

**IN THE SUPREME COURT OF APPEAL**

KEVIN PURYEAR,

Petitioner,

vs.

CASE NO. SC01-183

STATE OF FLORIDA,

Respondent.

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**PETITIONER'S BRIEF ON THE MERITS**

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
STATEMENT OF THE CASE AND FACTS .....	2
SUMMARY OF ARGUMENT .....	8
ARGUMENT	
THE DISTRICT COURT’S DECISION AND CERTIFIED QUESTION UNDERMINES THE PRINCIPLE OF STARE DECISIS AND FAILS TO FOLLOW THIS COURT’S INTERPRETA- TION OF THE DEFINITION OF NON-HEARSAY STATEMENTS OF IDENTIFICATION UNDER SECTION 90.801(2)(c). .....	10
CONCLUSION .....	29
CERTIFICATE OF SERVICE .....	29
CERTIFICATE OF COMPLIANCE .....	30

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Arizona v. Rumsey</u> , 467 U.S. 203 (1984) .....	14
<u>Burnet v. Coronado Oil &amp; Gas Co.</u> , 285 U.S. 393 (1932) .....	14
<u>Donato v. American Tel. &amp; Tel. Co.</u> , 767 So. 2d 1146 (Fla. 2000) .....	21
<u>Douglas v. State</u> , 921 S.W.2d 180 (Tenn. 1996) .....	16
<u>Gilbert v. California</u> , 388 U.S. 263 (1967) .....	24
<u>Hill v. State</u> , 711 So. 2d 1221 (Fla. 1 <sup>st</sup> DCA 1998) .....	13
<u>Hilton v. South Carolina Public Railways Commission</u> , 502 U.S. 197, 202 (1991) .....	14
<u>Hoffman v. Jones</u> , 280 So. 2d 431 (Fla. 1973) .....	12, 13, 16
<u>Holly v. Auld</u> , 450 So. 2d 217 (Fla.1984) .....	21
<u>Muhammad v. State</u> , 26 Fla. L. Weekly S37 (Jan. 18, 2001) .....	14
<u>Payne v. Tennessee</u> , 501 U.S. 808 (1991) .....	14
<u>Power v. State</u> , 605 So. 2d 856 (Fla. 1992) .....	13-16, 18, 19

<u>Puryear v. State</u> , 774 So. 2d 846 (Fla. 4 <sup>th</sup> DCA 2000) .....	10, 15, 16, 18, 22-24, 27
<u>Shalala v. Illinois Council on Long Term Care</u> , 529 U.S. 1 (2000) .....	15
<u>Standford v. State</u> , 576 So. 2d 737 (4 <sup>th</sup> DCA 1991) .....	22, 23
<u>State Dept. of Insurance v. Keys Title</u> , 744 So. 2d 599 (Fla. 1st DCA 1999) .....	21
<u>State v. Daniel</u> , 665 So. 2d 1040 (Fla. 1995) .....	15
<u>Stovall v. Denno</u> , 388 U.S. 263 (1967) .....	24
<u>Swafford v. State</u> , 533 So. 2d 270 (Fla. 1988) .....	10-15, 19-22, 24
<u>United States v. Owens</u> , 484 U.S. 554 (1988) .....	24
<u>United States v. Wade</u> , 388 U.S. 218 (1967) .....	24
<u>Waite v. Leesburg Regional Medical Center, Inc.</u> , 582 So. 2d 789 (Fla. 5 <sup>th</sup> DCA 1991) .....	20
<u>Webster v. Reproductive Health Services</u> , 492 U.S. 490 (1989) .....	14

OTHER AUTHORITIES

Black’s Law Dictionary 745  
(6<sup>th</sup> Ed. 1990) ..... 21

Ehrhardt, Florida Evidence,  
Section 801.9 ..... 23

CONSTITUTION PROVISIONS

Art. V, Sec. 3(b)(3), Florida Constitution ..... 10

Art. V, Sec. (3)(b)(4), Florida Constitution ..... 10

FLORIDA STATUTES

§ 90.801(2)(c) ..... 10-12, 20, 23, 26, 28

## **PRELIMINARY STATEMENT**

Petitioner was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. He will be referred to as petitioner in this brief.

The record on appeal is not consecutively numbered. The record volume is numbered independently from the transcripts. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. All references to the transcripts will be by the symbol "T" followed by the appropriate page number in parentheses.

