IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant

vs.

JEFFREY SCOTT RATNER,

Appellee.

CASE NOS.: SC05-1007 & SC05-1009 (CONSOLIDATED)

L.T. NO.: 4D04-2513

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ON DIRECT APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant, the State of Florida, is the prosecution in the trial court and was the appellant in the Fourth District Court of Appeal. Appellant will be referred to herein as "appellant" or "the State." Appellee, Jeffrey Scott Ratner, is the defendant in the trial court and was the appellee in the Fourth District Court of Appeal. Appellee will be referred to as "appellee."

In this brief, the following symbols will be used:

R = Record on Appeal

T = 6/11/04 Hearing Transcript

SR = Supplemental Record

SUMMARY ARGUMENT

Point I This Court should hold that excited utterances remain admissible in the wake of Crawford because they are nontestimonial statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. The decision in Crawford does not apply to nontestimonial hearsay statements; Crawford, by its own express terms, applies only to the use of testimonial hearsay statements. This Court should follow the multitude of decisions from various federal and state courts holding that Crawford does not preclude the admission of excited utterances into evidence. In addition, Florida's public policy strongly favors the use of excited utterances in domestic violence cases. Finally, appellee waived his right to cross-examine the victim under the "forfeiture by wrongdoing" rule.

Point II Since the State can appeal the trial court's ruling to the circuit court under Rule 9.140(c)(2) and sections 924.071(h) and (1) of the Florida Statues, the Fourth District had jurisdiction over this case under Rule 9.030(b)(4)(B) because the trial court certified a question of great public importance.

Point III The interplay between Rule 9.030(b)(4)(B) and Rule 9.140(c)(2) provides district courts of appeal jurisdiction over any non-final county court order, otherwise appealable to the

circuit court, where the county court has certified a question of great public importance. The Fourth District's decision in this case must be reversed because sections 924.07(1)(h) and (l) of the Florida Statutes are constitutional as applied in this case.

STATEMENT OF THE CASE AND FACTS

Appellee was charged with domestic battery for striking his wife, Diane Ratner (the victim). (R. 11). After the battery occurred, the victim (who was bleeding all over) fled the residence. (R. 69-70). The victim went to the public safety department, which was less than one-quarter of a mile away. Id. The victim approached Officer Darville in the public safety department's parking lot. (R. 3, 50-51). Both of the victim's eyes were swollen, and she was bleeding from her eyebrow. (R. 50). The victim's nose was also swollen and bleeding. Id. The victim was crying, excited, and upset when she told Officer Darville that appellee punched her and kicked her in the face. (R. 3, 50, 68-70, 87-89, 190). The victim refused to give a sworn statement and eventually recanted/revised her prior statements to law enforcement. (R. 60-67, 70-73).

In a deposition, Officer Darville testified he met appellee and the victim prior to the incident in this case. (SR. 6). Officer Darville met appellee and the victim when he responded

as backup officer to a prior incident. Id. Officer Darville was not familiar with the specifics of the prior incident, but he believed a lieutenant was there to arrest appellee. (SR. 6-7). As Officer Darville was sitting in his police car outside the police station, he saw the victim pull into the parking lot, get out of her car, and start walking toward him. (SR. 8). It was apparent that the victim had been battered or had an accident because her eyes were swollen, she was bleeding from her eyebrow, and she was crying. Id.

Officer Darville exited his vehicle and his exact words to the victim were "my goodness, what happened to you?" Id. The victim stated she wanted to report that appellee beat her up, punched her, knocked her down, and kicked her in the face. (SR. 9). The victim, who was bleeding from the nose and eyebrow, was upset and crying when she made the statement to Officer Darville. (SR. 12-13). The victim stated the incident just happened at her residence, which was approximately one minute away from the police station. (SR. 35-36). Officer Darville escorted the victim and her son into the police station and had the dispatcher call for medical assistance. (SR. 14). The victim would not give Officer Darville a written statement. (SR. 15-16).

The victim refused to go to the hospital and became uncooperative. (SR. 16-17). The paramedics arrived and treated the victim. (SR. 18). The police eventually escorted the victim back home, and appellee was standing in the garage. (SR. 20). Officer Darville asked appellee what happened to the victim. Id. Appellee stated he would rather not say anything and asked to call an attorney on the telephone. Id. As the victim was brining her dog back into the house appellee looked at the victim and asked "how could you do this to me?" (SR. 24). The victim dropped her head, would not look appellee in the eye, and walked past him into the house. Id. Appellee was arrested for domestic battery. (SR. 21).

At or around the time of appellee's arrest, the victim's attitude changed. (SR. 22-23). The victim stated she did not want to press charges against appellee, and she said she was recanting her earlier statement. Id. The victim had a fearful demeanor. (SR. 24). The victim stated that appellee was her husband and that she loved him. (SR. 22-23).

The State filed a motion in limine requesting that the victim's statement to Officer Darville be admitted into evidence under the excited utterance exception to the hearsay rule. (R. 87-89). The trial court held a hearing on the matter and the parties exhaustively briefed the issue. (R. 87-89, 137-141,

148-195, 198-203, 204-215). Appellee argued the decision in Crawford v. Washington, 541 U.S. 36 (2004) precluded the admission of the victim's hearsay statements as evidence under the excited utterance exception to the hearsay rule. The State argued Crawford did not preclude the admission of the victim's statements because they were excited utterances, which are nontestimonial.

