IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1331

THE STATE OF FLORIDA,

Petitioner,

vs.

EUSEBIO HERNANDEZ,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Eusebio Hernandez was charged with first degree murder, attempted first degree murder, conspiracy to commit murder and causing bodily injury during the commission of a felony. (R. 8-18). Henry Cuesta was charged as a codefendant. (R. 8-18).

The alleged victim of the murder was Dulce Diaz. (R. 8). The alleged victim of the attempted murder was Jorge Herrera. (R. 8). Ms. Diaz was defendant Hernandez's ex-wife; Herrera was the ex-wife's current boyfriend. Evidence acquired by the State resulted in the State's belief that defendant Eusebio Hernandez hired co-defendant Cuesta to murder both Diaz and Herrera.

Cuesta gave a sworn statement to the police on April 24, 1998. (R. 227-284). Cuesta provided the police with the following information:

Cuesta had been friendly with Anthony, whose father's name was Eusebio; Cuesta did not know the last name. (R. 232-33). Cuesta had met Eusebio in March, 1998. (R. 234). Eusebio asked Cuesta if Cuesta wanted to make some money and told Cuesta that he, Eusebio, had a personal problem that he needed help with – he needed to have two people killed. (R. 234-35). Eusebio said "that they had their religion" and that Cuesta would "have to call and make an appointment to be able to see them" and that Cuesta would then kill them during that appointment. (R. 235).

Cuesta and Eusebio Hernandez met again, a few days later. (R. 237). Hernandez said that he would pay Cuesta $6,000 for killing the two named individuals. (R. 237). Cuesta accepted the offer. (R. 238). Hernandez said that the two intended victims were involved in Santeria. (R. 238). Hernandez reiterated that Cuesta should set up an appointment to meet with them and kill them at that time. (R. 239). Hernandez said that he would get a gun for Cuesta. (R. 239). Hernandez further told Cuesta that the phone number for the victims would be in a newspaper available at the supermarkets in a section regarding individuals who "practice that religion." (R. 240). Cuesta obtained the phone number from the newspaper, made the call a few days later, and set up the appointment with the intended victims. (R. 240-41).

Cuesta saw Hernandez two days prior to the date set for the appointment. (R. 243). Hernandez told Cuesta to wear a beaded necklace, and Hernandez gave that to Cuesta on the day of the scheduled appointment. (R. 244-47). Cuesta returned to Hernandez on April 2nd, the day before the scheduled appointment, and Hernandez engaged in some kind of ritual with chickens and candles at that time. (R. 245-46).

The two met again on Friday, April 3rd, at which time Hernandez gave Cuesta a gun to use. (R. 247). Cuesta called Hernandez on Friday morning, and arrangements were made to meet

at t he residence of Hernandez's son, Anthony. (R. 249). After that call, Cuesta called the intended victims and spoke to the woman about a spiritual reading appointment for that morning; it was set for some time between 11 and noon. (R. 249).

Cuesta then went to Anthony Hernandez's house and met with Eusebio Hernandez again. (R. 251). At this meeting, Hernandez gave Cuesta a car, a key to the car, beads and a gun. (R. 251-52). Eusebio Hernandez told Cuesta to call when it was over and to tell him what happened. (R. 254).

Cuesta and Hernandez went to a shopping center parking lot, where they dropped the car off. (R. 255-56). Cuesta then changed cars, and Hernandez again told Cuesta to call when it was done so that Hernandez could get the money out of the bank. (R. 256).

Later that morning, Cuesta drove to the victims' residence for the scheduled appointment. (R. 257). He took the beads that Hernandez had given him, took the gun, and went for the appointment. (R. 257-58). Cuesta had never seen the two intended victims before. (R. 258). The man brought him into a room and started throwing beads around. (R. 258-59). The man was telling Cuesta about Cuesta's problems. (R. 259-60). Eventually, Cuesta got scared and left, without having killed the victims. (R. 260). Cuesta did tell the intended victims that he would call again. (R. 260-61).

Cuesta then called Eusebio Hernandez and told him that he did not kill the victims; Hernandez set up another meeting between them, to be held at the residence of Hernandez's son, Anthony. (R. 261). When they met, Hernandez told Cuesta to "go back and take care of it." (R. 263).

Cuesta did go back, with the gun, and again entered the victims' residence. (R. 264-65). The male victim had been away, and, after he returned home, some 10-15 minutes later, they spoke for awhile about Cuesta's supposed personal problems. (R. 265-66). When the male victim was not looking, Cuesta pulled out the gun and shot the man. (R. 266-67). The woman then screamed, and Cuesta shot her. (R. 268-70). Cuesta then left and drove away. (R. 270-71).

Cuesta returned to the parking lot, changed cars again, threw away the keys to the car the defendant had given him, and kept the gun in his girlfriend's car. (R. 272-73). Later on, Cuesta called Hernandez and told him what had happened. (R. 275-77). Hernandez asked if they "were dead," and Cuesta said, "I guess." (R. 277). They made arrangements to meet again, and Hernandez then gave Cuesta $6,000, and Cuesta returned the gun and beads. (R. 277-79). Cuesta said he left Hernandez's car in the shopping center parking lot, but that he had thrown away the keys. (R. 279).

Three weeks after the offenses, Cuesta, cooperating with law enforcement officers, participated in a controlled phone call to Hernandez. (R. 391, 409). The State filed a motion in limine seeking to have the contents of that telephonic conversation between Cuesta and Hernandez admitted into evidence as adoptive admissions by Hernandez. (R. 391-97). The defense filed a motion to suppress the recorded phone conversation on the grounds that it violated Hernandez's confrontation clause rights. (R. 403-407).

