IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MORONI LOPEZ,

Respondent.

CASE NO. SC05-88

PETITIONER'S REPLY BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

FELICIA A. WILCOX
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0088854

OFFICE OF THE ATTORNEY GENERAL
PL-O1, THE CAPITOL
TALLAHASSEE, FL 32399-1050

(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

FEDERAL CASES

STATE CASES

RULES

PRELIMINARY STATEMENT

Parties (such as the State and Respondent, Moroni Lopez), emphasis, and the record on appeal will be designated as in the Initial Brief, and "IB" will designate Petitioner's Initial Brief, "AB," will designate Respondent's Answer Brief, each followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State relies on its Statement of the Case and Facts

ARGUMENT

ISSUE I

WHETHER THE ADMISSION OF A HEARSAY STATEMENT BY A DECLARANT THAT WAS DEPOSED BUT DID NOT TESTIFY AT TRIAL, VIOLATES THE DEFENDANT=S RIGHT OF CONFRONTATION UNDER CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004)

On this issue, Appellant relies upon its argument as set forth in its initial brief.

ISSUE II

WHETHER THE APPELLATE COURT ERRED BY FINDING THAT THE VICTIM'S EXCITED UTTERANCE CONSTITUTED A TESTIMONIAL STATEMENT AS DEFINED BY CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004).

Petitioner readopts its argument on this issue as set forth in its initial brief and rejects Respondent=s argument that cases which Petitioner cites for the proposition that Aan excited utterance by its nature cannot be testimonial@, are readily distinguishable from the case at hand. Crawford v. Washington, 541 U.S. 36 (2004), barred the admission of testimonial hearsay in a criminal case under circumstances in which the accused has not had an opportunity to cross-examine the declarant. As stated in the initial brief, courts in a multitude of other jurisdictions have addressed whether the decision in Crawford precludes the admission of excited utterances as evidence at trial. [1] These cases stand for the reasoned position that Crawford does not preclude the admission of excited utterances into evidence, because excited utterances by their very definition, are not testimonial.

Respondent=s Answer Brief demonstrates a misunderstanding of the holdings of the cases which established that an excited utterance can never be testimonial. While

[1] See Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004); Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004); Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004); Leavitt v. Arave, 371 F.3d 663 (9th Cir. 2004) Demons v. State, 595 S.E.2d 76, 80-81 (Ga. 2004),State v. Orndorff,95 P. 3d 406 (Wash. Ct. App. Aug. 3, 2004)State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004); Cassidy v. State, 2004 Tex. App. LEXIS 4519 (Tex. Ct. App. May 20, 2004); People v. Mackey, 2004 N.Y. Misc. LEXIS 1768 (N.Y. Crim. Ct. Oct. 5); Wilson v. State, 2004 Tex. App. Lexis 9874 (Tex App Ft Worth 2004); State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004); People v. Corella, 122 Cal. App. 4th 461, (Cal. Ct. App. 2004).

Respondent correctly notes that Hammon v, State, 809 N.E. 2d 945 (Ind. Ct. App. 2004), held that the victim=s excited utterance to a police officer was not testimonial, he mistakenly concludes that this premise was overturned by the court=s finding that the same account, memorialized by a written affidavit, was testimonial and inadmissible under Crawford. The Hammon court merely held that the victim=s initial excited utterance statements were not testimonial as they were not gathered for future use at trial, but simply to find out what was going on, and that her affidavit was testimonial, as it was taken to preserve the victim's account of the facts.

Hammon did not overturn the rule that an excited utterance is not a testimonial statement under Crawford. See Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004) and Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004). If anything, Hammon reaffirmed Petitioner=s argument that oral statements or excited utterances are not testimonial statements.

Moreover, Respondent=s efforts to distinguish precedent on the grounds that admissibility of an excited utterance should be based upon presence of other evidence, is likewise a misunderstanding of the law. Respondent notes the presence of corroborating evidence as he posits that the courts permitted the admission of an excited utterance under Crawford because there was other evidence that a crime has been committed, independent of the challenged statement.

Respondent=s position is without merit because no legal precedent cited by Petitioner requires the presence of corroborating evidence meet the requirements of Crawford. Crawford precludes that admission of statements that were made under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Crawford v. Washington, 541 U.S. 36 (2004).

Excited utterances are admissible under Crawford because they are 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.;. An excited utterance cannot be barred under Crawford because logic dictates that a person in the excitement of an event cannot grasp any likelihood that his statements will be used for prosecution. It is not reasonable to conclude that a declarant made a statement with the knowledge that it might be used at trial if he made his statement under the stress of a startling event without the opportunity for reflective thought.

If a excited utterance declarant is able to engage in this reflection, then his statement cannot be an excited utterance. Thus, the lower court=s ruling that a victim=s statement was both an exited utterance and a testimonial statement is incorrect.

Even if this Court were to accept Respondent=s contention that admissibility of the excited utterance turned on the presence of corroborating evidence, there was ample evidence independent of the excited utterance to support the crime charged. Tallahassee Police Officer Mel Gaston was dispatched to an apartment complex based on a report to 911 that the victim had been abducted from his apartment at gunpoint (T 10,18). Within two and a half minutes, Officer Gaston arrived to the named apartment and found the door open with no one inside (T 10,18). Officer Gaston left the apartment and the people involved in the abduction arrived on scene and exited a vehicle (T 11).

Within twenty seconds arrival, Officer Gaston approached the victim (T 11). Upon contact with the victim, Officer Gaston observed that he appeared to be nervous, upset, shaken up and jittery (T 11,12,16,17). While Respondent stood about 15 to 20 feet away from him, the victim told Officer that Respondent had a gun in his possession (T 21,22). Respondent admitted to ownership of the firearm and that he hid the gun under a seat in the victim=s vehicle. (T 68,70,72-75).

Even without the excited utterance, the jury had evidence of the Respondent=s admission of possession of the gun, Respondent=s attempts to hide the firearm, and his status as a convicted felon. Thus, the jury properly convicted Respondent of possession of firearm by a convicted felon.

Summary

The State restates its argument that this Court should follow the precedent set by the federal courts, along with the vast majority of state courts passing on the issue, and hold that the excited utterance in this case was not testimonial and as such, was outside the scope of Crawford. The district court misapplied Crawford when it barred admission of the excited utterance on the ground that it was a testimonial statement made to a police officer. An excited utterance, by its very definition, cannot be a testimonial statement that triggers the confrontation clause protections set forth in Crawford.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004) should be disapproved, and the judgement entered in the trial court should be reinstated.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jamie Spivey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on December 19, 2005.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

/s/ Robert R. Wheeler___
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

/s/ Felicia A. Wilcox_____
FELICIA A. WILCOX
Assistant Attorney General
Florida Bar No. 0088854

Attorneys for State of Florida
Office of the Attorney General
Pl-o1, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L05-1-2371]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

/s/ Felicia A. Wilcox_____
Felicia A. Wilcox
Attorney for State of Florida

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