IN THE SUPREME COURT OF FLORIDA

JUAN RAUL CUERVO,	)	
	)	
Appellant,	)	
	)	
vs.	)	DCA CASE NO. 5D04-3879
	)	
STATE OF FLORIDA,	)	SUPREME CT. CASE NO. _____
	)	
Appellee.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Juan Raul Cuervo, hereinafter referred to as Cuervo, was charged by information filed August 26, 2003, with attempted first degree murder in Count I, burglary of a conveyance with an assault or battery with a weapon in Count II and carjacking with a deadly weapon in Count III. A hearing was held on August 25, 2004, on defendant=s motion to suppress. A detective testified that the defendant needed an interpreter when questioned. (T13) According to the detective, another officer acted as an interpreter. (T13) The witness testified that Miranda rights were given and the defendant twice said he did not want to talk. (T14) The defendant specifically stated: ANo, I don=t want to speak.@ (T15) Another deputy testified that the defendant initially stated he did not want to speak to us and subsequently stated: AI don=t want to say anything because I don=t know why - the other person said and her mother.@ (T26, 32)

A motion to suppress confession was filed on August 23, 2004 and denied at hearing on August 25, 2004. (R27) The jury returned a verdict of guilt as to attempted first degree murder with a special verdict that the

defendant did carry or threaten or attempt to use a weapon, guilt as to Count II, burglary of a conveyance with assault and battery with a special verdict as to the defendant having displayed, used, threatened or attempted to use a weapon, and a verdict of not guilty as to carjacking with a deadly weapon. (R57-59) Sentencing occurred on October 29, 2004. The defendant was sentenced to the Department of Corrections for a period of life on Count I and Count II. (R99-101) A notice of appeal was filed on November 18, 2004. (R142)

On appeal to the Fifth District Court of Appeal, the Court affirmed the judgments and sentences in Cuervo v. State, ____ So. 2d _____ (Fla. 5th DCA May 12, 2006). Cuervo contends that there is an express and direct conflict with the decisions of this Court and with the decisions of the Third and Fourth District Courts of Appeal.

SUMMARY OF THE ARGUMENT

The Petitioner, was subjected to custodial interrogation, and twice expressly advised the interrogating officer that he did not wish to speak. Questioning, nevertheless, ensued. The District Court of Appeal affirmed the trial court=s decision denying the defense motion to suppress. Judge Thompson, dissenting, with opinion, explained that the decisions of this Court along with those rendered by the Third and Fourth District Courts of Appeal require that suppression should have been granted where the Petitioner in the instant case stated that he did not wish to speak with the questioning officer. The interpreter testified that he advised the questioning officer, Ahe does not wish to talk to us.@ (R40) The officer admitted in testimony that the defendant twice stated that he did not wish to speak to the officer.

> Under Section 9, if the suspect *indicates in any manner* that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.

Dooley v. State, 743 So. 2d 65, 68 (Fla. 4th DCA 1999); citing Traylor v. State, 596 So. 2d 957, 965-66 (Fla. 1992). Accordingly, this Court should accept jurisdiction as the Fifth District Court of Appeal=s decision is in express and direct conflict with the decisions of this Court and the Courts in the Third and Fourth Districts.

ARGUMENT

THE INSTANT DECISION BY THE FIFTH DISTRICT IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL AND WITH THE DECISIONS OF THIS COURT.

On appeal, Petitioner argued that the trial court erred in denying the defense motion to suppress. The Fifth District Court of Appeal affirmed the decision of the trial court denying the motion to suppress finding that the follow-up questions by a law enforcement officer to the defendant, after the defendant stated he did not want to make a statement, did not amount to a violation of the Petitioner=s constitutional rights.

Judge Thompson, dissenting, with opinion, distinguished the opinion in State v. Owen, 696 So. 2d 715 (Fla. 1997), relied upon by the majority for the proposition that police need not ask clarifying questions, let alone stop interrogations, when suspects ambiguously invoke Fifth Amendment rights from the scenario present in the instant case. As Judge Thompson provided:

> In contrast to Owen, Cuervo made two statements that clearly showed he did not wish to speak to the police. Invocation of the Fifth Amendment should not require >criminal suspects to speak with the discrimination of an Oxford don.= Davis v. United States, 512 U. S. 452, 476 (1994) (Souter, J., concurring). Both officers specifically

> testified that Cuervo stated he did not want to speak to them; that expression sufficed.

Cuervo v. State, _____ So. 2d _____ (Fla. 5th DCA 2006).

In the present case the defendant=s responses are not equivocal. The defendant clearly, unequivocally and unambiguously invoked his right to remain silent.

In Globe v. State, 877 So. 2d 663 (Fla. 2004), this Court recently dealt with a scenario wherein a defendant responded to a request to make a statement with the term Anot at this time@ but, after a seven hour break, responded to a second officer=s request to make a statement. Id. at 667. This Court initially cited to Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992), for the proposition that:

> If the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.@

Globe v. State, supra, at 669, citing Traylor v. State, supra, at 966.