The trial court heard legal arguments as to the admissibility of the phone conversation on May 1, 2003. (R. 467, et seq.). At the outset of that hearing, the transcription of the phone conversation was accepted into evidence by the court. (R. 470).

At the beginning of the phone call, Cuesta states, "Hey, this is Henry, brother." (R. 409). Hernandez responds: "Damn, Henry don't call me." (R. 409). Cuesta explains that he has a big problem: he is "escaping today," and has a car ready, but he has no money and needs $500. (R. 410). Hernandez responds: "I don't have a single penny. I don't have a single penny, brother." (R. 410).

Cuesta then says: "Hey, brother, 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." (R. 411). The conversation continues as follows:

> 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.
>
> Cuesta: Tell me when, when can you get me the money, brother. I have to leave.
>
> Hernandez: I don't know, brother, I have to get this now, you took me by surprise.
>
> Cuesta: I need it, I need it today, brother, today.
>
> Hernandez: Where am I going to get it from, my God, I have a million problems now, because of this. I even had to ask for money for me also. Where am I going to get that from, brother?
>
> Cuesta: Find out, brother, I need it because I have to leave today. I need to leave today. I need it as soon as possible. I don't know where from, but get it because I have to . . . I don't know, I can't man. I am going crazy here.
>
> Hernandez: You, you haven't had any problems, right?

Cuesta: No, I just want to leave man. . . .

. . .

Hernandez: You can't call me anymore. You can't call me anymore, brother. I will let you know with Javier this, this afternoon and I'll let you know around eight or nine at night. If I don't get in touch with you, is because I was unable to get it.

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?

Cuesta: I, I need the money for today, now, now. You have to call somebody right now, I need it.

. . .

Cuesta: But why don't you want me to call you, brother? I need to get in touch with you to, to ah, for the money man.

Hernandez: Man, they were here, man, they questioned me and everything.

Cuesta: Who, who?

Hernandez: The police, calm down, you cannot call me on the phone.

Cuesta: But why did they go by there?

Hernandez: Talking to me.

Cuesta: About what?

Hernandez: About the problem with those people. You cannot call me, you cannot call me, I know what I am saying. You cannot call me.

Cuesta: Yeah, but the thing is that I did it. They will ask you about that.

Hernandez: No, they didn't ask me, but calm down, there's no problem, calm down. Don't worry about that.

. . .

Cuesta: No you, no, if you took out $6,000.00 dollars, brother, you can get me at least $500.00, all I need is $500.00.

Hernandez: I don't have it. I don't have it, and you can't keep calling me here. . . .

. . .

Hernandez: Calm down, brother, you can't say any of this on the telephone.

. . .

Hernandez: Brother you can't talk to me on the phone, for God's sake calm down!

Cuesta: But why, brother, nobody is listening in or anything that's ah, no.

Hernandez: Brother, they were over here, and I don't know if there's a tap on my phone. Where are you calling me from, your house?

. . .

> Cuesta: Brother, you have to get that money for me, brother, and I am out of here fast.
>
> Hernandez: I don't have, I don't have, I don't have a penny, brother. You have your car already, calm down.
>
> Cuesta: Hey, this man is still alive, brother. I am afraid that this man might find me.
>
> Hernandez: He's alive, he's alive, but hey look, why don't you leave, calmly? I, I don't have a damn penny, brother, I am in hot water.

(R. 411-419). The remainder of the conversation is primarily Cuesta's reiteration of his need for money, Hernandez's protestations that he has none, Hernandez's assertions that he will try to get $100, and an agreement to meet later in the day at the Micosukkee Indian reservation or the Burger King "where we met that day." (R. 419-22). Just prior to the end of the conversation, Cuesta refers to the gun:

> 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.

(R. 422).

The trial court heard legal arguments on the motions regarding the admissibility of the conversation on May 1, 2003. (R. 467, et seq.). After the judge ruled in favor of the defendant's motion to exclude the evidence (R. 486), the judge stated: "It is not so much I agree with the ruling, it's just for judicial economy sake research at the Third [District Court of Appeal]." (R. 486). The judge then reiterated that he was granting the defense's motion and added: "I do wish to make it clear once again this is more for the purpose of judicial economy clearing up this issue now than going through a two week trial and then having to come back arguably in 2 years make no sense." (R. 493). The court thereafter entered a written order suppressing the tape recorded phone call "because the admission of same violates the defendant's Sixth Amendment rights." (R. 449).

The State filed a notice of appeal, seeking review of the order in the Third District Court of Appeal. While the appeal was pending, the Supreme Court of the United States rendered its decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

The Third District first concurred with Hernandez that the State's notice of appeal must be treated as a petition for writ of certiorari:

> . . . Rule 9.140(c)(1), Florida Rules of Civil Procedure, authorizes the State to seek direct appellate review of an order "suppressing before trial confessions, admissions, or evidence obtained by search and seizure." The non-final pre-trial order being appealed by the State here is not listed in Florida Rule of Appellate Procedure 9.140(c)(1) as an order which may be appealed by the State. Thus, we treat the notice of appeal as a petition for writ off certiorari. However, we deny the petition because the State has failed to demonstrate that the trial court's order is a violation of clearly established law, resulting in a miscarriage of justice.