On June 22, 2004, the trial court entered an amended order denying the State's motion in limine based upon the decision in Crawford. (R. 218-219). The trial court acknowledged the "potentially wide-ranging implications" of its ruling, "especially as [it] pertains to cases of Domestic Violence," and certified the following question of great public importance: "Should the decision of the United States Supreme Court in *Crawford v. Washington* (2004 WL 413301) be interpreted to preclude admission of a statement which would otherwise be admissible under the excited utterance exception to hearsay?" Id. The State appealed the trial court's order. The Fourth District ordered briefing on the issue of jurisdiction, and ultimately accepted jurisdiction over this case on August 27, 2004.

Approximately five months after the case was fully briefed, the Fourth District issued an order transferring this case to the Circuit Court based upon a purported lack of jurisdiction.

State v. Ratner, 30 Fla. L. Weekly D851 (Fla. 4th DCA Mar. 30, 2005). The State filed an extensive motion for rehearing, rehearing en banc, certification of conflict, and/or certification of questions of great public importance detailing how the Fourth District had jurisdiction over this case. The Fourth District withdrew its previous opinion and subsequently issued a nearly identical opinion transferring this case to the Circuit Court. State v. Ratner, 902 So. 2d 267 (Fla. 4th DCA 2005). The State appealed from the Fourth District's decision and also filed a notice to invoke this Court's discretionary jurisdiction. On October 12, 2005, this Court accepted jurisdiction over the instant case.

ARGUMENT

POINT I

SHOULD THE DECISION OF THE UNTIED STATES SUPREME COURT IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) BE INTERPRETED TO PRECLUDE THE ADMISSION OF A STATEMENT WHICH WOULD OTHERWISE BE ADMISSIBLE UNDER THE EXCITED UTTERANCE EXCEPTION TO HEARSAY?

The State respectfully requests the Court entertain this issue due to its great public importance and wide-ranging implications, especially in domestic violence cases. Although the Crawford issue did not form the basis of this Court's jurisdiction, the law is clear that "once the Court grants jurisdiction, it may, in its discretion, address other issues

properly raised and argued before the Court." State v. T.G., 800 So. 2d 204, 210 n.4 (Fla. 2001); Hall v. State, 752 So. 2d 575, 577 n.2 (Fla. 2000)("Once we have conflict jurisdiction, we have jurisdiction to decide all issues necessary to a full and final resolution."). Due to the constitutional nature of the issue raised, and the split among the district courts that have addressed the subject, this Court should resolve whether excited utterances remain admissible in the wake of Crawford.

The State's motion in limine requested the victim's statement to law enforcement be admitted into evidence at trial under the excited utterance exception to the hearsay rule. (R. 86-88). The trial court denied the State's motion in limine based upon the United States Supreme Court's decision in Crawford, and certified a question of great public importance. (R. 218-219). The State respectfully submits the trial court erroneously denied the motion in limine, and that Crawford does not preclude the admission of excited utterances because such statements are nontestimonial. This issue involves a pure question of law, and the proper standard of review is *de novo*. See Demps v. State, 761 So. 2d 302, 306 (Fla. 2000).

In Crawford, the defendant (Crawford) was charged with assault and attempted murder for stabbing a man who allegedly attempted to rape Crawford's wife (Sylvia). Law enforcement

interrogated Crawford and Sylvia about the incident and obtained statements from both of them. Crawford's account of the attack varied from the description given by Sylvia. At trial, Crawford claimed he acted in self-defense, and Sylvia did not testify because of the state marital privilege. The prosecution introduced Sylvia's tape-recorded statement into evidence under the hearsay exception for statements against one's penal interest. Crawford claimed the admission of Sylvia's statement violated his rights under the Confrontation Clause of the United States Constitution.

The trial court admitted Sylvia's statement into evidence because it bore "adequate indicia of reliability" under the United States Supreme Court's decision in Ohio v. Roberts, 448 U.S. 56 (1980). The jury convicted Crawford of assault. The Washington Supreme Court ultimately upheld Crawford's conviction, and the United States Supreme Court granted certiorari to determine whether the prosecution's use of Sylvia's statement violated the Confrontation Clause. Crawford, 541 U.S. at 42. The Supreme Court held that the admission of Sylvia's "testimonial" hearsay statements pursuant to the "adequate indicia of reliability" test espoused in Roberts violated the Confrontation Clause.

In Crawford, the Supreme Court differentiated between nontestimonial and testimonial hearsay and stated:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law - as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford, 541 U.S. at 68. The Supreme Court expressly chose not to comprehensively define testimonial hearsay finding only that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. However, many post-Crawford decisions have analyzed whether excited utterances and their "first cousin" or "twin sibling," spontaneous statements, remain admissible in the wake of Crawford. Williams v. State, 714 So. 2d 462, 466 (Fla. 3d DCA 1998)(referring to spontaneous statements as "a first cousin if not the twin sibling of the excited utterance").

There is a split among the Florida District Courts of Appeal regarding whether excited utterances and spontaneous statements are testimonial in nature under Crawford. The Fifth and Third Districts embraced the majority view of American

courts and held that excited utterances and spontaneous statements, like the ones made by the victim in this case, are nontestimonial. Williams v. State, 909 So. 2d 599 (Fla. 5th DCA 2005)(excited utterances made to a 911 operator were not testimonial in nature); Towbridge v. State, 898 So. 2d 1205 (Fla. 3d DCA 2005)(spontaneous statement made to 911 operator was nontestimonial); Herrera-Vega v. State, 888 So. 2d 66, 67 (Fla. 5th DCA 2004)(spontaneous statement of juvenile victim was not testimonial); Anderson v. State, 111 P.3d 350, 354 (Alaska Ct. App. 2005)("The great majority of courts which have considered this question have concluded that an excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not testimonial."). The First District, however, adopted the minority view and held that excited utterances may be testimonial in nature. Lopez v. State, 888 So. 2d 693, 700 (Fla. 1st DCA 2004)(excited utterance made to police officer was testimonial); Howard v. State, 902 So. 2d 878 (Fla. 1st DCA 2005). For the reasons set forth below, this Court should adopt the majority view of American courts and hold that excited utterances are nontestimonial under Crawford.