This Court then referenced Michigan v. Mosley, 423 U. S. 96, 104, 96 S.Ct. 321, 46 L. Ed. 2d 313 (1975), for the proposition that:

> the United States Supreme Court held that resolution of the question of the admissibility of statements obtained after a person in custody has invoked his or her right to remain silent depends upon whether the person=s decision to assert his or her >right to cut off questioning=

was ›scrupulously honored.: In holding that no Miranda violation occurred in Mosley, the court stated:

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

Globe v. State, supra at 669-70, citing Michigan v. Mosley, supra, at 105-06.

In Globe v. State, supra, this Court recognized that five factors the court in Michigan v. Mosley, supra, found to be relevant were critical to examine in the instant scenario. The Court provided:

> First, Mosley was *informed of his rights both times* before questioning began. Second, the officer *immediately ceased questioning* when Mosley unequivocally said he did not want to talk about the burglaries. Third, there was a *significant lapse of time* between the questioning on the burglary and the questioning on the homicide. Fourth, the second episode of *questioning took place in a different*

> *location*. Fifth, the second episode *involved a different crime*.

Id. at 670.

Applying the five factors set forth in Michigan v. Mosley, supra, to the Globe v. State, supra, scenario, this Court ruled that four of the factors were present:

> (1) Miranda warnings were given several times, including right before each request for a statement; (2) interrogations ceased immediately when Globe expressed his desire to remain silent; (3) there was a significant time lapse between the questioning in that the second request for a statement was made seven and a half hours after the first request; and (4) the second questioning took place at a different location.

Id. at 670.

This Court further stated:

> We consider not only that four of the five factors weigh in favor of admissibility but also that when Globe initially invoked his right to silence he said only that he did not want to make a statement ›at this time,= leaving open the prospect of future questioning on the crime. We hold that Globe=s right to remain silent was scrupulously honored.

Id. at 670.

Pursuant to the analysis set forth in Michigan v. Mosley, supra, and Globe v. State, supra, and Henry v. State, 574 So. 2d 66 (Fla. 1991), no equivocal or ambiguous statement existed in the instant case. The Petitioner initially made a

clear statement that he did not want to answer questions and subsequently made a second statement evidencing his reasoning as he did not know what the victim had already said. (T17) Deputy Garcia specifically admitted that the defendant said: ANo two times.@ (T40) Dissimilar to the scenario set forth in Michigan v. Mosley, supra and Globe v. State, supra, the interrogation did not cease immediately when the defendant expressed his desire to remain silent, there was no significant time lapse between the questioning, the questioning did not take place in a different location and the questioning did not involve a different crime.

Dissimilar to the scenario in Globe v. State, supra, wherein the defendant responded to the request to make a statement with the words: ANot at this time,@ the Petitioner advised the law enforcement officers: ANo, I don=t want.@ According to the translator, the defendant did not add in the words Anot now.@ (R34) In fact, the translator expressly testified that he translated the line for the questioning detective AHe does not wish to talk with us.@ (R40)

In Smith v. State, 915 So. 2d 692 (Fla. 3d DCA 2005), the Third District reversed a trial court=s erroneous denial of a motion to suppress adverse statements made after a defendant asserted his right to remain silent. The State=s position in Smith, id., was that the defendant=s invocation of his right to remain silent was ambiguous and therefore law enforcement officers could

properly question the defendant further. The Third District found: ANothing to this argument@ and ruled that the defendant=s statement that he had: ANothing to say,@ was Amore than sufficient.@ Smith, supra, at 693. In the instant case, the following testimony occurred:

> Q. Isn=t it accurate to state, Detective Palmieri, that the defendant, twice, when he was asked separately, he told you twice that he did not wish to speak to you?
>
> A. Okay. Let me just refer back to make sure it was twice.
>
> Q. Okay. That=s fine. Okay.
>
> A. Okay. Yes.
>
> Q. Is that fair to say, that he -
>
> A. Yes.
>
> Q. Twice? Okay. And he said - the translation=s pretty clear, ANo, I don=t want to speak@, correct?
>
> A. Yes.

(T14-15)

> Under Section 9, if the suspect *indicates in any manner* that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.

Dooley v. State, 743 So. 2d 65, 68 (Fla. 4th DCA 1999); citing Traylor v. State, 596 So. 2d 957, 965-66 (Fla. 1992). Clearly, the Petitioner in the instant case indicated that he did not want to be interrogated. Accordingly, this Court should accept jurisdiction in this cause due to the Fifth District Court of Appeal=s decision being in express and direct conflict with Traylor, supra, Globe, supra, and Dooley, supra.

CONCLUSION

BASED on the cases and authorities herein, the Petitioner respectfully requests
this Honorable Court to exercise its discretionary jurisdiction and accept the instant

case for review.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Juan Raul Cuervo, Inmate No. X-47568, Santa Rosa Correctional Institution, 5850 E. Milton Road, Milton, Florida 32583-7914, on this _____ day of June, 2006.

_____

LEONARD R. ROSS
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_____)		

CERTIFICATE OF FONT

I CERTIFY that the size and style of the type used in this brief is 14 point TIMES NEW ROMAN, a font that is proportionately spaced.

Respectfully submitted,

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