IN THE SUPREME COURT OF FLORIDA

CASE NO. 04-1331

STATE OF FLORIDA,

Petitioner,

-vs-

EUSEBIO HERNANDEZ,

Respondent.

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

Respondent, Eusebio Hernandez, was the appellee in the district court of appeal and the defendant in the Circuit Court. Petitioner, State of Florida, was the appellant in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol AA@ will be used to designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The facts underlying the trial court=s evidentiary ruling were not in dispute in the trial court. At the hearing on the defendant=s motion to exclude the co-defendant=s out-of-court statements, the State and the defense essentially stipulated to the facts in the motion and presented legal argument concerning the admissibility of the statements (R. 403-408, 467-497).

Between the hours of 2:40 a.m. and 3:50 a.m. on April 24, 1998, Henry Cuesta gave a sworn statement to Detective Fred Suco of the Miami-Dade Police Department Homicide Bureau (R. 227-283). In that sworn statement, Cuesta admitted shooting Dulce Diaz and Jorge Herrera, but claimed that he had been hired to do so by Eusebio Hernandez (R. 227-283).[1] Before he gave this sworn statement to the detective, Cuesta had told his girlfriend that he killed Dulce Diaz in a drug rip-off, and never mentioned Eusebio Hernandez (R. 404, 478-479). When Detective Suco first questioned Cuesta about the shooting, Cuesta stated that he had not participated in the shooting (R. 404, 478-479).[2] At the time he gave the statement implicating Eusebio Hernandez, Cuesta had

[1]In the Statement of the Case and Facts in the initial brief on the merits filed in this case by the State, the version of the events given by Cuesta in his sworn statement is meticulously detailed over the span of four pages (Brief of Petitioner at 1-4). These facts have no relevance to the issue in this appeal, and thus serve no purpose other than to unfairly prejudice Mr. Hernandez by presenting this court with only the version of the facts which is most incriminating to him. As this case involves the State=s pre-trial appeal of an evidentiary ruling made by the trial judge, the actual facts of this case have yet to be determined.

[2]In a later statement made to a fellow inmate while he was awaiting trial, Cuesta claimed that he had shot Dulce Diaz and Jorge Herrera because he wanted to get drugs

been questioned over a six-hour period and told he could receive the death penalty if he did not cooperate with the police (R. 480-481).

After he gave this statement to Detective Suco and he was arrested and charged with the homicide, Cuesta agreed to make a controlled telephone call to Eusebio Hernandez in which Cuesta would try to get Hernandez to implicate himself in the homicide (R. 404). The telephone call was monitored and recorded by Detective Suco (R. 404). The call was placed to Hernandez at approximately 5:40 a.m. (R. 409).

Most of the statements made by Cuesta to Hernandez in the recorded telephone call were Cuesta's pleas for money from Hernandez (R. 403-423). Cuesta repeatedly asked Hernandez to give him $500 (R. 409-411). After several of these requests for money, the following conversation took place:

> [Cuesta]: Hey brother, I, I heard some things, brother that ah, hey I didn=t know that woman was your ex-wife. You, you didn=t tell me that.
> [Hernandez]: Hey, compadre, don=t say anything about that, brother.
> [Cuesta]: Why didn=t you say anything, brother?
> [Hernandez]: Don=t tell me anything about that. Don=t say anything about that. Hey.
> [Cuesta]: Tell me.
> [Hernandez]: Ah, you can=t call me on the telephone, brother. You can=t call me brother. You cannot call me, I know what I am telling you.

(R. 411-412).

Following these statements, Cuesta resumed begging Hernandez to give him some

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and cash which Hernandez had told him he would find inside the house where the shooting took place (R. 336-337, 375-376, 479-480).

money (R. 412-413). When Hernandez told Cuesta that he would try to get him the money, the following exchange took place:

> [Cuesta]: No, but I=m going crazy, brother. I don=t know why you made me do that, man (sigh).
> [Hernandez]: Man, you cannot call me. I know what I am saying.
> [Cuesta]: Why did you make me kill him, brother, tell me? I am going crazy brother, I am nervous, I, I=ve never been like this in my life, man. I can=t even sleep, I am always looking out the window man, I don=t know (sigh).
> [Hernandez]: Don=t call me, don=t call me. I, I will try to see you, OK?

(R. 413-414). After this exchange, Cuesta resumed his pleas for money from Hernandez (R. 414-419). Hernandez finally agreed to give Cuesta $100, and made arrangements to get the money to Cuesta (R. 419-421). As Hernandez attempted to end the conversation, the following exchange took place:

> [Hernandez]: Ok, good bye, Ok? At the Burger King, OK?
> [Cuesta]: Yeah, and where did you throw away that gun?
> [Hernandez]: What, man?
> [Cuesta]: I, when I gave you the gun, where did you throw it away at?
> [Hernandez]: What, man? What do you mean man? Hey.
> [Cuesta]: Tell me, tell me, tell me, no, it=s just that, look just get the money for me, I have to escape, brother.
> [Hernandez]: I=ll see you there at 6:30.
> [Cuesta]: Ok, brother.

(R. 422).

Prior to trial, the defense filed a motion to exclude Cuesta=s statements in the recorded conversation on the ground that such statements were inadmissible on hearsay grounds and their admission at trial would violate Hernandez=s Sixth Amendment rights under the Confrontation Clause because Cuesta would not testify at Hernandez=s trial (R.

403-423). The State filed a motion in limine seeking a ruling that Cuesta=s statements were admissible under section 90.803(18)(b), Florida Statutes (2003) as statements of another in which the defendant had Amanifested his adoption or belief in its truth.@ At the hearing on the motions, the prosecutor stated his intention to offer the statements of Cuesta to prove the truth of those statements (R. 484-485). After both sides presented legal argument on the issue, the trial judge issued his ruling denying the State=s motion in limine and granting the defendant=s motion to exclude Cuesta's statements, on the ground that admission at trial of those statements would violate the defendant=s Sixth Amendment rights (R. 449).

