningful cross-examination. Florida law prohibits introduction a discovery deposition as substantive testimonial evidence at trial.

In *Basiliere*, the "defendant was not present during the deposition by the state and defendant received no notice that said deposition could be used at his trial" in violation of his 6th Amendment rights. See *State v. Basiliere*, 353 So.2d 820, 823 (Fla. 1977).

During the COVID pandemic, many cases contained instances of remote (out-of-court) testimonies at hearings, trials, and other proceedings involving minors and other witnesses. In *I.P v. State*, 48 Fla. L. Weekly, D 410 (Fla. 3rd DCA 2021) Case No. 3D21-2256, *I.P.*, a juvenile appealed an adjudication of delinquency after a hearing, partially conducted remotely. Some witnesses testified remotely and *I.P* objected to the remote proceedings. The trial court held a hearing on the objection, overruled the objection, but did not make case specific findings supporting the need to conduct the proceedings remotely. The 3rd DCA reversed and remanded the case on the authority of *M.D. v. State*, 345 So.3d 927 (Fla. 3d DCA 2022); *J.T.B. v. State,* 345 So.3d 927 (Fla. 3d DCA 2022); and *T.H. v. State*, 349 So.3d 951 (Fla. 3d DCA 2022). In each of these cases involving minors, the trial court failed to make case specific findings supporting the need to conduct the proceedings remotely. The instant case differs in that "unavailability" to attend trial was established at trial BUT admission of the discovery deposition was not "established" and is fundamental error and a violation of Florida law. The court simply should have not allowed admission of the deposition. According to state and federal case law, this violation requires a reversal and a new trial. Of critical note, to qualify for close circuit testimony movant must establish emotional or mental harm and requires a motion in camera mandating a trial court's specific findings. See Fla. R. Juv. P. 8104(a).

Fla. Stat. 90.803 (23)(b) states, in reference to "unavailability." "In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall contain a written statement of the contents of the child's statement, the time at which the statement was made, the circumstance

surrounding the statement which indicates its reliability, and such other particulars as necessary to provide full disclosure of the statement." See Fla. Stat. 90.803(23)(b).

Mr. Huss' trial court failed to comply with ANY of the provisions of Fla. Stat. 90.803 (23)(b). See T @ C 2, 3, 18, 19, 21, 22 in Appendix C.

Prior to *Crawford*, Florida's court held to the standard that admission of a discovery deposition amounted to fundamental error. In *Clark*, the court reversed and remanded the case because the admission of a discovery deposition amounted to fundamental error, a due process, and confrontation violation. See *Clark v. State*, 572 So.2d 929) (Fla. 5th DCA 1990).

Similarly, in *James,* the court held that a discovery deposition is inadmissible under Florida case law. *James'* case was reversed and remanded for a new trial. See *James v. State*, 400 So.2d 571 (Fla. 5th DCA 1980).

The following three cases were also reversed and remanded for new trials because of the unlawful admission of discovery depositions at trial: *Campos v. State*, 489 So.2d 1235 (Fla. 3rd DCA 1986); *Terrel v. State*, 407 So.2d 1039 (Fla. 1st DCA 1981); and *Robidoux v. State*, 405 So.2d 267 (Fla. 4th DCA 1981).

Florida courts have consistently held that 6th Amendment violations at trial require a reversal and a new trial. In *Gardner* the "trial court properly denied a motion to introduce the discovery deposition even though she (the witness) was unavailable to testify." It is a trial court's "abuse of discretion" to allow introduction of a discovery deposition at trial whereas the defendant is not present and counsel is not motivated for a thorough cross-examination. See *Gardner v. State*, 194 So.3d 385 (Fla. 2nd DCA 2016). In *Johnson*, the State sought to introduce FDLE lab evidence without producing the

technician that tested the evidence. The defendant objected but the trial court erroneously allowed the evidence to be introduced. The 2nd DCA held that this was a 6th Amendment violation and reversed and remanded the case. See *Johnson v. State*, 929 So.2d (Fla. 2nd DCA 2005). The 2nd DCA also reversed and remanded *Padilla* for the introduction of an audio recording implicating defendant, violating his 6th Amendment right to confront. See *Padilla v. State*, 189 So.3d 986 (Fla. 2nd DCA 2016).

Precisely like the trial court in *Padilla*, Mr. Huss' trial court introduced a video recording implicating Mr. Huss, violating his 6th Amendment right to confront. Equal protection of the laws guaranteed by the 14th Amendment compels Mr. Huss' case to be reversed like all of the cases cited and to prevent and avoid another manifest injustice and fundamental miscarriage of justice. See T @ C 2, 3, 21, 22 in Appendix C.

In *Schluck*, the 1st DCA held that the recording was the only direct evidence implicating defendant and there is no way the state can prove that the recording did not "contribute to the verdict." See *Schluck v. State*, 329 So.3d 231 (Fla. 1st DCA 2021). This case mirrors *Padilla* and Mr. Huss' case exactly and both *Padilla* and *Schluck* were reversed and remanded for 6th Amendment violations. Where a jury's decision is affected by an incorrect application of the law the appellate court must reverse a conviction.

In *James*, the 5th DCA held that a discovery deposition was "inadmissible under Florida case law," that the discovery deposition failed to meet the requirements of Fla. R. Crim. P. 3.190 where the accused is required to attend and that deposition is designed to perpetuate testimony. See *James v. State*, 400 So.2d 571 (Fla. 5th DCA 1980). As previously stated, at Mr. Huss' trial the court allowed the unlawful use of the "discovery

deposition" as their primary evidence at trial. See T @ C 2, 3, 21, 22 in Appendix C.

