IN THE SUPREME COURT OF FLORIDA

DARIUS JAMINE POLITE, CASE NO. SC10-1812

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review From the
District Court of Appeal
Fifth District

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TABLE OF CONTENTS

PAGE(s)

TABLE OF CITATIONS....................................iii

STATEMENT OF JURISDICTION.............................v

STATEMENT OF THE CASE AND FACTS.......................1

SUMMARY OF THE ARGUMENT...............................9

ARGUMENT:

I. THE ALLEGED VICTIM'S WRITTEN STATEMENT WAS IMPROPERLY ADMITTED INTO EVIDENCE BECAUSE THE PREDICATE FOR PAST RECOLLECTION RECORDED WAS NOT ESTABLISHED..........................10

II. EVIDENCE CONCERNING THE ALLEGED OUT-OF-COURT IDENTIFICATION OF MR. POLITE FROM A PHOTO LINEUP BY THE ALLEGED VICTIM WAS HEARSAY THAT WAS IMPROPERLY ADMITTED AT TRIAL.....................18

CONCLUSION..20

CERTIFICATE OF COMPLIANCE.............................21

CERTIFICATE OF SERVICE................................22

TABLE OF CITATIONS

CASES PAGE(S)

Andrews v. State, 261 So.2d 497 (Fla. 1972)....................12

Carter v. State, 951 So.2d 939 (Fla. 4th DCA 2007).............12

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354,
158 L.Ed.2d 177 (2004)...16

Deans v. State, 988 So.2d 1271 (Fla. 5th DCA 2008)..........18,19

Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074,
13 L.Ed.2d 934 (1965)..16

Garrett v. Morris Kirschman & Co., 336 So.2d 566
(Fla. 1976)...13,14

Hernandez v. State, 31 So.3d 873 (Fla. 4th DCA 2010)........13,14

Lindley v. State, 728 So.2d 1153 (Ala. 1998)...................15

Montano v. State, 846 So.2d 677 (Fla. 4th DCA 2003).........13,14

Neeley v. State, 883 So.2d 861 (Fla. 1st DCA 2004).............12

Neilson v. State, 713 So.2d 1110 (Fla. 2d DCA 1998).........18,19

Richardson v. State, 875 So.2d 673 (Fla. 1st DCA 2004).........12

Russell v. State, 982 So.2d 642 (Fla. 2008)....................10

Savoie v. State, 422 So.2d 308 (Fla. 1982).....................10

Smith v. State, 880 So.2d 730 (Fla. 2d DCA 2004)...........13,14

State v. Freber, 366 So.2d 426 (Fla. 1978).................18,19

State v. Giorgetti, 868 So.2d 512 (Fla. 2004)..................16

State v. Macias, 210 P.3d 804 (N.M. 2009).......................15

State v. Scott, 285 N.Ed.2d 344 (Ohio 1972)....................15

United States v. Collicott, 92 F.3d 973 (9th Cir. 1996)........15

Vanevery v. State, 980 So.2d 1105 (Fla. 4th DCA 2008)..........12

Woods v. State, 733 So.2d 980 (Fla. 1999)......................12

CONSTITUTIONAL PROVISIONS

U.S. CONST., AMEND. VI...16

STATUTES

Section 90.104(1)(a), Florida Statutes.........................12

Section 90.803(5), Florida Statutes........................10-17

OTHER AUTHORITIES

Kenneth S. Broun, *McCormick on Evidence*, § 283 (2009 ed.)...14-15

Charles W. Ehrhardt, *Ehrhardt's Florida Evidence*, § 803.5
(2010 ed.)...14

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Article V, Section 3(b)(3), and Fla. R. App. P. 9.030(a)(2)(A)(iv), because the decision of the Fifth District Court of Appeal is in direct and express conflict with decisions of other district courts of appeal and with a decision of this Court.

STATEMENT OF THE CASE AND FACTS

Darius Jamine Polite was charged by Information with Burglary of a Dwelling with an Assault or Battery (Count One), Robbery with a Firearm (Count Two), two counts of Aggravated Assault with a Firearm (Counts Three and Four), and Possession of a Firearm by a Convicted Felon (Count Five). (R1 at 34).[1] The charged offenses arose out of an alleged incident on July 14, 2008, in which three black males allegedly broke into the home of Falisa Levine and her two children and attempted to rob them at gunpoint. (5DCA at 12-13).