The State filed a notice of appeal seeking appellate review of the trial court=s order excluding Cuesta=s out-of-court statements (R. 453). The Third District Court of Appeal treated the State=s notice of appeal as a petition for writ of certiorari because a non-final pretrial order excluding the out-of-court statements of a co-defendant on hearsay grounds is not listed in Florida Rule of Appellate Procedure 9.140(c)(1) as an order which may be appealed by the State (A. 3). The district court of appeal then denied the petition for writ of certiorari because the order excluding Cuesta=s out-of-court statements did not constitute a violation of clearly established law, resulting in a miscarriage of justice (A. 4).

First, the Third District held that under the unique facts of this case, admission of co-defendant Cuesta=s out-of-court statements would violate the Sixth Amendment Confrontation Clause under the decision of the United States Supreme Court in *Crawford*

v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), because Cuesta was in police custody at the time he made the statements and the police had set up the controlled situation for the express purpose of manufacturing evidence against Hernandez:

> The United States Supreme Court [in *Crawford*] further noted:
>
> > Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.
>
> *Id*. at 1367, n. 7.
>
> Accordingly, the trial court correctly ruled that admission of the co-defendant's out-of-court statements while in police custody would violate the Confrontation Clause. Here, police set up a controlled situation, in the hopes that Hernandez would incriminate himself. As such, because the co-defendant's statements are testimonial under Crawford, admission of those statements at trial would violate the Sixth Amendment Confrontation Clause because Hernandez had no opportunity to cross-examine the co-defendant. Thus, the trial court's order excluding these statements does not violate a clearly established principle of law, resulting in a miscarriage of justice.

(A. 5-6).

Second, the district court of appeal held that under the unique facts of this case, Cuesta=s out-of-court statements are not admissible as adoptive admissions because those statements were made by an alleged accomplice of the defendant who was working with the police in an attempt to manufacture evidence against the defendant:

> The co-defendant's statements are not admissible as adoptive admissions because the out-of-court statements were the direct product of police officers who directed the co-defendant to make the statements so that Hernandez would incriminate himself . . .
>
> In the cases cited by the State which admit out-of-court statements as adoptive admissions, the statements were made during conversations the defendant had with other people and there was no police involvement, unlike the facts before us. See Nelson v. State, 748 So.2d 237 (Fla.1999); Privett v. State, 417 So.2d 805 (Fla. 5th DCA 1982); Tresvant v. State, 396 So.2d 733 (Fla. 3d DCA 1981). Under these circumstances, the trial court's decision not to allow the co-defendant's statements to come within the hearsay exception for adoptive admissions does not violate a clearly established principle of law, resulting in a miscarriage of justice.

(A. 6, 7).

Finally, the Third District held that Cuesta's out-of-court statements did not meet the requirements for admission as adoptive admissions:

> In addition, the co-defendant's out of court statements do not meet the requirements for an adoptive admission. A careful reading of the conversation that took place between Hernandez and the co-defendant indicates that there was nothing in the statements made by the co-defendant that were so accusatory in nature that Hernandez's silence could be taken as an assent to its truth. Furthermore, portions of the conversation indicate that Hernandez was not sure what the co-defendant was asking or talking about. In fact, the co-defendant was evidently extorting money from Hernandez, who kept repeating that they should not be talking on the telephone. Thus, two of the requirements for admission of a statement as an adoptive admission, that the statement must have been heard by the party claimed to have acquiesced and that the statement must have been understood by the defendant, were not met.

(A. 7-8).

On July 1, 2004, the State filed its notice seeking discretionary review in this Court

of the decision of the district court of appeal. The State sought discretionary review on two grounds. First, the State claimed that the decision of the district court of appeal in this case expressly and directly conflicts with the decisions of other courts on the question of the State=s right to appeal a non-final pretrial order. Second the State claimed that the decision of the district court of appeal in this case, which was issued on June 16, 2004, misapplied the decision of this Court on rehearing in *Globe v. State*, 877 So. 2d 663 (Fla. 2004), which was issued two weeks later on July 1, 2004. On January 19, 2005, this Court accepted jurisdiction and scheduled oral argument for June 8, 2005.

SUMMARY OF ARGUMENT

This case involves a unique set of facts in which a police officer engaged the services of an individual in police custody and charged with a homicide to assist the police in setting up a controlled tape-recorded telephone call with the defendant for the express purpose of manufacturing evidence against the defendant. Under such facts, the Third District Court of Appeal correctly held that (1) the State did not have the right to appeal the order excluding the out-of-court statements of the individual working with the police officer, as Rule 9.140(c)(1) does not give the State the right to appeal such an order; (2) admission of the individual=s out-of-court statements would violate the Sixth Amendment Confrontation Clause under the decision of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), because the out-of-court statements resulted from the involvement of government officers in the production of testimony with an eye toward trial; (3) the out-of-court statements are not admissible as adoptive admissions because the individual who made the statements was, at the time he made the statements, an alleged accomplice of the defendant who was working with the police in an attempt to manufacture evidence against the defendant; and (4) the out-of-court statements are not admissible as adoptive admissions because those statements do not meet the requirements for admission as adoptive admissions.

Thus, the district court of appeal's decision to treat the State's appeal as a petition for writ of common law certiorari does not conflict with any decisions from either this

Court or another district court of appeal because this case involves an order excluding the out-of-court statements of an individual working with a police officer. Furthermore, because this Court's decision in *Globe v. State*, 877 So. 2d 663 (Fla. 2004) does not involve out-of-court statements that resulted from the involvement of government officers in the production of testimony with an eye toward trial, the decision of the district court of appeal in this case does not misapply this Court's decision in *Globe*. Accordingly, it is respectfully submitted that this Court should conclude upon further consideration that jurisdiction was improvidently granted and dismiss this review proceeding. Alternatively, this Court should approve the decision of the district court of appeal.

ARGUMENT

I.