The excited utterance exception to the hearsay rule is "firmly rooted" in our jurisprudence and its origin predates the

formation of the United States of America. Sweat v. State, 895 So. 2d 462, 465 (Fla. 5th DCA 2005)("An excited utterance has been held to be a "firmly rooted" hearsay exception."); State v. Branch, 865 A.2d 673, 684 (N.J. 2005)(the excited utterance has "deep roots in our common law, dating back to the late 17th century); 6 Wigmore, Evidence in Trials at Common Law § 1750 (Chadborne Revision 1976). In Florida, an excited utterance is "[a] statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 90.803(2), Fla. Stat. Such statements have been admissible at trial since the inception of our nation because "[a] person who is excited as a result of a startling event does not have the reflective capacity essential for conscious misrepresentation; therefore statements that are made by the person who is in a state of excitement and has not had an opportunity to engage in reflective thought are spontaneous and have sufficient guarantees of truthfulness." Ehrhardt, Charles, Florida Evidence § 803.2 (2005 ed.)(footnotes omitted).

"The rationale underlying the 'excited utterance' exception is that 'excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self

interest and therefore rendered unreliable.'" United States v. Alexander, 331 F.3d 116, 122 (D.C. Cir. 2003)(citations omitted). A "trial court must be able to determine that the declarant's state of mind at the time that the statement was made precluded conscious reflection on the subject of the statement." United States v. Joy, 192 F.3d 761, 766 (7th Cir. 1999). This Court has previously held that the following requirements must be met for an excited utterance to be admissible: "(1) there must have been an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the startling event." Stoll v. State, 762 So. 2d 870, 873 (Fla. 2000). Thus, excited utterances are admissible because the declarant is under the influence of a startling and does not have the capacity (or the time) to consciously reflect on the statement.

The first step in conducting an analysis under Crawford is to determine whether the statements at issue are "testimonial" in nature. If the statements are "non-testimonial" in nature, they are not precluded by the Supreme Court's decision in Crawford. Crawford, 541 U.S. at 68. It is obvious that excited utterances do not qualify as, nor are they analogous to, the

narrow list of "testimonial hearsay" specifically identified in Crawford, i.e., "prior testimony at a preliminary hearing," "prior testimony before a grand jury," "prior testimony at a former trial," or "prior testimony during police interrogations." Id. However, *dicta* in Crawford acknowledges, without endorsing, various formulations of the "core class" of testimonial statements the Confrontation Clause was designed to protect against. Id. at 51-52. These formulations include (1) *ex parte* in-court testimony or its functional equivalent, (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe the statements would be available for use at a later trial. Id.

The State asserts that excited utterances do not fall within the "core class of testimonial statements" referred to in Crawford. A close reading of Crawford reveals the principal evil the Confrontation Clause was directed toward "was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." Id. at 50. With this particular evil in mind, it is easy to see how the Supreme Court posited that certain statements, such as *ex*

parte in court testimony, custodial examinations, and affidavits (in the general sense of the term), can be considered "testimonial" in nature. A common thread in these examples of "testimonial" statements is that they all generally contemplate an official examination of a declarant and the give-and-take of questions and answers.

Contrary to the First District's conclusion in Lopez, excited utterances cannot constitute testimonial statements under Crawford. In Lopez, the trial court admitted, as excited utterances, a victim's statements to a police officer about what happened. According to the decision in Lopez, the victim's excited utterance was testimonial under Crawford because "he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant." Lopez, 888 So. 2d at 700. The First District's analysis is fundamentally flawed because it fails to acknowledge that a declarant who makes an excited utterance, by definition, does not have the reflective capacity essential for conscious misrepresentation. Rogers v. State, 660 So. 2d 234, 240 (Fla. 1995); McGauley v. State, 638 So. 2d 973, 974 (Fla. 4th DCA 1994).

If a declarant who makes an excited utterance does not have the reflective capacity essential for conscious

misrepresentation, how could such a declarant reasonably expect the statement to be used in court at a later trial? Logic dictates that if a declarant does not have the reflective capacity essential for conscious misrepresentation, she could not harbor any "reasonable expectation" when making an excited utterance. The court in State v. Anderson, 2005 Tenn. Crim. App. LEXIS 62 (Tenn. Crim. App. Jan. 27, 2005), rev. granted, 2005 Tenn. App. LEXIS 571 (Tenn. June 20, 2005), reached a similar conclusion and noted:

> The underlying rationale for the excited utterance exception is that the perceived event produces nervous excitement, making fabrication of statements about that event unlikely. Because an excited utterance is a reactionary event of the senses made without reflection or deliberation, it cannot be testimonial in that such a statement has not been made in contemplation of its use in a future trial.

The Tennessee court, guided by this analysis, concluded the applicable statements in Anderson were non-testimonial and the admission of the statements did not violate the defendant's Confrontation Clause rights. In addition, the Texas Twelfth District Court of Appeals recently held "that the underlying rationale of an excited utterance supports a determination that it is not testimonial in nature." Key v. State, 2005 Tex. App. LEXIS 1573 (Tex. App. Feb. 28, 2005), rev. denied, In re Key, 2005 Tex. Crim. App. LEXIS 999 (Tex. Crim. App. June 29, 2005).