## STATEMENT OF THE CASE AND FACTS

Petitioner, Kevin Puryear, was convicted of robbery, as a lesser included offense of robbery with a weapon in Broward County. His appeal to the Fourth District Court of Appeal was denied in a decision that found the victim's out-of-court descriptions of her assailant to her boyfriend and a police officer after the robbery admissible as non-hearsay under section 90.801(2)(c), Florida Statutes (1999), as statements of "identification of a person," where the victim testified at trial and was subject to cross-examination. Puryear v. State, 774 So. 2d 846 (Fla. 4<sup>th</sup> DCA 2000) (Appendix-1-10). The facts before the jury were summarized in the district court's decision:

Sixteen-year-old Amy Deese was the victim of the robbery. She testified that on April 27, 1999, between 3:00-4:00 p.m., she pulled into a stall at a do-it-yourself car wash. On her way to the change machine, she saw "a guy standing there by the fence" behind the car wash "[j]ust walking back and forth." No one else was around. Deese looked at the man for only "a couple of seconds. Just a glance." She "didn't pay any mind" to what he looked like. After getting change, Deese began to wash her car.

As she knelt to wash her tires, a man came up to her from the right. He put what she thought was a gun to her head. It felt hard and metallic. She saw out of the corner of her eye that it was black. The man told her something like, "give me your money." She hesitated, but without looking back, gave him six single dollar bills from her back pocket.

The man took off. Deese stood up and saw her assailant turn near the vacuum cleaners. He made a crude comment, and told her "you better be glad you're alive or thank God

you're alive." When asked if she got a good look at him, she said "Not really. Just a side of his face." When asked if she got a good look at his face, Deese replied "No." Deese observed the man's clothing, height, and weight for only a matter of seconds.

Deese got in her car and drove home. She told her mother what had happened. Her mother advised her to make a police report and then left to look for the assailant.

Danny Cratsenberg, Deese's boyfriend, came over to the house. Deese told him about the robbery. The two of them went to look for the suspect, whom Deese had described. Not spotting the assailant, the victim and Cratsenberg went to the police station.

To a detective, Deese gave a description of the perpetrator as a black male wearing a burgundy or maroon shirt, white tennis shoes, and black faded jeans. She said he had body odor and was missing every other tooth. She estimated him to be age 30-35. Deese testified that she told the detective at the police station that the suspect had a mustache and missing teeth; she said she saw a mustache from glancing at his face as he stood by the vacuum cleaners after the robbery. But she said that she "just don't remember when I seen his teeth."

Deese and her boyfriend left the police station. On the drive home, near the car wash, Deese saw "the man crossing the street." He was the only black man in the area. Cratsenberg asked if the man was her assailant. Deese said she "hesitated because I wasn't really sure. Then I looked at him and I said yeah that's him." She was able to identify the robber based upon his clothes, height, and weight. She did not identify him by his face. Deese testified "I knew it's him by the clothes, and I also wanted it to be him because I knew the cops were looking for him."

The couple waved down a police officer, who stopped

appellant. Without getting out of the car, from approximately twenty feet away, Deese identified appellant as he stood across the street from her. She was sure it was the person who robbed her based on "clothing and height, stuff like that."

In court, Deese was able to identify defendant as the person who robbed her.

During cross-examination, Deese conceded that when she first saw a man near the fence at the car wash, she only glanced at him and would not be able to recognize him again. She was not sure that the man by the fence was the same person she saw in the car wash or in police custody. The first time she saw her assailant's face was from a distance of about twenty feet as he was running away. He turned and paused, muttered obscenities at Deese, and continued on. Deese never got a full frontal view of his face. She was not sure when she saw his mouth with the missing teeth and admitted that her description of his teeth was "pretty much a guess." The victim testified that her in-court identification of defendant was based upon seeing him at the vacuum cleaners at the car wash. She said she was not good at estimating a person's height and weight. She noticed nothing unusual about the robber's teeth. When asked if she was positive, based on her observation of the assailant's face, clothing, height, and weight, that the man the police arrested was the same man who robbed her, Deese said she was not positive, only about seventy-five percent sure.

However, on re-direct examination, she said based on only the clothes, height, and weight, she was positive the man arrested was the assailant.

On the day of the robbery, Detective Wardlaw took a report from Deese at the police station. The state asked the detective, "What was the description that [the victim] gave you?" Over appellant's hearsay objection, Wardlaw testified

that Deese described the robber as "a black male, approximately six foot in height, 140 pounds, between the ages of 30, 35. He had a burgundy t[ee]-shirt with prints on it and faded black blue jeans." Wardlaw said that the victim reported that the perpetrator's shoes were "white sneakers" and said that he had "every other tooth missing in his mouth," a moustache, and a "very strong body odor to him." After the detective finished her report, she responded to the scene where appellant had been detained. She saw that appellant "[a]bsolutely" matched the description just given by the victim. The detective stood "very close" to appellant and noticed that he was "emitting a strong odor, body odor." Detective Wardlaw then went across the street and spoke to Deese, who identified appellant as her assailant. The detective testified that the victim took her time in making the identification.

