IN THE SUPREME COURT OF FLORIDA

CLYDE MCPHADDER,

Petitioner,

vs. CASE NO. 65,724

STATE OF FLORIDA,

Respondent,
_____/

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

JOHN W. TIEDEMANN
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

TOPICAL INDEX

TABLE OF CITATIONS

OTHERS

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PRELIMINARY STATEMENT

Petitioner, Clyde McPhadder, the criminal defendant and appellee below in State v. McPhadder, 452 So.2d 1017 (Fla. 1st DCA 1984), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellant below, will be referred to as "the State."

References to the two-volume record on appeal will be designated "(R:)." Certain prior filing by the parties in this cause will be referred to in appropriately descriptive language.

For the sake of clarity and exposition, the State has taken the liberty of dividing and discussing petitioner's compound issue upon certiorari as two issues.

For the convenience of the Court, a confirmed copy of the decision under review is attached to this brief as an appendix.

All emphasis is supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State rejects petitioner's statement of the case and facts because it improperly fails to present the legal occurrences and evidence adduced below in the light most favorable to the State as the prevailing party, see generally Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983), affirmed in part, reversed in part on other grounds, 457 So.2d 1385 (Fla. 1984); cf McNamara v. State, 357 So.2d 410 (Fla. 1978); Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980); and Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982). The State therefore substitutes the following statement of the case and facts necessary for purposes of resolving the narrow legal issue(s) presented upon petition for writ of certiorari:

On April 8, 1983, the State filed a six-count information in the Circuit Court of the Eighth Judicial Circuit in and for Alachua County charging petitioner with the possession and delivery of cannabis on January 13, February 21, and March 2 (R 1-4). Trial was scheduled for September 27, and a panel was sworn on that date. However, before a jury had been sworn to try the particular case, petitioner made an ore tenus motion to suppress three tape recorded conversations of drug transactions between himself, a confidential informant named Mae Campbell, and a City of Ocala Police Officer named Ella Daniels (R 50-51; 22). Petitioner, relying in part upon Tollett v. State, 272 So.2d 490 (Fla. 1973), contended

that this evidence was inadmissible under §934.03(2)(c), Fla.Stat.[1] because he had not consented to being taped; because Mae Campbell was unavailable for trial and consequently would not testify that she had consented to being taped; and because Ella Daniels, who was present but had not spoken during the conversation, was not a "party" to the conversations and hence could not testify that she had consented to being taped. The State countered that Daniels was indeed a "party" to the conversations because, although these conversations consisted principally of petitioner and Campbell negotiating drug transactions in which petitioner was the seller and Campbell the buyer, Daniels was present in the car where the conversations occurred and it was understood that Campbell was buying the drugs for Daniels as well as herself (R 23-25; 29-36). After hearing testimony from Daniels and the argument of counsel, the lower court denied the motion to suppress the tapes, holding that Daniels could verify the tapes and testify regarding their contents (R 6-7; 37-38).

Petitioner then moved that Ms. Campbell's half

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1 Fla.Stat. §934.03(2)(c) reads as follows:

934.03 Interception and disclosure of wire or oral communications prohibited.--

(2)(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

of the taped conversations be stricken as hearsay in view of her unavailability (R 38). The State countered that Ms. Campbell's statements on the tape would not be hearsay because they would not be submitted to prove the truth of the matters she asserted (i.e. that she wanted to buy drugs for her own use and Daniels' use), but rather would be submitted as the best evidence that petitioner had committed the crimes charged. Alternatively, the State contended that even if Ms. Campbell's statements were hearsay, they would still be admissible because they went to petitioner's state of mind and because petitioner, in building upon these statements to consummate drug deals, had essentially adopted them (R 39-44). The lower court, however, sided with petitioner and granted the motion to suppress Ms. Campbell's statements (R 6; 44).