The 4th DCA distinguished the difference between a discovery deposition and a deposition to perpetuate testimony where a discovery deposition is not intended for cross-examination and defendant is not entitled to be present. See *Belvin v. State*, 922 So.2d 1046 (Fla. 4th DCA 2006).

Florida Supreme Court:

The Florida Supreme Court holds that "a discovery deposition was not the prior opportunity for cross-examination for purposes of the confrontation clause," U.S. Constitution, 6th Amendment.

In *Corona*, the Fla. Supreme Court held that "A child's (out of court) witness statement that defendant committed act were testimonial and witness was unavailable for trial. The evidence was not harmless as it was the single most damning evidence at trial." *Corona* was reversed for the 6th Amendment violation. See *Corona v. State*, 64 So.3d 1232 (Fla. 2011).

Like *Corona*, a child's statements in a discovery deposition implicating Mr. Huss was the "single most damning" evidence at trial, and like Corona, Mr. Huss' case should be reversed for precisely the same violation. Equal application of the laws guaranteed by the 14th Amendment of the U.S. Constitution compels Mr. Huss' case to be reversed for the same point of law.

In contrast, the trial court in *Stevenson's* case did not "abuse discretion" or violate defendant's right to confront where they "allowed the child victim to testify [in court] seated in front of the jury box because the child gave live testimony in presence of defendant and the jury, the jurors had an unimpaired view of the witness, and counsel

had an unrestricted opportunity to cross-examine the child." See *Stevenson v. State*, 234 So.3d 828 (Fla. 1st DCA 2017).

Also in *Contreras*, the court held the videotaped statement, "the single most damning persuasive evidence on [Contreras] guilt." Again, this is precisely the same violation to Mr. Huss and there is certainly a reasonable probability that the conviction would not have occurred minus the incurable Constitutional violations. See *State v. Contreras*, 979 So.2d 896 (Fla. 2008)

Several other Florida Supreme Court cases support this claim and every case included was reversed and remanded due to 6th Amendment violations. *State v. Lopez*, 974 So.2d 340 (Fla. 2008); *Blanton v. State*, 978 So.2d 149 (Fla. 2008); and *Harrel v. State*, 709 So.2d 1364 (Fla. 1998).

Recent Supporting Persuasive Cases:

(1) A recent Missouri Supreme Court case held that "witness video testimony violated defendants 6th Amendment "right to confront" See *State (Missouri) v. Smith*, S. Ct. 99086 (Jan. 2022). Here, the witness was not able to see the defendant during the video testimony. In Mr. Huss' case, the witness was not able to see Mr. Huss, Mr. Huss was not allowed to be present, and the deposition was for discovery purposes only. 2) In August, 2021 the commonwealth of Kentucky Court of Appeals upheld a lower court's decision denying a prosecutor's request to let one witness testify by video at a fraud trial. This is precisely what the court should have done in Mr. Huss' case, "deny introduction of the videotaped discovery deposition at trial," without providing any opportunity for cross-examination. It is clear that the conflict presented in this petition applies, not only to all other Florida courts, but to courts in other states and the U.S. Supreme Court.

Trial Court's Pattern of 6th Amendment Violations:

At Mr. Huss' trial the State introduced two additional recordings used to implicate Mr. Huss in the trial. One was an alleged audio recording of Mr. Huss and the second was a videotaped deposition of a DNA analyst, each of which Mr. Huss was not aware of prior to trial. In both instances Mr. Huss had no prior opportunity to review, examine, or cross-examine the evidence or witness in direct violation of Mr. Huss' right to confront. See T @ C 14, 18, 19 in Appendix C

Summary:

Mr. Huss suffered a 6th Amendment "confrontation" violation at trial resulting in a conviction where there is a reasonable probability that it would not have occurred minus the violation. Cases from the U.S. Supreme Court, lower Federal courts, the Florida Supreme Court, Florida District courts, and courts from other states are represented in this Writ to support Mr. Huss' claim. Florida's 6th DCA denied Mr. Huss' 6th Amendment violation claim in direct conflict with federal and state rulings represented throughout this Writ. All of the cases cited were reversed and remanded for new trials or corrective proceedings except for cases that properly denied admission of the testimonial statements, depositions, or other out-of-court statements at trials or other court proceedings. Several cases with precisely the same violation, "admission of a discovery deposition" were included where each of these cases was reversed.

The error in Mr. Huss' case was a structural error that resulted in a fundamental miscarriage of justice.

It is clear that the remedy in both Federal and state courts for violations suffered by Mr. Huss is for his case to be reversed and he be remanded for a new trial. Mr. Huss

hereby prays this Honorable Court will grant certiorari and make the recommendations and orders that this Honorable Court deems just, lawful, and appropriate.

REASONS FOR GRANTING THE PETITION

The reasons to grant a Writ of Certiorari in this case is because the Petitioner's state court of last resort has decided an important federal question in a way that conflicts with the decisions of all other Florida state appellate courts of last resort and of U.S Courts of Appeals including the United States Supreme Court.

Petitioner's state court of last resort decided this federal question in a way that conflicts with relevant decisions of this Court and includes a fatal Sixth Amendment, confrontation violation at trial significantly prejudicing the jury and defendant.

CONCLUSION

WHEREFORE, based on the foregoing facts, argument, and cited authorities, the Petitioner prays that this Court will grant certiorari.

Date: June 20th, 2023

Respectfully submitted,

Scott Huss

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