IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC05-1007 & SC05-1009
LOWER TRIBUNAL NO.: 4D04-2513

STATE OF FLORIDA,
Petitioner/Appellant,

v.

JEFFREY SCOTT RATNER,
Respondent/Appellee.

****
ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

RESPONDENT'S COMBINED ANSWER BRIEF ON JURISDICTION

EISENBERG & FOUTS, P.A.
JAMES L. EISENBERG
KAI LI ALOE FOUTS
250 AUSTRALIAN AVENUE, SOUTH
SUITE 704
WEST PALM BEACH, FLORIDA 33401
561-659-2009

COUNSEL FOR RESPONDENT, JEFFREY SCOTT RATNER

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF CITATIONS	3
STATEMENT OF THE CASE AND FACTS	5
SUMMARY OF THE ARGUMENT	7
ARGUMENT	7
POINT I: **THIS COURT MUST DECLINE TO ACCEPT JURISDICTION BECAUSE THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT IT DID NOT HAVE JURISDICTION OVER THE INSTANT CASE AND ITS DECISION DOES NOT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.**	7
POINT II: **THE COURT DOES NOT HAVE JURISDICTION OVER THIS CASE BECAUSE THE FOURTH DISTRICT COURT OF APPEAL'S DECISION DID NOT DECLARE A FLORIDA STATUTE UNCONSTITUITIONAL.**	9
CONCLUSION	11
CERTIFICATE OF SERVICE	11
CERTIFICATE OF COMPLIANCE	11

TABLE OF CITATIONS

FLORIDA CASES

Crawford v. Washington, 124 S.Ct. 1354 (2004) 5

State v. Brigham, 694 So. 2d 793 (Fla. 2d DCA 1997) 8

State v. Gaines, 770 So. 2d 1221 (Fla. 2000) 8

State v. Muldowny, 871 So. 2d 911 (Fla. 5th DCA 2004) 8

State v. Rasmussen, 644 So. 2d 1389 (Fla. 1st DCA 1994) 8

State v. Ratner, No. 4D04-2513 (Fla. 4th DC May 19, 2005) 6

State v. Slaney, 653 So. 2d 422 (Fla. 3d DCA 1995) 8

State v. Smith, 260 So. 2d 489 (Fla. 1972) 8

State v. Spiegel, 710 So. 2d 13 (Fla. 3d DCA 1998) 8

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 9.030(B)(4)(B) 6

Rule 9.140(c) 7, 8, 9, 10

Rule 9.140(c)(1) 9

Rule 9.140(c)(1)(B) 8

Rule 9.140(c)(2) 6

Rule 9.210(a)(2) 11

FLORIDA STATUTES

Section 741.283 5

Section 784.03(1)	5, 8
Section 924.07(1)	7, 10
Section 924.07(1)(h)	6, 8, 10
Section 924.07(1)(l)	8, 10

STATEMENT OF THE CASE AND FACTS

Respondent is charged, by Information, with domestic battery (bodily harm), pursuant to Section 784.03(1) and 741.283, Fla. Stat. R. 11. While pending trial, in order to prove its case, the state filed a motion in limine seeking to admit at trial the following out-of-court statement of Mrs. Ratner as an excited utterance and therefore as an exception to the hearsay rule: "I want to make a report. My husband just punched me in the face, knocked me down and kicked me in the face." R. 87-89. On March 19, 2004, the state advised the trial court that it did not intend to call the available witness, Mrs. Ratner, as a witness at trial. R. 216, 218. The trial court issued an Amended Order denying the state's motion in limine based on *Crawford v. Washington*, 124 S.Ct. 1354 (2004). Specifically, the trial court wrote that it

> must deny the State's Motion in Limine to admit the alleged victim's statement as an exception to the hearsay rule absent the State first calling the alleged victim as [a] witness in its case-in-chief before it can attempt to impeach her by introducing the alleged prior statement. To permit otherwise, would be in violation of the Confrontation Clause pursuant to the Sixth Amendment of the United State[s] Constitution and contrary to CRAWFORD."

R. 218-219 (Uppercase in original.). The trial court then certified the following question as one 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?

R. 219. Petitioner then filed an appeal directly to the Fourth District, which exercised its discretionary jurisdiction. R. 220-223. After all briefs were filed, the Fourth District issued an opinion transferring the case to the Circuit Court because it lacked jurisdiction. *State v. Ratner*, 30 Fla. L. Weekly D851 (Fla. 4th DCA March 30, 2005). Petitioner filed a motion for rehearing, rehearing en banc, certification of conflict, and/or certification of questions of great public importance. Petitioner claimed that since the state could appeal the County Court's ruling to the Circuit Court under Section 924.07(1)(h), Florida Statutes, and Rule of Appellate Procedure 9.140(c)(2), the Fourth District had jurisdiction over this case under Florida Rule of Appellate Procedure 9.030(b)(4)(B) because the County Court certified the question as one of great public importance.

Subsequently, the Fourth District withdrew its prior opinion and issued a new opinion holding that it did not have jurisdiction over the present case. *State v. Ratner*, NO. 4D04-2513 (Fla. 4th DCA May 19, 2005). Petitioner then filed a petition to invoke the discretionary review of the Florida Supreme Court. Respondent's answer brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

POINT I:

This Court must decline to accept jurisdiction because the Fourth District's decision that it lacked jurisdiction in the present case does not expressly or directly conflict with a decision of another district court of appeal on the same question of law. The Fourth District found that it did not have jurisdiction pursuant to Fla. R. App. P. 9.140 (c) and therefore properly transferred the case to the Circuit Court.

