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**THE FLORIDA SUPREME COURT
500 SOUTH DUVAL STREET
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BY _____

JAMMORA I. SIMMS,
Petitioner,

CASE NO: SC13-1426
DISTRICT NO: 4D11-3038

Vs.

STATE OF FLORIDA,
Respondents
_____/

**PETITIONER'S AMENDED JURISDICTION BRIEF
ON REVIEW FROM THE DISTRICT COURT OF APPEALS
FOURTH DISTRICT OF FLORIDA**

Jammora I. Simms DC# W04018
Hardee Correctional Institution
6901 State Road 62
Bowling Green, Florida 33834

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STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted by jury trial in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, of Count I, Burglary of an Occupied Structure with a Firearm, Count II, Robbery with a Firearm, Count III, Burglary of a conveyance with a firearm, and Count IV, Grand Theft with a Firearm all occurring on June 23, 2009.

The Petitioner was sentenced to life in prison with credit for time served for Counts I-III, and (15) years in prison on Count IV, Grand Theft while Armed. The Petitioner's Judgment of Conviction and Sentence were affirmed on Appeal. The Petitioner filed a Motion to Suppress the Victims Show-Up Identification. In that motion, the Petitioner contended that the show-up identification procedures were impermissibly suggestive causing a likelihood of irreparable misidentification violating the Petitioner's rights to a fair trial, and to Due Process of Law under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

The victim in this case took a deposition in this case on August 26, 2010. In the Deposition, the victim testified and made the following statement:

"I saw a whole bunch of people on the sidewalks and then I saw a whole bunch of police—a whole bunch of police cars and I saw a couple of police officers, then I saw three guys coming out in handcuffs in the middle of the road... And I remember the first--- the first one it was that identified the skinny one, the one with the gun. And then the second one I was like Oscar, yeah, that's definitely the one that was in

the store before asking for directions...And then I was the third guy and I was like, no, I didn't see him."

The victim was asked concerning how long it took to recognize the first one as being the gunman. The victim testified to the following:

"I kind of look at his shirt and I was the little hole like I - I saw before and then the low cut [hair-style] like I was picturing the jacket and the- and the shirt around his face and that was like his height matched, his skinniness matched and I was like, yeah, that's him.

The victim was then asked, "Is it possible you identified a person who looks similar to the gunman, but not the gunman?" The victim testified to the following:

"No, I don't believe I made any mistakes and I believe that, I mean, he was found in the house where all the merchandise was and the car was right outside. There's like no way that it couldn't be him. I know I didn't make a mistake.

Also, something that I found out after I was there there's—the lady who does the alterations, her son, she told me—they were telling me after the cops left and everything that happened that she had saw the same two—he had saw the same two guys there. They were looking around, so it was something like I'm pretty—they told me before he took his mom to church he saw— so it was on a Sunday. So like, I mean, this was planned like two days—a day in advance, something like that.

And when he told me it he said it was guy who also, you know, a little bit tall, big, not big but like you know, like he was just like, you know in the middle and a scrawny guy with him. And like, I mean, it was something that like I know I couldn't possibly mess up with like identifying them.

During the Motion to Suppress hearing, the police officers admitted that they took the victim to the place where they had the Petitioner was detained and in handcuffs. The victim testified at the suppression hearing that she was taken by the police to identify the Petitioner. Additionally, she testified that the Petitioner was detained and in handcuffs. The victim was asked during the suppression hearing whether she recognized the Petitioner. She testified that she was not sure. Defense counsel asked the Petitioner to remove his glasses, and the victim still testified that she was not sure. The victim testified at trial. During the trial, she testified that when she spoke to the police that she did not give many details in her taped statement concerning the robbers. The State through direct examination used improper identification procedures during trial. During the State' direct examination of the victim, the State forced the victim to identify the Petitioner as the gunman by using leading question and pointing and singling the Petitioner out thereby forcing the victim to identify the Petitioner as the gunman, when she previously testified during the suppression hearing that she was not sure. The record states the following:

Q. And when you did that, were you asked to identify someone in the court room? Did someone ask you if you could identify or recognize anyone in the courtroom?