(App. 4). The lower court then proceeded to conclude that the admission of the telephone conversation would violate the "Sixth Amendment Confrontation Clause because Hernandez did not have the opportunity to cross-examine the co-defendant, even if the statements were otherwise admissible into evidence under the hearsay exception for adoptive admissions." The court continued:

> As Hernandez points out in his brief, although in Globe v. State, 29 Fla. L. Weekly S119 (Fla. March 18, 2004), the Florida Supreme Court held that the admission of co-defendant statements as adoptive admissions did not violate the Confrontation Clause, Globe was based on the decision of the United States Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1980), which was overruled by Crawford. As such, this court is not bound by Globe.

(App. 4). The lower court then found that the statements of the co-defendant, Cuesta, were "testimonial" under Crawford, and

that the admission of those statements would violate the Confrontation Clause, because the "police set up a controlled situation, in the hopes that Hernandez would incriminate himself." (App. 5).

Lastly, the Court concluded that the statements and/or silence of Hernandez did not qualify as adoptive admissions because "there was nothing in the statements made by the co-defendant [Cuesta] that were so accusatory in nature that Hernandez's silence could be taken as an assent to its truth." (App. 8). The lower court also found that portions of the recorded conversation reflected a lack of certainty on the part of Hernandez regarding what Cuesta was talking about. (App. 8).

The State then invoked the discretionary review jurisdiction of this Court, based on alleged conflicts between the lower court's decision and decisions of this Court or other district courts of appeal regarding the issue of the right to appeal and the issue of whether the lower court's decision was contrary to this Court's decision in Globe v. State, 877 So. 2d 663 (Fla. 2004), with respect to the applicability of the Confrontation Clause to adoptive admissions.

SUMMARY OF ARGUMENT

The lower court erred in holding that the order excluding the statements during the telephone conversation was not appealable and was reviewable only by way of certiorari. Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure clearly authorizes appeals from orders suppressing admissions, and that provision encompasses the suppression order in the instant case.

The lower court also erred in holding that statements made by Cuesta did not constitute adoptive admissions on the part of the defendant Hernandez. Cuesta's statements to Hernandez included several comments which accused Hernandez of involvement in criminal conduct, or otherwise attributed to Hernandez knowledge of criminal activities. The statements were such as would reasonably call for a denial or protestation of ignorance by one who was not involved in the underlying criminal conduct.

Lastly, the lower court erred in holding that the admission of Cuesta's statements would violate the Confrontation Clause. This is not true for several reasons. First, in the aftermath of Crawford v. Washington, infra, this Court has already held that adoptive admissions do not violate the Confrontation Clause. Second, other statements by Cuesta, which may not constitute adoptive admissions, are not hearsay at all, and are not introduced to prove the truth of the matter; they exist only

to put Hernandez's statements in context. Several post-Crawford decisions have already recognized that such statements do not violate the Confrontation Clause. Third, Cuesta's statements in the instant case are similar to statements of co-conspirators, and the Supreme Court, in Crawford, has already recognized that co-conspirator statements are not "testimonial" and are thus not violative of the Confrontation Clause. That holds true even when the "co-conspirator" to whom a suspect makes statements is an undercover officer. The same principles would render all statements between Hernandez and Cuesta nontestimonial under Crawford and thus admissible without violating the Confrontation Clause.

ARGUMENT

I. THE LOWER COURT ERRED IN HOLDING THAT AN ORDER SUPPRESSING A STATEMENT MADE BY A CODEFENDANT IS REVIEWABLE BY CERTIORARI RATHER THAN APPEAL.

The order of the trial court granted the defendant's motion to suppress, "resulting in a suppression of the subject tape recorded phone call because the admission of same violates the defendant's Sixth Amendment rights." (R. 449). Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure, permits the state to appeal an order "suppressing before trial confessions, admissions, or evidence obtained by search and seizure." The lower court erred in holding that this provision is inapplicable to the order herein.

The Third District's opinion does not clearly state why the court believes the above rule is inapplicable. Without elaboration, the lower court merely held that the order being appealed by the State was not listed in Rule 9.140(c)(1). There are only two possible reasons for the lower court's conclusion: first, that the phone conversation which was suppressed did not involve "admissions" and was therefore not covered by the quoted rule; second, that the quoted rule applies only when the confessions, admissions or other evidence are suppressed due to search and seizure violations. Neither of those reasons has any merit.

If the lower court is suggesting that the order appealed in this case is non-appealable because it does not contain any "admissions" and is therefore beyond the scope of Rule 9.140(c)(1)(B), the court's reasoning is erroneous in several respects. First, regardless of whether defendant Hernandez's statements constitute adoptive admissions of codefendant Cuesta's statements, and regardless of whether Cuesta's statements are admissible, any utterance by Hernandez constitutes an admission. As the Third District held in State v. Elkin, 595 So. 2d 119, 120 (Fla. 3d DCA 1992), any statement by a party opponent constitutes an "admission" for purposes of the hearsay rule in § 90.803(18), Florida Statutes. This is true regardless of whether the statement contains a "confession" or any admission of guilt. It is an admission "simply because it is the party opponent's statement and because the party opponent cannot complain about not cross-examining him or herself." 595 So. 2d at 120. Thus, since the phone conversation includes, inter alia, statements by defendant Hernandez, it necessarily includes admissions of Hernandez, and the suppression order extends to all aspects of the recorded conversation – Hernandez's statements/admissions and Cuesta's statements, whose status as admissions adopted by Hernandez is disputed by the parties. Thus, the order appealed, at a minimum, includes some

admissions which have been suppressed, even if other portions of the order include matters which are not admissions.