THE DISTRICT COURT OF APPEAL PROPERLY TREATED THE STATE=S APPEAL AS A PETITION FOR WRIT OF COMMON LAW CERTIORARI, AS A NON-FINAL PRETRIAL ORDER EXCLUDING THE OUT-OF-COURT STATEMENTS OF AN INDIVIDUAL WORKING WITH THE POLICE, ON HEARSAY AND SIXTH AMENDMENT CONFRONTATION CLAUSE GROUNDS, IS NOT LISTED IN FLORIDA RULE OF APPELLATE PROCEDURE 9.140(C)(1) AS AN ORDER WHICH MAY BE APPEALED BY THE STATE.

The order which the State appealed to the Third District Court of Appeal in this case is an order which excludes from evidence at trial out-of-court statements made by a co-defendant at the specific direction of a police officer, in a controlled telephone call which was set up and taped by that police officer, on the ground that admission of the co-defendant=s statements would violate the Sixth Amendment Confrontation Clause.[3] Such an order is not listed in Florida Rule of Appellate Procedure 9.140(c)(1), which sets forth the orders that may be appealed by the State. If a non-final pretrial order does not involve one of the subjects enumerated in Rule 9.140(c)(1), the State is not authorized to seek direct appellate review of such order. The State=s only remedy to seek review of non-final pretrial orders not listed in Rule 9.140(c)(1) is by writ of common law certiorari.

[3] A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Globe v. State*, 877 So. 2d 663 (Fla. 2004).

State v. Pettis, 520 So. 2d 250 (Fla. 1988); *State v. Gates*, 826 So. 2d 1064 (Fla. 2d DCA 2002); *State v. Sowers*, 763 So. 2d 394 (Fla. 1st DCA 2000).

Contrary to the claim made by the State, the statements made by co-defendant Cuesta at the specific direction of a police officer in a controlled telephone call which was set up and taped by that police officer do not fall within the class of statements which may be considered admissions, so as to render an order excluding such statements appealable by the State under Rule 9.140(c)(1)(B), as an order Asuppressing before trial confessions, admissions, or evidence obtained by search and seizure.@ In *McPhadder v. State*, 475 So. 2d 1215 (Fla. 1985) this Court held that the State could not appeal a non-final pretrial order striking statements made by an informant on electronic recordings on the ground that the informant was not available to testify and the statements were hearsay, because such an order was not listed in Rule 9.140(c)(1).[4] In *State v. Brea*, 530

[4]In its initial brief on the merits, the State asserts: AIn State v. McPhadder, 452 So. 2d 1017 (Fla. 1984), *this Court* held that the above rule [9.140(c)(1)(B)] applied to permit the State to appeal an order suppressing a tape-recorded conversation in which the defendant was taking part in plans to supply an informant with illegal drugs.@ (Brief of Petitioner at 18). The 1984 decision in *State v. McPhadder* which can be found at 452 So. 2d 1017 is the decision of the *First District Court of Appeal* holding that the State has the right to appeal such an order under Rule 9.140(c)(1)(B). However, in this Court=s subsequent decision in *McPhadder v. State*, 475 So. 2d 1215 (Fla. 1985), *this Court* quashed the decision of the district court of appeal and held that the State could *not* appeal a non-final pretrial order striking statements made by an informant on electronic recordings on the ground that the informant was not available to testify and the statements were hearsay, because such an order was not listed in Rule 9.140(c)(1). Thus, while respondent wholeheartedly agrees with the State=s claim that, AThe statements of the informant in McPhadder appear to be indistinguishable from the statements of

So. 2d 924, 926 (Fla. 1988), this Court explained that the pre-trial order in *McPhadder* was not appealable by the State because it was made by an informant, not a co-conspirator or agent of the defendant, and A[a] statement made by an informant is not made by someone acting in concert with the defendant and does not fall within the class of statements which may be considered admissions. *See, e.g.*, ' 90.803(18), Fla.Stat. (1985).@

Similarly, as the statements excluded in the instant case were made by someone who was acting as an informant in concert with the police, rather than as a co-conspirator or agent of the defendant[5] those statements do not fall within the class of statements

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codefendant Cuesta in the instant case, for the purpose of applying Rule 9.140(c)(1)(B)@ (Brief of Petitioner at 19), the necessary conclusion from that claim is that the State does *not* have the right to appeal an order excluding such statements.

[5]Under the usual set of circumstances where the State seeks to introduce evidence of out-of-court statements as adoptive admissions, the out-of-court statements were made during conversations concerning criminal activities between the defendant and a co-conspirator or agent of the defendant. *See Privett v. State*, 417 So. 2d 805 (Fla. 5th DCA 1982)(defendant present and heard extensive discussions by others of bank robberies and his participation in them); *Nelson v. State*, 748 So. 2d 237 (Fla. 1999)(discussions concerning facts of murder, including defendant=s involvement in the incident, while defendant and three other persons were in car driving towards Daytona Beach and while all four were present in a hotel room in Daytona Beach); *Tresvant v. State*, 396 So.2d 733 (Fla. 3d DCA)(discussions concerning bribery conspiracy which incriminated defendant taking place during meetings attended by co-conspirators), *review denied*, 408 So.2d 1096 (Fla.1981). In these situations, the State would have the right to appeal an order excluding such statements under *Brea* as they would be statements by someone acting in concert with the defendant and therefore would fall within the class of statements which may be considered admissions.

which may be considered admissions for purposes of the State=s right to appeal under Rule 9.140(c)(1)(B). The district court of appeal therefore properly treated the State=s appeal as a petition for writ of common law certiorari. As that decision does not conflict with any decisions from either this Court or another district court of appeal, it is respectfully submitted that this Court should conclude upon further consideration that jurisdiction was improvidently granted and dismiss this review proceeding. Alternatively, this Court should approve the decision of the district court of appeal insofar as it treated the State's appeal as a petition for writ of common law certiorari.

II.