Several courts from other jurisdictions have reached similar conclusions. See State v. Aguilar, 107 P.3d 377, 378 (Ariz. Ct. App. 2005)(because an excited utterance "is made by a declarant whose reflective faculties have been stilled, the excited declarant will not simultaneously be rationally anticipating that his utterance might be used at a future court proceeding."); State v. Warsame, 701 N.W.2d 305 (Minn. Ct. App. 2005)("a majority of post-Crawford cases involving initial police-victim interactions at the scene hold that the situations do not involve interrogation and that resulting statements are not testimonial."); Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), aff'd in part, superseded in part, Hammon v. State, 829 N.E.2d 444 (Ind. 2005)("[a]n unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial."). Accordingly, this Court should embrace the Fifth District's holding in Williams, 909 So. 2d 599 (excited utterances made to a 911 operator were not testimonial in nature), and reject the illogical view espoused in Lopez.

Although this Court has not passed on whether excited utterances remain admissible in the wake of Crawford, a multitude of high courts in other jurisdictions have addressed

the issue. For example, in State v. Barnes, 854 A.2d 208 (Me. 2004), the Supreme Judicial Court of Maine addressed an issue nearly identical to the one raised in this case. In Barnes, the defendant (Barnes) was charged with murdering his mother. Before trial, Barnes moved in limine to exclude certain testimony, e.g., prior statements by Barnes that he wanted to kill his mother. The trial court denied Barnes's motion in limine, and a police officer testified that Barnes's mother drove herself to the police station on a prior occasion and entered the station crying. Barnes's mother continued crying despite efforts to calm her down, and she stated Barnes assaulted her and threatened to kill her. The trial court ruled the police officer's testimony regarding the statements made by Barnes's mother was admissible under the excited utterance exception to the hearsay rule.

On appeal, Barnes cited Crawford and argued his mother's statements "were testimonial in nature, and, because she was not subject to cross-examination, their admission violated the *Confrontation Clause of the United States Constitution*." Id. The State argued the comments were admissible under Crawford because they were nontestimonial in nature. The Supreme Judicial Court did a thorough analysis of Crawford and determined that Barnes's mother's statements were not

testimonial in nature and listed a number of factors to support its holding: (1) Barnes's mother's went to the police station on her own, not at the demand or request of the police, (2) the statements were made when Barnes's mother was still under the stress of the alleged assault, and (3) Barnes's mother was seeking safety and was not responding to tactically structured police questioning (as Sylvia was in Crawford). Because the statements of Barnes's mother were not testimonial in nature, they were admissible and did not implicate the Confrontation Clause concerns discussed in Crawford.

Contrary to the trial court's ruling in this case, the victim's statements to Officer Darville are admissible at trial because they do not implicate the Confrontation Clause concerns discussed in Crawford. As the prosecutor pointed out below, excited utterances are admissible under Crawford because they are nontestimonial statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 90.803(2), Fla. Stat.; (R. 172-173). A review of the factors set forth by the Supreme Judicial Court of Maine in Barnes demonstrates that the victim's statements in this case are nontestimonial. The record on appeal reveals that: (1) the victim went to the police station on her own volition, not at the demand or request of the

police, (2) the victim's statements were made shortly after the battery, when she was crying and bleeding from the attack, and (3) the victim was seeking safety and was not responding to tactically structured police questioning (as Sylvia was in Crawford). (R. 3, 50, 68-70, 87-89, 190). Because the victim's statements in this case are nontestimonial, the United States Supreme Court's decision in Crawford does not preclude the admission of the statements into evidence. See Crawford; Barnes.

Even if this Court concludes that excited utterances may be testimonial in nature under certain circumstances, the victim's statements to Officer Darville in this case were nontestimonial and, therefore, admissible at trial. When the victim made her statements to Officer Darville she was upset, she was crying, her eyes were swollen, and she was bleeding from the nose and eyebrow. (SR. 8, 12). The victim just endured a brutal beating at her residence, which was approximately one minute away from the police station. (SR. 35-36). The victim was distraught, she was not thinking clearly, and she "didn't have any prearranged agenda" in her mind when she arrived at the police station. (R. 69-73). Under these circumstances, the victim's statements were clearly nontestimonial. Accordingly, this Court should follow the majority view and hold that excited

utterances, like the ones made by the victim in this case, are nontestimonial under Crawford. See State v. Green, 874 A.2d 750, 775 (Conn. 2005)("under these factual circumstances, where a victim contacts a police officer immediately following a criminal incident to report a possible injury and the officer receives information or asks questions to ensure that the victim receives proper medical attention and that the crime scene is properly secured, the victim's statements are not testimonial in nature because they can be 'seen as part of the criminal incident itself, rather than as part of the prosecution that follows.'"); Compan v. State, 2005 Colo. LEXIS 873 (Colo. Oct. 3, 2005)(the victim's excited utterances made to a friend were nontestimonial and admissible under Crawford); Demons v. State, 595 S.E.2d 76, 80-81 (Ga. 2004)(an excited utterance admitted against a defendant in a murder case did not violate the Confrontation Clause or the holding in Crawford); Fowler v. State, 829 N.E.2d 459 (Ind. 2005)(wife's statements to police were properly admitted as an excited utterance because they were made only 15 minutes after the officer was dispatched and the wife was still under the stress of the event); Bray v. Commonwealth, 2005 Ky. LEXIS 288 (Ky. Sept. 22, 2005)(statements made by victim to her sister over the telephone were admissible as spontaneous statements concerning her ongoing observations);