During the direct examination of Cratsenberg, the state asked him to relate the description Deese had given him of her assailant. Defense counsel raised a hearsay objection, which the trial court overruled. Cratsenberg said that at Deese's house, right after the robbery, she told him that the robber was wearing a maroon shirt, faded black jeans, white sneakers, had "missing teeth" and a moustache; she said that the perpetrator was a black man and that he "stunk." Officer Kazmierczak stated that she stopped appellant in the vicinity of the car wash because he wore a burgundy tee-shirt and black faded jeans. The officer found no weapon on appellant or in her search of the area. She found nothing on appellant that she could conclusively say belonged to the victim.

Petitioner contended that Swafford v. State, 553 So. 2d 270 (Fla. 1988) had directly addressed the proper interpretation of section 90.801(2)(c), holding that "a description is not an identification" and that:

An "identification of a person after perceiving him,"

subsection 90.801(2)(c), is a designation or reference to a particular person or his or her photograph and a statement that the person identified is the same as the person previously perceived. The witness in this case never made an identification of the person he had seen; he only gave a description. This testimony does not meet the definition of "identification" as used in subsection 90.801(2)(c).

Although the Puryear decision at 850 identified Swafford as containing the “definitive interpretation” of section 90.801(2)(c) as it applied to a declarant’s description of a person, the district court found that the Court had reached a “different conclusion” in another first degree murder case, Power v. State, 605 So. 2d 856 (Fla. 1992). The district court recited the facts of Power, that Power raised on appeal the error of allowing a deputy sheriff to testify that Frank Miller had said the suspect was “white male with reddish-colored hair” and commented on the supreme court’s ruling that these statements were “probably admissible” as excited utterances . The Puryear decision further described the Power decision: “without equivocation the court found the statement admissible under section 90.801(2)(c)”:

We agree with the State that these statements were probably admissible under the “excited utterance” exception to the hearsay rule. Deputy Welty testified that when Mr. Miller flagged him down, “[h]e appeared to be a person that had just witnessed an unusual or serious crime, and very shaken.” Additionally, the statement regarding the reddish hair was admissible nonhearsay as one of identification of a person made after perceiving him. Frank Miller testified at trial and was clearly subject to cross-examination concerning the statement. Even if the statements were erroneously admitted, any error was harmless. . . . Welty

testified that the man who robbed him had sandy blond hair, not reddish hair.

Puryear determined that “*Power* and *Swafford* cannot be reconciled” even though it was possible to dismiss the brief holding in Power as dicta, and declared that Swafford had been overruled *sub silentio* by Power.

The Fourth District then interpreted the statute finding reasonable support for both interpretations and “[w]hether the statute should be expansively construed is a policy decision concerning the type of evidence a fact finder should consider at trial.” Id. at 851. After discussing the definition of “identification” and admitting that “a plain reading of the statute is thus consistent with *Swafford*’s holding that ‘a description is not an identification’” the court held that section 90.801(2)(c) should be construed to include descriptions within the statute’s designation of statement of identification of a person as non-hearsay where the declarant testifies and is subject to cross-examination at trial.

Because of the “apparent conflict” between Swafford and Power, the court certified to this Court a question of great public importance: “HAS SWAFFORD v. STATE, 533 So. 2d 270 (Fla. 1988) BEEN OVERRULED BY POWER V. STATE, 605 So. 2d 856 (Fla. 1992)?”

Notice to invoke discretionary jurisdiction was timely filed. This brief on the merits follows.

## SUMMARY OF ARGUMENT

This case is before this Court on a certified question of great public interest but this Court also has jurisdiction to review the decision of the district court because it directly and expressly conflicts with a decision of this Court on the same point of law.

The Fourth District Court of Appeal in petitioner's case sidestepped established principles of stare decisis in holding that a victim's out-of-court "description" of a robber could be the subject of testimony by her boyfriend and a police officer without violating the proscription against hearsay. The district court interpreted the exception of Section 90.801(2)(c) for statements of "identification of a person made after perceiving the person" to apply with equal force to "descriptions" as within the meaning of "a statement of identification." This Court in Swafford v. State, 533 So. 2d 270 (Fla. 1988) clearly decided that descriptions do not constitute identifications for purposes of this hearsay exception. This Court did not overrule Swafford *sub silentio* in Power v. State, 605 So. 2d 856 (Fla. 1992) and the district court erroneously found that this Court operated by silent means to change precedent.

Further, the district court advanced its own policy reasons why the hearsay exception should be expanded and the statute interpreted to include "descriptions" within the hearsay exception applicable to "identification." The district court's analysis offends the principles of Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), as a district court is not entitled to set aside the principle of stare decisis and overrule

precedent from this Court for policy reasons. Under the plain meaning rule of statutory interpretation, “identification” under 90.801(2)(c) does not mean “description.” Further, the policy justification for the very limited exception to the general rule against unreliable hearsay evidence does not apply with equal force to descriptions.

## ARGUMENT

THE DISTRICT COURT'S DECISION AND CERTIFIED QUESTION UNDERMINES THE PRINCIPLE OF STARE DECISIS AND FAILS TO FOLLOW THIS COURT'S INTERPRETATION OF THE DEFINITION OF NON-HEARSAY STATEMENTS OF IDENTIFICATION UNDER SECTION 90.801(2)(c).