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT UNDER THE UNIQUE FACTS OF THIS CASE, ADMISSION OF CO-DEFENDANT CUESTA=S OUT-OF-COURT STATEMENTS WOULD VIOLATE THE SIXTH AMENDMENT CONFRONTATION CLAUSE UNDER THE DECISION OF THE UNITED STATES SUPREME COURT IN *CRAWFORD V. WASHINGTON*, 541 U.S. 36, 124 S. CT. 1354 (2004), BECAUSE THE OUT-OF-COURT STATEMENTS RESULTED FROM THE INVOLVEMENT OF GOVERNMENT OFFICERS IN THE PRODUCTION OF TESTIMONY WITH AN EYE TOWARD TRIAL.

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), the United States Supreme Court Achanged the legal landscape for determining whether the admission of . . . hearsay statements violates the accused=s right[s]@ under the Confrontation Clause. *Horton v. Allen*, 370 F. 3d 75, 83 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 971 (2005). The Court in *Crawford*, partially abrogating its prior decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), held that Atestimonial@ hearsay statements may not be introduced against a defendant unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at ---, 124 S.Ct. at 1374. This outcome obtains regardless of whether the statement at issue falls within a firmly rooted hearsay exception or has a particularized guarantee of trustworthiness. Insofar as Atestimonial@ evidence is concerned, *Crawford* replaced the reliability analysis mandated by *Roberts* with a virtually *per se* rule of exclusion.

The *Crawford* Court expressly declined to provide a comprehensive definition of

Atestimonial statements.@ *Crawford*, 541 U.S. at ---, 124 S.Ct. at 1374. The Court did, however, reference several Aformulations of [the] core class of >testimonial= statements.@ *Id*. 541 U.S. at ---, 124 S.Ct. at 1364. One of these formulations defines a testimonial statement as one A>made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.=@ 541 U.S. at ---, 124 S.Ct. at 1364 (quoting *amicus curiae* brief of the National Association of Criminal Defense Lawyers). And in a statement particularly relevant to this case, the Court noted the following concerning testimonial statements:

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

541 U.S. at ---, 124 S. Ct. at 1367, n.7.

Considering the unique set of facts in this case, it is clear that the out-of-court statements of Henry Cuesta are testimonial hearsay statements that may not be introduced against Eusebio Hernandez because Cuesta will be unavailable at trial and Hernandez had no prior opportunity to cross-examine Cuesta. At the time he made the out-of-court statements, Cuesta was in police custody and was working with a police detective who had set up the controlled and recorded telephone call between Cuesta and Hernandez for the very purpose of manufacturing evidence against Hernandez. Under

such circumstances, Cuesta had every reason to believe that his statements would be available for use at a later trial. Thus, this case presents a classic example of A[i]nvolvement of government officers in the production of testimony with an eye toward trial,@ *Crawford*, 541 U.S. at ---, 124 S.Ct at 1367 n.7, and therefore Cuesta=s out-of-court statements are testimonial within the meaning of *Crawford*. *See State v. Snowden*, 385 Md. 64, 867 A.2d 314, 324 (2005)(Athe uniting theme underlying the *Crawford* holding is that when a statement is made in the course of a criminal investigation initiated by the government, the Confrontation Clause forbids its introduction unless the defendant has had an opportunity to cross-examine the declarant@).[6]

This Court=s decision on rehearing in *Globe v. State*, 877 So. 2d 663 (Fla. 2004) does not compel a contrary result. In *Globe*, this Court considered the admissibility of the out-of-court statements of Globe=s co-defendant and fellow inmate, Andrew Busby. Shortly after another inmate was murdered, a police official asked Globe if he was willing to make a statement. Globe answered that he would only be willing to give a statement if he could do so in the presence of Busby. Globe and Busby were then advised of their

[6]Under the usual set of circumstances where the State seeks to introduce evidence of out-of-court statements as adoptive admissions, the out-of-court statements were made during conversations concerning criminal activities between the defendant and a co-conspirator or agent of the defendant, with no involvement of government officers in the conversations. In these situations, the statements would not be considered testimonial because they were not the result of involvement of government officers in the production of testimony with an eye toward trial, and accordingly their admission against the defendant would not violate the Confrontation Clause under *Crawford*.

Miranda rights, after which they gave a joint tape-recorded statement in which they admitted to killing the victim. In that joint statement, Globe verbally affirmed what Busby said and added significant details to Busby=s statement. Under these circumstances, this Court held that *Crawford* did not bar the admission of Busby=s out-of-court statements against Globe.

Considering the fact that Globe specifically demanded that Busby be present at the time he spoke to the police officers, it can hardly be claimed that *Globe* is a case where Busby=s out-of-court statements were the result of A[i]nvolvement of government officers in the production of testimony with an eye toward trial,@ *Crawford*, 541 U.S. at ---, 124 S.Ct at 1367 n.7. As previously demonstrated, however, the instant case does present a classic example of such involvement by government officers in the production of testimony with an eye toward trial. It is undisputed in this case that at the time Cuesta made the out-of-court statements which the State now seeks to admit into evidence at his trial, Cuesta was working with a police detective who had set up the controlled and recorded telephone call between Cuesta and Hernandez for the very purpose of manufacturing evidence against Hernandez. As *Globe* does not involve out-of-court statements generated by the police under such circumstances, the holding of that case does not control the disposition of the *Crawford* issue in this case. Thus, the decision of the district court of appeal in this case does not misapply this Court's decision in *Globe*, and therefore it is respectfully submitted that this Court should conclude upon further

consideration that jurisdiction was improvidently granted and dismiss this review proceeding.

The State=s alternative arguments to avoid *Crawford* are equally unavailing. In its brief on the merits filed in this case, the State claims that *Crawford* does not bar the admission of Cuesta=s out-of-court statements because the State does not seek to admit those statements into evidence at trial to prove the truth of the statements:

> Subsequent to Crawford, statements comparable to those of Cuesta have been deemed admissible under at least two distinct theories: first, that such statements are not offered to prove the truth of the matter and thus do not violate the Confrontation Clause; second, that such statements are used only as a means for establishing the context and meaning of the defendant=s own statements, and thus do not violate the Confrontation Clause.