Commonwealth v. Gonsalves, 833 N.E.2d 549 (Mass. 2005)("emergency questioning by law enforcement officers to secure a volatile scene or determine the need for or provide medical care cannot be said to be interrogation. Because the questioning is not interrogation, any out-of-court statements it elicits are not testimonial per se and must be evaluated on a case-by-case basis to determine whether they are testimonial in fact."); State v. Wright, 701 N.W.2d 802 (Minn. 2005)(statements of the victim and her sister made to 911 operator, and to police at the scene, were admissible as excited utterances); State v. Hembertt, 696 N.W.2d 473 (Neb. 2005)(officer's testimony regarding the victim's statements was properly admitted as an excited utterance; police responding to emergency calls who ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger are not obtaining information for the purpose of making a case against a suspect); State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004), aff'd, 611 S.E.2d 833 (N.C. 2005)(kidnapping victim's excited utterances made to police after the defendant's arrest were admissible); State v. Cunningham, 99 P.3d 271 (Ore. 2005)(excited utterances made by victim to her mother on the telephone were admissible), cert. denied, Cunningham v. Oregon, 2005 U.S. LEXIS 2607 (U.S. Mar. 21, 2005); State v. Wilkinson,

879 A.2d 445 (Vt. 2005)(victim's excited utterances made to his cousin were admissible) State v. Ferguson, 607 S.E.2d 526 (W. Va. 2004)(victim's statements to her friends about the defendant threatening her with a knife were admissible as excited utterances); State v. Manuel, 697 N.W.2d 811 (Wis. 2005)(statement witness made to his girlfriend was properly admitted under the "recent perception" exception); Anderson v. State, 111 P.3d 350 (Alaska Ct. App. 2005)(injured man's statement to police officer, that defendant hit him with a pipe, was admissible as an excited utterance); State v. Aguilar, 107 P.3d 377, 378 (Ariz. Ct. App. 2005)(because an excited utterance "is made by a declarant whose reflective faculties have been stilled, the excited declarant will not simultaneously be rationally anticipating that his utterance might be used at a future court proceeding."); People v. Cage, 120 Cal. App. 4th 770 (Cal. App.), pet. for rev. granted, 99 P.3d 2 (Cal. 2004)(victim's statement to deputy at the hospital was not testimonial and was admissible as a spontaneous statement); State v. Johnson, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. July 19, 2005)(statement of the victim to her son was admissible as an excited utterance); Stancil v. United States, 866 A.2d 799, 815 (D.C. 2005)(excited utterances made to police officers are testimonial only when given in response to questioning in a

structured environment); State v. Doe, 103 P.3d 967, 972 (Idaho Ct. App. 2004)(victim's statements to relatives regarding the defendant's attack were admissible as excited utterances); Marquardt v. State, 2005 Md. App. LEXIS 188 (Md. Ct. Spec. App. Sept. 8, 2005)(excited utterances made during a 911 call were admissible); People v. Mileski, 2004 Mich. App. LEXIS 3002 (Mich. Ct. App. Nov. 4, 2004), app. granted, People v. Mileski, 2005 Mich. LEXIS (Mich. June 17, 2005)(victim's excited utterances were admissible because they were nontestimonial under Crawford); People v. Conyers, 777 N.Y.S.2d 274 (N.Y. Sup. Ct. 2004)(911 calls entered into evidence under excited utterance exception were not testimonial and did not violate the defendant's Confrontation Clause rights); People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004)(911 calls with excited utterances were not testimonial in nature under Crawford); People v. Isaac, 4 Misc. 3d 1001A (N.Y. Sup. Ct. 2004)(excited utterances not precluded by Crawford because they are not testimonial in nature); State v. Primo, 2005 Ohio App. LEXIS 3576 (Ohio Ct. App. Aug. 1, 2005)(victim's excited utterances to nurses were not testimonial in nature); Commonwealth v. Gray, 867 A.2d 560 (Pa. Super. Ct. 2005), appeal denied, 2005 Pa. LEXIS 1451 (Pa. July 14, 2005)(excited utterances made by the victim's daughter to the police were admissible); State v.

Davis, 613 S.E.2d 760 (S.C. Ct. App. 2005)(excited utterances made by defendant's cohort to third-party witness were admissible); State v. Anderson, 2005 Tenn. Crim. App. LEXIS 62 (Tenn. Crim. App. Jan. 27, 2005), rev. granted, 2005 Tenn. App. LEXIS 571 (Tenn. June 20, 2005)(juveniles' statements to police officer were admissible as excited utterances); Key v. State, 2005 Tex. App. LEXIS 1573 (Tex. App. Feb. 28, 2005), rev. denied, In re Key, 2005 Tex. Crim. App. LEXIS 999 (Tex. Crim. App. June 29, 2005)(excited utterances are nontestimonial); Commonwealth v. Salaam, 65 Va. Cir. 405 (Va. Cir. Ct. 2004)(victim's statement to bystander regarding who shot him was admissible as an excited utterance); State v. Orndorff, 95 P.3d 406, 408 (Wash. Ct. App. 2004), rev. denied, 113 P.3d 482 (Wash. 2005)(excited utterance was not testimonial and admission of such statements did not violate the defendant's Confrontation Clause rights); United States v. Luciano, 414 F.3d 174 (1st Cir. 2005)(excited utterance made by witness to police officer immediately after incident would be admissible at trial); Mungo v. Duncan, 393 F.3d 327, 336 n.9 (2d Cir. 2004)(doubting that Crawford applies to excited utterances made to police officers under emergency circumstances to help authorities apprehend suspects); United States v. Hinton, 423 F.3d 355 (3d Cir. 2005)(statements made during 911 call were nontestimonial, and

