IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1331

STATE OF FLORIDA,

Petitioner,

-vs-

EUSEBIO HERNANDEZ,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the prosecuting authority in the trial court and the Appellant in the Fourth District Court of Appeal. Respondent, **EUSEBIO HERNANDEZ**, was the Defendant in the trial court and the Appellee in the Third District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief, except that Petitioner may also be referred to as the "State" and Respondent may also be referred to as "Defendant". The symbol "App." refers to the appendix to this brief, which contains a conformed copy of the slip opinion of the Third District Court of Appeal in the instant cause.

STATEMENT OF THE CASE AND OF THE FACTS

Defendant was charged along with co-defendant Henry Cuesta in the Circuit Court of the Eleventh Judicial Circuit of Florida with first degree murder, attempted first degree murder, conspiracy to commit murder and causing bodily injury during the commission of a felony.[1]

Prior to trial the defendant filed a motion to suppress a taped phone conversation between he and the co-defendant on

[1] The crimes involved the murder of defendant's ex-wife and the attempted murder of her then boyfriend. The State alleged that defendant hired co-defendant Cuesta to commit the crimes.

Sixth Amendment grounds since the co-defendant would not testify at trial and thus would not be subject to cross-examination. The State responded by filing, in part, a motion for order in limine which sought a determination as to the admissibility of the controlled phone call. The phone conversation between co-defendant Cuesta and the defendant included information relating to the charged crimes which the State argued was adopted as admissions by defendant through his silence and by statements he made in response to Cuesta's remarks.

At the conclusion of the hearing held on the competing motions, without making any specific findings, the trial judge granted the motion to suppress and effectively denied the State's in limine request for admission of the taped phone conversation. The trial judge simply determined that it would be wasteful to hold a trial only to have the appellate court potentially reverse the ruling. Thus, for the sake of expediency and judicial economy, the trial judge granted the motion to suppress in order to gain, prior to trial, the guidance of the Third District Court of Appeal on the question of the admissibility of the controlled phone call. The trial court subsequently entered a written order granting defendant's suppression motion and suppressing the tape recorded phone call

"because the admission of same violates the defendant's Sixth Amendment rights."

The State thereupon filed its notice of appeal from the trial court's order granting the suppression motion. Following the submission of briefs by parties and oral argument, the Third District entered its opinion in this cause. The court first determined that the State's notice of appeal had to be treated as a petition for writ of certiorari since the trial court's order was not listed as an appealable order in Florida Rule of Appellate Procedure 9.140(c)(1). (App. A, p. 3). Additionally, the district court held that since the co-defendant's statements were testimonial under the Supreme Court's recent decision in Crawford v. Washington, 124 S. Ct. 1354 (2004), the admission of those statements at trial would violate the Sixth Amendment Confrontation Clause because Defendant had no opportunity to cross-examine the co-defendant. (App. A, p. 5). In doing so, the court opined that, in light of the Crawford decision, it was not bound by this Court's decision in Globe v. State, 29 Fla. L. Weekly S119 (Fla. March 18, 2004). (App. A, p. 4).

The Petitioner thereafter timely filed its notice to invoke this Court's discretionary jurisdiction to review this cause, and this jurisdictional brief follows.

QUESTIONS PRESENTED

I. WHETHER THE THIRD DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN STATE V. PALMORE, 495 SO. 2D 1170 (FLA. 1986) AND OTHER DISTRICT COURTS OF APPEAL ON THE QUESTION OF WHETHER THE STATE CAN APPEAL A PRETRIAL ORDER SUPPRESSING AS EVIDENCE ADMISSIONS MADE BY A DEFENDANT BASED ON SIXTH AMENDMENT GROUNDS?

II. WHETHER THE THIRD DISTRICT COURT OF APPEAL'S DECISION MISAPPLIED THIS COURT'S REVISED DECISION IN GLOBE V. STATE, 29 FLA. L. WEEKLY S345 (FLA. JULY 1, 2004), SO AS TO CREATE EXPRESS AND DIRECT CONFLICT WITH THAT DECISION?

SUMMARY OF THE ARGUMENT

I. The Third District Court of Appeal's decision expressly and directly conflicts with the decision of this court in State v. Palmore, 495 so. 2d 1170 (Fla. 1986), and other district courts of appeal on the question of whether the State can appeal a pretrial order suppressing as evidence admissions made by a defendant based on Sixth Amendment grounds. Hence, this Court's acceptance of discretionary jurisdiction is necessary to resolve the conflict that presently exists between these decisions and the district court's decision *sub judice*.

II. The Third District Court of Appeal's decision misapplied this Court's revised decision in Globe v. State, 29

Fla. L. Weekly S345 (Fla. July 1, 2004), so as to create express and direct conflict with that decision.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN STATE V. PALMORE, 495 SO. 2D 1170 (FLA. 1986), AND OTHER DISTRICT COURTS OF APPEAL ON THE QUESTION OF WHETHER THE STATE CAN APPEAL A PRETRIAL ORDER SUPPRESSING AS EVIDENCE ADMISSIONS MADE BY A DEFENDANT BASED ON SIXTH AMENDMENT GROUNDS.