(Brief of Petitioner at 35).

This claim, that the State is not seeking to admit Cuesta=s out-of-court statements to prove the truth of the matters in those statements, was never presented to the district court of appeal. The failure to present such a claim in the district court of appeal is understandable considering the fact that in the trial court the prosecutor directly told the trial judge that he *was* seeking to admit the out-of-court statements to prove the truth of those statements:

> THE COURT: Mr. Gilfarb [the prosecutor], if the Court were to instruct the jury that the statements made by Mr. Questa [sic] in his criminal confession are not offered to prove the truth of those statements, does that resolve the problem[?]
>
> MR. GILFARB: I don=t think it does. Because then the admission you are telling them is not true. Let me clarify, also only one as respect of what

he said. Because I take issue with his argument, only one fact.

THE COURT: *So that means then the statement made by Mr. Questa [sic] deemed to be true, they are [offered] to prove the truth of those statements?*

MR. GILFARB: *Yes*.

(R. 484-485).

Thus, the issue litigated in the trial court and decided by the trial judge was the admissibility of co-defendant Cuesta=s out-of-court statements to prove the truth of those statements. This was also the issue decided by the district court of appeal. Accordingly, the issue of the admissibility of Cuesta=s out-of-court statements for purposes other than proving the truth of those statements is not properly before this Court. *See Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985)("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved@); *see also* Section 924.051(1)(b), Florida Statutes (2003)(an issue is properly preserved if "an issue, legal argument, or objection ... was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection ... was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.").

The State also claims in its brief on the merits that the decision of the United States Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987) supports the admissibility of co-defendant Cuesta=s statements. The State is wrong.

In *Bourjaily*, the Court addressed the admissibility of admissions made unwittingly by Bourjaily=s co-defendant (and purported co-conspirator) to an informant. The Court held that even though the co-defendant was unavailable to testify at trial, and even though Bourjaily had not had a prior opportunity to cross-examine the co-defendant regarding the statements, the introduction of those statements as evidence against Bourjaily did not run afoul of the Confrontation Clause. In *Crawford*, the Court approved of this holding, citing it as an example of a case that is Aconsistent with@ the principle that the Sixth Amendment permits the admission of nontestimonial statements even in the absence of a prior opportunity for cross-examination. *Crawford*, 541 U.S. at ---, 124 S.Ct. at 1367.

What the State fails to recognize in this case is that the issue in *Bourjaily* was the admissibility of the out-of-court statements unwittingly made to the informant by the co-defendant. *See also People v. Redeaux*, 291 Ill.Dec. 258, 823 N.E.2d 268 (2005)(holding that out-of-court statements unwittingly made to informant by co-defendant in the course of a conspiracy were nontestimonial and therefore admission of those statements did not violate Confrontation Clause under *Crawford*). Those statements were nontestimonial because the co-defendant did not know that the informant was working for the government and thus the co-defendant would have no reason to believe that his statements would be available for use at a later trial. While any out-of-court statements made by the informant in *Bourjaily* would be testimonial because the

informant knew those statements would be available for use at a later trial, the *Bourjaily* Court did not in any way address the Confrontation Clause implications of the out-of-court statements made by the informant. In addressing the Confrontation Clause implications of the admission of conversations between the informant and the co-defendant, the *Bourjaily* Court focused only on the non-informant half of the conversation. As this case involves the Confrontation Clause implications of the admission of the out-of-court statements of an individual who was working for the government and thus knew that his statements would be available for use at a later trial, the *Crawford* Court=s approval of the holding in *Bourjaily* is not relevant to the disposition of the issue before this Court.

To summarize, as Cuesta=s out-of-court statements, which the State sought to admit for the truth of those statements, are testimonial hearsay statements within the meaning of *Crawford*, the Confrontation Clause bars admission of those statements at trial as evidence against Eusebio Hernandez because Cuesta will be unavailable at trial and Hernandez had no prior opportunity to cross-examine Cuesta. The trial court=s order excluding those statements under the Sixth Amendment Confrontation Clause was therefore entirely correct under the decision of the United States Supreme Court in *Crawford*, and therefore the district court of appeal correctly held that the trial court=s order did not violate a clearly established principle of law, resulting in a miscarriage of justice.

III.

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT UNDER THE UNIQUE FACTS OF THIS CASE, CO-DEFENDANT CUESTA=S OUT-OF-COURT STATEMENTS ARE NOT ADMISSIBLE AS ADOPTIVE ADMISSIONS BECAUSE AT THE TIME HE MADE THE STATEMENTS CUESTA WAS AN ALLEGED ACCOMPLICE OF THE DEFENDANT WHO WAS WORKING WITH THE POLICE IN AN ATTEMPT TO MANUFACTURE EVIDENCE AGAINST THE DEFENDANT.

The hearsay exception which establishes the admissibility of out-of-court statements as tacit admissions or admissions by silence is firmly entrenched in this state. *See* Section 90.803(18)(b), Florida Statutes (2003); *Nelson v. State*, 748 So. 2d 237 (Fla. 1999); *Privett v. State*, 417 So. 2d 805 (Fla. 5th DCA 1982). However, A[e]vidence of >tacit= or >adoptive= admissions is replete with possibilities for misunderstanding and >[t]he cases repeatedly emphasize the need for careful control of this otherwise hearsay . . . testimony.=@ *Holmes v. United States*, 580 A. 2d 1259, 1263 (D.C. 1990), *quoting Skiskowsi v. United States*, 81 U.S.App.D.C. 274, 278-79, 158 F.2d 177, 181-82 (1946), *cert. denied*, 330 U.S. 822 (1947)(footnote omitted). AThere are >great possibilities of error= in relying on oral utterances which are supposed to have been heard, understood, and acknowledged by the defendant.@ *Holmes*, 580 A. 2d at 1263, *quoting Naples v. United States*, 120 U.S.App.D.C. 123, 126-27, 344 F.2d 508, 511-12 (1964). In *Moore v. Smith*, 14 Serg. & Rawle 388, 393 (Pa.1826), quoted in 4 J. Wigmore, Evidence in Trial at Common Law ' 1071, at 103 (Chadbourn Rev.Ed.1972),