therefore, admissible); United States v. Brun, 416 F.3d 703 (8th Cir. 2005)(statements made during 911 calls were admissible as excited utterances); Leavitt v. Arave, 371 F.3d 663 (9th Cir. 2004)(the victim's statements made to police the night before her death were admissible under the excited utterance exception), cert. denied, 2005 U.S. LEXIS 4542 (U.S. June 6, 2005); McKinney v. Bruce, 125 Fed. Appx. 947 (10th Cir. 2005)(the victim's statements made immediately before his death in his uncle's home, which were admitted under the state-of-mind exception to the hearsay rule, were nontestimonial).

The State would also point out that public policy strongly favors the use of excited utterances in domestic violence cases. Florida has a public policy directed at reducing domestic violence, and the courts have focused their scarce resources on the scourge of domestic violence for many years. Weiand v. State, 732 So. 2d 1044, 1056 (Fla. 1999). A public policy combating domestic violence is well-founded because "[v]iolent attacks by men now tops the list of dangers to an American woman's health," and approximately four million women are battered each year by their husbands or partners. Alexander Dombrowsky, Whether the Constitutionality of the Violence Against Women Act Will Further Federal Prosecution from Sexual Orientation Crimes, 54 U. Miami L. Rev. 587, 601 (2000).

Brining the perpetrators of domestic violence to justice is often a herculean task because 80%-90% of domestic violence victims recant their accusations or refuse to cooperate with a prosecution. Tom Lininger, Evidentiary Issues in Federal Prosecutions of Violence Against Women, 36 Ind. L. Rev. 687, 709 n.76 (2003). Florida courts have recognized this phenomenon and stated it is "lamentably common" in cases of domestic violence for a victim to give trial testimony "diametrically contrary" to her/his original statements to the police. See Williams v. State, 714 So. 2d 462, 463 (Fla. 3d DCA 1997); Werley v. State, 814 So. 2d 1159, 1160 (Fla. 1st DCA 2002). This phenomenon is undoubtedly influenced by the psychological complexities of "battered woman's syndrome" and the victim's fear of further attacks. See Shannon Selden, The Practice of Domestic Violence, 12 UCLA Women's L.J. 1 (2001).

In order to further the public policy of reducing domestic violence in Florida, the State is often compelled to utilize excited utterances as evidence in domestic violence cases. Unfortunately, the victim in this case succumbed to the "lamentably common" pattern of giving statements "diametrically contrary" to the ones she initially gave to Officer Darville. (R. 60-67, 70-73). A review of Florida case law reveals that excited utterances have long been utilized as evidence in

domestic violence cases. See, e.g., Williams; Werley; Montano v. State, 846 So. 2d 677 (Fla. 4th DCA 2003); State v. Frazier, 753 So. 2d 644 (Fla. 5th DCA 2000); State v. Bagley, 697 So. 2d 1246 (Fla. 5th DCA 1997); Morris v. State, 727 So. 2d 975 (Fla. 5th DCA 1999); Moss v. State, 664 So. 2d 1061 (Fla. 3d DCA 1995). In light of the extensive pre-Crawford Florida case law authorizing the use of excited utterances in domestic violence cases, and the fact that Crawford does not preclude the use of excited utterances because they are nontestimonial statements, this Court should follow the majority of American courts and hold that the victim's statements in this case are admissible at trial.

Finally, the Crawford decision expressly accepted the rule of "forfeiture by wrongdoing," which can extinguish a defendant's Confrontation Clause claims on equitable grounds. Crawford, 541 U.S. at 62. Although the State's research has not uncovered any Florida domestic violence case addressing the "forfeiture by wrongdoing" rule, other state high courts have recently broached the issue. For example, the Minnesota Supreme Court addressed this doctrine in a domestic violence case and acknowledged "that perpetrators of domestic violence frequently intimidate their victims with the goal of preventing those victims from testifying against them. Thus, a forfeiture by

wrongdoing analysis is particularly suitable for cases involving domestic violence." Wright, 701 N.W.2d at 814; see also People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004)("Under this [forfeiture by wrongdoing] rule, a defendant is not to benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case."). In addition, the Supreme Judicial Court of Massachusetts recently adopted the "forfeiture by wrongdoing doctrine" and held "the doctrine should apply in cases where a defendant murders, threatens, or intimidates a witness in an effort to procure that witness's unavailability." Commonwealth v. Edwards, 830 N.E.2d 158, 165-168 (Mass. 2005)(footnotes omitted).

The State submits this Court should adopt the "forfeiture by wrongdoing" rule and hold that appellee forfeited his right to confront the victim in this case. The victim, who was beaten, bloody, crying, and upset, told Officer Darville what occurred shortly after the incident. (R. 3, 50, 70-73; SR. 12-13). When the victim entered the police station and calmed down, however, she refused to give a formal statement. (R. 70-71). When the victim returned home accompanied by law enforcement, her attitude and demeanor changed. (SR. 22-24). The victim's demeanor was sheepish and controlled. (SR. 23).

When the victim returned home and encountered appellee, she dropped her head, would not look appellee in the eye, and walked past him and entered the house. (SR. 24). The victim then told law enforcement she did not want to file charges, and that she was going to recant her statement because "he's my husband. I love him. It's hard. You know." (SR. 22). The victim, who attended appellee's court hearing the morning after the attack, was living with appellee less than one month after the incident. (R. 11, 16-17, 75).