Indicating that this suppression of evidence struck at the heart of its case, the State moved for and was granted a continuance to pursue an appeal (R 44-50). Thereafter, the State did perfect a timely appeal pursuant to Fla.R.App.P. 9.140(c)(1)(B)(R8), framing its argument as heretofore described ("Brief of Appellant"). Procedurally, petitioner responded by arguing that while the State was not entitled to direct appellate review of the order at issue via Fla.R.App.P. 140(c)(1)(B) as a matter of right, it was conceededly entitled to such review via petition for writ of common law certiorari as a matter of discretion, citing to State v. Steinbrecher, 409 So.2d 510 (Fla. 3rd DCA 1982) ("Answer Brief of Appellee", pp. 5-6). Substantively, petitioner responded by disputing the State's

good faith assurance that it did not intend to submit Ms. Campbell's statements on tape for the truth of the matters asserted by relying upon out-of-context remarks of counsel to argue that the State would supposedly need to rely on Campbell's salutation "Hey Clyde" to prove the truth of his identity ("Answer Brief of Appellee", pp.6-8; see R 38-39; 42-43; 47-48). The State replied that it "obviously (did) not need Ms. Campbell's statements on the tapes admitted for this purpose inasmuch as Ella Daniels' in - court identification of (petitioner) as the male voice on the tapes (would) provide adequate evidence of identification" ("Reply Brief of Appellant", p. 4). In reversing the order at issue, the First District unanimously rejected both petitioner's procedural and substantive arguments, explicitly accepting the State's contention that:

> the record shows that Ms. Campbell's statements were not being offered by the state to prove the truth of the matters she asserted thereon, but instead her statements were being presented into evidence for the purpose of showing that appellee engaged in conversation with Ms. Campbell and took part in plans to supply illegal drugs to her. Therefore, her recorded statements are not hearsay and are admissible. See Breedlove v. State, 413 So.2d 1 (Fla. 1982). Another eyewitness to the transactions is available to the state to make an in court identification of appellee. Since the taped statements of Ms. Campbell are not excludable on the basis of a hearsay objection, the trial judge erred in suppressing them.

State v. McPhadder, 452 So.2d 1017,1018 (Fla. 1st DCA 1984). Petitioner filed a Fla.R.App.P. 9.330(a) motion for

rehearing, again disputing the State's assurance that it did not intend to submit Ms. Campbell's statements on tape for the truth of the matters asserted, and arguing that the First District's ruling that these statements were admissible "for the purpose of showing that (he) engaged in conversation with Ms. Campbell and took part in plans to supply illegal drugs to her" on its face unwittingly sanctioned their use for the hearsay purpose of establising his identity despite the Court's explicit finding to the contrary ("Motion For Rehearing").

The First District denied rehearing, and also denied petitioner's motion to stay its mandate pending resolution of his consequent petition for writ of certiorari to this Court on the basis of conflict with State v. Steinbrecher, despite the fact that petitioner had signalled his intention to relitigate the hearsay question in this Court if possible ("Motion For Stay Pending Review"). Petitioner did not otherwise seek to postpone his trial so that he might await the outcome of the instant discretionary proceeding, either by moving the trial court for a continuance, cf Nelson v. State, 414 So.2d 505 (Fla. 1982), or by moving this Court for a writ of prohibition to ensure the completeness of its jurisdiction, see Article V, Section 3(b)(7) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(3). Consequently, he was tried and convicted for three of the offenses charged, and then appealed to the First District, simultaneously citing as one judicial act to be reviewed that "the (c)ourt

erred in allowing into evidence tape-recorded statements made at the time of the offense" ("Expedited Motion to Strike Brief/Motion for Order Commanding First District Court to Stay Proceedings", Exhibits II & III).[2]

Meanwhile, the State had responded to petitioner's jurisdictional brief upon petition for writ of conflict certiorari by suggesting, "with no disrespect intended, that petitioner (was) not pursuing this litigation for the sake of resolving the academic point of whether the order at issue should have been received by the First District via direct appeal or petition for writ of (common law) certiorari" as the Third District had determined in State v. Steinbrecher, but rather saw this perceived conflict as a vehicle for obtaining further review of the First District's conclusion that Ms. Campbell's taped statements were not excludable as hearsay ("Brief Of Respondent On Jurisdiction", p. 6). The State noted that such an approach would appear to be improper insofar as this Court had generally refused to expend its judicial labor by resolving in its opinions issues unrelated to those over which its jurisdiction had been invoked, citing to Berezovsky v. State, 350 So.2d 80 (Fla. 1977), Sobel v. State, 437 So.2d

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2 If per chance petitioner claims in his reply brief that these lower court documents are not properly before this Court, the State would then respectfully move that they be compulsorily judicially noticed, see §§90.202(6) and 90.203, Fla.Stat.