Furthermore, if the lower court is suggesting that the order is not appealable because it does not include "admissions," the lower court is erroneously putting the cart before the horse. Such reasoning, by the lower court, effectively means that in order to decide whether an order is appealable, the appellate court must first determine the issue on the merits – i.e., decide whether the statements are adoptive admissions first, and then, if the conclusion is negative, deny the right to an appeal. Any right to appeal, of necessity, exists prior to the determination of the merits of the cause of action.

The second possible reason for the lower court's conclusion is an erroneous belief that any orders appealed under Rule 9.140(c)(1)(B) must be obtained through search and seizure, including "admissions" or "confessions." That position is erroneous, both legally and grammatically. The phrase "search and seizure" qualifies only the immediately preceding phrase, "other evidence," and does not relate back to confessions or admissions.

Either of the above theories of the lower court is repudiated by this Court's decision in State v. Palmore, 495 So. 2d 1170 (Fla. 1986). There, this Court held that an order

suppressing a statement of the defendant, containing admissions, was appealable under Rule 9.140(c)(1)(b), as the phrase "search and seizure" modified only the phrase "other evidence," and did not apply to admissions or confessions.

In the Palmore opinion, this Court further criticized the Third District's earlier decision in State v. Steinbrecher, 409 So. 2d 510 (Fla. 3d DCA 1982). Steinbrecher involved a pretrial order excluding a tape recorded conversation, "based on the intelligibility and audibility of the tape." 409 So. 2d at 510-11. The order did not "involve issues of suppression of pre-trial confessions, admissions, or evidence obtained by search and seizure." Id. at 511. The Third District had concluded that the order was reviewable by certiorari, not under Rule 9.140(c)(1)(b). This Court, in Palmore, found "it difficult to fathom why the suppression order in *Steinbrecher* did not fall within the rule." 495 So. 2d at 1170-71. Thus, even though there was no legal issue regarding confessions or admissions, the suppression of statements was deemed within the scope of the rule.

In State v. McPhadder, 452 So. 2d 1017 (Fla. 1984), this Court held that the above rule 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. Both the statements of the

defendant and the informant appear to have been treated by this Court as "admissions." The statements of the informant in McPhadder appear to be indistinguishable from the statements of codefendant Cuesta in the instant case, for the purpose of applying Rule 9.140(c)(1)(B). If the informant's statements qualified as admissions for purposes of allowing the State to appeal, how can the statements of codefendant Cuesta not be admissions, as well, for the purpose of allowing an appeal? The only reasonable conclusion that can be drawn from McPhadder is that the term "admissions," as used in the rule, is being used in a very broad, generic sense, and not in the sense of the ultimate decision on the merits as to whether the "admission" which is the subject of the appeal is one which is admissible at trial. Any contrary conclusion would have the effect of construing the rule as authorizing only appeals in which the State will, of necessity, prevail.

II. THE LOWER COURT ERRED IN HOLDING THAT STATEMENTS MADE BY THE CODEFENDANT, IN A MONITORED CONVERSATION WITH THE DEFENDANT, WERE NOT ADOPTIVE ADMISSIONS.

This Court, in Globe v. State, 877 So. 2d 663, 672-73 (Fla. 2004), has recently held that admissions by acquiescence or silence do not implicate the Confrontation Clause. That holding was expressly made in the aftermath of the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Thus, if the statements made by Henry Cuesta, in the recorded telephone conversation, were adopted by Eusebio Hernandez, either by silence or acquiescence, any statements made by Cuesta would be admissible without violating the Confrontation Clause.

A. Statements By Cuesta Were Adopted By Hernandez By Silence or Acquiescence

The lower court erroneously concluded that Hernandez did not adopt Cuesta's statements by silence or acquiescence. In Privett v. State, 417 So. 2d 805 (Fla. 5th DCA 1982), the court addressed adoptive admissions, or admissions by silence or acquiescence:

> 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. Daugherty 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.

417 So. 2d at 806. The Court then proceeded to list factors that "should be present to show that an acquiescence did in fact occur":

> 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.

Id. This Court approved of the foregoing analysis in Nelson v. State, 748 So. 2d 237, 242-43 (Fla. 1999). The factors to consider were again reiterated by this Court in Globe. 877 So. 2d at 673. The above factors clearly exist in the instant case.

1. "The statement must have been heard by the party claimed to have acquiesced." This factor is evident from the transcript of the recorded conversation. Eusebio Hernandez clearly heard all of Cuesta's statements and responded to them in one manner or another.

2. "The statement must have been understood by [the defendant]." This factor is likewise clearly established by the transcript of the recorded conversation. Eusebio Hernandez does not tell Cuesta that he either can not hear what Hernandez is saying or that he does not understand what Hernandez is saying. To the contrary, the remarks of Hernandez clearly reflect that he understands Cuesta. As soon as Cuesta identified himself, Hernandez already knew that the phone call meant that there were problems, as Hernandez's first remark is, "Damn, Henry don't call me." (R. 409). When Cuesta states that he is "escaping today" and needs money, Hernandez does not indicate that he has no knowledge of what Cuesta is talking about; Hernandez clearly knows what Cuesta is "escaping" from and why Cuesta is seeking money to aid in the escape. Hernandez, at one point, inquires of Cuesta: "You, you haven't had any problems, right?" (R. 413). That comment, on the part of Hernandez, clearly reflects that Hernandez understands what is at the root of any possible problems; what might have caused such problems in the first place.

