IN THE SUPREME COURT OF FLORIDA

CASE NO. 04-1331

STATE OF FLORIDA,

Petitioner,

-vs-

EUSEBIO HERNANDEZ,

Respondent.

_____

BRIEF OF RESPONDENT ON JURISDICTION

_____

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

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1963

HOWARD K. BLUMBERG
Assistant Public Defender
Florida Bar No. 264385

Counsel for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGES**

OTHER AUTHORITIES

INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *State v. Hernandez*, 875 So. 2d 1271 (Fla. 3d DCA 2004), on the grounds of express and direct conflict of decisions. In this brief of respondent on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as "A", followed by the page number(s). All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts contained in petitioner's brief on jurisdiction as a substantially accurate account of the proceedings below, as reflected in the opinion of the Third District Court of Appeal.

SUMMARY OF ARGUMENT

As the out-of-court statements excluded in the pre-trial order in this case were made by a co-defendant acting at the direction of police officers, and not by the defendant or someone acting in concert with the defendant, that order is not appealable by the State under Florida Rule of Appellate Procedure 9.140(c)(1). That being the case, the State has failed to demonstrate that the decision of the district court of appeal in this case expressly and directly conflicts with the decision of this court in *State v. Palmore*, 495 So. 2d 1170 (Fla. 1986), or decisions of other district courts of appeal on the question of the State's right to appeal an order suppressing before trial an admission made by the defendant.

The State has failed to demonstrate that the district court of appeal misapplied this Court's revised decision in *Globe v. State*, 877 So. 2d 663 (Fla. 2004), as (1) this Court's revised opinion in *Globe* was not issued until two weeks *after* the decision of the district court of appeal; (2) the State of Florida, by its own actions in this case, precluded the district court of appeal from addressing the revised decision in *Globe*; and (3) the district court of appeal properly found that it was not bound by this Court's interpretation of the Sixth Amendment Confrontation Clause in this Court's original decision in *Globe* because it was based on a decision of the United States Supreme Court which had been overruled after this Court issued its decision in *Globe*.

ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN *State v. Palmore*, 495 So. 2d 1170 (Fla. 1986) OR DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE QUESTION OF THE STATE'S RIGHT TO APPEAL AN ORDER SUPPRESSING BEFORE TRIAL AN ADMISSION MADE BY THE DEFENDANT, BECAUSE THE ORDER WHICH THE STATE SOUGHT TO APPEAL IN THIS CASE DID NOT EXCLUDE A STATEMENT MADE BY THE DEFENDANT OR SOMEONE ACTING IN CONCERT WITH THE DEFENDANT.

In seeking to persuade this Court to exercise its discretionary jurisdiction to review the decision of the district court of appeal in this case based on a claimed conflict with this Court's decision in *State v. Palmore*, 495 So. 2d 1170 (Fla. 1986) or decisions of other district courts of appeal on the question of the State's right to appeal an order suppressing before trial an admission made by the defendant, the State of Florida has misrepresented the nature of the decision of the Third District Court of Appeal.

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 police officers in a controlled telephone

call which was set up and taped by those police officers, on the ground that admission of the co-defendant's statements would violate the Sixth Amendment Confrontation Clause. The district court of appeal ruled that the State's notice of appeal was required to be treated as a petition for writ of certiorari, as the non-final pre-trial order excluding the co-defendant's statements was not listed in Florida Rule of Appellate Procedure 9.140(c)(1) as an order which may be appealed by the State.

Unsupported by any reference to a specific portion of the decision of the district court of appeal, the State claims in its jurisdictional brief that the district court found that the order could not be appealed by the State based on "[t]he 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 [Rule 9.140(c)(1)]." Brief of Petitioner at 6. However, the district court did not find that the State could not appeal the order excluding the statements because the statements had not been obtained by search and seizure. Rather, the district court found that the State could not appeal the order excluding the statements because Rule 9.140(c)(1) does not authorize the State to appeal a non-final pre-trial order which excludes statements made by *a co-defendant* at the specific direction of police officers in a controlled telephone call which was set up and taped by those police officers. This finding fully comports

with the decisions from this Court and the other district courts of appeal on the question of the State's right to appeal non-final pre-trial orders.

In *State v. Palmore*, 495 So. 2d 1170 (Fla. 1986) this Court held that an order excluding admissions made by the defendant in a sworn motion to dismiss was appealable by the State under Rule 9.140(c)(1). On the other hand, in *McPhadder v. State*, 475 So. 2d 1215 (Fla. 1985) this Court held that the State could not appeal a non-final pre-trial 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). In *State v. Brea*, 530 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] 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."

Thus, as the out-of-court statements excluded in the pre-trial order in this case were made by a co-defendant acting at the direction of police officers, and not by the defendant or someone acting in concert with the defendant, that order is not appealable by the State under Rule 9.140(c)(1), and therefore the State has failed to demonstrate that the decision of the district court of appeal in this case expressly and directly

conflicts with the decision of this court in *State v. Palmore*, 495 So. 2d 1170 (Fla. 1986), or decisions of other district courts of appeal on the question of the State's right to appeal an order suppressing before trial an admission made by the defendant.

