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**State of Florida v. Moroni Lopez
SC05-88**

MAY IT PLEASE THE COURT. MY NAME IS JAMIE SPIVEY. I AM A LAWYER WITH THE PUBLIC DEFENDERS OFFICE AND I AM HERE TO DAY , IT IS MY PRIVILEGE TO REPRESENT THE RESPONDENT, MR . MORON I LOPEZIN THIS CASE.

CHIEF JUSTICE: I KNOW WE HAVE LIMITED TIME BUT YOU CAN SLOWDOWN IN YOUR PRESENTATION .

JUSTICE: IS N'T THE REAL PROBLEM HERE , THE FLY IN THE PROVERBIAL O INTMENT , THE Q UESTION OF WHETHER OR NOT THIS WAS AN EXCITED UTTERANCE , BECAUSE THIS COURT HAS DEFINED AN EXCITE ED UTTERANCE , IF THE STATEMENTWAS MADE BEFO RE THERE WAS TIME FOR REFLECTION. NOW, IF THE STATEMENT IS MADE BEFORE THERE IS TIME FOR REFL ECTION , THEN ITSEEMS TO ME THAT IT IS CIRCULAR TO SAY THAT IT IS IN CONTEMPLATION OF THE FACT THAT IT IS A GOING TO B E USED IN A JUD ICIAL PROCEEDING, SO IT SEEMS TO ME WE HAVE CONTRADICTIONARY DEFINITIONS.

WELL , IT SEEMS THAT THE RELIABILITY QUESTION IS THAT JUS TICE ANS TEAD BROUGHT UP IS THE KEY HERE. O NCE YOU START ANALYZINGWHETHER OR NOT IT IS EXCITED UTTERANCE , YOU GET INTO THAT PROBLEM OF RELIABILITY. THE SUPREME COURT IN CRAWFORD V WASHINGTON SAID THAT IS NO LONGER A V ALID TEST. THAT WILL NOT PROTECT THE CONFRONTATION RI GHTS ANY LONGER, SO TA LKING ABOUT WHETHER IT IS EXCITED UTTERANCE OR NOT -- JUST JUST BUT THE SUPREME COURT COURT HAS NOT AT LEAST AS WE SIT HERE ON MAY 4, SAID THAT AN EXCITED UTTERANCE , ADMISSION OF AN EXCITED UTTERANCE IS IN VIOLATION OF THE CONFRONTATION CLAUSE.

I AM JUST SAY ING, YOUR HONOR , ANAL YSIS OF EXCITED UTTERANCE DEPEN DS UPON RELIABILITY . THE STATE I S SAYING THIS IS A REL IABLE STATEMENT , EXCITED UTTERANCE , AND THESUPREME COURT SAID THE RELIABILITY TEST IS JUST NOTSUFFICIENT TO PROTECT CONFRONTATION RIGHTS , WHERE TESTIMONIAL EVIDENCE IS INVOLVED, AND HERE WE HAVE ABSOLUTE TESTIMONIAL EVIDENCE .

CHIEF JUSTICE: FOLLOWINGYOU UP ON JUSTICE WELLS , EXCITED UTTERANCE MADE BEFORE THE TIME FOR REFLECTION, AND THIS IS REALLY WHAT MS. WILCOX WAS S AYING IS BY THAT NATURE,THERE IS NO TIME FOR REFLECTION, THEN WOULD A REASONABLE DECLARANT SIMILARLY , SITUATED IN THE SAME SITUATION , HAVE THE CAPACITY TO APPRECIATE THE L EGAL RAMIFICATIONS OF THE STATEMENT? ARE THE TWO MUTUALLY EXCLUSIVE , OR DO YOU SEETHAT THE INQUIRY IS DIFFERENT?

I SEE IT THAT EVERY TIME SOMEBODY MAKES AN ALLEGATION LIKE THAT, THEY HAVE GO T TO KNOW THAT IT IS GOING TO BE USED. IT MAY BE PROVED THAT THEY ARE EXCITED , BUT THE FACT THAT THEY ARE EXCITED DOESN'T MEAN THAT THEY AREN'T, ALSO , REASONABLY ON NOTICE, REASONABLY CONSCIOUS AND REASONABLY UNDERSTAND THAT MR . LOPEZ, THAT MANRIGHT THERE POI NTED A GUN AT ME. YOU HAVE GOT TO KNOW THAT.