The decision in petitioner's case is before this court for review under Article V, section (3)(b)(4), Florida Constitution, on a certified question of great public importance: "HAS SWAFFORD v. STATE, 533 So. 2d 270 (Fla. 1988) BEEN OVERRULED BY POWER V. STATE, 605 So. 2d 856 (Fla. 1992)?" Puryear v. State, 774 So. 2d 846,853 (Fla. 4<sup>th</sup> DCA 2000) (Appendix-1-10). Additionally, this Court's discretionary review jurisdiction is present because the decision of the district court directly and expressly conflicts with a decision of this Court in Swafford v. State, 533 So. 2d 270 (Fla. 1988), on the same point of law. Article V, section 3(b)(3), Florida Constitution.

The certified question as written by the district court does not expressly identify the importance of the legal issues to be decided by this Court. The Fourth District's en banc decision in Puryear interpreted prior precedent from this Court on the definition of nonhearsay under section 90.801(2)(c) as confusing and in conflict with each other so as to permit the Fourth District to conclude that it could choose the correct interpretation of section 90.801(2)(c) on reasons of public policy. Puryear at

851 (“Whether the statute should be expansively construed is a policy decision concerning the type of evidence a fact finder should consider at trial.”) Not only is the correct interpretation of that statute at issue but also the principles of stare decisis. By perceiving the controlling precedent from this Court to be conflict, the district court then declared that this Court had overruled itself *sub silentio*. The concept of a court overruling itself *sub silentio* does not exist as a recognized practice of this Court consistent with stare decisis nor is there support for the district court’s conclusion that it has the authority to decide issues of law based on public policy. A correct decision on both of these issues require reversal of petitioner’s conviction. The inadmissible hearsay testimony from the boyfriend and a police officer of the victim’s prior descriptions of the robber was prejudicial to petitioner’s right to a fair trial.

The proper interpretation of a statement of identification under section 90.801(2)(c)<sup>1</sup> to not include a witness’ out-of-court description of an individual or suspect was directly decided by this court in Swafford v. State. There the defendant in a murder trial sought to introduce a description to the police that a witness gave of

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<sup>1</sup>Section 90.801(2)(c), Florida Statutes provides:

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

\* \* \*

(c) One of identification of a person made after perceiving the person.

a man that he saw at the scene of the crime. This description did not match the defendant, and the defendant sought to introduce the description as exoneration, to show that he was not the killer. Even though the witness testified at trial, the defendant argued for admissibility of the description given to the police shortly after the crime under section 90.801(2)(c) contending the description would be more accurate than the witness' recollection on the witness stand three years later. This Court held against the defendant, finding that the description did not fall within the hearsay exception for "statements of identification" saying:

...[A] description is not an identification. An "identification of a person after perceiving him," subsection 90.801(2)(c), is a designation or reference to a particular person or his or her photograph and a statement that the person identified is the same as the person previously perceived. The witness in this case never made an identification of the person he had seen; he only gave a description. This testimony does not meet the definition of "identification" as used in subsection 90.801(2)(c).

Swafford remains controlling precedent, which the Fourth District was obligated to apply. This Court has said: "[t]o allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level." Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973). This Court has never explicitly receded from its holding in Swafford and until it does, appellate district courts are without power to overrule it as controlling precedent. Hoffman v. Jones, *supra*; Hill v. State, 711 So. 2d 1221 (Fla. 1<sup>st</sup> DCA

1998) (In the absence of clear constitutional or statutory authority reflecting a change in established law, the district courts do not possess the authority to disregard controlling precedent from the Supreme Court).

Even though this Court has not explicitly overruled Swafford, the court below interpreted this Court's decision in Power v. State, 605 So. 2d 856, 862 (Fla. 1992), as overruling Swafford *sub silentio*, thereby removing the binding force of Swafford and freeing the court below to hold that the phrase "a statement of identification of a person" can be stretched to include a physical description of a person. This undermined the spirit of Hoffman v. Jones, because the court below basically overruled Swafford, but only surreptitiously by attributing the act to this Court's alleged *sub silentio* pronouncement in Power.

In Power, the state sought to introduce evidence that a witness, Mr. Miller, told Officer Welty, who responded to the witness' 911 call, that the suspect was a "white male with reddish-colored hair." The state argued that the statement was admissible as an excited utterance. This Court said:

We agree with the State that these statements were probably admissible under the "excited utterance" exception to the hearsay rule. Deputy Welty testified that when Mr. Miller flagged him down, "[h]e appeared to be a person that had just witnessed an unusual or serious crime, and very shaken." *Additionally, the statement regarding the reddish hair was admissible nonhearsay as one of identification of a person made after perceiving him.* Frank Miller testified at trial and was clearly subject to

cross-examination concerning the statement. Even if the statements were erroneously admitted, any error was harmless. . . . Welty testified that the man who robbed him had sandy blond hair, not reddish hair. (E.s.)