Moreover, in response to Cuesta's requests for aid and money, Hernandez advises Cuesta that "they questioned me and everything." (R. 414). When Cuesta inquires who questioned Hernandez, Hernandez responds that it was the police. (R. 415). Thus, both Hernandez and Cuesta are clearly on the same playing field, both understanding that they are talking about some underlying criminal offense, and the same criminal offense.

When Hernandez repeatedly advises Cuesta that Cuesta can not call Hernandez, Hernandez is clearly evincing an understanding and fear of being further linked to the underlying offense. Hernandez fears that the phone might be tapped by the police and that the police will understand the joint connection between Hernandez and Cuesta and the underlying criminal offense.

Furthermore, when Cuesta states that "this man is still alive, brother. I am afraid that this man might find me," Hernandez does not respond with any professed lack of understanding. Rather, Hernandez responds: "He's alive, he's alive, but hey look, why don't you leave, calmly." (R. 419). Hernandez does not evince any surprise at the statement; he does not assert that he does not know what Cuesta is talking about.[1]

[1] The record on appeal includes the tape-recorded version of the conversation between Cuesta and Hernandez. It is the State's belief that Hernandez's tones and inflections further reflect understanding of the statements from Cuesta,

The only reasonable implication is that Hernandez understands that the victim of at attempted murder survived and might identify Cuesta as the shooter.

As Hernandez ultimately yields to Cuesta's requests for some form of minimal assistance, without ever telling Cuesta that Cuesta is crazy and that Hernandez doesn't have a clue about the matters to which Cuesta refers, Hernandez's resulting agreement to help out again provides confirmation that Hernandez knows what he is helping with and why he is providing that help.

The only point at which Hernandez ever expressed a lack of understanding, is when Cuesta asked where Hernandez threw the gun away. (R. 422).

3. "The subject matter of the statement is within the knowledge of the [defendant]."

The subject matter of the statements by Cuesta was clearly within the knowledge of Hernandez. This is evinced in several respects. First, when Cuesta states that he did not "know that woman was your ex-wife, you didn't tell me that," Hernandez responds by saying, "don't say anything about that, brother." (R. 411). This is the response of one who understands the predicate and has reasons for not wanting Cuesta to discuss it. Second, Hernandez was clearly concerned that his phone was being

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such as a lack of surprise when confronted by the statement, "He's alive," and knowledge as to whom Cuesta's statement refers. The recording is in Spanish.

tapped by law enforcement officers, and he therefore knew that he wanted to steer the conversation away from any discussions of criminal matters. Third, when Cuesta repeatedly says that he needs money to help his escape, Cuesta does not ask him why he needs to escape, and eventually agrees to help with the escape in some minimal manner. As to the subject matter at issue, Hernandez was, at all times, clearly in a position of either acknowledging matters or indicating that he did not know what Cuesta was talking about. The only time that he made the latter statement was when Cuesta asked what Hernandez did with the gun.

4. "There were no physical or emotional impediments to the person responding."

Hernandez clearly had the mental and physical ability to respond in this case.

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."

There was nothing about the relationship between Cuesta and Hernandez that would make it unreasonable to expect either a denial or an indication that Hernandez did not know what Cuesta was talking about. As there was one instance, with respect to the gun, where Hernandez did profess a lack of knowledge, it is therefore reasonable to conclude that had Hernandez similarly lacked knowledge as to other matters, he would reasonably have

been expected to say so. To the contrary, Hernandez saw fit to share with Cuesta the fact that the police had already been to see him to question him "and everything." (R. 414-15). Just as Cuesta expected Hernandez to understand what Cuesta was referring to, so, too, Hernandez expects Cuesta to understand the reference, without embellishment.

6. "The statement itself must be such as would, if untrue, call for a denial under the circumstances."

Cuesta's remarks implicated Hernandez in both the shooting of his ex-wife and another man and in Cuesta's intended flight from law enforcement. To the extent that Hernandez contemplates assisting Cuesta, and, ultimately agrees to assist Cuesta's escape, Hernandez is agreeing to participate in the aiding and abetting of a felon after the fact, an offense which Hernandez would not participate in absent the likelihood of his own involvement in the underlying matters. Thus, the statements from Cuesta are statements that would reasonably be expected to call for either denials or protestations of ignorance.

The above matters can be seen in several respects. First, there are the repeated references to Cuesta's urgent need to escape and to obtain money for the escape. Hernandez never asserts that he does not know what Cuesta is talking about and does not know why Cuesta needs to escape. Hernandez's ultimate

agreement to assist with the escape compels the conclusion that Hernandez knew why Cuesta would need to escape.

Similarly, when Cuesta states that "I didn't know that woman was your ex-wife, . . . you didn't tell me that," once again, Hernandez does not profess ignorance, he says, "don't say anything about that, brother," a response connoting an understanding of the premise. Hernandez confirms all of the above, moments later, when he asserts that "I have a million problems now, because of this." (R. 412) (emphasis added). "This," is what both Cuesta and Hernandez have been talking about; "this," represents a common understanding between them; "this," relates to whatever happened to the ex-wife.

Cuesta then becomes more specific, asking Hernandez, "Why did you make me kill him, brother, tell me?" (R. 413-14). Hernandez has now been expressly accused of compelling Cuesta to kill someone. He does not respond with a denial; he does not respond with a professed lack of knowledge; he responds by saying, "I will try to see you." (R. 414). Anyone who has just been wrongfully accused of involvement in murder would reasonably be expected to deny the charge, especially when they have reason to believe that the call is being monitored by law enforcement authorities. When Hernandez volunteers that the police have been to see him and questioned him, he further corroborates the reasonable expectation that he should

reasonably have been expected to deny involvement or knowledge. He obviously knows what Cuesta is talking about.