JUSTICE: ISN'T THERE REALLY A DIFFERENCE BETWEEN HE HAS GOT A GUN AND MR. LOPEZ KIDNAPPED ME AND HE HAS GOT A GUN AND A FULL DESCRIPTION, AND THE SAME TIME PERIOD? SO YOU SEEM TO BE URGING THAT AN EXCITED UTTERANCE IS ALWAYS TESTIMONIAL, IF IT JUST RELAYS SOME FACTS, SO IT SEEMS TO ME -- IF IT JUST RELAYS SOME FACTS, SO IT SEEMS TO ME THAT THE RULE EITHER WAY MAY NOT BE THE REAL ANSWER HERE.

I THINK EXCITED UTTERANCE, THE DEFINITION GIVEN TO EXCITED UTTERANCE IS WAY TOO MUCH IN ALL OF THESE CASES. I DON'T THINK IT IS SO IMPORTANT THAT THE PERSON, WHAT THE PERSON'S INTENT WAS. THEY MAY HAVE, THEIR INTENT MAY HAVE BEEN TO GET HELP, BUT THAT DOESN'T BE THE FACT THAT THEY ARE REASONABLY CONSCIOUS OF WHAT IS GOING TO HAPPEN WHEN THEY USE THOSE WORDS. A GAIN, WHEN YOU GET FOCUSED ON EXCITED UTTERANCE ANALYSIS, A GAIN, YOU ARE INVOLVED IN A RELIABILITY TEST AND YOU ARE SAYING, WELL, BECAUSE IT IS RELIABLE, IT MUST NOT BE TESTIMONIAL. BUT THE RELIABILITY IS NOT GOOD ANY MORE.

CHIEF JUSTICE: WHAT JUSTICE CANTERO POINTED TO, WHICH IS THAT REALLY AND I HAVE SEEN THIS FOR THE LAST 12 YEARS, THAT THERE IS SOMUCH OF A TENDENCY ON THE PART OF THE STATE TO USE EXCITED UTTERANCE WHEN THEY ARE REALLY NOT. SOMEONE COMES TO THE DOOR AND THEY, IT IS 20 MINUTES AFTER AND THERE ARE QUESTIONS AND ANSWERS AND --

ALWAYS GETS IN.

CHIEF JUSTICE: IT IS EXCITED UTTERANCE AND IT REALLY, PROBABLY, THAT IS A VERY NARROW EXCEPTION WHEN SOMEBODY IS, YOU SEE SOMEONE DRIVING BY IN A CAR AND YOU SAY THEY ARE SPEEDING, AND THAT WAS THE KIND OF EXCITED UTTERANCE, NOT THE WHOLE STORY OF HOW THE CRIME OCCURRED.

RIGHT.

JUSTICE: AND IN MOST CASES, EXCITED UTTERANCES ARE INTRODUCED, THE ISSUE OF UNAVAILABILITY IS NOT REALLY THERE. IN A LOT OF CASES, YOU WILL INTRODUCE EXCITED UTTERANCES, AND THE DECLARANT IS PRESENT IN THE COURTROOM AND TO INTRODUCE AS IMPEACHMENT OR FOR OTHER REASONS. HERE WE ARE TALKING ABOUT THE NARROW CASE WHERE THE DECLARANT IS UNAVAILABLE.

I WOULD LIKE YOU TO DEFINE AS BROADLY AS POSSIBLE, GIVING AS LITTLE DEFERENCE TO EXCITED UTTERANCE IN ANY CASE, BUT IN THIS CASE WE REALLY HAD TESTIMONIAL STATEMENTS.