Ms. Levine appeared at trial but expressed great reluctance about testifying. She testified that she did not identify or tell

[1] Citations to the Trial Court Record on Appeal will be indicated as follows: (R1 at 50 = Page 50, Volume 1 of the Record on Appeal); (TT1 at 50 = Page 50, Volume 1 of the Trial Transcripts). Citations to the Record on Appeal of the Fifth District Court of Appeal will be indicated as follows: (5DCA at 12 = Page 12 of the Record on Appeal of the Fifth District Court of Appeal).

the police the name of the person who had committed the offenses against her. (TT1 at 31-33). She also repeatedly testified that she could not remember the specific details of the alleged incident. (TT at 40-41).

The State showed Ms. Levine a written statement she allegedly provided to the police on the night of the alleged incident. Although Ms. Levine testified that she had written the statement, she never testified that the written statement accurately reflected the facts she allegedly observed on the date of the charged offenses or that she was being truthful at the time she wrote the statement. (TT1 at 31-46). In fact, Ms. Levine actually testified that she may have made a mistake when she wrote the statement because the police were pressuring her when she wrote it. (TT1 at 49).

Immediately prior to the State attempting to introduce Ms. Levine's written statement into evidence by having her read it to the jury, Mr. Polite's trial counsel stated the following: "Objection, your honor. This is improper predicate." (TT1 at 34).

Mr. Polite objected again when the State attempted to establish the predicate for the statement's admissibility, specifically indicating that the exception for "past recollection recorded" was at issue, and contending that the State could not introduce the statement into evidence. In direct response to Mr. Polite's objection, the State argued that the statement was

admissible pursuant to Fla. Stat. § 90.803(5). In overruling Mr. Polite's objection, the trial court also specifically addressed § 90.803(5) and the necessity that a proper foundation be established prior to the admissibility of evidence pursuant to that hearsay exception. (TT1 at 42-43).

Additionally, Mr. Polite objected to the introduction of Ms. Levine's written statement as substantive evidence on the basis that he could not cross-examine the document and that he was being deprived of his right to confrontation. The trial court referenced Fla. Stat. § 90.803(5) and overruled Mr. Polite's objection. (TT1 at 43-44). Later in the trial, both the trial court and the State again indicated that Ms. Levine's statement was admitted pursuant to Fla. Stat. § 90.803(5). (TT2 at 209, 210).

The State proceeded to read the written statement to the jury. The statement was read as follows:

> I, Falisa Levine, was coming out of my bathroom when I heard a loud bang. I looked into my kitchen and noticed three black men entering the door by kicking it in. Two men I did not recognize, one I did only knowing him as Darius. Darius I know from the neighborhood. Darius then told me to get on the ground and also had handgun to head. When I screamed his name, Darius, he then said to other guys, we have the wrong house. One guy took my purse and Darius told him to put it back. The guys then ran out the door. Only two of the guys had handguns. Third guy did not. One of the guys did put handgun on kids. That is the guy that had his face covered up. The third guy came in after other two guys had already entered not doing anything but

> looking around. I then asked Darius why he is doing this and he said that he has the wrong house. He then walked outside leaving yard as I walked behind to see how they were traveling. I do know that this is Darius as soon as he entered my home. After that Darius then called my name. All the suspects left. I then tried to call police and phone line would not work. Second suspect did put purse on the shoulder and took my money totaling $250 out of my purse. That's when Darius told him to put it back because this is like family.
>
> First suspect 6'2, 200 pound black male; second suspect, 5'2, 130 pound, black male; third suspect, 5'2 130 pound black male.
>
> Sworn to and subscribed before me, this 14th day of July, 2008. Deputy Sheriff Brissette. I swear/affirm the above attached statements are correct and true, Falisa Levine.

(TT1 at 47-48).

On cross-examination, Ms. Levine testified that she could have made a mistake when she completed the written statement, because she was being pressured at the time she wrote it. (TT1 at 49).

Detective Robert Branch, of the Orange County Sheriff's Office, also provided testimony. Detective Branch testified that he responded to Ms. Levine's residence on July 14, 2008, and spoke with Ms. Levine and her children. Detective Branch testified that Ms. Levine identified Mr. Polite as one of the people who entered her home. Mr. Polite objected to Detective Branch's testimony about Ms. Levine's identification, but that objection was overruled. (TT1 at 73-76).

The State sought to introduce the testimony of Detective

Branch concerning an identification Ms. Levine allegedly made of Mr. Polite from a photo lineup and the photo lineup itself. Mr. Polite objected to the introduction of that evidence. The trial court reserved ruling on Mr. Polite's objection, indicating that the court needed to review the Fifth District Court of Appeal's decision in *Deans v. State*, 988 So.2d 1271 (Fla. 5th DCA 2008). (TT1 at 76-81, 101).