Thus, there are numerous instances in the recorded conversation in which denials or protestations of lack of knowledge should reasonably have been forthcoming from Hernandez if he was not involved in the underlying offenses; the absence of such denials or protestations of ignorance compels the conclusion that Hernandez's silence or evasive or ambiguous responses are indicative of both knowledge and involvement.

Several cases involving adoptive admissions present similar circumstances. For example, in People v. Morgan, 358 N.E. 2d 280, 283 (Ill. App. 1976), the defendant's sister asked the defendant why he set fire to a store, and the defendant just laughed and shrugged it off. The appellate court, quoting Wharton's Criminal Evidence treatise, first noted that evasive or unresponsive replies to accusatory statements are tantamount to silence. 358 N.E. 2d at 284. The absence of either a denial or a clear showing of nonacquiescence compelled the conclusion that the defendant's response was an adoptive admission. 358 N.E. 2d at 284. This was similar to People v. Medina, 799 P. 2d 1282, 1294-95 (Cal. 1990), where the defendant's sister asked the defendant why he had to shoot "those three poor boys," and the defendant initially gave no response and later indicated that he did not want to talk about the matter.

In United States v. Jenkins, 779 F. 2d 606, 612 (11th Cir. 1986), Murphy told Pool, in the presence of defendant Prather, that Murphy had to "get some money up" for "Moms" (Prathers' nickname) to finish paying for cocaine received in Miami. Prathers did not respond. This was found to constitute an adoptive admission.

In Jackson v. State, 652 P. 2d 104 (Ala. App. 1982), in the aftermath of a drug deal gone bad, resulting in four deaths, Risher testified that after emerging from a bedroom and seeing the carnage wrought by Mills, Risher said to Jackson, "Look what you've brought me. You caused him to kill my family." Jackson responded by saying, "You all doing all this shooting." 652 P. 2d at 108.

United States v. Higgs, 353 F. 3d 281, 309-10 (4th Cir. 2003), involved a telephone conversation between defendant Higgs and his former jailhouse friend Grayson. During the course of that phone conversation, Grayson read Higgs a newspaper article reporting the conviction of Haynes, along with Haynes' claim that he only shot the women because he was afraid of Higgs. Higgs did not respond to the reading of that article. In finding the silence to constitute an admission by silence, the court noted that Higgs did not give any indication that his silence was due to a belief that he was being recorded. 353 F. 3d at 310. That, however, should not be a dispositive factor.

If anything, knowledge of the recording of a conversation would motivate the individual to clearly deny the allegation.

In United States v. Kehoe, 310 F. 3d 579, 590-92 (8th Cir. 2002), codefendant Daniel Lee, in the presence of defendant Kehoe, told Kehoe's mother that Kehoe "had paid him a thousand dollars for a rifle for his part in the robbery and murders." This was held to be an adoptive admission by the court.

In United States v. Villarreal, 764 F. 2d 1048, 1050 (5th Cir. 1985), the owner of a massage parlor operating as a house of prostitution, was told by Chavana, who collected payments, that she could make payments to Villarreal if necessary. Similarly, in United States v. Anddrus, 775 F. 2d 825, 838-40 (7th Cir. 1985), one colleague said, in the presence of others, including Tom Whittington, that Tom would be taking over the business; the business was a drug dealing business. Tom Whittington did not deny the assertion, and it was treated as an adoptive admission.

Lastly, in United States v. Tocco and Ferranti, 135 F. 3d 116, 127-29 (2d Cir. 1998), Marziano related how defendant Tocco admitted that he and Ferranti set a fire, and Ferranti nodded in response to Tocco's account. This "nod" was an adoptive admission.

B. Many Statements By Cuesta Are Not Hearsay At All

While several of the comments by Cuesta became adoptive admissions by Hernandez, several other statements by Cuesta were not hearsay at all, and pose no problem under Florida's hearsay statutes. Hearsay is defined as an out-of-court statement being offered into evidence to prove the truth of the matter asserted therein. Section 90.801(1)(c), Florida Statutes. When evidence is offered for some purpose other than proving the truth of the matter asserted, it is not inadmissible hearsay.

Most of Cuesta's statements were to the effect that he was getting ready to escape and needed money for the escape. Those statements were not being offered to prove the truth of the matter asserted and were not inadmissible hearsay. Cuesta had already been apprehended by the police and was cooperating with the police in an effort to obtain acknowledgment of involvement by Hernandez. Every time that Cuesta says that he needs to escape, the statement is clearly not being offered to prove the truth of the matter – i.e., Cuesta's need to escape. Cuesta, most clearly, was not trying to escape and could not try to escape, since he was already in police custody As the statements are not being offered to prove Cuesta's need to escape, they are not being offered as inadmissible hearsay. The same holds true to all of Cuesta's statements to the effect that he needs money. There are only a few statements during the

conversation which could reasonably be viewed as being offered to prove the truth of the matter asserted: the express references to the ex-wife, to the man having survived, to Hernandez having made Cuesta kill the man, and to the disposition of the gun. All other matters alluded to were not for the purpose of establishing the truth of the matter asserted and were not hearsay at all.