the court, while discussing the doctrine of acquiescence by silence stated that A[n]othing can be more dangerous than this kind of evidence. It should always be received with great caution.@ ARecognizing that at its best, the doctrine of assenting silence brings about the weakest assumption known to the law, the courts generally have imposed conditions upon the introduction of evidence that an alleged admission by silence has occurred.@ 29A Am. Jur. 2d Evidence ' 802. The doctrine has also been criticized by commentators. *See* Maria L. Ontiveros, "Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity," 28 Sw. U. L. Rev. 337 (1999); C. Gamble, "The Tacit Admission Rule: Unreliable and Unconstitutional--A Doctrine Ripe for Abandonment," 14 Ga.L.Rev. 27 (1979); Note, "Tacit Criminal Admissions," 112 U.Pa.L.Rev. 210 (1963).

The facts of this case present a scenario where the adoptive admission exception should not be applied. After being questioned over a six-hour period and after being told that he could receive the death penalty if he did not cooperate with the police, at approximately 3:00 a.m. Henry Cuesta gave a statement to Detective Suco implicating Eusebio Hernandez in the shooting of Dulce Diaz and Jorge Herrera (R. 277-283, 480-481). Before giving this statement implicating Hernandez, Cuesta had told his girlfriend that he killed Dulce Diaz in a drug rip-off and never mentioned Eusebio Hernandez, and he had also told Detective Suco that he had not participated in the shooting at all (R. 404, 478-479). After he gave his statement implicating Hernandez, and after he was arrested

and charged with the homicide, Cuesta agreed to work with Detective Suco and make a controlled, tape-recorded telephone call to Hernandez in which Cuesta would try to get Hernandez to implicate himself in the homicide (R. 404). This telephone call was placed to Hernandez at approximately 5:40 a.m. (R. 409).

Allowing evidence of accusations that occurred in the presence of police officials who often are aware of the tacit admission rule has been singled out for particular criticism. In *Commonwealth v. Dravecz*, 424 Pa. 582, 227 A.2d 904 (1967), Justice Musmanno sharply criticized the admission of such accusations. Dravecz was employed as a laborer by a corporation which owned a trailer in which were stored many items of equipment being used on a construction job. Some of this equipment disappeared and part or all of it was found on a farm owned by the parents of Dravecz. A couple of days later, the police questioned Eugene Stockley, a labor foreman for the corporation, who gave a statement which implicated Dravecz in the theft of the equipment. Dravecz thereafter voluntarily submitted himself to questioning at the police station, and denied any involvement in the crime. A police officer then brought Stockley before Dravecz and read to Dravecz the written statement which had been made by Stockley. Dravecz made no comment at the end of the reading of the statement. At Dravecz=s trial, Stockley=s statement was read to the jury. On appeal to the Superior Court, the admission of Stockley=s statement was upheld under the tacit admission rule.

The Pennsylvania Supreme Court reversed the decision of the Superior Court,

holding that Stockley=s statement was not admissible as a tacit admission. Justice Musmanno=s eloquent indictment of the tacit admission rule under the facts of that case applies with equal force to the facts of the case before this Court:

> Under common law and, of course, this was doubly true in medieval continental Europe, forced confessions were as common as they were cruel and inhuman. The framers of our Bill of Rights were too aware of the excesses possible in all governments, even a representative government, to permit the possibility that any person under the protection of the United States flag could be forced to admit to having committed a crime. In order to make the protection hazard-proof, the framers went beyond coercion of confessions. They used the all-embracive language that no one could be compelled >to be a witness against himself=. What did the Trial Court in this case do but compel Dravecz to be a witness against himself? [D]ravecz had said nothing, yet because something was read to him, to which he made no comment, the prosecution insisted that Dravecz admitted guilt. If Dravecz could not be made a self-accusing witness by coerced answers, he should not be made a witness against himself by unspoken assumed answers.
>
> A direct confession unwillingly given is a coerced confession. A tacit admission is still an unwilling performance. It is more gentle because it is silent, but it is as insidious as monoxide gas which does not proclaim its presence through sound or smell. A forced confession is a steam-chugging locomotive moving down the track, blowing its whistle and clanging its bell with the victim tied to the rails. A tacit admission is a diesel locomotive silently but relentlessly moving forward without audible signals and striking the victim unawares. The approach is different, the effect is the same.
>
> If the police prepare a statement reciting facts, which precisely and physically point to the defendant as the author of a certain crime, and read it to him and he remains silent during the reading, the statement may not be introduced in evidence against him. Yet, under the [tacit admission rule], *a third person may utter anything he pleases, charging the defendant with any crime at all, and if the defendant fails to answer, then that third person's unmonitored, unauthenticated declaration may doom him. No system of law should countenance so blatant an illogicality, so untrustworthy a procedure, and so unsportsmanlike and unfair a practice*.

424 Pa. at 587-589, 227 A.2d at 907-908.

Where, as in this case, the alleged adoptive admission is said to have been made in a context in which the other party to the conversation was an alleged accomplice of the defendant who was working with the police in an attempt to manufacture evidence against the defendant, Athere is an especially enhanced potential for misapprehension.@ *Holmes*, 580 A.2d at 1263. In *Holmes*, the court was faced with a set of facts nearly identical to those in the instant case. Based on a victim=s report to the police that he had been shot in the head and implicating a man named Hood in the shooting, Hood was arrested by the police. Hood admitted to the police that he played a role in the shooting, and identified Holmes as the triggerman. Seeking to cooperate with the authorities in the hope of securing more lenient treatment, Hood agreed to make a telephone call to Holmes and to have it secretly taped by the police. During the telephone call, Hood made several statements incriminating Holmes and Holmes responded in rather vague terms.

