IN THE SUPREME COURT OF FLORIDA

DARIUS JAMINE POLITE,

Petitioner,

CASE NO. SC10-1812
DCA NO. 5D08-3921

vs.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

_____

On Petition for Discretionary Review
From the District of Appeal of
Florida, Fifth District

_____

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STATEMENT OF CASE AND FACTS

Darius Jamine Polite was convicted of four serious offenses arising out of an alleged incident on July 14, 2008, in which three men allegedly broke into the home of Falisa Levine and her two children and attempted to rob them at gunpoint. (Appendix A at 1-2). Ms. Levine appeared at trial but expressed great reluctance about testifying and repeatedly claimed she did not remember the alleged events. (Appendix A at 2; TT1 at 38-41).[1]

The State showed Ms. Levine a written statement she allegedly prepared and provided to the police on the date 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, 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).

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[1] References to the transcripts of Mr. Polite's trial are noted as follows: (TT1 at 45 = Volume 1, Page 45 of the Trial Transcripts).

Over numerous objections by Mr. Polite, the trial court admitted Ms. Levine's out-of-court statement into evidence. (TT1 at 34, 42-43, 44). The written statement was extremely prejudicial to Mr. Polite, because it indicated that Ms. Levine recognized Mr. Polite as one of the perpetrators. (Appendix A at 4-5).

Mr. Polite appealed his convictions to the Fifth District Court of Appeal. In that appeal, Mr. Polite argued, *inter alia*, that 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). Mr. Polite argued that the State had failed to establish the proper foundation for the admissibility of Ms. Levine's prior out-of-court statement pursuant to that exception because Ms. Levine did not testify at trial that the statement was accurate at the time it was written. Additionally, Mr. Polite argued that an interpretation of § 90.803(5) which would permit the introduction of the out-of-court statement without that testimony would violate Mr. Polite's right to confrontation, as guaranteed by the Sixth Amendment to the United States Constitution.

The Fifth District Court of Appeal issued a written opinion

affirming Mr. Polite's convictions. (Appendix A). First, the Fifth District held that Mr. Polite did not properly preserve for appellate review the specific argument he made on appeal. (Appendix A at 7).

The Fifth District also held, however, that even if the issue 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). (Appendix A at 7-11). In support of that decision, the Fifth District stated the following:

> Polite correctly points out that Florida case law, as it stands currently, does not allow a written statement to qualify as a past recollection recorded unless the declarant lays the foundation for its admission with testimony at trial that he or she recorded the statement when the described events were fresh in his or her mind, and attests to the accuracy of the statement (either by testifying that he or she made an accurate record of the fact or event or that he or she is confident that the facts would not have been written unless they were true). *E.g., Hernandez v. State*, 31 So.3d 873 (Fla. 4th DCA 2010) (holding that where witness was unable, or unwilling, to attest to the accuracy of the taped conversation, the state could not introduce the same as a past recollection recorded); *Smith v. State*, 880 So.2d 730 (Fla. 2d DCA 2004) (holding audio-taped recordings were inadmissible as past recollection recorded where witnesses did not testify that the recordings accurately reflected their memories of events when made); *Montano v. State*, 846 So.2d 677 (Fla. 4th DCA 2003) (holding tape

> recorded statement given to police shortly after criminal incident was inadmissible under section 90.803(5) when witness did not remember its contents and did not testify that it correctly reflected her knowledge or that she tried to be truthful at the time she made the statement).
>
> We disagree with these cases because they are contrary to the plain language of the statute and rule.

(Appendix A at 8-9).

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 the Fourth District were incorrect. (Appendix A at 9-10). In conclusion, the Fifth District stated the following:

> 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 with 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.

(Appendix A at 11).

Mr. Polite filed a Motion for Rehearing and Certification. The Fifth District denied Mr. Polite's motion. (Appendix B).

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in this case directly and expressly conflicts with a decision of this Court and decisions of other district courts of appeal. The Fifth District's opinion clearly and expressly indicates its disagreement with the previous holdings of this Court, the Second District Court of Appeal, and the Fourth District Court of Appeal, which all state that a witness must personally vouch for the accuracy of his or her prior out-of-court statement at the time of trial before that statement becomes admissible pursuant to the hearsay exception for a past recorded recollection.

ARGUMENT

This Court has discretionary jurisdiction to review a district court decision where that decision expressly and directly conflicts with a decision of this Court or another district court of appeal on the same issue of law. Article V, Section 3(b)(3), FLA. CONST.; Fla. R. App. P. 9.030(a)(2)(A)(iv). 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).

THE DISTRICT COURT'S DECISION IN THIS CASE EXPRESSLY AND DIRECTRLY CONFLICTS WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON WHETHER A WITNESS MUST PERSONALLY VOUCH FOR THE ACCURACY OF HIS OR HER PRIOR OUT-OF-COURT STATEMENT AT THE TIME OF TRIAL BEFORE THE OUT-OF-COURT STATEMENT IS ADMISSIBLE PURSUANT TO THE HEARSAY EXCEPTION FOR PAST RECOLLECTION RECORDED.