Thus, the recorded call consists of some hearsay on the part of Cuesta, which needs to qualify as adoptive admissions in order to obtain admissibility for hearsay purposes; numerous statements by Hernandez, which are admissible, in and of themselves, as admissions of a party opponent; and much non-hearsay from Cuesta. As those few comments from Cuesta which were hearsay going to the truth of the matter asserted did elicit responses from Hernandez which qualify as adoptive admissions, the phone conversation, in its entirety, should be admissible.[2]

[2] The only possible exception to the above is the question regarding the disposition of the gun. That question would be hearsay, as it was proffered for the purpose of asserting the truth, and, Hernandez's response is clearly not an admission, adoptive or otherwise, regarding the disposition of the gun.

III. THE LOWER COURT ERRED IN HOLDING THAT STATEMENTS MADE BY THE CODEFENDANT, IN A MONITORED CONVERSATION WITH THE DEFENDANT, VIOLATED THE CONFRONTATION CLAUSE.

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the Supreme Court substantially altered the legal analysis regarding what out-of-court statements violate the Confrontation Clause when introduced into evidence. As noted above, to the extent that the statements of Cuesta were adopted by Hernandez, and thus constitute either adoptive admissions or admissions by silence or acquiescence, Cuesta's statements became Hernandez's own statements, and the admission of Cuesta's statements therefore would not violate the Confrontation Clause. Globe, supra. It should be noted that the Confrontation Clause analysis is concerned only with the statements of Cuesta, not Hernandez's own statements, as the admission of a party's own out-of-court statements will never violate the Confrontation Clause.

Confrontation Clause analysis is therefore relevant only to the extent that any of Cuesta's statements are not adoptive admissions by Hernandez. Such a situation could exist as to some of those statements of Cuesta which, as noted above were not adoptive admissions, but were also not hearsay, as they were not introduced to prove the truth of the matter asserted by Cuesta's statements.

Crawford held, in summary, that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at ___; 124 S.Ct. at 1369. Thus, two questions arise under Crawford: whether the out-of-court statements are "testimonial," and, if so, whether the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. If statements are not "testimonial," they do not fall within the prohibition of the Confrontation Clause.

The instant case thus presents the question of whether the statements of Cuesta are "testimonial." The Supreme Court avoided expressly addressing the question of what constituted "testimonial" statements, but noted three possible formulations:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 116 L.Ed. 2d 848, 112 S.Ct. 736 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to

> believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition – for example, *ex parte* testimony at a preliminary hearing.

541 U.S. at ___, 124 S.Ct. at 1364.

The State submits that the statements of Cuesta, even if not adoptive admissions, could nevertheless be admitted without violating the Confrontation Clause, as they are not "testimonial." 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.

In United States v. Sexton, 2005 U.S. App. LEXIS 361 (6th Cir. Jan. 6, 2005), Sexton was convicted of conspiracy to distribute cocaine. On appeal, he claimed that tape recorded statements made by a confidential informant, Goins, during several controlled buys, included inadmissible statements from Goins. The federal appellate court concluded that the admission

of Goins' tape-recorded statements did not violate the Confrontation Clause:

> Romans and Sexton further erroneously contend that the admission of Goins' tape-recorded statement violated their *Sixth Amendment* right to confront the witnesses against them. When an out-of-court statement is not offered to prove the truth of the matter asserted, as with Goins' statement, the *Confrontation Clause* is not implicated. *Tennessee v. Street*, 471 U.S. 409, 413, 85 L.Ed. 2d 425, 105 S.Ct. 2078 (1985); *United States v. Martin*, 897 F. 2d at 1372.
>
> The statements were clearly admissible under the Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed. 2d 177, 124 S.Ct. 1354 (Mar. 8, 2004). Because Goins' statements were not offered for their truth, they are not hearsay, and the other statements fall within well-established exceptions to the hearsay rule – either as admissions or statements of co-conspirators.

2005 U.S. App. Lexis at *13-14. Goins' statements were not offered to prove their truth, "but rather to give meaning to the admissible responses of Romans and Moss [two of the co-conspirators]." Id. at *13.

To those statements of Cuesta which do not qualify as adoptive admissions under Globe, the same holds true – they were not offered to prove the truth of the matter, but are only relied upon "to give meaning to the admissible responses" of Hernandez.

The same reasoning was utilized by the Third Circuit Court of Appeals, in United States v. Hendricks, 395 F. 3d 173 (3d Cir. 2005). Hendricks was charged with drug conspiracy, possession and distribution offenses, based upon his ownership of a facially-legitimate business which was allegedly used for money-laundering purposes. Wiretap evidence included conversations between some of the defendants and a murdered confidential informant. The decision of the federal district court to exclude the evidence based on Crawford was held to be erroneous by the appellate court:

> During oral argument before us, the United States conceded that it was not seeking to introduce the statements of CI Rivera for their truth and thus correctly argued that the introduction of his statements would present no hearsay problems. . . . Therefore, even if we were to hold that CI Rivera's statements within the conversations are themselves testimonial, an issue we need not reach, such an outcome would not preclude the United States from introducing CI Rivera's statements for a purpose other than establishing the truth of the matters contained therein.
>
> Due to the Crawford Court's reaffirmation of Bourjaily, we conclude that the party admission and co-conspirator portions of the disputed CI Rivera conversations are nontestmonial and thus, assuming compliance with the Federal Rules of Evidence, are admissible. . . .
>
> Under these circumstances, we conclude that the Government should be permitted to introduce the balance of the conversations,

> i.e., the statements of CI Rivera which, as the Government argues, put the statements of the other parties to the conversations "into perspective and make them intelligible to the jury and recognizable as admissions." . . .
>
> We thus hold that if a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the *Confrontation Clause* does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context.