The trial court subsequently permitted this evidence to be admitted. Mr. Polite argued that the evidence was inadmissible because Ms. Levine never testified to making the out-of-court identification in question. (TT1 at 188-191).

At the close of the State's case, Mr. Polite moved for a judgment of acquittal on all of the charged offenses. (TT2 at 202-07). The trial court granted the motion on Count Three, but denied it as to the remaining counts of the Information. (TT2 at 211).

During closing argument, the State again read Falisa Levine's written statement to the jury. (TT2 at 236-37). The State also noted for the jury that Ms. Levine made an out-of-court identification of Mr. Polite from a photo lineup. (TT2 at 239).

The jury found Mr. Polite guilty as charged on Counts One, Two, Four, and Five of the Information. (R1 at 109-117). The trial court found Mr. Polite to a be a Prison Releasee Reoffender and sentenced him to concurrent sentences of life in prison on Counts One and Two of the Information, and to concurrent lesser

sentences on the remaining counts. (R1 at 16-17).

Mr. Polite appealed his convictions to the Fifth District Court of Appeal. In that appeal, Mr. Polite argued, that (I) the trial court erred in admitting Ms. Levine's written statement into evidence pursuant to the past recollection recorded hearsay exception contained in Fla. Stat. § 90.803(5); and (II) that the trial court had erred in admitting evidence concerning Ms. Levine's alleged out-of-court identification of Mr. Polite from a photo lineup. (5DCA at A).

As to Issue I, Mr. Polite argued that the State had failed to establish the proper predicate to admit Ms. Levine's written statement pursuant to § 90.803(5), because Ms. Levine never testified that the statement accurately represented her knowledge at the time it was made or that she was being truthful at the time she wrote it. As to Issue II, Mr. Polite argued that the State was precluded from introducing evidence of Ms. Levine's alleged out-of-court identification of Mr. Polite, because the State failed to ask her questions about that issue during its direct examination of her. (5DCA at A).

The Fifth District Court of Appeal issued a written opinion affirming Mr. Polite's convictions. (5DCA at 12). On Issue I, the Fifth District held that Mr. Polite did not properly preserve for appellate review the specific argument he made on appeal. (5DCA at 18).

The Fifth District also held, however, that even if Issue I was properly preserved for appeal, the State had presented sufficient evidence to support the admission of Ms. Levine's statement pursuant to § 90.803(5). (5DCA at 18-22). The Fifth District acknowledged that the decisions of the district courts in *Hernandez v. State*, 31 So.3d 873 (Fla. 4th DCA 2010), *Smith v. State*, 880 So.2d 730 (Fla. 2d DCA 2004), and *Montano v. State*, 846 So.2d 677 (Fla. 4th DCA 2003), supported Mr. Polite's argument. The Fifth District, however, expressed disagreement with those cases, concluding that they were decided contrary to the plain language of the statute. (5DCA at 18-20).

The Fifth District relied on decisions of various federal courts and decisions made by appellate courts in other states to support its conclusion that the aforementioned decisions of the Second District and Fourth District were incorrect. (5DCA at 19-20). The Fifth District concluded as follows:

> Given the totality of the circumstances, including that the witness swore to the statement as true at the time she gave it; that she was still consumed with the emotions of the event when talking to police; and that other evidence corroborated her statement, we find that there was sufficient evidence to lay a foundation for admission of the statement under section 90.803(5), even though the declarant herself never confirmed the accuracy of the statement at trial.

(5DCA at 22).

On Issue II, the Fifth District held that, during its

direction examination of Ms. Levine, the State asked her general questions about whether she had identified the person who had committed the offense against her. The Fifth District concluded that those questions were broad enough to allow Mr. Polite to cross-examine Ms. Levine about her out-of-court identification of Mr. Polite from a photo lineup. (5DCA at 22-24).

Mr. Polite filed a timely Motion for Rehearing and Certification. (5DCA at 29). The Fifth District denied that motion. (5DCA at 41).