144 (Fla. 1983), and Barket v. State, 356 So.2d 263 (Fla. 1978), cert. denied, 439 U.S. 848 (1978) ("Brief Of Respondent On Jurisdiction", pp. 6-7). When this Court accepted conflict certiorari jurisdiction to review the decision below, petitioner did attack the First District's ruling on the hearsay issue,[3] prompting the State to move to strike this brief according to the aforecited authority ("Initial Brief of Petitioner"; "Expedited Motion To Strike Brief/Motion For Order Commanding First District Court to Stay Proceedings"). Noting that a failure to so limit the parameters of the instant proceeding would potentially render further action on petitioner's appeal to the First District either conflicting or useless, the State moved in the alternative that this Court stay further proceedings in that Court pending the outcome here, expeditiously if possible so that petitioner would not have to file a perhaps unnecessary initial brief in the First District.

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3 Petitioner once again disputed the State's assurance that it did not intend to submit Ms. Campbell's tape for the truth of the matters asserted, and also argued that "(t)he propriety of common law certiorari to review pretrial orders is....now in doubt", ("Initial Brief of Petitioner", p. 14), despite having conceeded in the First District that the State would, at worst, be entitled to receive this form of discretionary review over the order at issue, as noted ("Answer Brief of Appellee", pp. 5-6).

("Expedited Motion To Strike Brief/Motion For Order Commanding First District Court to Stay Proceedings"). Petitioner opposed the State's primary motion to strike by arguing that the Court's decision on the parameters of its review could be better made following submission of the remaining briefs; in so moving, petitioner characterized the State's position as "arrogant" and its motion as "somewhat hysterical", containing "overblown rantings." Petitioner did not oppose the State's alternative motion for a stay, however. ("Response to State's Motion To Strike and For Other Relief"). On February 26, this Court denied both of the State's motions.

SUMMARY OF ARGUMENT

The First District properly concluded that the order of the trial judge suppressing Ms. Campbell's portions of her tape recorded conversations with petitioner as hearsay was reviewable by direct appeal as a matter of right under the plain language of Fla.R.App.P. 9.140(c)(1)(B), rather than by petition for writ of common law certiorari as a matter of discretion as the Third District had determined in State v. Steinbrecher, 409 So.2d 510 (Fla. 3rd DCA 1982). The issue of whether the First District properly reversed this order is not presented for certiorari review; alternatively, the First District correctly determined that the statements were admissible insofar as they would not be submitted to prove the truth of the matters asserted.

ISSUES PRESENTED UPON CERTIORARI

ISSUE I

THE FIRST DISTRICT PROPERLY DETERMINED THAT THE ORDER AT ISSUE WAS REVIEWABLE BY DIRECT APPEAL.

ISSUE II

THE QUESTION OF WHETHER THE FIRST DISTRICT PROPERLY DETERMINED THAT THE ORDER AT ISSUE WAS ERRONEOUS IS NOT PRESENTED FOR CERTIORARI REVIEW; ALTERNATIVELY, THE FIRST DISTRICT WAS CORRECT.

ISSUE I

THE FIRST DISTRICT PROPERLY DETERMINED THAT THE ORDER AT ISSUE WAS REVIEWABLE BY DIRECT APPEAL.

ARGUMENT

Petitioner first alleges that the First District erred by determining that the order of the trial court suppressing Ms. Campbell's portions of her tape recorded conversations with him as hearsay was reviewable by direct appeal as a matter of right rather than by petition for writ of common law certiorari as a matter of discretion as the Third District determined in State v. Steinbrecher, 409 So.2d 510 (Fla. 3rd DCA 1982). The State disagrees.

Fla.R.App.P. 9.140(c)(1)(B) provides that the State may directly appeal as a matter of right any order of a trial court "(s)uppressing before trial....evidence obtained by search and seizure." Faithful to the axioms that where the language of a specific court rule is unambiguous, it must be accorded its plain and ordinary meaning without recourse to principles of construction, including references to general court rules on related subjects, see Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981) and Abrahams v. Mimosa Co., 174 So.2d 82 (Fla. 3rd DCA 1965), cf Reino v. State, 352 So.2d 853,860 (Fla. 1977), the First District correctly determined that the order at issue, which indisputably suppressed evidence obtained by search and seizure prior to trial, was reviewable under

Fla.App.P. 9.140(c)(1)(B).

