

**IN THE SUPREME COURT OF FLORIDA**

ANTHONY K. RUSSELL, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Supreme Court Case No. \_\_\_\_\_

DCA Case No.: 5D05-2630

**JURISDICTIONAL BRIEF OF THE PETITIONER**

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

David S. Morgan  
Assistant Public Defender  
Florida Bar number: 0651265  
444 Seabreeze Boulevard, Suite 210  
Daytona Beach, Florida 32118  
(386) 252-3367

COUNSEL FOR APPELLANT



## TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
<p style="text-align: center;"><b>THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION IN ORDER TO RESOLVE THE EXPRESS AND DIRECT CONFLICT BETWEEN THE FIFTH DISTRICT COURT OF APPEAL AND TWO OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.</b></p>	
CONCLUSION	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF FONT	9

## TABLE OF CITATIONS

CASES CITED:	PAGE NO.
<i>Arndt v. State</i> 815 So. 2d 674 (Fla. 5th DCA 2002)	2, 5
<i>Blair v. State</i> 805 So. 2d 873 (Fla. 2d DCA 2001)	2
<i>Colina v. State</i> 629 So. 2d 274 (Fla. 2d DCA 1993)	7
<i>Colwell v. State</i> 838 So. 2d 670 (Fla. 2d DCA 2003)	2, 6
<i>Morris v. State</i> 727 So. 2d 975 (Fla. 5th DCA 1999)	2
<i>Russell v. State</i> __So. 2d__, 31 Fla. L. Weekly D235, 2006 WL 141514 (Fla. 5th DCA January 20, 2006)	1
<i>Santiago v. State</i> 889 So. 2d 200 (Fla. 4th DCA 2004)	2, 6

## STATEMENT OF THE CASE AND FACTS

The defendant's girlfriend contacted the police to report an alleged battery upon her by the defendant.<sup>1</sup> *Russell v. State*, \_\_\_So. 2d\_\_\_, 31 Fla. L. Weekly D235, 2006 WL 141514 (Fla. 5th DCA January 20, 2006) (copy appended). The deputy took a statement from the alleged victim and observed a red mark on the side of her neck, which the alleged victim stated had been inflicted by the defendant.

Affidavits of violation of probation (VOP) were filed against the defendant. Among the allegations was the claim that he had committed an aggravated battery upon a pregnant woman. The responding deputy testified at the VOP hearing and the statement of the alleged victim was introduced. At the conclusion of the hearing, which the victim did not attend, the defendant was exonerated of all allegations except the claim that he had struck the alleged victim on her neck.

The defense argued on appeal that a violation could not be founded solely upon hearsay and that the red mark only had significance when the hearsay statement of the alleged victim was considered. Secondly, the defense contended that the defendant was revoked for conduct not charged in the information (*i.e.*, a 10-day variance between the allegation and the testimony of the responding

---

<sup>1</sup> The facts are based on those in the decision. Persons involved in the litigation are referred to by their trial court designations.

deputy.<sup>2</sup> Lastly, the defense asserted that admission of the written statement of the alleged victim violated the defendant's sixth amendment right to confrontation. Only the first ground is material to the instant argument that discretionary jurisdiction should be exercised.

The Fifth District Court of Appeal rendered a written decision. *Russell, supra*. The court rejected the first argument of the defense by holding "hearsay statements of the battery victim, coupled with the officer's observation of injury, were sufficient to prove a probation violation." *Id.*, WL, p. 1, citing *Arndt v. State*, 815 So. 2d 674 (Fla. 5th DCA 2002); *Morris v. State*, 727 So. 2d 975 (Fla. 5th DCA 1999). Significantly, perhaps, the court also noted: "We acknowledge what appears to be contrary authority on this point in *Santiago v. State*, 889 So. 2d 200 (Fla. 4th DCA 2004), *Colwell v. State*, 838 So. 2d 670 (Fla. 2d DCA 2003) and *Blair v. State*, 805 So. 2d 873 (Fla. 2d DCA 2001)."<sup>3</sup>

The defense filed a motion for certification of conflict based on the court's acknowledgment of contrary authority, which was denied.

This brief follows.

---

<sup>2</sup> The second argument advanced by the defense on appeal was not addressed by the court.

<sup>3</sup> The petitioner does not assert conflict between the instant case and *Blair v. State*, 805 So. 2d 873 (Fla. 2d DCA 2001), because it differs from the instant case

---

as there was no visible injury on the victim in the earlier case. *Id.*, at 875-76.

## **SUMMARY OF ARGUMENT**

Two other district courts of appeal have held that the observation of injuries taken together with inculpatory hearsay statements are insufficient for the purpose of proving a VOP. The Fifth District Court of Appeal, on the other hand, held in this case that inculpatory hearsay statements coupled with an officer's observation of injury are sufficient to prove a VOP.