Power did not have any effect on the binding force of Swafford. This Court has said: “[w]e have the utmost respect for the doctrine of stare decisis, which ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” Muhammad v. State, 26 Fla. L. Weekly S37, n. 16 (Jan. 18, 2001)(citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)). Under the doctrine of stare decisis, courts do not depart from established precedent unless there is “‘some compelling justification.’” Hilton v. South Carolina Public Railways Commission, 502 U.S. 197, 202 (1991)(citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)). “[T]he careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged ‘to bring its opinions into agreement with experience and with facts newly ascertained.’” Webster v. Reproductive Health Services, 492 U.S. 490, 558 (1989)(quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) (Brandeis, J., dissenting)).

The Court in Power did not provide “compelling justification” for changing course from Swafford, and did not even cite the Swafford holding. The Fourth

District in Puryear opined that Power overruled Swafford *sub silentio* even while acknowledging that Power's conflicting language could be viewed as dicta:

Although it is possible to dismiss the brief holding in *Power* as dicta, given the clear language of the opinion, that interpretation is available only to the Supreme Court. The evidentiary ruling in *Swafford* could also have been based on other grounds. See *supra*, note 1. We therefore conclude that the supreme court overruled *Swafford sub silentio* in *Power*. See *Deluxe Motel, Inc. v. Patel*, 727 So. 2d 299,301 (Fla. 5<sup>th</sup> DCA 1999); *Wright v. State*, 519 So. 2d 1157,1157 (Fla. 5<sup>th</sup> DCA 1988).

However, this Court has never acknowledged that a subsequent case of this Court may be held to overrule its prior precedent *sub silentio*. This Court has recognized its precedent may overrule decisions of district courts *sub silentio*. State v. Daniel, 665 So. 2d 1040 (Fla. 1995), footnote 3. The U. S. Supreme Court has said: “[t]his Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.” Shalala v. Illinois Council on Long Term Care, 529 U.S. 1, 18 (2000). The Court has also recognized that permitting *sub silentio* overruling would offend *stare decisis* principles. Id. at 41. A lower court that disagreed with established precedent from a higher court, but nonetheless lacked authority to directly overrule that precedent, could simply interpret a subsequent pronouncement from the higher court, even in dicta, that appears, or could be made to appear, inconsistent with the distasteful precedent as overruling that precedent *sub silentio*, even though the higher court itself said nothing at all about an overruling. Within Hoffman v. Jones'

prohibitions of overruling precedent from the Florida Supreme Court, district courts should not be able to hold that precedent from a higher court has been overruled *sub silentio* by a subsequent opinion of that higher court.

Responsibility for changing or overruling established precedent must rest squarely with the higher court. If an opinion of the higher court does not explicitly overrule established precedent, but nonetheless appears inconsistent with that precedent, the lower court's duty is to interpret the two opinions as consistent with one another, as much as possible, on the theory that if the higher court intended to depart from established precedent, to set aside the important principle of stare decisis in the name of necessary change, the higher court would have done so explicitly. As one court has noted: "it is well- settled that because of the importance of the doctrine of stare decisis, a subsequent case is not to be regarded as overruling a prior one *sub silentio* if an alternative, logical reading of the later case is possible." Douglas v. State, 921 S.W.2d 180, 188 (Tenn. 1996).

In dissent to Puryear, Judge Farmer explained why the en banc majority was wrong to advance the decision in Power as a *sub silentio* reversal:

I cannot subscribe to the court's rationale for choosing which supreme court decision to follow. As the majority opinion shows, first we have a supreme court decision necessarily and directly deciding the issue. Swafford v. State, 533 So.2d 270 (Fla. 1988). Then we have a later supreme court decision where the issue is raised but brushed aside as no basis to reach a different result and

ultimately treated as harmless, if error at all. *Power v. State*, 605 So.2d 856 (Fla.1992). Yet, from these two decisions we find a conflict and treat the latter as "sub silentio" overruling the former. As methodology, this is all wrong.

Supreme courts in general and ours in particular do not work that way.<sup>4</sup> If the court has directly and necessarily decided an issue, it does not stealthily overrule it a few years later in a case in which the issue plays no role in the outcome. When a later decision happens to state an alternative ground for affirming that appears to be contrary to what was decided in a former case, its dictum is properly understood as merely disposing of the case at hand, not as a full-dress reconsideration of the former decision. Here the context of the later dictum clearly shows that even the different holding on the issue would not have changed the result in the later case because the court had already decided the issue on alternative grounds. In short when the supreme court wants to reconsider an earlier express ruling on a discrete point of law, it says so unmistakably either by explicitly confronting the earlier decision or in language that cannot be misunderstood as indisputably receding from the former, even if unmentioned by name. Plainly that is not what is involved here.