The Fifth District's decision expressly and directly conflicts with this Court's decision in *Garrett v. Morris Kirschman and Company, Inc.*, 336 So.2d 556 (Fla. 1976), and 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 *Hernandez*, *Smith*, and *Montano*, 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.

In *Garrett*, this Court held that the predicate for the admission of a witness' prior out-of-court statement as a past recollection recorded is established where the witness testifies

at trial that he knew at the time it was written that it was accurate. 336 So.2d at 570 n.6. Although this Court issued its decision 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.

Both this Court in *Garrett* and the district court in *Montano* explicitly noted that the reliability of statements properly introduced pursuant to the hearsay exception for past recorded recollections is derived from the veracity of the witness whose statement is at issue, not by the circumstances under which the statement was made. Where the witness testifies at trial that the out-of-court statement is accurate, the Courts reasoned, the out-of-court statement becomes admissible because it is supported by the oath taken by the witness at trial, and because the witness is available for cross-examination. *Garrett*, 336 So.2d at 570 n.6; *Montano*, 846 So.2d at 680.

The decision of the Fifth District on this issue is in express and direct conflict with the decision of this Court in *Garrett* and with the decisions of the district courts in

Hernandez, *Smith*, and *Montano*. First, the Fifth District explicitly noted its disagreement with the decisions in *Hernandez*, *Smith*, and *Montano*. (Appendix A at 9) ("We disagree with these cases . . .").

Second, the Fifth District explicitly rejected the rule, that a witness must personally vouch for the accuracy of his prior out-of-court statement at the time of trial, that was adopted by this Court in *Garrett* and the other district courts in *Hernandez*, *Smith*, and *Montano*. Instead, the Fifth District concluded that the totality of the circumstances, including the circumstances under which Ms. Levine's statement was originally made, and the other evidence presented at trial, established the reliability of, and rendered the statement admissible even though the Ms. Levine never confirmed its accuracy at trial. That conclusion is directly contrary to this Court's decision in *Garrett* and the district court's decision in *Montano*.

Although the Fifth District held that Mr. Polite did not properly preserve the aforementioned issue for appellate review, this Court should still accept jurisdiction to resolve the conflict that now exists. First, upon further review, Mr. Polite believes that this Court will ultimately conclude that his numerous objections to the admissibility of Ms. Levine's

out-of-court statement were sufficient to preserve the issue for review. Mr. Polite asserts that his 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.

Second, the Fifth District, based on the specific facts of Mr. Polite's case, addressed the merits of his argument and ultimately concluded that the State had established the proper foundation for admissibility of Ms. Levine's statement That conclusion was an alternative holding, not dicta.

A court's conclusion that (1) is based on the specific facts of the case; and (2) could constitute a sufficient ground standing alone to support the court's decision is a holding, not dicta. *Whetsel v. Network Property Services, LLC*, 246 F.3d 897, 903 (7th Cir. 2001). "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co*., 337 U.S. 535, 537, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949); *See also State v. Yule*, 905 So.2d 251, 260 (Fla. 2d DCA 2005) (Canady, J., specially concurring) (courts should avoid both restrictive readings of

opinions and dismissal of stated judicial rationale as dicta).

Here, the Fifth District considered the specific facts of Mr. Polite's case to determine that the State had established the predicate for admissibility under § 90.803(5). Additionally, in rejecting Mr. Polite's argument on the merits, the Fifth District engaged in a lengthy discussion of the requirements for admissibility pursuant to § 90.803(5). It is readily apparent that the court's decision could have rested independently on its conclusion that the State had established the predicate for admissibility of Ms. Levine's statement pursuant to § 90.803(5). Therefore, the Fifth District's conclusion on the merits of the past recollection recorded issue in this case constituted an alternative holding that is in conflict with both a decision of this Court and decisions of other district courts of appeal.

Finally, even if this Court concludes that the lengthy portion of the Fifth District's decision that dealt with the merits of the past recorded recollection issue is dicta, this Court should still accept jurisdiction to address the direct and express conflict that now exists. This Court has previously accepted jurisdiction to address a conflict that it found to exist in dicta. *See Cowan Liebowitz & Latman v. Kaplan*, 902

So.2d 755, 756-57 (Fla. 2005); *Watson Realty Corp. v. Quinn*, 452 So.2d 568, 569 (Fla. 1984); *See also Garcia v. Cedars of Lebanon Hospital Corp*., 444 So.2d 538, 539 n.3 (Fla. 3d DCA 1984).

CONCLUSION

For the aforementioned reasons, this Court should accept jurisdiction, address the merits of the instant case, and resolve the conflict described above.

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 8th day of October, 2010.

_____
WILLIAM R. PONALL
Florida Bar No. 421634

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief 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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WILLIAM R. PONALL
Florida Bar No. 421634

APPENDIX

A. Opinion of Fifth DCA Affirming Convictions - July 16, 2010

B. Order of Fifth DCA Denying Rehearing and Certification – August 13, 2010