

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DARIUS JAMINE POLITE,

Petitioner,

v.

CASE NO.: SC10-1812

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The facts of this case were set forth in extensive detail in the opinion below. *Polite v. State*, 41 So. 3d 935 (Fla. 5<sup>th</sup> DCA 2010). The Petitioner was convicted of burglary of a dwelling with an assault or battery, robbery with a firearm, aggravated assault with a firearm, and possession of a firearm by a convicted felon. *Id.* at 936. Testimony at trial established that three men broke into the home of the victim and her two daughters, kicking in the door and rushing inside with guns drawn. *Id.* The victim recognized the Petitioner, who lived in the neighborhood. *Id.* When the Petitioner recognized the victim, he told the other men that they had the wrong house, and they left. *Id.*

The deputy who responded to the 911 call testified that the victim identified the Petitioner by name, then gave a sworn written statement detailing the events and again identifying the Petitioner by name as one of the robbers. *Id.* at 936-37. The victim later identified the Petitioner in a photographic line-up. *Id.* Physical evidence supported the victim's allegations, a videotape corroborated her story, and Petitioner's presence at the scene was confirmed by his GPS ankle monitor. *Id.* at 938.

At trial, the victim was extremely reluctant to testify, fearing for the safety of herself and her children. *Id.* at 937.

She eventually testified that three men kicked in the door to her home and came in, but then professed a lack of memory of the events. *Id.* She was shown her sworn statement and authenticated the document, admitting that she made the statement at the time or shortly after the event. *Id.* Defense counsel objected when the prosecutor asked if the statement was true and correct, and the question was not repeated when the objection was withdrawn. *Id.*

The victim's sworn statement was admitted into evidence as past recollection recorded. *Id.* at 937-38. The Fifth District Court of Appeal found that Petitioner had failed to preserve in the trial court the argument he made on appeal. *Id.* at 939. It further concluded, in dicta, that the new argument had no merit. *Id.* at 939-41.

SUMMARY OF ARGUMENT

This Court has found that it has the discretion to accept jurisdiction where dicta in a lower court opinion conflicts with the holding of another case. That discretion should not be exercised here, where the alleged error was not preserved at trial and can in no way be deemed fundamental, and where the court's decision is based on a totality of the circumstances test well recognized in other courts and compatible with case law in Florida. This factually ensconced analysis does not warrant this Court's attention.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS  
DISCRETIONARY JURISDICTION OVER THIS  
CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Nonetheless, as Petitioner points out, this Court has concluded that it has jurisdiction under this section even when the conflict arises from dicta.

Here, the Petitioner contends that the lower court's discussion regarding the required predicate for admitting past recollection recorded conflicts with other cases. This discussion was purely dicta, as the lower court had already concluded that this argument was not properly preserved below, and there was clearly no fundamental error. *Polite*, 41 So. 3d at 939. Indeed, as Judge Torpy noted in his concurring opinion, this case presents a classic example of the reason for the contemporaneous objection rule; had the Petitioner's argument been made in the trial court, the alleged foundational omission could have been easily remedied. *Id.* at 943.

At any rate, while this Court could exercise its jurisdiction here, such jurisdiction is purely discretionary, not mandatory. The State submits that jurisdiction is not warranted here.

The lower court conducted an extensive analysis of the required foundation for admitting a recorded recollection, concluding that admissibility must be evaluated by considering the totality of the circumstances, rather than the presence or absence of any certain magic words. *Id.* at 939-41. Such an approach has been embraced by numerous courts in other jurisdictions and is fully consistent with Florida law in other areas. Most importantly, this approach comports with the plain language of the statute governing this hearsay exception.

There is no need for this Court to exercise jurisdiction to review this well-reasoned decision, especially where such review will make no difference in the ultimate outcome of this case due to Petitioner's failure to properly preserve this issue at trial.



CONCLUSION

Based on the arguments and authorities presented herein, the Respondent respectfully requests this Honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by U.S. mail to William R. Ponall and Warren W. Lindsey, counsel for Petitioner, 1150 Louisiana Avenue, Suite 1, Winter Park, Florida 32790, this \_\_\_ day of October, 2010.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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