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<sup>4</sup> See *State v. DuBose*, 99 Fla. 812, 128 So. 4, 6 (1930) (stating that "all the courts adhere to the policy of dealing with [issues] as cases arise in which they are *directly* involved and in which the question of validity is *pointedly* raised. They consistently *decline to settle questions beyond the necessities of the immediate case*. This court is committed to the 'method of a gradual approach to the general, by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by *out of hand attempts* to establish general rules to which future cases must be fitted.' " [e .s.] ); see also *State Comm'n on Ethics v. Sullivan*, 430 So.2d 928, 942 (Fla. 1st DCA 1983) (Shaw, J., concurring) ("Because this discussion is not essential to the decision in

*Key Haven* ... I consider it to be obiter dicta which does not provide controlling judicial precedent.").

Id. at 853-854.

In agreement with Judge Farmer's dissent, petitioner asserts that the conflicting language from Power should be viewed as dicta. The Puryear decision declines to find it as dicta because the Fourth said that only this Court could identify its own dicta. ("Although it is possible to dismiss the brief holding in *Power* as dicta,...that interpretation is available only to the supreme court."). Id. at 850-851. This principle that lower courts may describe but not identify dicta is strange indeed and not supported by citation to any authority.

At issue in Power were two statements by the witness, the reddish colored hair description, and a statement that the witness customarily picked up the victim for school at 9:00 a.m. The Court initially said: "[w]e agree with the State that these statements were probably admissible under the 'excited utterance' exception to the hearsay rule." Then, the Court went on to find that the reddish hair description may be admissible as an identification. The Puryear decision characterized the excited utterance ruling as equivocal because the Court used the words "probably admissible," however, the excited utterance ruling was necessary to the ruling, and could not have been equivocal. The ruling on the identification exception applied only to the hair color description and not to the statement that Mr. Miller customarily picked up the

victim for school at 9:00 a.m., which would have been inadmissible unless it was an excited utterance. Thus, the finding that the statements were excited utterances was necessary to the Court's ruling for admissibility and entirely sufficient. Both statements were made by the witness at the same time, under the same excited condition, and either they were both excited utterances, or neither were. Thus, the assertion that the reddish hair statement could fall under the identification exception was unnecessary. Finally, the Court in Power gave even another basis for its holding: "[e]ven if the statements were erroneously admitted, any error was harmless."

By regarding the reference in Power to the admissibility of the reddish hair statement as an identification to be dicta and not necessary to the Court's ruling, the lower court would not have had to interpret Power as overruling Swafford *sub silentio*. The Fourth District in this case should have interpreted Power as resting on the necessary and sufficient holding that the statements at issue were admissible under the excited utterance exception to the hearsay rule. Since the Court in Power did not explicitly address Swafford, nor was the Court in Power under any necessity to consider the issues decided and established by Swafford, it is an affront to principles of stare decisis for the lower court in this case to hold that Power overruled Swafford *sub silentio*.

The Fourth District's decision to find that Swafford was overruled led it to then adopt a different construction of the statute based on pertinent policy reasons that it

found attractive. (“Whether the statute should be expansively construed is a policy decision concerning the type of evidence a fact finder should consider at trial.” ) Id. at 851. However, social policy decisions are for the legislature, not the courts. Waite v. Leesburg Regional Medical Center, Inc., 582 So. 2d 789 (Fla. 5<sup>th</sup> DCA 1991). Nothing advanced by the district court shows justification for adopting an interpretation contrary to Swafford. In her concurrence, Judge Taylor saw no reason to change the rule of Swafford and urged this Court to not extend section 90.801(2)(c) beyond its literal meaning:

[T]he better view is to follow the literal interpretation of section 90.801(2)(c) set forth in *Swafford*. As both the majority and dissenting opinions point out, a “statement of identification” is most commonly understood as a witness’s affirmation that a particular person is the same person that the witness observed at an earlier time. Such statements are ordinarily made during identification procedures, such as photospreads and lineup. Ideally, they are given under circumstances where procedural rules and guidelines are followed by law enforcement investigators to reduce the risk of mistaken identification.

Given the well-documented dangers inherent in eyewitness identification generally, and cross-racial identifications specifically, I would urge the supreme court to stay with *Swafford* and not extend section 90.801(2)(c) to cover situations where a witness provides only a description of a suspect.<sup>3</sup>

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<sup>3</sup> See *McMullen v. State*, 714 So.2d 368, 370 n. 5 (Fla.1998) (referring to a comprehensive treatment of the subject of eyewitness identification in the treatise *Eyewitness Testimony: Civil and Criminal* (3d ed.1997),

authored by Elizabeth F. Loftus and James M. Doyle).

There are no “compelling reasons” to deviate from the clear holding in Swafford that descriptions are not statements of identification. Principles of statutory interpretation support the holding in Swafford. The applicable standard of review on the construction of a state statute is de novo because it presents a pure issue of law. State Dept. of Insurance v. Keys Title, 744 So. 2d 599 (Fla. 1st DCA 1999).