395 F. 3d at ___; 2005 U.S. App. LEXIS 843 at *31-32.

Thus, Hernandez's own statements are not testimonial in nature and not subject to the restrictions of the Confrontation Clause; Hernandez's adoption of at least some of Cuesta's statements makes those statements adoptive admissions of Hernandez, and thus places them beyond the scope of the Confrontation Clause; and, any remaining statements of Cuesta remain beyond the scope of the Confrontation Clause because (a) they are not proffered to prove the truth of their matter; and/or (b) they "are reasonably required to place the defendant['s] . . . nontestimonial statements into context." As this Court has already ruled, in Globe, regarding the nontestimonial status of adoptive admissions under Crawford, and as any other statements by Cuesta would not be hearsay at all and just place the defendant's own nontestimonial statements in

context, the entire conversation between Cuesta and Hernandez is admissible without violating the Confrontation Clause.

Lastly, the Crawford opinion itself compels the conclusion that Cuesta's statements during the recorded conversation were not testimonial. The Supreme Court, while surveying prior decisions regarding the Confrontation Clause, noted that in Bourjaily v. United States, 483 U.S. 171 (1987), a codefendant's unwitting statements to an FBI informant constituted "nontestimonial" statements, which were admissible against a defendant without a prior opportunity for cross-examination. Crawford, 124 S.Ct. at 1367-68. The Supreme Court did not distinguish between the portions of the conversation emanating from the codefendant as opposed to the FBI informant. In Bourjaily, the Court described the recorded conversations, referring to the portions from both the codefendant and the FBI informant. 483 U.S. at 173-74.

Statements which were being admitted into evidence, based on the coconspirator hearsay exception, in conformity with the requirements of Crawford, are highly analogous to the statements in the instant case. The FBI informant, in Bourjaily, is, for all practical purposes, in the same position as Cuesta, in the instant case. Both the FBI informant and Cuesta are eliciting information from an individual who may ultimately be prosecuted for an offense. Both the FBI informant and Cuesta are making

statements which are, at least at times, not being offered for proving the truth of the matter asserted by either the FBI informant or Cuesta. Both the FBI informant and Cuesta are cooperating with law enforcement officers at the time of the recording of the conversations.

If coconspirators statements are nontestimonial under Crawford, even when one party to the conversation is a government informant, it is difficult to see how the situation in the instant case could have a different result. Indeed, the above situation compels the conclusion that the Supreme Court has recognized one of the more limited definitions of testimonial. Statements made by the FBI informant in Bourjaily, or Cuesta, in the instant case (apart from any adoptive admissions by Hernandez), might be such as to "'lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Crawford, 124 S.Ct. at 1364 (quoting Brief for National Association of Criminal Defense Lawyers). Such statements by the FBI informant or Cuesta, however, most clearly would not be testimonial under the alternative formulations referred to by the Supreme Court – i.e., "ex parte in-court testimony or its functional equivalent"; or "extrajudicial statements . . . contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions." 124 S.Ct. at

1364. The fact that the FBI informant's statements, in Bourjaily, would not be testimonial under the latter two alternatives quoted in this paragraph, but would probably be testimonial under the third alternative, strongly suggests that the Supreme Court has already rejected the broadest possible definition of testimonial in favor of one of the narrower definitions of what constitutes a testimonial statement.

The foregoing points are emphasized by the recent decision of an Illinois appellate court, in People v. Redeaux, 2005 Ill. App. LEXIS 86 (Ill. App. Feb. 4, 2005). The defendant, Redeaux, was convicted of unlawful delivery of a controlled substance. The State was permitted, at trial, to introduce tape-recorded conversations between Johns, a coconspirator, and Osorio, an undercover officer trying to arrange a purchase from Johns. Johns, in those conversations, implicated the defendant, Redeaux.

The Illinois appellate court rejected the defense's arguments based on Crawford. First, the court pointed out that it did not matter that one party to the conversation was a government agent. Id. at *6-*7. Second, the court rejected the argument that the undercover officer, Osorio, was "interrogating" Johns:

> Defendant next contends that Johns' statements are inadmissible under Crawford because Osorio "interrogated" Johns. As

> noted, Crawford did not define "interrogation." However, the Court held that the statement under consideration was testimonial because it was given in response to "structured police questioning." . . .
>
> Here, nothing in the conversations between Osorio and Johns even came close to "structured police questioning." The two were merely trying to arrange the details of a drug transaction. . . .

2005 Ill. App. LEXIS at *8.

Thus, statements from Cuesta were erroneously excluded by the Third District Court of Appeal and the trial court. Those statements are admissible under multiple, alternative theories – some become adoptive admissions of the defendant Hernandez; others are nonhearsay and serve only to put into context the defendant Hernandez's own admissible statements; and none are "testimonial."[3]

[3] With respect to the unavailability of codefendant Cuesta for Hernandez's impending trial, the Third District notes, in its opinion, that the State asserted in the trial court that codefendant Cuesta would not testify at Hernandez's trial. (App. 1-2).

CONCLUSION

Based on the foregoing, the decision of the lower court should be quashed, with findings that the order in question was appealable and that Cuesta's statements in the telephone conversation were admissible as adoptive admissions by Hernandez, or as other non-hearsay statements which are non-testimonial in nature and thus not violative of the Confrontation Clause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed this ___ day of March, 2005, to HOWARD K. BLUMBERG, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

_____
RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Initial Brief of Appellant has been typed in Courier New, 12-point type, in conformity with the Florida Rules of Appellate Procedure.

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RICHARD L. POLIN