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE DOES NOT MISAPPLY THIS COURT'S REVISED DECISION IN *Globe v. State*, 877 So. 2d 663 (Fla. 2004), SO AS TO CREATE EXPRESS AND DIRECT CONFLICT WITH THAT DECISION.

Once again, this time in seeking to persuade this Court to exercise its discretionary jurisdiction to review the decision of the district court of appeal in this case based on a claimed misapplication of this Court's revised opinion in *Globe v. State*, 877 So. 2d 663 (Fla. 2004), the State of Florida has misrepresented the nature of the decision of the Third District Court of Appeal.

First, the State of Florida is claiming that the Third District of Appeal, in its decision issued June 16, 2004, misapplied a decision of this Court which was not issued until July 1, 2004, two weeks *after* the decision of the district court of appeal. Second, the State of Florida, by its own actions in this case, precluded the Third District Court of Appeal from addressing the revised decision issued by this Court in *Globe*. Knowing full well that a motion for rehearing was pending in *Globe* based on the decision of the United State Supreme Court in *Crawford v. Washington*, --- U.S.

---, 124 S. Ct. 1354 (2004), the State chose not to file a motion for rehearing in this case to give the district court an opportunity to address any revised opinion issued by this Court on rehearing in *Globe*. Instead, the State filed its notice of discretionary review on July 1, 2004, which was the deadline for the filing of a motion for rehearing, and 15 days prior to the 30-day deadline for the filing of the notice of discretionary review.[1] It seems somewhat unfair to accuse the Third District Court of Appeal of misapplying this Court's revised opinion in *Globe* after taking steps which prevented the Third District from addressing that revised opinion.

Similarly misleading is the State's claim that, "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 [sic], p. 4)." Brief of Petitioner at 8. The Third District Court of Appeal did no such thing.

In this Court's original opinion in *Globe*, this Court cited to the decision of the United State Supreme Court in *Ohio v. Roberts*, 448 U.S. 56 (1980) as establishing the principle that the admission at trial of an out-of-court statement would not violate the

[1]Indeed, the State may well have been aware of the issuance of the revised opinion in *Globe* when it filed its notice of discretionary review. This Court's revised opinion was released at 11:00 a.m. on the day that the State could have filed a motion for rehearing, but instead chose to file its notice of discretionary review.

Sixth Amendment Confrontation Clause if the statement fell within a firmly rooted hearsay exception. Applying the principles established in *Ohio v. Roberts*, this Court held in *Globe* that admission of a co-defendant's out-of-court statement under the adoptive admission exception to the hearsay rule would not violate the Sixth Amendment Confrontation Clause because the statement fell within a firmly rooted hearsay exception:

> The statements were properly admitted as adoptive admissions pursuant to section 90.803(18)(b). The Confrontation Clause was not violated because the statements were admitted into evidence under a firmly rooted hearsay exception and were corroborated by other evidence, thus providing adequate indicia of reliability for their admission. The trial court did not abuse its discretion when it denied Globe's motion in limine.

Globe v. State, 29 Fla. L. Weekly S119, 122 (Fla. March 18, 2004)(footnote omitted).

Based on this reliance on *Ohio v. Roberts* in the original *Globe* decision, the Third District Court of Appeal did not feel itself bound by that portion of this Court's decision after the United States Supreme Court issued its decision in *Crawford* overruling *Ohio v. Roberts*:

> As Hernandez points out in his brief, although in *Globe v. State*, 29 Fla. L. Weekly S119, --- So.2d ----, 2004 WL 524928 (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, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), which was overruled by *Crawford*. As such, this court is not bound by *Globe*.

(A. 4). Thus, the Third District simply found that it was not bound by this Court's interpretation of the Sixth Amendment Confrontation Clause in *Globe* because it was based on a decision of the United States Supreme Court which had been overruled after this Court issued its decision in *Globe*. In this Court's revised decision in *Globe*, this Court acknowledged that the United States Supreme Court had receded from the *Ohio v. Roberts* indicia of reliability test in *Crawford*, and this Court removed from its decision the very analysis based on *Ohio v. Roberts* which the Third District refused to follow in its decision in this case. Thus, contrary to the State's claim in its jurisdictional brief, the Third District's statement, "[T]his court is not bound by Globe" (A. 4), when viewed in its proper context, does not create any express and direct conflict of decisions.[2]

CONCLUSION

[2]It is important to note that the district court of appeal also held that the co-defendant's out-of-court statements did not qualify for admission as adoptive admissions of the defendant "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 and also because the out-of-court statements do not meet the requirements for admission as adoptive admissions." (A. 6-8). This holding, which is not challenged by the State in its jurisdictional brief, provides further support for a decision by this Court to decline to exercise its discretionary jurisdiction in this case.

Based on the foregoing facts, authorities and arguments, respondent respectfully requests this Court to deny the petition for discretionary review.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125

BY:_____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF FONT AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Douglas J. Glaid, Assistant Attorney General, Office of the Attorney General, 110 SE 6th Street, Ft. Lauderdale, Florida 33301, this 1st day of September, 2004, and that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
HOWARD K. BLUMBERG
Assistant Public Defender