CHIEF JUSTICE: WHAT IS THE SIXTH AMENDMENT VALUE? THERE IS -- THIS IS WHERE I AM HAVING DIFFICULTY, THE EXCITED UTTERANCE THAT SAID TO A NEIGHBOR, AND THE OTHER -- THAT IS MADE TO A NEIGHBOR, AND THEN THE OTHER EXCITED UTTERANCE IS MADE TO A POLICE OFFICER, BUT THEY ARE BOTH MADE UNDER THE SAME CIRCUMSTANCES AND YET IN ONE THE SIXTH AMENDMENT IS GOING TO DENY THIS OPPORTUNITY FOR CROSS-EXAMINATION AND -- DEMAND THIS OPPORTUNITY FOR CROSS-EXAMINATION AND THE OTHER IT ISN'T. IT SEEMS LIKE WE WILL SEE WHAT PART TWO OF CRAWFORD COMES OUT WITH, BUT THEY ARE NOT REALLY GIVING US A LOT OF GUIDANCE AS TO YOU HOW, REALLY, TRULY TO PROTECT THE DEFENDANT'S RIGHTS, HOW WE ARE TO GO ABOUT THIS.

I THINK IT IS A VALID DISTINCTION. WHAT THEY ARE TALKING ABOUT IS, IF A POLICE OFFICER COMES ON TO THE SCENE AND HE HEARS SOMEBODY SHOUT "HELP ME, HE HAS GOT A GUN" BUT NOT NECESSARILY TALKING TO THE POLICE OFFICER. HE DOESN'T KNOW THAT THE POLICE OFFICER IS THERE. THAT IS NOT TESTIMONIAL, BECAUSE IT IS NOT INVOLVING AN AGENT, A POLICE OFFICER OR AN AGENT. THEY OVER HEAR THAT. WE ARE CONCERNED ABOUT

STATEMENTS MADE TO POLICE OFFICERS OR OTHER AGENTS OF THE STATE. IT MIGHT BE A CHILD PROTECTION TEAM .

CHIEF JUSTICE: ARE YOU ASKING NOW , IT SEEMS LIKE EVERYONE IS ASKING FOR PER SE RULES THIS MORNING AND THOSE ARE NICE , PER SE RULES, BUT ARE YOU ASKING FOR A PER SE RULE THAT, IF THAT EXCITED UTTERANCE IS MADE TO A POLICE OFFICER, IT IS ALWAYS TESTIMONIAL?

I AM SAYING THAT THE ISSUE OF WHETHER IT IS TESTIMONIAL , YES, IF IT IS MADE, IF IT IS A STATEMENT MADE TO THE POLICE OFFICER, I AM ASKING FOR A PER SE RULE THAT SAYS WHETHER OR NOT IT IS EXCITED UTTERANCE . WE WILL PAY ATTENTION TO THAT.

CHIEF JUSTICE: AS OPPOSED TO THE TRIAL JUDGE MAKING TWO SEPARATE INQUIRY , ONE AS EXCITED UTTERANCE AND TWO MEETING THE STANDARDS OF CRAWFORD. SHOULDN'T , HAVING SOME OF THE CASES SAID , YOU HAVE GOT TO REALLY LOOK AT THEM.

I AM BECAUSE OF WHAT JUSTICE ANSTEAD REFERRED TO , THAT ONCE YOU GET TO THAT , YOU SHOULD START WITH WHETHER IT IS TESTIMONIAL IN YOUR ANALYSIS AND YOU SHOULD END YOUR ANALYSIS ON WHETHER IT IS TESTIMONIAL. IF YOU GET INTO EXCITED UTTERANCE , YOU GET INTO RELIABILITY .

JUSTICE: CRAWFORD REFUSED TO ARTICULATE A DEFINITION OF WHAT TESTIMONIAL IS , CORRECT?

WELL, IT GAVE A LIMITED DEFINITION .