Mr. Polite filed a Notice to Invoke Discretionary Jurisdiction in the Fifth District (5DCA at 43) and a Jurisdictional Brief in this Court, asserting that the decision of the Fifth District is in express and direct conflict with decisions of this Court and other district courts of appeal. This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The trial court improperly admitted hearsay evidence at trial when it permitted the alleged victim's written statement into evidence and when it permitted evidence to be admitted concerning the alleged victim's out-of-court identification of Mr. Polite from a photo lineup. The State failed to establish that the alleged victim's written statement was admissible as past recollection recorded because the alleged victim did not verify its accuracy at the time of trial. The State should not have been permitted to introduce testimony from a detective about the alleged victim's identification of Mr. Polite from a photo lineup, because the State failed to question the alleged victim about that specific identification on direct examination.

ARGUMENT

This Court accepted jurisdiction based on a direct and express conflict between the decision of the Fifth District with decisions of other district courts of appeal and with a decision of this Court. Once this Court accepts jurisdiction of a case in order to resolve a conflict, it has the authority to address all the issues properly raised in the lower court. *Russell v. State*, 982 So.2d 642, 645 (Fla. 2008); *Savoie v. State*, 422 So.2d 308, 310 (Fla. 1982).

I. THE ALLEGED VICTIM'S WRITTEN STATEMENT WAS IMPROPERLY ADMITTED INTO EVIDENCE BECAUSE THE STATE FAILED TO ESTABLISH THE PREDICATE FOR THE PAST RECOLLECTION RECORDED EXCEPTION FOR HEARSAY.

The trial court erred in admitting into evidence Falisa Levine's written statement. The written statement was not properly admitted as a past recollection recorded pursuant to Fla. Stat. § 90.803(5), because Ms. Levine never testified that the statement accurately represented her knowledge at the time it was made or that she was being truthful at the time she wrote it.

Initially, the Fifth District's conclusion that this issue was not properly preserved for appellate review at trial is not supported by the record or the applicable law. Immediately prior to the State attempting to introduce Ms. Levine's written statement into evidence by having her read it to the jury, Mr. Polite's trial counsel stated the following: "Objection, your honor. This is improper predicate." (TT1 at 34).

By making this objection, Mr. Polite explicitly indicated that the proper foundation for admissibility of the written statement pursuant to § 90.803(5) had not been elicited. The purpose of the contemporaneous objection rule is to provide both the trial judge and the opposing party with notice of the deficiency that exists so that they have the opportunity to cure the problem if possible. Here, although the State was put on notice of the failure to establish the proper predicate for admissibility, it was still unable to elicit the information necessary to justify admission of the evidence pursuant to § 90.803(5). Mr. Polite's "predicate"

objection was more than sufficient to preserve the issue for appellate review.

Even if the "improper predicate" objection was not sufficient on its own to preserve the issue for appellate review, Mr. Polite's various objections to the introduction of Ms. Levine's written statement were sufficient to do so. Mr. Polite's countless objections to the admission of this piece of evidence clearly conveyed to both the trial court and the State that he believed that the evidence in question was inadmissible hearsay and that the hearsay exception for past recollection recorded found in § 90.803(5) did not apply.

This Court has explicitly held that a general hearsay objection is sufficient to preserve for appellate review a party's failure to the lay the proper predicate for admissibility. *See Andrews v. State*, 261 So.2d 497, 498 (Fla. 1972). The district courts have followed suit. *See e.g. Carter v. State*, 951 So.2d 939, 942-43 (Fla. 4th DCA 2007) (general hearsay objection sufficient to preserve for appellate review State's failure to lay proper predicate for admissibility of evidence pursuant to hearsay objection for business records); *Richardson v. State*, 875 So.2d 673, 676 (Fla. 1st DCA 2004) (same).

Moreover, to preserve an error involving a ruling concerning the admission of evidence, a timely objection stating the specific ground for the objection must only be made **if the specific ground**

is not apparent from the context. *See* Fla. Stat. § 90.104(1)(a); *See also Woods v. State*, 733 So.2d 980, 987 (Fla. 1999) ("vague" objection preserved hearsay issue when basis was clear from context); *Vanevery v. State*, 980 So.2d 1105, 1107 (Fla. 4th DCA 2008) (same); *Neeley v. State*, 883 So.2d 861, 864 (Fla. 1st DCA 2004) (general hearsay objection properly preserves for appeal all hearsay violations, exceptions, and exclusions, including insufficient predicate).

Mr. Polite's various objections to the admissibility of Ms. Levine's written statement and the trial court's repeated discussion of § 90.803(5) clearly indicate that the specific grounds for his objection was apparent from the context of the trial. This issue was properly preserved for appellate review.