Where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So. 2d 217,219 (Fla.1984). Donato v. American Tel. & Tel. Co., 767 So. 2d 1146 (Fla. 2000). As Puryear itself recognized: “A plain reading of the statute is thus consistent with *Swafford’s* holding.” Id. at 851. The statutory language defining this exception to the hearsay rule could not be more clear, applying only to a “statement of identification of a person.” As the court below recognized, Black’s Law Dictionary 745 (6<sup>th</sup> Ed. 1990) defines “identification” as follows:

Proof of identity. The proving that a person, subject, or article before the court is the very same that he or it is alleged, charged or reputed to be; as where a witness recognizes the prisoner as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them.

Puryear at 851.

This Court in Swafford stated the definition of “identification” as “a designation or reference to a particular person or his or her photograph and a statement that the person identified is the same person previously perceived.” Finally, in Standford v. State, 576 So. 2d 737, 739 (4<sup>th</sup> DCA 1991), the court said: “[w]e believe that the typical situation contemplated by the code and the case law is one where the victim sees the assailant shortly after the criminal episode and says, ‘that’s the man.’”

A description, on the other hand, does not entail the witness *recognizing* the suspect as the same person who committed the crime. Rather, a description consists of the witness recounting from memory what the person who committed the crime looked like, and, instead of designating the suspect as the same person who committed the crime, reciting details of the person’s physical characteristics. Descriptions are not, by definition, equivalent to identifications. The statutory exception to the hearsay rule, by its unambiguous terms applying only to identifications, should be construed under the plain meaning rule to exclude descriptions.

The court below acknowledged that “identification” does not mean “description,” but that difference did not compel the court into a posture of strict statutory construction. Rather, the Fourth District employed the expansive view that “the ability to describe a person’s physical characteristics is the fraternal twin of the capacity to identify the person.” Id. at 851. The court concluded that reasons of

policy support treating descriptions as identifications for purposes of the hearsay exclusion. (“[T]o allow description testimony of a person under section 90.801(2)(c) does not do violence to the policy behind the rule.”) Id. at 851. Thus, not only did the court below ignore clear precedent from this Court on the issue, but also the court ignored the clear language of the statute in favor of its own view of sound policy on the type of evidence juror’s ought to consider.

Yet, the policy justification for the hearsay exception for “identifications” do not apply with equal force to “descriptions.” Section 90.801(2)(c) recognizes that an identification made shortly after a crime, accident or event is more reliable in most situations than identifications made at a later time. Ehrhardt, Florida Evidence, Section 801.9. Puryear itself acknowledges this reason that “the earlier, out-of-court identifications are believed to be more reliable than those made under the suggestive conditions prevailing at trial,” Id. at 852, and points to what Justice Anstead wrote regarding out-of court identifications, “[t]here is a lessened possibility of taint than when an identification is made in court where the identified person (defendant) is in the obvious ‘hotseat’ alongside his counsel.” Stanford, 576 So. 2d at 740.

Out-of-court identifications may be presumed reliable. However, there is no similar presumption that descriptions made near the time of the crime are any more reliable than what the witness remembers in court. Staged out-of-court identifications must be accompanied by certain safeguards to ensure reliability and protect the rights

of the accused. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 263 (1967). Those safeguards were part of the reason for the hearsay exception for identifications. The United States Supreme Court explained: “[t]he premise . . . was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications.” United States v. Owens, 484 U.S. 554, 562 (1988). Out-of-court descriptions carry no such safeguards, and may in fact be an off-handed remark weeks, months, or possibly years after the crime. Also, identifications spring from a flash of recognition, where the witness suddenly recognizes the person who committed the crime, and points, “that’s him.” Descriptions, however, must be conjured from the vagaries and imperfections of memory, and are, as Justice Farmer points out in dissent, “well known to be rife with error.” Thus, case law recognizes that out-of-court identifications carry assurances of reliability but the rationale for those decisions are not shared by other forms of hearsay, such as out of court descriptions.

Unlike an identification which is specific, a description is different. Swafford v. State, *supra*. As Judge Farmer pointed out in dissent in Puryear:

There are significant reasons for allowing as substantive evidence an out-of-court *identification* of a defendant occurring near the crime or its aftermath. For one, there is no mistaking "It was Sean."<sup>5</sup> Similarly, the witness who points to the third man in the line-up and says "That's him, that's the man who did it" is specifically naming one person in the whole world as the perpetrator.

Descriptions are different. They do not purport to reduce the universe of suspects to the one person who actually did it. Instead they define a class. And they do so not by naming or pointing to one person and one person only.<sup>6</sup> But rather by stating general characteristics shared by substantial numbers of people. A "bushy-haired, one-armed stranger" may ultimately come to signify George, but only because other circumstances are brought to bear and thus shrink the class.