The appellate court concluded that evidence of Hood=s incriminating out-of-court statements had been erroneously admitted at trial as adoptive admissions, and stated the following in support of its conclusion:

> [T]his is a criminal case in which the defendant's liberty is at stake, and a cautious approach to the reception of evidence of "tacit" admissions . . . is "especially appropriate" under these circumstances. E. Cleary, McCormick on Evidence ' 270, at 800 (3d ed. 1984), and authorities cited at notes 6 & 7. Where a criminal defendant is available to be confronted with an accusatory statement (as Holmes was here available over the telephone), judicial resort to the adoptive admission doctrine may provide "an open invitation to manufacture evidence," *id.*, or to make something out of nothing or very much out of very little.

580 A. 2d at 1263 (footnote omitted).

In its brief on the merits filed in this case, the State has cited numerous decisions from around the country upholding the admission of out-of-court statements as adoptive admissions. Significantly, however, in not a single one of those decisions was the out-of-court statement made by an alleged accomplice of the defendant who was working with the police in an attempt to manufacture evidence against the defendant. *See Privett v. State*, 417 So. 2d 805 (Fla. 5th DCA 1982)(testimony clear that defendant was present and heard extensive discussions of bank robberies and his participation in them; no indication of any government involvement in conversations); *Nelson v. State*, 748 So. 2d 237 (Fla. 1999)(discussions concerning facts of murder, including defendant's involvement in the incident, while defendant and three other persons were in car driving towards Daytona Beach and while all four were present in a hotel room in Daytona Beach; no indication of government involvement in conversations); *Globe v. State*, 877 So. 2d 663 (Fla. 2004)(joint tape-recorded statement given by defendant and co-defendant after defendant specifically demanded that co-defendant be present at the time he gave his statement to police officers): *People v. Morgen*, 44 Ill.App.3d 459, 358 N.E.2d 280, 3 Ill.Dec. 113 (1977)(defendant not subject of an investigation when acquaintance, who was not in any way connected with law enforcement officials, asked him why he set fire to building); *People v. Medina*, 51 Cal.3d 870, 799 P.2d 1282, 274

Cal.Rptr. 849 (1991)(unmonitored conversation between defendant and his sister when she visited him in jail; no government involvement in conversation); *United States v. Jenkins*, 779 F.2d 606 (11th Cir. 1986)(conversation between defendant and two co-conspirators in a bedroom; no government involvement in conversation); *Jackson v. State*, 652 P.2d 104 (Alaska App. 1982)(accusation made in defendant=s presence by woman upon viewing shooting victims; no government involvement in accusation); *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003)(accusation made during telephone call which defendant placed from prison to a friend; call routinely recorded by prison officials); *United States v. Kehoe*, 310 F.3d 579 (8th Cir. 2002)(conversation between defendant and co-conspirator; no government involvement in conversation); *United States v. Villarreal*, 764 F.2d 1048 (5th Cir. 1985)(statement made by co-conspirator to operator of massage parlor in defendant=s presence; no government involvement in conversation); *United States v. Andrus*, 775 F.2d 825 (7th Cir. 1985)(conversation between defendant and co-conspirator; no government involvement in conversation); *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998)(defendant=s nod in response to companion=s account of co-defendant=s admission; no government involvement in conversation).

In holding that Cuesta=s out-of-court statements are not admissible as adoptive admissions, the district court of appeal expressly recognized the significance of the fact that the out-of-court statements were made by an alleged accomplice of the defendant

who was working with the police in an attempt to manufacture evidence against Hernandez:

> The co-defendant's statements are not admissible as adoptive admissions because the out-of-court statements were the direct product of police officers who directed the co-defendant to make the statements so that Hernandez would incriminate himself . . .
>
> In the cases cited by the State which admit out-of-court statements as adoptive admissions, the statements were made during conversations the defendant had with other people and there was no police involvement, unlike the facts before us. See Nelson v. State, 748 So.2d 237 (Fla.1999); Privett v. State, 417 So.2d 805 (Fla. 5th DCA 1982); Tresvant v. State, 396 So.2d 733 (Fla. 3d DCA 1981). Under these circumstances, the trial court's decision not to allow the co-defendant's statements to come within the hearsay exception for adoptive admissions does not violate a clearly established principle of law, resulting in a miscarriage of justice.

(A. 6, 7).

The district court of appeal was entirely correct in determining that the trial court's decision not to allow the admission of the co-defendant's out-of-court statements as adoptive admissions did not violate a clearly established principle of law, resulting in a miscarriage of justice. Considering the general need for the exercise of great caution in admitting such out-of-court statements, and the particular dangers inherent in admitting such out-of-court statements when they are made by an alleged accomplice of the defendant who was working with the police in an attempt to manufacture evidence against the defendant, the trial court properly ruled that co-defendant Cuesta's out-of-court statements are not admissible as adoptive admissions because Cuesta was in police

custody at the time he made the statements and the police had set up the controlled situation for the express purpose of manufacturing evidence against Hernandez.

IV.

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT CO-DEFENDANT CUESTA=S OUT-OF-COURT STATEMENTS DID NOT MEET THE REQUIREMENTS FOR ADMISSION UNDER THE ADOPTIVE ADMISSIONS EXCEPTION TO THE HEARSAY RULE.