This is absolutely as far as this Court needs to go to resolve the cause under review. Petitioner, of course, would have the Court to go much farther. Petitioner would have the Court overlook the foregoing axioms and hold that Fla.R. Crim.P. 3.190(h), simply by providing that the only revelant defense motions for the suppression of evidence which must normally be filed prior to trial are those challenging the legality of a search and seizure, artifically impresses upon Fla.R.App.P. 9.140(c)(1)(B) an unwitten caveat that the State may not appeal pretrial orders suppressing evidence on evidentiary grounds unrelated to the legality of the search and seizure. But this is simply not what the latter rule say!

Moreover, petitioner's reliance upon Fla.R.Crim.P. 3.190(h) for the foregoing proposition is implicitly premised in part upon the misassumption that pretrial motions to suppress evidence obtained by search and seizure upon grounds other than the lawfulness of such search and seizure have been universally rejected by the courts of this state due to their alleged prematurity. This is not the case.[4] If this were the case, it would inevitably follow that the trial judge here erred by

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4 Compare State v. Steinbrecher, in which pretrial litigation of such a motion was permitted, cf also State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982), with State v. Brown, 257 So.2d 263 (Fla. 3rd DCA 1972), in which pretrial litigation of such a motion was condemned.

not dismissing the instant motion out of hand, which would constitute an additional reason for this Court to affirm the First District! Since this is not the case, it follows that any interpretation of Fla.R.App.P. 9.140(c)(1)(B) predicating the State's right to appeal a pretrial motion suppressing evidence upon the fortuity of whether or not the ruling was based upon the legality of the search and seizure is simply untenable.

While on the subject of the timeliness of motions to suppress evidence, the State would note that in Savoie v. State, 422 So.2d 308 (Fla. 1982), this Court held that under certain circumstances the propriety of a motion to suppress evidence obtained by an allegedly unlawful search and seizure may be litigated during trial, even though such action would admittedly have the effect of depriving the State of the right to directly appeal an adverse ruling under Fla.R.App.P. 9.140(c)(1)(B); see also Morris v. State, 310 So.2d 757 (Fla. 1st DCA 1975). If the Court is inclined to interpret Fla.R. App. 9.140(c)(1)(B) contrary to its plain meaning, it should do so by revisiting Savoie and holding that the State's right to appeal motions suppressing evidence obtained by an allegedly illegal search and seizure will not hereinafter be predicated upon the fortuity of when the defendant elects to file his motion.

Of course, even if the Court does not revisit Savoie, the State will retain the right to seek appellate review of in-trial orders suppressing evidence obtained by search and

seizure via petition for writ of common law certiorari. Cf Combs v. State, 436 So.2d 93 (Fla. 1983), affirming the continued viability of this vehicle for securing review of serious legal errors for which there exists no other adequate remedy at law; cf also State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982).

In any event, the pretrial order at issue here was properly received by the First District via direct appeal as a matter of right. At this point, the State would note that while petitioner disagreed with this position in the district court, he did conceed that the State was entitled to review of this order via petition for writ of common law certiorari as a matter of discretion. Here, however, he argues that "(t)he propriety of common law certiorari to review pretrial orders is....now in doubt." Petitioner is procedurally precluded from maintaining this position here in view of his failure to present it below, cf Sapp v. State, 411 So.2d 363 (Fla. 4th DCA 1982) and State v. Beamon, 298 So.2d 376 (Fla. 1974), cert. denied, 419 U.S. 1124 (1975); moreover, this position is uncompelling on the merits, see Combs v. State. Thus even if the First District should have received the State's challenge to the order at issue as a petition for writ of common law certiorari rather than as a direct appeal, it still had the right to review and reverse this order on the merits.

ISSUE II

THE QUESTION OF WHETHER THE FIRST DISTRICT PROPERLY DETERMINED THAT THE ORDER AT ISSUE WAS ERRONEOUS IS NOT PRESENTED FOR CERTIORARI REVIEW; ALTERNATIVELY, THE FIRST DISTRICT WAS CORRECT.