Next, the Fifth District's conclusion that the State established the proper foundation for the admissibility of Ms. Levine's statement pursuant to Fla. Stat. § 90.803(5) is also in error. Despite the district court's conclusion to the contrary, the admission of hearsay testimony pursuant to § 90.803(5) requires that the declarant personally vouch for the accuracy of his or her prior out-of-court statement at the time of trial.

The Fifth District's conclusion to the contrary is in direct opposition to the decisions of the district courts in *Hernandez v. State*, 31 So.3d 873 (Fla. 4th DCA 2010), *Smith v. State*, 880 So.2d 730 (Fla. 2d DCA 2004), and *Montano v. State*, 846 So.2d 677 (Fla.

4th DCA 2003). In all three of those cases, the district courts held that a witness' prior recorded out-of-court statement is not admissible at trial unless the witness personally testifies at trial that the statement was accurate at the time it was made. *Hernandez*, 31 So.3d at 878; *Smith*, 880 So.2d at 736; *Montano*, 846 So.2d at 681-82.

"Unlike exceptions to the rule against hearsay which derive their ability from the circumstances that surround the making of an out-of-court statement, the reliability of a recorded recollection depends on the credibility of its maker." *Montano*, 846 So.2d at 681. In *Garrett v. Morris Kirschman & Co.*, 336 So.2d 566 (Fla. 1976), this Court concluded as follows:

> When a witness identifies as such a writing made contemporaneously (or nearly so) with events as to which testimony is elicited, **and testifies that he knew at the time it was written that it was accurate, he incorporates into his testimony by reference the record or past recollection. On this basis, the writing becomes admissible since it is supported by the witness' oath, and he is available for cross-examination.** If the writing is by another, it may be admitted notwithstanding the rule against hearsay. As with any other exception to the hearsay rule, however, it is necessary that the predicate be established for the exemption for the rule.

336 So.2d at 570 n.6 (emphasis added). Although this Court issued its opinion in *Garrett* prior to the Florida legislature's adoption of the evidence code and § 90.803(5), the adoption of that statute did not change the state of Florida law or the requirement that the

witness acknowledge the accuracy of his or her prior statement through testimony at trial. *See Montano*, 846 So.2d at 682.

The conclusion of this Court in *Garrett*, and the district courts in *Hernandez*, *Montano*, and *Smith*, finds further support from various authorities on evidence. Professor Ehrhardt indicates that the foundation for admissibility under § 90.803(5) requires "testimony that the witness remembers making an accurate recording of the fact or event or by testimony that the witness is confident that the facts would not have been written unless they were true." Charles W. Ehrhardt, *Ehrhardt's Florida Evidence*, § 803.5 at 873 (2010 ed.). McCormick on Evidence also indicates that in order to establish admissibility under Federal Rule of Evidence 803(5), the federal hearsay exception for past recollection recorded, "the witness must acknowledge at trial the accuracy of the statement." Kenneth S. Broun, *McCormick on Evidence*, § 283 (2009 ed.). "This may be accomplished by a statement that the person presently remembers recording the fact correctly or remembers recognizing the statement as accurate at an earlier time." *Id.*

Moreover, despite the Fifth District's reliance on various cases from outside Florida to support its decision, it is readily apparent that the cases it cited do not reflect the prevailing rule. The New Mexico Supreme Court, the Alabama Supreme Court, the Ohio Supreme Court, and the Ninth Circuit Court of Appeals are among the various courts that have concluded that the hearsay

exception for past recollection recorded requires the declarant to personally vouch for the accuracy of his or her prior out-of-court statement at the time of trial. *State v. Macias*, 210 P.3d 804, 815 (N.M. 2009); *Lindley v. State*, 728 So.2d 1153, 1156 (Ala. 1998); *State v. Scott*, 285 N.Ed.2d 344, 348 (Ohio 1972); *United States v. Collicott*, 92 F.3d 973, 984 (9th Cir. 1996).

Here, Ms. Levine never testified that the written statement accurately reflected the facts she allegedly observed on the date of the charged offenses or that she was being truthful at the time she wrote the statement. (TT1 at 31-46). In fact, she actually testified that she may have made a mistake when she wrote the statement because the police were pressuring her when she wrote it. (TT1 at 49). Under these circumstances, the trial court erred in admitting her statement into evidence.

Additionally, the Fifth District's construction of § 90.803(5) raises serious constitutional concerns. This Court is obligated to construe statutes in a manner which avoids holding that a statute may be unconstitutional. *State v. Giorgetti*, 868 So.2d 512, 518 (Fla. 2004).

