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SID J. WHITE

FEB 7 1992

CLERK, SUPREME COURT

By [Signature]  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 RUFUS FORD, :  
 :  
 Respondent. :  
 :  
 \_\_\_\_\_ :

Case No. 79,220

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NUMBER 351199

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ATTORNEYS FOR RESPONDENT

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THIS COURT LACKS JURISDICTION BE-  
CAUSE (1) THE DECISION BELOW MERELY  
APPLIED RATHER THAN CONSTRUED A  
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SUMMARY OF THE ARGUMENT

This court lacks jurisdiction because the decision below merely applied rather than construed a constitutional provision and because the application of the constitution was not the primary holding of the case.

## ARGUMENT

### ISSUE

THIS COURT LACKS JURISDICTION BECAUSE (1) THE DECISION BELOW MERELY APPLIED RATHER THAN CONSTRUED A CONSTITUTIONAL PROVISION AND (2) THE APPLICATION OF THE CONSTITUTION WAS NOT THE PRIMARY HOLDING OF THE CASE.

This Court lacks jurisdiction because the district court merely applied rather than construed a constitutional provision. The court did not issue any novel interpretation of the confrontation clause but rather applied black letter confrontation law to the facts of the case. According to this black letter law, the four elements of the confrontation clause included physical presence, oath, cross-examination, and observation of demeanor. Although not all of these elements must be present in every case if the state has good reason to request otherwise, enough elements must be present to provide sufficient assurance of reliability, particularly when the witness's testimony seems on its face to be unreliable. The district court applied this well-settled law to the facts of the case and found that three of the four elements -- physical presence, oath, and cross-examination -- were not present or were restricted. In addition, the child witness's testimony seemed on its face to be unreliable. Consequently, the right to confrontation was violated.

Contrary to the Petitioner's claim, Brief of Petitioner on Jurisdiction at 6, the district court did not hold that physical presence was required regardless of any compelling state interests.

If this claim were true, then this Court would have jurisdiction on the basis of conflict with other decisions. The district court instead held that not enough of the elements of the confrontation right (including physical presence) were present to outweigh the competing interests and the apparent unreliability of the child's statements. This holding was not a new construction of the confrontation clause but an application of existing confrontation law to the facts of the case. Consequently, this court lacks jurisdiction to take this case. Armstrong v. City of Tampa, 106 So. 2d 407, 410 (Fla. 1958) ("It is not sufficient to sustain our jurisdiction merely to point to a set of facts and contend that the trial judge failed to apply correctly a recognized provision of the Constitution.").

Furthermore, the court's application of the confrontation clause was only an alternative holding. The primary holding was that no statute authorized the videotaping procedure employed in this case. This primary holding did not construe a constitutional provision, and Petitioner does not suggest any other basis for jurisdiction over this primary holding. This Court does not take jurisdiction on the basis of alternative holdings. Hanft v. Phelan, 488 So. 2d 531 (Fla. 1986).

CONCLUSION

This Court may not and should not take jurisdiction of this case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen Baker, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 5<sup>th</sup> day of February, 1992.

Respectfully submitted,



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