ARGUMENT

Petitioner secondly alleges that regardless of the propriety of the First District's determination that the order of the trial court suppressing Ms. Campbell's portions of her tape recorded conversations with him as hearsay was reviewable by direct appeal rather than by petition for writ of common law certiorari, the First District's reversal of this order was legally erroneous.

The State continues to believe that this issue is not presented for certiorari review insofar as it is unrelated to the basis upon which this Court's jurisdiction was invoked, see Berezovsky v. State, Sobel v. State, Barket v. State, State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), see generally Trushin v. State, 425 So.2d 1126 (Fla. 1982), but see Fla.R.App.P. 9.040 (a), Savoie v. State, and Bould v. Touchette, 349 So.2d 1181 (Fla. 1977), albeit that the State's motion to strike petitioner's initial brief for raising this issue was denied. The State is hopeful that this denial merely reflects an acceptance of petitioner's position that the Court's decision on the parameters of its review could be better made following submission of the remaining briefs. After these briefs have been received and

examined, the Court should reaffirm its general position that a petitioner should not obtain a second review of matters resolved in due course by a district court through a procedural fortuity unavailable to others. It must be remembered that a district court is not merely an inconvenient rung on the appellate ladder. Florida Greyhound v. West Flagler Association, 347 So.2d 408 (Fla. 1977) (England, J., concurring).

The State confesses an inability to understand fully just what petitioner's point is concerning the merits of the First District's determination that Ms. Campbell's portions of her tape recorded conversations with him were not excludable as hearsay. Apparently, petitioner is either displeased that the First District accepted the State's repeated good faith assurances that it did not intend to submit Ms. Campbell's statements to prove the truth of his identity given that the testimony of Ms. Daniels would suffice for this purpose, or else he simply does not understand hearsay. In Breedlove v. State, 413 So.2d 1,6 (Fla. 1982), cert. denied, 459 U.S. 882 (1982), this Court noted, axiomatically, that "[h]earsay is an out-of-court statement, other then one made by a declarant who testifies at the trial or hearing, offered in court to prove the truth of the matter contained in the statement." The Court further noted that the fact that an out-of-court statement would be inadmissible as evidence that it was true does not mean that the statement would also be inadmissible as evidence that it was in fact made, whether

true or false. Accord, Williams v. State, 338 So.2d 251 (Fla. 3rd DCA 1976); United States v. Hansbrough, 450 F.2d 328 (5th Cir. 1971); United States v. Webster, 649 F.2d 347 (5th Cir. 1981). The United States v. Webster Court proposed the following test:

> Where the alleged fact is so only if the substance of the statement is the truth, the statement constitutes hearsay. [Citation omitted]. On the other hand where the alleged fact may be so regardless of whether the statement is true or false, the statement is not hearsay.

Id., 649 F.2d 346,349. Here, the alleged fact (that petitioner had committed the crimes charged), would be so regardless of whether the essence of the statements (that Campbell wanted to buy drugs for her own use and Daniels' use) was true or false. In fact, since the two women were undercover operatives, the statements were false. Because this does not diminish the truth of the alleged fact of petitioner's guilt, the statements are not hearsay. Hence the First District properly determined that these statements were admissible.

The State would suggest that petitioner, in the effort to discredit the First District's opinion by showing that it allegedly unwittingly sanctioned the use of Ms. Campbell's statements for the hearsay purpose of establishing his identity, places too much emphasis on the semantics of the Court's finding these statements were admissible "for the purpose of showing that (he) engaged in conversation with Ms. Campbell and took part in plans to supply illegal drugs to her", and not enough emphasis on the Court's finding that "[a]nother eyewitness is

available to the state to make an in court identification of (petitioner)", State v. McPhadder, 452 So.2d 1017,1018. The clear thrust of the First District's opinion, in the State's view, is that Ms. Campbell's statements on the tapes were to be admitted only for the nonhearsay purpose of proving that the crimes charged were committed, not the hearsay purpose of proving the identity of petitioner as the guilty party. If it should develop that the statements were admitted at petitioner's trial to show his identity in violation of the First District's mandate, then petitioner will have a remedy upon direct appeal to that Court. Certainly, it behooves this Court to refrain from accepting petitioner's speculations that the State intended to use these statements for a hearsay purpose in view of the undeveloped nature of the instant record. See Cardinale v. Louisiana, 394 U.S. 437 (1969); Troedel v. State, ___So.2d___(Fla. 1984), 9 F.L.W. 511.