The Fifth District's construction of § 90.803(5) violates the right to confrontation guaranteed by the Sixth Amendment to the United States Constitution and the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because it relied on the circumstances

under which Ms. Levine's statement was made to conclude that it was reliable and admissible. In *Crawford*, however, the Supreme Court held that the Confrontation Clause is a procedural safeguard, and that the reliability of hearsay testimony must be ensured through cross-examination, not based on a judicial determination that the particular circumstances under which an out-of-court statement is made establishes its reliability. 541 U.S. at 61-62; 124 S.Ct. at 1370; *See also Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) (defendant deprived of right to confrontation where witness' confession read to jury but witness not subject to cross-examination because he invoked his privilege against self-incrimination).

Based on the Fifth District's construction of § 90.803(5), there is no requirement that a witness who makes an out-court-statement be present at trial and be subject to cross-examination in any meaningful fashion before the witness' statement becomes admissible pursuant to this hearsay exception. This Court should avoid that construction in order to avoid any constitutional infirmity.

Finally, even if the Fifth District's conclusion that Ms. Levine was not required to personally vouch for the accuracy of the statement in order to establish the necessary foundation for admissibility under § 90.803(5) is correct, the circumstances of this case still fail to establish the required foundation. Ms.

Levine did not simply indicate that she could not remember whether the statement was accurate. She testified that she may have made a mistake on the statement because the police were pressuring her. In light of her repudiation of her written statement, it cannot be said that the statement reflects her knowledge correctly, as required by the plain language of § 90.803(5).

Accordingly, this Court should conclude that Ms. Levine's statement was improperly admitted at Mr. Polite's trial. This Court should quash the decision of the Fifth District and remand the case for a new trial.

II. EVIDENCE CONCERNING THE ALLEGED VICTIM'S OUT-OF-COURT IDENTIFICATION OF MR. POLITE FROM A PHOTO LINEUP WAS HEARSAY THAT WAS IMPROPERLY ADMITTED AT TRIAL.

The trial court erred in admitting evidence concerning Falisa Levine's alleged out-of-court identification of Mr. Polite from a photo lineup. The State's failure to inquire into this issue on its direct examination of Ms. Levine precluded its admission.

If the State fails to elicit testimony on direct examination about an alleged identification from the witness who allegedly made the identification, cross-examination of the witness about that issue is inappropriate. Under those circumstances, testimony about the alleged identification from a witness other than the person who allegedly made the identification is inadmissible hearsay. *Deans v. State*, 988 So.2d 1271, 1272 (Fla. 5th DCA 2008); *Neilson v. State*, 713 So.2d 1110, 1112 (Fla. 2d DCA 1998).

Both *Deans* and *Neilson* relied on this Court's decision in *State v. Freber*, 366 So.2d 426 (Fla. 1978). In *Freber*, this Court held that third-party testimony about another witness' identification of a perpetrator is admissible as non-hearsay evidence if the declarant testifies at trial and is subject to cross-examination about the identification. 366 So.2d at 428 n.3.

In both *Deans and Neilson*, the district court's decisions rested on the fact that the State did not elicit testimony from the alleged victim on direct examination about the specific photo pack identification in question.

During the direct examination of Ms. Levine which was actually conducted at trial, the State did not inquire about her alleged out-of-court identification of Mr. Polite from a photo lineup. The written statement of Ms. Levine that was admitted into evidence pursuant to Fla. Stat. 90.803(5), and that was read to the jury, also failed to address the photo lineup. Since the State never addressed this issue with Ms. Levine during its direct examination, Mr. Polite was not permitted to address the issue with her on cross-examination. Since Mr. Polite was deprived of the opportunity to cross-examine the alleged victim on this issue, the State should not have been permitted to introduce the testimony of Detective Branch concerning Ms. Levine's alleged out-of-court identification or the actual photo lineup on which she allegedly marked the photo depicting Mr. Polite.

The Fifth District's attempt to distinguish *Neilson* and *Deans* based on two general questions the State asked Ms. Levine about identification is unsuccessful. There is no indication that those questions were related to the identification from the photo lineup. Accordingly, the Fifth District's decision is contrary to *Freber* and its progeny. This Court should quash the Fifth District's decision to affirm Mr. Polite's convictions and remand the case for a new trial.

CONCLUSION

For the aforementioned reasons, this Court should quash the decision of the Fifth District Court of Appeal and remand Mr. Polite's case for a new trial.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Petitioner's Brief on the Merits is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to Kristen L. Davenport, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 20th day of April, 2011.

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