This court should exercise its discretionary jurisdiction in order to resolve the express and direct conflict between the decision of the Fifth District Court of Appeal in the instant case and decisions of two other district courts of appeal on the same question of law. The question of law that requires resolution is whether a VOP based upon an allegation of battery can be proven through the use of hearsay statements and testimony regarding the observation of injuries on the alleged victim.



## ARGUMENT

### **THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION IN ORDER TO RESOLVE THE EXPRESS AND DIRECT CONFLICT BETWEEN THE FIFTH DISTRICT COURT OF APPEAL AND TWO OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.**

There is express and direct conflict between the Second and Fourth District Courts of Appeal and the Fifth District Court of Appeal on the same question of law. The Second and the Fourth District Courts of Appeal have on a number of occasions held that inculpatory hearsay statements that are corroborated only by indicia of an injury are insufficient to prove a VOP. The question of law that requires resolution is whether a VOP based upon an allegation of battery can be proven through the use of hearsay statements and testimony regarding the observation of injuries on the alleged victim.

In this case the alleged victim, who did not testify at the VOP hearing, gave a statement to the police. She had a red mark on her neck, an injury which she attributed to the defendant. In pertinent part, the Fifth District Court of Appeal held in the instant case: “[R]esolution of this issue is controlled by our decision in *Arndt v. State*, 815 So. 2d 674 (Fla. 5th DCA 2002), wherein we concluded that the hearsay statements of the battery victim, coupled with the officer’s observation of

injury, were sufficient to prove a probation violation.” *Russell, supra*, WL, p. 1.

This holding is in express and direct conflict with the cases that follow.

The facts in *Santiago v. State*, 889 So. 2d 200 (Fla. 4th DCA 2004), are very similar to those in the instant case. The evidence of battery was in the form of hearsay statements and a red mark on the alleged victim’s neck. The Fourth District Court of Appeal held:

In the case sub judice, the trial court relied upon the victim’s mother’s hearsay statements and the circumstantial evidence of red marks on the victim’s face. Analogous to *Colwell v. State*, and *Blair*, although the victim’s injuries suggested to the deputy that a battery may have occurred, the deputy’s observations could not connect Santiago to the alleged battery. Moreover, that the red marks on her cheek may have resulted from Santiago’s slap suffers from the same hearsay deficiency as the remainder of the State’s case. It is quite possible that there is another explanation for the red marks wholly independent of Santiago. . . . Therefore, we find that the trial court abused its discretion in revoking Santiago’s probation on th[is] violation[.]

*Santiago*, at 203.

The Second District Court of Appeal has ruled consistently with the Fourth District Court of Appeal in *Santiago*. The facts in the case of *Colwell v. State*, 838 So. 2d 670 (Fla. 2d DCA 2003), are almost identical to those in the instant case. The deputy responded to a domestic battery call at a convenience store. The alleged victim stated that Colwell had battered her and there was a red mark on her neck.

The revocation was reversed. The appellate court held: “[T]he trial court found that there was additional evidence to prove the domestic battery - the red mark on Mrs. Colwell’s neck that was consistent with her statements to the deputy and her hysterical demeanor. As a matter of law, this additional evidence was insufficient to sustain the revocation.” *Id.*, at 671.

In an earlier case, *Colina v. State*, 629 So. 2d 274 (Fla. 2d DCA 1993), the district court rejected a revocation based upon evidence consisting of hearsay in the form of a letter from the alleged victim and testimony as to injuries. The court held: “Because the evidence relied upon to prove appellant committed a battery while on probation was hearsay, the trial court's finding that appellant violated his probation is improper. We reverse the revocation of probation . . .” *Id.*, at 275.

Discretionary jurisdiction should be exercised by this court. There is an express and direct conflict between the ruling of the Fifth District Court of Appeal and those of the Second and Fourth District Courts of Appeal. The question of law that requires resolution is whether a VOP based upon an allegation of battery can be proven through the use of hearsay statements and testimony regarding the observation of injuries on the alleged victim.

## **CONCLUSION**

This court should exercise its discretionary jurisdiction to resolve the express and direct conflict between this case and others from two other district courts of appeal on the same question of law.

Respectfully submitted,

**JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT**

---

David S. Morgan  
Assistant Public Defender  
Florida Bar No.: 0651265  
444 Seabreeze Boulevard, Suite 210  
Daytona Beach, Florida 32118  
(386) 252-3367

**COUNSEL FOR APPELLANT**

## **CERTIFICATE OF FONT**

I certify that the font used in this brief is 14 point proportionally spaced Times New Roman.

## **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this brief has been hand delivered to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Anthony K. Russell, Inmate # U16516, G1-21-U, Liberty Correctional Institution, 11064 N.W. Dempsey Barron Road, Bristol, Florida 32321-9711, on this \_\_\_\_ day of February 2006.

---

David S. Morgan  
Assistant Public Defender