JUSTICE: THEY SAY WE LEAVE FOR ANOTHER DAY HOW TO SPELL OUT THE COMPREHENSIVE DEFINITION OF TESTIMONIAL , AND IT SEEMS ONE OF THE PROBLEMS IN ALL OF THESE CASES THAT I AM LOOKING AT FROM FLORIDA COURTS, IS THEY ASSUME THAT THESE THREE FORMULATIONS THAT CRAWFORD ARTICULATED , WERE INTENDED TO BE A PRESCRIPTION FOR HOW COURTS ARE TO LOOK AT STATEMENTS , WHEN THE WAY I READ CRAWFORD , IT IS ONLY A DESCRIPTIVE STATEMENT OF HOW SOME PEOPLE HAVE FORMULATED THE DEFINITION , AND IT SAYS VARIOUS FORMULATIONS OF THIS CORE CLASS OF TESTIMONIAL STATEMENTS EXIST , AND THEN IT QUOTES , FOR ARE TWO OF THE THREE TESTS , IT -- FOR TWO OF THE THREE TESTS AND IT QUOTES THE BRIEFS FILED IN THE CASE AND SAYS THESE CASES ALL SHARE COMMON NUCLEUS AND SAYS VARIOUS LEVELS OF AND EXTRACTION AROUND IT, REGARDLESS OF THE PRECISE ARTICULATION , SOME STATEMENTS QUALIFY UNDER ANY DEFINITION, FOR EXAMPLE EX PARTE TESTIMONY AT A PRELIMINARY HEARING, SO IT SEEMS PRETTY CLEAR TO ME , GIVEN THAT STATEMENT AND A LATER STATEMENT THAT THEY LEAVE A COMPREHENSIVE DEFINITION THAT , THEY DENIED INTENT FOR LOWER COURTS TO APPLY THIS 3- PART TEST TO DETERMINE WHETHER STATEMENTS WERE TESTIMONIAL. CAN YOU ADDRESS THAT?

THIS 3-PART TEST , I --

JUSTICE: WELL, THE COURT BELOW FOR EXAMPLE , DETERMINED WHETHER THEY USE ONE TEST, WHETHER STATEMENTS THAT WERE MADE UNDER CIRCUMSTANCES WHICH WOULD LEAD AN OBJECTIVE WITNESS REASONABLY TO BELIEVE THAT THE STATEMENT WOULD BE AVAILABLE FOR LATER USE AT A LATER TRIAL, AND THEY SAY THAT CRAWFORD REQUIRES CONSIDERATION OF THAT FACTOR , WHEN IN FACT THE WAY I READ CRAWFORD, IT WAS SIMPLY QUOTING FROM THE BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AN EXAMPLE OF ONE DEFINITION THAT HAS BEEN USED .

THERE WERE LOTS OF SOURCES OF MATERIALS THAT WENT INTO CRAWFORD, AND THEY TALKED ABOUT WHAT THE FRAMERS ' ORIGINAL INTENT WAS, AND THEY DIDN'T WANT SECRET TESTIMONY. THEY DIDN'T WANT WITNESSES SAYING THINGS AGAINST OTHER PEOPLE AND THEN NOT HAVING TO COME TO COURT AND SAYING THEM UNDER OATH IN FRONT OF A JURY WHERE

THEY COULD HAVE PROPER CONFRONTATION.

JUSTICE: PART OF CONCERN THAT I HAVE IS, IF YOU ACCEPT THAT LAST DEFINITION THAT JUSTICE CANTERO WAS JUST TALKING ABOUT , IF YOU HAD A CHILD IN A SCHOOL SITUATION GIVE A STATEMENT TO THE PRINCIPAL OR TEACHER AT SCHOOL , WOULD THAT BE TESTIMONIAL ?

IT WOULD DEPEND ON WHETHER OR NOT THE TEACHER OR THE PRINCIPAL WAS ASKING AS AN AGENT FOR THE STATE.

CHIEF JUSTICE: IT SEEMS LIKE WHAT YOU ARE SAYING AS I HEAR JUSTICE CANTERO , IS THAT THEY DIDN'T GIVE US, THIS IS THREE AND THAT IS NOT GOING TO , SORT OF LIKE STAY TUNED AND LUCKILY WE WILL BE ABLE TO HEAR THE NEXT EPISODE IN JUNE AS TO WHAT THEY --

I AM LOOKING FORWARD TO THAT, MYSELF.

JUSTICE: I AM NOT AS CONFIDENT AS YOU SEEM TO BE THAT THEY HELD THE EVIDENCE CODE UNCONSTITUTIONAL, EITHER, WHICH WOULD AFFECT THE READING OF CRAWFORD , WHICH DEALT OUT HERE SAY -- HEARSAY , THROW OFF HEARSAY.

CHIEF JUSTICE: I DON'T KNOW IF YOU --

WELL , WE WOULD LIKE , IN SUM, I WOULD LIKE YOU TO AFFIRM THE FIRST DISTRICT'S HOLDING IN OVERTON AND QUASH THE FIFTH DISTRICT DECISION.

CHIEF JUSTICE: THANK YOU. THANK YOU.