A. Yes.

Q. And at that time, were you were unable to say for sure if someone Was involved?

A. No.

Q. Who do you recognize?

A. You, of course. Him. And the guy sitting next to him.

Q. Okay. Now this individual – You said you recognize me?

A. Yes.

Q. Because you met me before?

A. Yes.

Q. And the individuals at the table, you said you recognized both of them?

A. Yes.

Q. Who do you recognize as – If you could describe the individuals at the table, the one in the gray suit, you said you recognize them. Do you just recognize then either from the scene or from the courtroom?

A. The courtroom.

Q. And the other individual sitting next to him, do you recognize that individual?

A. Yes.

Q. Who is that individual?

A. He's the gunman.

Q. At the last time you saw him—

Mr. Clemens: Objection Your Honor. May we Approach?

The victim's identification was not based upon her own recollection of the Defendant but was influenced by the suggestive procedures employed by the State and the police.

The Circuit Court denied the Petitioner's Motion to Suppress Show-Up Identification. In its order, the Circuit Court held that the Show-up procedures were inherently suggestive but found that it did not give rise to a substantial likelihood of irreparable mistaken identification.

The Petitioner appealed to the Fourth District Court Appeals raising this issue for appellate review. The Fourth District Court of Appeals in its written opinion dated June 5, 2013 found the claim to be without merit. (*Record Fourth District Court of Appeals Opinion Appendix 1*)

The Petitioner contends that the Fourth District Court of Appeals decision in this case directly conflicts with this Court's decision in *Edwards v State*, 538 So.2d 440 (Fla. 1989); *Macias v State*, 673 So.2d 176 (Fla. 1996), and the United States Supreme Court's decision in *Manson v Braithwaite*, 97 S.Ct. 2243 (1977). The Fourth District Court misapplication of the law is grounds for this Court to exercise its conflict jurisdiction.

SUMMARY OF THE ARGUMENT

The Petitioner contends that the Fourth District Court of Appeals opinion in this case directly and expressly conflicts with this Court's decision in *Edwards v State*, 538 So.2d 440 (Fla.1989); *Macias v State*, 673 So.2d 176 (Fla.1996), and the United States Supreme Court's decision in *Manson v Braithwaite*, 97 S.Ct. 2243 (1977). The Fourth District Court of Appeals decision finding that the Petitioner's claim was without merit is unsupported by the record and the law. The Fourth District Court of Appeals misapplication of the United States Supreme Court's decision in *Manson* and the misapplication of this Court's decision in *Edwards*, and *Macias*, give this Court jurisdiction to resolve the direct and express conflict in this case.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeals that expressly and directly conflicts with a decision of the Supreme Court under Article V Section 3 (b) (3) of the Florida Constitution (1980), and under the Florida Rules of Appellate Procedure 9.030 (a) (2) (A) (iv) (2013).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEALS IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *EDWARDS V STATE*, 583 SO.2D 440 (FLA. 1989); *MACIAS V STATE*, 673 SO.2D 176 (FLA.1996) AND THE DECISION OF THE UNITED STATES SUPREME COURT DECISION IN *MANSON V BRAITHWAITE*, 97 S.CT. 2243(1997)