After reuniting with appellee, the victim changed her tune and spun a fanciful tale about how her injuries "truly" occurred. (R. 60-68). The victim claimed she was intoxicated the night of the incident and, after an argument, approached appellee with two knives in her hands. Id. Appellee, who allegedly felt threatened, then attempted to disarm the victim by kicking the knives out of her hands (rather than fleeing or eluding his intoxicated attacker). Id. Appellee kicked the victim in the face as he was trying to disarm her. Id. The victim's revised explanation of the incident is preposterous, and this Court should hold that, under the facts in this case, appellee forfeited his right to cross-examine the victim. "Whether the reason is fear of retaliation, physical terror of seeing the abuser, or a desire to please and remain with the

abuser, the cause of a victim's unavailability is the same – procurement by the abuser through the abuse itself." Adam M. Krischer, Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases, 38-DEC Prosecutor 14, 15-16 (2004).

POINT II

DO FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(4), 9.140(C)(2), AND 9.160 PROVIDE A DISTRICT COURT OF APPEAL WITH DISCRETIONARY JURISDICTION OVER A NON-FINAL COUNTY COURT ORDER (OTHERWISE APPEALABLE TO THE CIRCUIT COURT) WHICH CERTIFIES A QUESTION OF GREAT PUBLIC IMPORTANCE?

Although the Fourth District initially accepted appellate jurisdiction over this case, it subsequently entered an order transferring the case to circuit court. The Fourth District's opinion expressly held "we do not have jurisdiction to review this type of non-final order of a county court which certifies a question of great public importance." Ratner, 902 So. 2d at 268. "Whether a court has subject matter jurisdiction is a question of law reviewed de novo." Jacobsen v. Ross Stores, 882 So. 2d 431, 432 (Fla. 1st DCA 2004). For the reasons set forth below, the Fourth District's opinion in this case must be reversed.

The trial court in this case entered an order which denied the State's motion in limine and certified a question of great

public importance. The State appealed the trial court's order to the Fourth District under Florida Rule of Appellate Procedure 9.030(b)(4)(B). Rule 9.030(b)(4)(B) provides district courts of appeal with discretionary review over "non-final orders, otherwise appealable to the circuit court under rule 9.140(c), that the county court has certified to be of great public importance."

Rule 9.140(c)(2) expressly states "[t]he state as provided by general law may appeal to the circuit court non-final orders rendered in county court." Section 924.07(1)(h) of the Florida Statutes permits the State to appeal, from the county court to the circuit court, "[a]ll other pretrial orders, except that it may not take more than one appeal under this subsection in any case." See also Art. V, § 5(b), Fla. Const. ("The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law."). Similarly, section 924.07(1)(l) of the Florida Statutes allows the State to appeal, from the county court to the circuit court, "[a]n order or ruling suppressing evidence or evidence in limine at trial."

The Fourth District's decision in this case acknowledges that the trial court's order could be appealed to the circuit court under general law as it appears "to fall within the

category of 'other pretrial orders,' which the state can appeal to circuit court under section 924.071(h)." Ratner, 902 So. 2d at 269. Nevertheless, the opinion in Ratner ignored section two of Rule 9.140(c), which specifically provides "[t]he State as provided by general law may appeal to the circuit court non-final orders rendered in the county court." Fla. R. App. P. 9.140(c)(2). Since the State can appeal the trial court's ruling to the circuit court under sections 924.071(h) and (1) of the Florida Statues and Rule 9.140(c)(2), the Fourth District had jurisdiction over this case under Rule 9.030(b)(4)(B) because the trial court certified a question of great public importance. See Fla. R. App. P. 9.030(b)(4); Fla. R. App. P. 9.140(c)(2); §§ 924.07(1)(h) & (l), Fla. Stat.

Other district courts of appeal have entertained cases with a similar procedural posture without claiming a lack of jurisdiction. For example, in State v. Spiegel, 710 So. 2d 13 (Fla. 3d DCA 1998), the county court entered an order suppressing a defendant's statements made during a Florida Bar grievance interview. The county court's order also certified a question of great public importance. The Third District exercised its jurisdiction over the case and held that statements made by an attorney at a Florida Bar interview, when the attorney believes he is compelled to answer, may be

suppressed in a subsequent criminal prosecution as a violation of the privilege against self-incrimination. Id. at 16.

The Fourth District's decision in Ratner also conflicts with the decisions in State v. Muldowny, 871 So. 2d 911, 912-913 (Fla. 5th DCA 2004)(district court has discretionary review of non-final orders of a county court containing a question certified to be of great public importance), State v. Slaney, 653 So. 2d 422, 424 (Fla. 3d DCA 1995)("this court has jurisdiction to entertain this appeal as one taken from a non-final order of the county court certified to be of great public importance."), State v. Brigham, 694 So. 2d 793 (Fla. 2d DCA 1997)(accepting jurisdiction over case where the State appealed a county court's non-final order which (1) granted a motion in limine and (2) certified several questions of great public importance), and State v. Rasmussen, 644 So. 2d 1389 (Fla. 1st DCA 1994)(accepting jurisdiction over county court order ruling on a motion in limine and certifying a question of great public importance). The Fourth District's attempt to distinguish this case from the decisions of other district courts of appeal is unavailing because the opinion in Ratner completely ignores the plain language in Rule 9.140(c)(2). The "bottom line" is that based upon the interplay between the provisions in Rule 9.030(b)(4), Rule 9.140(c)(2), Rule 9.160, and sections

924.07(1)(h) & (l) of the Florida Statutes, a district court of appeal may exercise its discretionary review over a State appeal from a non-final county court order which certifies a question of great public importance.