Even if the out-of-court statements of co-defendant Cuesta which were induced by the police officer could qualify for consideration under the adoptive admission exception, those out-of-court statements did meet the requirements for admission under that exception. As recognized by the decision of the district court of appeal in this case, the following criteria have been established for admissions by silence:

> If a party is silent, when he ought to have denied a statement that was made in his presence and that he was aware of, a presumption of acquiescence arises. Not all statements made in the presence of a party require denial. The hearsay statement can only be admitted when it can be shown that in the context in which the statement was made it was so accusatory in nature that the defendant's silence may be inferred to have been assent to its truth. *Daughtery v. State*, 269 So.2d 426 (Fla. 1st DCA 1972). To determine whether the person's silence does constitute an admission, the circumstances and the nature of the statement must be considered to see if it would be expected that the person would protest if the statement were untrue. *Tresvant v. State*, 396 So.2d 733 (Fla. 3d DCA), *review denied*, 408 So.2d 1096 (Fla.1981).
>
> Several factors should be present to show that an acquiescence did in fact occur. These factors include the following:
>
> 1. The statement must have been heard by the party claimed to have acquiesced.
>
> 2. The statement must have been understood by him.

> 3. The subject matter of the statement is within the knowledge of the person.
>
> 4. There were no physical or emotional impediments to the person responding.
>
> 5. The personal make-up of the speaker or his relationship to the party or event are not such as to make it unreasonable to expect a denial.
>
> 6. The statement itself must be such as would, if untrue, call for a denial under the circumstances.
>
> The essential inquiry thus becomes whether a reasonable person would have denied the statements under the circumstances.

Nelson v. State, 748 So. 2d 237, 242-243 (Fla. 1999); *Privett v. State*, 417 So. 2d 805, 806-807 (Fla. 5th DCA 1982).

Most of the statements made by Cuesta to Hernandez in the recorded telephone call were Cuesta's pleas for money from Hernandez (R. 403-423). Cuesta called Hernandez at approximately 5:40 a.m. and repeatedly asked Hernandez to give him $500 (R. 409-411). After several of these requests for money, the following conversation took place:

> [Cuesta]: Hey brother, I, I heard some things, brother that ah, hey I didn=t know that woman was your ex-wife. You, you didn=t tell me that.
> [Hernandez]: Hey, compadre, don=t say anything about that, brother.
> [Cuesta]: Why didn=t you say anything, brother?
> [Hernandez]: Don=t tell me anything about that. Don=t say anything about that. Hey.
> [Cuesta]: Tell me.
> [Hernandez]: Ah, you can=t call me on the telephone, brother. You can=t call me brother. You cannot call me, I know what I am telling you.

(R. 411-412). Nothing in the context in which these statements by Cuesta were made rendered the statements so accusatory in nature that Hernandez=s silence may be inferred to have been assent to their truth. Indeed, there is nothing at all accusatory in the above-quoted statements, and therefore the statements are not admissible as adoptive admissions.

Following the above-quoted statements, Cuesta resumed begging Hernandez to give him some money (R. 412-413). When Hernandez finally told Cuesta that he would try to get him the money, the following exchange took place:

> [Cuesta]: No, but I=m going crazy, brother. I don=t know why you made me do that, man (sigh).
>
> [Hernandez]: Man, you cannot call me. I know what I am saying.
>
> [Cuesta]: Why did you make me kill him, brother, tell me? I am going crazy brother, I am nervous, I, I=ve never been like this in my life, man. I can=t even sleep, I am always looking out the window man, I don=t know (sigh).
>
> [Hernandez]: Don=t call me, don=t call me. I, I will try to see you, OK?

(R. 413-414). These statements by Cuesta could be considered to have been accusatory. However, Hernandez did not remain silent in the face of these statements. As he had already told Cuesta six times during the telephone conversation,[7] Hernandez responded to

---

[7] ADamn, Henry don=t call me.@ (R. 409)

* * * * *

AAh, you can=t call me on the telephone, brother. You can=t call me, brother. You cannot call me, I know what I am telling you.@ (R. 412)

* * * * *

AYou can=t call me anymore. You can=t call me anymore, brother.@ (R. 413).

Cuesta=s statements by telling him not to call Hernandez on the telephone. Repeatedly refusing to talk to someone on the telephone is not the same as remaining silent, especially under the circumstances of the conversation in this case where Cuesta was evidently extorting money from Hernandez. While a defendant's silence in the face of an accusation may be inferred to have been assent to its truth under certain circumstances, the same cannot be said of a defendant=s repeatedly saying, ADon=t call me@ to a person who is trying to extort money from him.

After Cuesta made these accusations and Hernandez affirmatively stated that he did not want to discuss that subject on the telephone, the co-defendant returned to his pleas for money from Hernandez (R. 414-419). Hernandez finally agreed to give Cuesta $100, and made arrangements to get the money to Cuesta (R. 419-421). As Hernandez attempted to end the conversation, the following exchange took place:

> [Hernandez]: Ok, good bye, Ok? At the Burger King, OK?
> [Cuesta]: Yeah, and where did you throw away that gun?
> [Hernandez]: What, man?
> [Cuesta]: I, when I gave you the gun, where did you throw it away at?
> [Hernandez]: What, man? What do you mean man? Hey.
> [Cuesta]: Tell me, tell me, tell me, no, it=s just that, look just get the money for me, I have to escape, brother.
> [Hernandez]: I=ll see you there at 6:30.
> [Cuesta]: Ok, brother.

(R. 422). Hernandez=s responses of AWhat@ and AWhat do you mean man@ clearly fail to meet the requirements for admission of a statement as an adoptive admission that the statement must have been heard by the party claimed to have acquiesced and that the

statement must have been understood by that party.

Thus, none of the statements made by Cuesta during the telephone conversation which was monitored by the police meet the criteria for admissions by silence. That being the case, even if *Crawford* did not bar admission of Cuesta's statements under the Confrontation Clause, the district court of appeal properly found that the trial court's exclusion of those statements did not violate a clearly established principle of law, resulting in a miscarriage of justice.

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent respectfully requests this Court to conclude upon further consideration that jurisdiction was improvidently granted and dismiss this review proceeding. Alternatively, this Court should approve the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Richard L. Polin, Bureau Chief, Criminal Appeals, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 1st day of April, 2005.

_____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
HOWARD K. BLUMBERG
Assistant Public Defender