Eyewitness descriptions, though, are well-known to be rife with error.<sup>7</sup> There are factors that affect the reliability of a witness's perception of strangers--especially during the circumstances of a crime or startling event. And even aside from the perception of the witness, there is the problem of the open texture of descriptive language, as well as its subjective nature. The witness may describe "a big man with light curly hair," but how big is big, and how light is light, and what is curly? To a woman barely 5 feet tall, a man of 6 feet may seem big, while to a woman nearly as tall he may seem of ordinary height. There is no standard currency in descriptive language; the terms may reasonably mean different things to speaker and listener. Yet, neither speaker nor listener is likely to mistake the meaning of "Sean did it."

And so, descriptions are often unreliable, while identifications are specific and usually free from doubt--at least as to whom one is referring. While a description may create a class of scores or hundreds or thousands of people, an identification is by definition a class of one. For these reasons the hearsay rule can plausibly be defined not to include identifications, but the reasons for doing so are entirely lacking when it comes to descriptions. I therefore dissent from today's decision.

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<sup>5</sup> Where Sean is a known person involved in or related to the events.

<sup>6</sup> Of course I exclude a description such as "the very muscled male actor with the vaguely German accent," whose effect is to specify Arnold. In that instance what purports to be merely a description is in reality an identification.

<sup>7</sup> See Helen O'Neill, "How Could the Perfect Witness Be So Wrong?," Fort Lauderdale Sun Sentinel (Oct. 14, 2000).

<sup>8</sup> See H.L.A. Hart, THE CONCEPT OF LAW 124-125 (Legal Classics Library 1990):

"communication ... will, at some point ... prove indeterminate; [it] will have what has been termed an *open texture* . So far we have presented this ... as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open textured." [e.o.]

The effect of the Fourth District's decision to find binding precedent of this Court to have been overruled *sub silentio* and to then fashion an interpretation that otherwise inadmissible hearsay descriptions were admissible under section 90.801(2)(c) allowed improper and prejudicial hearsay to be admitted against petitioner. Notably, the lower court did not find that the admission of the hearsay descriptions was harmless error despite the state's urging in its answer brief that the court do so. Under the facts of this case, the improper admission of this hearsay was quite harmful to petitioner. The hearsay descriptions testified to by the victim's boyfriend and a police officer mentioned the only distinguishing feature, missing every

other tooth, on which the state could corroborate the victim's otherwise weak and equivocal identification of petitioner as the robber.

The victim, Amy Deese, did not see her assailant at all during the robbery as he accosted her from behind as she knelt to wash her tires at a self-service car wash. She only saw the gun out of the corner of her eye and handed the man 6 dollars without looking back at him. She said that she did not get a good look at the robber and just saw the side of his face as he turned toward her while running away. Deese only saw the man's clothing, height, and weight for a few seconds and hesitated to identify him when her boyfriend first pointed him out, the only black man walking down the street. She said that she "wasn't really sure" it was him and identified him, not by his face, but only by his clothes. She then identified petitioner at a police show-up without getting out of her car from a distance of 20 feet away based on his "clothing and height, stuff like that." She identified petitioner, as he sat in the "hot seat" in court. Her certainty that her identification of petitioner as the robber whose face she never saw ranged between only 75% positive to being positive. Puryear at 847-848.

Into this mix of uncertainty, the court allowed the improper hearsay statement of the detective and boyfriend to be admitted. This hearsay was admitted not as just a statement for impeachment, but as substantive evidence. Since 90.801(2)(c) actually excludes statements of identification from the definition of hearsay, if descriptions are admitted under this rule they are out-of-court statements admitted to prove the truth

of the matter asserted. Thus, admission of Deese's description of the robber as a black male wearing a burgundy or maroon shirt, white tennis shoes and black faded jeans who had a body odor and missing every other tooth could not be harmless. Deese was not sure at trial that she ever saw the robber's mouth with the missing teeth and admitted that her description of the teeth was "pretty much a guess." She also said her identification of petitioner came from the few seconds view ("not a good look") she had of the side of his face as he ran away near the vacuum cleaners after the robbery occurred. In these circumstances the admission of the hearsay description improperly bolstered or corroborated her otherwise incredibly unsure identification of petitioner. The juror's otherwise reasonable doubts of the identity of the robber were improperly influenced by this description testimony where the testimony shows she did not have any ability to observe or notice the features and face of the assailant at the time of the crime. Reversal for a new trial where improper hearsay will not be admitted against petitioner is now required.

**CONCLUSION**

Based on the foregoing, petitioner urges this Court to return to the authority of Swafford, to quash the decision of the Fourth District and to reverse petitioner's conviction for a new and fair trial.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to MELYNDA MELEAR, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, this \_\_\_\_\_ day of March, 2001.

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MARGARET GOOD-EARNEST

Assistant Public Defender

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

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