POINT III

THE PROVISIONS OF SECTION 924.07(1) OF THE FLORIDA STATUTES RELIED UPON THE STATE IN THIS CASE ARE NOT UNCONSTITUTIONAL AS TO CERTAIN APPEALS TO DISTRICT COURTS OF APPEAL

The Fourth District's opinion properly acknowledged that "our constitution grants the power to authorize non-final appeals to district court of appeal to our supreme court." Ratner, 902 So. 2d 269. However, the Fourth District erroneously concluded that "[a]lthough some provisions of *section* 924.07(1) have been adopted in *rule* 9.140(c) by the Florida Supreme Court, the portions relied on by the State have not been adopted by rule and are unconstitutional as to appeals to district courts of appeal. *State v. Gaines*, 770 So. 2d 1221 (Fla. 2000); *State v. Smith*, 260 So. 2d 489 (Fla. 1972)." Id. For the reasons set forth below, the Fourth District's decision in this case must be reversed because sections 924.07(1)(h) and (l) of the Florida Statutes are constitutional as applied in this case.

There is a strong presumption in favor of the constitutionality of statutes, and all doubt will be resolved in favor of the constitutionality of a statute. State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Courts are "obligated to interpret statutes in such a manner as to uphold their constitutionality if it is reasonably possible to do so." Dickerson v. State, 783 So. 2d 1144, 1146 (Fla. 4th DCA 2001). Therefore, this Court must interpret sections 924.07(1)(h) and (l) of the Florida Statutes with all doubts resolved in favor of holding it constitutional. The constitutionality of a state statute involves a pure question of law, and the proper standard of review in this case is *de novo*. City of Miami v. McGrath, 824 So. 2d 143, 146 (Fla. 2002).

Under the Florida Constitution, "[t]he circuit courts shall have original jurisdiction not vested in the county courts, **and jurisdiction of appeals when provided by general law.**" Art. V, § 5(b), Fla. Const. (emphasis added). Section 924.07(1)(l) of the Florida Statutes allows the State to appeal, from the county court to the circuit court, "[a]n order or ruling suppressing evidence or evidence in limine at trial." Similarly, section 924.07(1)(h) of the Florida Statutes permits the State to appeal, from the county court to the circuit court, "[a]ll other pretrial orders, except that it may not take more than one

appeal under this subsection in any case." Thus, it is undisputed that the trial court's order in this case was appealable from the county court to the circuit court. Ratner, 902 So. 2d at 269 ("This order does appear to fall within the category of 'other pre-trial orders,' which the state can appeal to circuit court under *section* 924.07(1)(h))."

The trial court certified a question of great public importance, so the State appealed this case to the Fourth District. (R. 218-222). Such an appeal was proper because Florida Rule of Appellate Procedure 9.030(b)(4)(B) provides district courts of appeal with discretionary review over "non-final orders, **otherwise appealable to the circuit court under rule 9.140(c)**, that the county court has certified to be of great public importance." (emphasis added). Florida Rule of Appellate Procedure 9.140(c)(2) expressly states "[t]he state **as provided by general law** may appeal to the circuit court non-final orders rendered in county court." As discussed above, the trial court's order in this case was appealable to circuit court under general law. The general law involving non-final appeals from the county court to the circuit court is specifically incorporated into the Florida Rules of Appellate Procedure (via Rule 9.140(c)(2) and Rule 9.030(b)(4)(B)). The interplay between Rule 9.030(b)(4)(B) and Rule 9.140(c)(2) essentially

provides district courts of appeal jurisdiction over any non-final county court order, otherwise appealable to the circuit court, where the county court has certified a question of great public importance.[1] Thus, the Fourth District's decision in this case must be reversed because sections 924.07(1)(h) and (l) of the Florida Statutes are constitutional as applied in this case.

The Fourth District's reliance upon this Court's decisions in State v. Gaines, 770 So. 2d 1221 (Fla. 2000) and State v. Smith, 260 So. 2d 489 (Fla. 1972) is misplaced. Both Gaines and Smith involved direct appeals from circuit court non-final orders to the district court of appeal, not discretionary appeals from non-final county court orders certifying a question of great public importance. Furthermore, this Court "breathed life" into the applicable statutes in this case by incorporating them into Rule 9.140(c)(2) and Rule 9.030(b)(4)(B). This Court, however, has not "breathed life" into the statutes involved in Gaines and Smith by incorporating them into a court rule. Since the State can appeal the trial court's ruling to the circuit court under sections 924.071(h) and (1) of the Florida Statues and Rule 9.140(c)(2), the Fourth District had jurisdiction over

[1] The State would note, however, that a district court of appeal has the absolute discretion to accept or reject such a case. Fla. R. App. P. 9.160(e)(2). The Fourth District chose to accept jurisdiction in this case, but later claimed it lacked such jurisdiction in Ratner.

this case under Rule 9.030(b)(4)(B) because the trial court certified a question of great public importance. See Fla. R. App. P. 9.030(b)(4)(B); Fla. R. App. P. 9.140(c)(2); §§ 924.07(1)(h) & (l), Fla. Stat.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and hold (1) that excited utterances are admissible under Crawford because they are not testimonial in nature, (2) the Fourth District had jurisdiction over the instant case, and (3) that the provisions of section 924.07(1) of the Florida Statutes relied upon by the State in this case are not unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to: James Eisenberg, 250 Australian Avenue, South, Suite 704, West Palm Beach, FL on October __, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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