POINT II:

The Court does not have jurisdiction over this case because the Fourth District Court of Appeal's decision to transfer the case back to the Circuit Court was not based on a finding that Section 924.07(1), Florida Statutes, is unconstitutional, but rather, it was based on a finding that there is no constitutional provision by which it has the authority to take jurisdiction.

ARGUMENT

POINT I:

THIS COURT MUST DECLINE TO ACCEPT JURISDICTION BECAUSE THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT IT DID NOT HAVE JURISDICTION OVER THE INSTANT CASE AND ITS DECISION DOES NOT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

Petitioner argues that this Court should exercise its discretionary jurisdiction

to review the instant decision because the Fourth District's holding is in direct conflict with decisions from every other district court of appeal in Florida. As the Fourth District clearly stated in its opinion, the County Court order in this case which denies the state's motion in limine is not an appealable order under Fla.R. App. P. 9.140(c). Petitioner relies on provisions of Section 924.07(1)(h) and Section 924.07(1)(l), Fla. Stat., which have not been adopted by the Florida Supreme Court in Fla. R.App. P. 9.140(c). *State v. Gaines*, 770 So. 2d 1221(Fla. 2000); *State v. Smith*, 260 So. 2d 489 (Fla. 1972). As such, the state may appeal non-final orders from the County Court to the Circuit Court pursuant to Section 924.07(1), Fla. Stat. There is no provision, however, for the state to appeal the instant non-final order to the Fourth District in this case.

Petitioner relies on cases where discretionary jurisdiction was exercised in matters of a constitutional nature. Specifically, the cases cited by Petitioner, *State v. Spiegel*, 710 So. 2d 13 (Fla. 3d DCA 1998), *State v. Muldowny*, 871 So. 2d 911 (Fla. 5th DCA 2004), *State v. Slaney*, 653 So. 2d 422 (Fla. 3d DCA 1995), *State v. Brigham*, 694 So. 2d 793 (Fla. 2d DCA 1997) and *State v. Rasmussen*, 644 So. 2d 1389 (Fla. 1st DCA 1994), all involved constitutional issues such as the suppression of evidence obtained through search and seizure or the suppression of a defendant's statements due to a violation of privilege against self-incrimination, all of which the state is permitted to appeal pursuant to Fla. R. App. P. 9.140(c)(1)(B).

Unlike the cases cited by Petitioner, the County Court's pretrial ruling in the present case that an alleged excited utterance of a witness was inadmissible is not appealable under any subsection of Fla. R. App. P. 9.140(c)(1). Despite Petitioner's characterization of the County Court's order as "suppressing evidence (the victim's excited utterance) and certifying a question of great public importance," the County Court order at issue is not a suppression issue and therefore is not an order appealable to the Fourth District pursuant to Fla. R. App. P. 9.140(c)(1). Furthermore, the County Court's certification that the issue in this case is a question of great public importance does not supersede the provisions of Fla. R. App. P. 9.140(c), which enumerate what types of appeals are permitted by the state.

Based on the foregoing, Petitioner appears to be erroneously arguing conflict where there is none. The Fourth District correctly found that it lacked jurisdiction and transferred this case to the Circuit Court. As a result, this Court should not exercise its discretionary jurisdiction in this case.

POINT II:

THE COURT DOES NOT HAVE JURISDICTION OVER THIS CASE BECAUSE THE FOURTH DISTRICT COURT OF APPEAL'S DECISION DID NOT DECLARE A FLORIDA STATUTE UNCONSTITUITIONAL.

The Court does not have jurisdiction over this case because the Fourth

District Court of Appeal's decision to transfer the case back to the Circuit Court was not based on a finding that Section 924.07(1), Florida Statutes, or any other statute, is unconstitutional. Rather, when the Order is read in context, it is clear that the Fourth District Court of Appeal based its decision to transfer the case back to the Circuit Court on its finding that there is no constitutional provision by which it has the authority to take jurisdiction.

Despite the state's claim that the Fourth District Court of Appeal "expressly held that some provisions of section 924.07(1) of the Florida Statutes are unconstitutional," this simply is not the case. Specifically, the Fourth District's Order transferring the appeal stated:

> The State argues that we have jurisdiction to review this pre-trial order under section 924.07(1)(h), Florida Statutes (2004) which purports to allow the state to appeal "other pre-trial orders," and section 924.07(1)(l), which allows the state to appeal "an order or ruling suppressing evidence or evidence in limine at trial." As is apparent from our earlier discussion, however, our constitution grants the power to authorize non-final appeals to district courts of appeal to our supreme court. Although 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.*

(citations omitted) (emphasis supplied). The word "unconstitutional" was used artfully to explain that the state was relying on Section 924.07(1), portions of which have not been adopted in Rule 9.140(c) by the Supreme Court, and therefore

do not provide for appeals to the district courts of appeals.

Based on the foregoing, it is clear that the Fourth District Court of Appeal did not expressly declare a statute, or even portions thereof, unconstitutional. As a result, the Court must not exercise its appellate jurisdiction in this case.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court decline to accept jurisdiction in this case because the district court decision does not expressly or directly conflict with a decision of another district court of appeal on the same question of law and the Fourth District Court of Appeal did not declare a statute unconstitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Combined Answer Brief on Jurisdiction has been furnished by United States mail to: Richard Valuntas, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, and to Jeffrey Ratner, Respondent, on this ________ day of August, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief is submitted in Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

EISENBERG & FOUTS, P.A.
Attorney for Jeffrey Ratner, Appellee
250 Australian Avenue, South, Ste. 704
West Palm Beach, Florida 33401
561-659-2009
561-659-2380 (FACSIMILE)

____
JAMES L. EISENBERG
Florida Bar Number: 216615

____
KAI LI ALOE FOUTS
Florida Bar Number: 0076790