For parallel reasons, the State would submit that this Court should refrain from ruling upon petitioner's claim that Ms. Campbell's taped statements should have been excluded under the search and seizure decision of Tollett v. State, 272 So.2d 490 (Fla. 1973), interpreting the now obsolete unamended Article I, Section 12 of the Constitution of the State of Florida. As noted, petitioner relied in part upon Tollett in unsuccessfully arguing below that his taped conversations with Campbell should have been suppressed in their entirety under §934.03(2)(c), Fla.Stat. because the silent witness

Daniels was not a "party" to the conversations and hence could not testify that she had consented to being taped. The propriety of the order denying this suppression is one of the judicial acts slated for review by the First District. However, should this Court elect to now reach the merits of petitioner's Tollett claims, the State would submit that Tollett itself is no longer wholly good law, see Article I, Section 12 of the Florida Constitution as amended and Palmer v. State, 448 So.2d 55 (Fla. 5th DCA 1984), and that Daniels was indeed a consenting "party" to the taped conversations as defined in §934.03, Fla.Stat., and hence could verify the tapes and testify to their contents at trial despite Campbell's absence, see Miller v. State, 411 So.2d 944 (Fla. 4th DCA 1982), review denied, 419 So.2d 119 (Fla. 1982); Parnell v. State, 218 So.2d 535 (Fla. 3rd DCA 1969); and Gomien v. State, 172 So.2d 511 (Fla. 3rd DCA 1965).

Pursuant to the axiom that the decision of a lower court must be upheld where it has reached the right result, regardless of its reasoning, see e.g. Combs v. State, the State would submit that the First District's conclusion that the tapes were admissible must be upheld even if Ms. Campbell's half of these conversations can somehow be categorized as hearsay. To afford the jury only officer Daniels' recollections and petitioner's half of the taped conversations would seem a pale and illogical substitute for the complete conversations. The complete conversations should be admissible to place petitioner's remarks in context, see United States v. Rodriguez, 509 F.2d 1342 (5th Cir. 1975), and as the best evidence

that he committed the crimes charged, see §90.952; Smith v. State, 311 So.2d 775 (Fla. 3rd DCA 1975), cert. denied, 327 So.2d 35 (Fla. 1976). "The purpose of the hearsay rule is to exclude unreliable testimony", City of Miami v. Fletcher, 167 So.2d 638,639 (Fla. 3rd DCA 1964), and what could be more reliable than cerified tape recordings of the crimes charged actually being committed? Ms. Campbell's statements, moreover, were both relevant to petitioner's state of mind or intent in committing the crimes charged and were adopted by him through his responses, thereby rendering these statements admissible, even if they are hearsay, as hearing exceptions. See §90.803(3)(a)(1) and Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982), modified on other grounds, 444 So.2d 947 (Fla. 1984); §90.803(18)(b) and Sullivan v. McMillian, 8 So.2d 450 (Fla. 1890). Furthermore, errors in the admission of tape recordings may be harmless depending upon the circumstances, Priestly v. State, 450 So.2d 289 (Fla. 4th DCA 1984), which determination, again, would obviously be better made by the First District upon direct appeal.

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The appellate litigation of this case has been marked by petitioner's repeated refusals to accept the State's good faith assurances that it did not intend to submit Ms. Campbell's tape recorded statements to prove the truth of his identity, and by his pejorative characterizations of the State's position that the merits of the hearsay issue are not properly before

this Court. It would not be proper form for the State to react to these tactics here, see generally Gluck v. State, 62 So.2d 71 (Fla. 1952). The State would, however, probatively note that such tactics are not customarily employed by litigants confident of their legal positions, and accordingly challenge petitioner to limit himself to an analysis of this position in reply.

CONCLUSION

WHEREFORE, the State of Florida respectfully submits that the decision under review must be AFFIRMED.

Respectfully submitted,

JIM SMITH
Attorney General

John W. Tiedemann
JOHN W. TIEDEMANN
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent has been forwarded to Mr. Michael J. Minerva, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, on this 1st day of March, 1985.

John W. Tiedemann
John W. Tiedemann
Assistant Attorney General