Discretionary jurisdiction of this Honorable Court may be exercised to review, among other matters, decisions of district courts of appeal which expressly and directly conflict with a decision of this Court or of another district court of appeal on the same question of law. Article V, Section 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Here, the district court's holding that the trial court's suppression order was not appealable by the State under Rule 9.140(c)(1) of the Florida Rules of Appellate Procedure is clearly at odds with this Court's decision in State v. Palmore, 495 So. 2d 1170 (Fla. 1986), where it was held that such orders *are* appealable by the State. See also State v. Brea 530 So.2d 924 (Fla. 1988) (State has right to appeal order suppressing

before trial admissions of coconspirator). In its opinion, the Third District stated that the trial court's order is not listed in rule 9.140(c)(1) as an appealable order.[2] The lower court's apparent belief that since the statements made during the controlled phone call were excluded under the Sixth Amendment Confrontation Clause as opposed to being "obtained by search and seizure," they were not covered by the foregoing rule, is simply incorrect. To be sure, this Court in Palmore specifically rejected a narrow construction of rule 9.140(c)(1)(B) in which the phrase "obtained by search and seizure" was interpreted as modifying all three elements of the rule, i.e., confessions, admissions, and evidence. Id. at 1171. Instead, the Court agreed with the reasoning of the district courts of appeal in State v. McPhadder,452 So. 2d 1017 (Fla. 1st DCA 1984), reversed on other grounds, 475 So. 2d 1215 (Fla. 1985) and State v. Segura, 378 So. 2d 1240 (Fla. 2d DCA 1979)(motion in limine is in effect a motion to suppress and subject to appellate review), and held that the State has the statutory right to appeal a pretrial

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[2] Florida Rule of Appellate Procedure 9.140(c)(1)(B) provides:

> (1) **Appeals Permitted.** The State may appeal an order
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> • * *
>
> (B) suppressing before trial confessions, admissions, or evidence obtained by search and seizure;

order barring it from entering into evidence a defendant's sworn statement during its case in chief. Thus, this Court should resolve the clear conflict that has resulted from the instant decision.

The district court may alternatively have believed that since it concluded that there were no "adoptive admissions" in the instant case, the trial court did not suppress any "admissions" and rule 9.140(c)(1)(B) was not implicated at all. That would be incorrect. The defendant, in the instant case, did make statements, and any statements are "admissions" of a defendant, adoptive or otherwise. See State v. Elkin, 595 So. 2d 119 (Fla. 3d DCA 1992). Thus, whether the statements of the defendant herein were adoptive admissions or not, they were some kind of "admissions" and the instant case thus involves the right to appeal an order "suppressing . . . admissions" under rule 9.140(c)(1)(B).

As evident from the foregoing, the decision *sub judice* also necessarily conflicts with decisions of other district courts of appeal regarding the State's right to appeal pretrial suppression orders. See State v. McPhadder,452 So. 2d 1017 (Fla. 1st DCA 1984) (suppression orders reviewable under rule 9.140(c)(1)(B)), reversed on other grounds, 475 So. 2d 1215 (Fla. 1985); State v. Richardson, 621 So. 2d 752 (Fla. 5th DCA 1993) (State could appeal

trial court's order suppressing evidence of admissions defendant made to father and police); State v. Kleinfeld 587 So. 2d 592 (Fla. 4th DCA 1991)(State had right to appeal nonfinal order of trial court suppressing defendant's admissions); State v. Katiba, 502 So. 2d 1274 (Fla. 5th DCA 1987); State v. Segura, 378 So. 2d 1240 (Fla. 2d DCA 1979).

II. THE THIRD DISTRICT COURT OF APPEAL'S DECISION MISAPPLIED THIS COURT'S REVISED DECISION IN GLOBE V. STATE, 29 FLA. L. WEEKLY S345 (FLA. JULY 1, 2004), SO AS TO CREATE EXPRESS AND DIRECT CONFLICT WITH THAT DECISION.

The district court's decision below misapplied this Court's revised decision in Globe v. State, 29 Fla. L. Weekly S345 (Fla. July 1, 2004), thereby creating express and direct conflict with that decision. The Third District essentially held that the Supreme Court's recent decision in Crawford v. Washington, 124 S. Ct. 1354 (2004), overruled the Globe decision, so that it was "not bound by Globe." (App. C, p. 4). However, in its revised opinion in Globe, this Court acknowledged the recent holding in Crawford, and adhered to its prior decisions holding that admissions by acquiescence or silence do not implicate the Confrontation Clause. (App. D, p. 7). In light of the revised opinion in Globe, the Third District's statement that "this court is not bound by Globe" is clearly incorrect and, more

importantly, only serves to create conflict between the district court's decision and the decision in Globe on the same point of law. Thus, this Court should exercise its discretionary jurisdiction in this matter to resolve the conflict necessarily created by the Third District's decision in order to maintain uniformity of decisions throughout the state. See Acensio v. State, 497 So. 2d 640 (Fla. 1986) (supreme court found that it had jurisdiction based upon the conflict created by district court of appeal's misapplication of the law).

CONCLUSION

WHEREFORE, based on the foregoing arguments and cited authorities, Petitioner respectfully requests this Honorable Court to accept discretionary jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON JURISDICTION** was mailed to Howard K. Blumberg, Assistant Public Defender, Public Defender's Office, 1320 NW 14th Street, 6th Floor, Miami, Florida 33125 on this _____ day of August, 2004.

_____

DOUGLAS J. GLAID
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Petitioner hereby certifies this brief is formatted to print in Courier New 12-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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APPENDIX TO
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