The Petitioner contends that the decision of the Fourth District Court of Appeals expressly and directly conflicts with the decision of this Court in *Macias v State*, 673 So.2d 176 (Fla.1996) and the United States Supreme Court decision in *Manson v Braithwaite*, S.Ct. 2243 (1977), and *Edwards v State*, 583 So.2d 440 (Fla. 1989). The Florida Supreme Court has discretionary review to review a District Court of Appeals decision that expressly and directly conflicts with the decision of this Court and the United States Supreme Court based upon a misapplication of a decision. *See: Nielsen v City of Sarasota*, 117 So.2d 731 (Fla. 1960). The jurisdiction of this Court can be invoked when the alleged conflicts are: (1) the announcement of a new rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. Under the second situation, the controlling facts become vital and the Court's jurisdiction may be asserted only where the Court of Appeals has applied a recognized rule of law to reach a conflicting

conclusion in a case involving substantially the same controlling facts as were involved in the conflicting decision. The Fourth District Court of Appeals in this case issued a written opinion and found that the Petitioner's claim that the show-up identification was inherently suggestive causing irreparable mistaken identification was without merit. That decision expressly and directly conflicts with the decision of this court in *Edwards v State*, 538 So.2d.440 (Fla.1989). In *Edwards*, this Court held that there are two situations which may require the exclusion of the in-court identification testimony. The First is when the police have obtained a pretrial lineup identification in violation of the defendant's right to counsel. *See: United States v Wade*, 87 S.Ct. 1916 (1967) and *Gilbert v California* 87 S.Ct. 1951 (1967). The second is when the police have obtained a pretrial identification by means of an unnecessary suggestive procedure. *See: Manson v Braithwaite*, 97 S.Ct. 2243 (1977). In both situations the in-court identification may not be admitted unless, it is found to be reliable and based solely upon the witness independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation.

A criminal defendant has a Due Process right to be identified before trial "in a manner that is 'unnecessarily suggestive and conducive to irreparable mistaken identification. *See United States v Rogers*, 387 F.3d. 925 (2004). There is a two-step analysis to determine whether an identification procedure comport with Due

Process. (1) The Petitioner must demonstrate that the identification procedures were unduly suggestive, and (2) whether under the totality of the circumstances, the identification was reliable despite the suggestive procedures

The Fourth District Court of Appeals found that this claim was without merit in its written opinion dated June 5, 2013. The Petitioner contends that the decision of the Fourth District Court of Appeals in this expressly and directly conflicts with this Court's decisions in *Macias v State*, 673 So.2d 176 (Fla.1996); *Edwards v State*, 538 So.2d 440 (Fla.1989); and the United States Supreme Court's decision in *Manson v Braithwaite*, 97 S.Ct. 2243 (1977) as the Fourth District Court of Appeals misapplied the law to the facts of this case when it applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were disposed of by this Court .

CONCLUSION

This Court has discretionary review jurisdiction to review the decision of the Fourth District Court of Appeals that has misapplied the law and this court's decision as well as misapplied the decision of the United States Supreme Court, and should exercise that jurisdiction to consider the merits of the Petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to the Office of the Attorney General, 1515 North Flagler Drive, Suite 900 West Palm Beach, Florida 33401-3432 on this ____ day of _____ 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, that this brief complies with the font requirements of the Florida Rules of Appellate Procedure Rule 9.210 (a) (2) (2013).

Jammora I. Simms DC# W04018

APPENDIX 1

FORTH DISTRICT COURT OF APPEALS
ORDER AFFIRMING CONVICTION
AND SENTENCE

APPENDIX 1

FORTH DISTRICT COURT OF APPEALS
ORDER AFFIRMING CONVICTION
AND SENTENCE

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2013

JAMMORA ISHMEA SIMS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D11-3082

[June 5, 2013]

PER CURIAM.

Appellant appeals his convictions and sentence to life in prison for burglary of an occupied structure, robbery, burglary of a conveyance, and grand theft of a motor vehicle, all of which were committed while appellant was armed with a firearm. Appellant claims the trial court should have granted his motion for mistrial and to strike the jury panel because of comments made by the judge during voir dire. He also claims the trial court should have suppressed an out-of-court identification made by the victim as impermissibly suggestive. We find these issues to be without merit and, as such, we affirm.

Affirmed.

MAY, C.J., GERBER and LEVINE, JJ., concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Joseph Marx, Judge; L.T. Case No. 502009CF008001BXXXMB.

Carey Haughwout, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.