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IN THE SUPREME COURT OF FLORIDA

JOSEPH ELI BEARDEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC12-1314

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case only to the extent that it is relevant to the issues raised in Petitioner's initial brief on the merits and only to the extent that it is supported by the record before this Court.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's statement of facts as substantially accurate for purposes of the issues raised in Petitioner's initial brief on the merits, but only to the extent that the recited facts are supported by the record before this Court; with the caveat that many of Petitioner's citations to the record on appeal are missing, incomplete, or inaccurate, and a few cite to opening statements, which are not evidence; and with the following additions and corrections:

John Kirchoff testified that, while at the Brown house but out of the victim's hearing, Petitioner said that he was going to rob the victim while at the victim's house, but either someone else was inside the house or someone else came home before Petitioner could effect the robbery, so Petitioner left with the victim (V 14 T 1636-1637). Kirchoff testified that Bill-Bill Brown—who knew the victim (V 14 T 1662, V 15 T 1785, V 16 T 1942-1943)—was present when Petitioner mentioned that he had intended to rob the victim at the victim's house, but Kirchoff did *not* testify that there had been a "discussion" amongst himself, Petitioner, and Bill-Bill "about

robbing Skipper," as stated at p. 8 of Petitioner's initial brief on the merits (V 14 T 1637-1638).

Robert Aguero testified that Petitioner "referred to we" "in connection with harming the person who owned the car" (V 13 T 1471). Maria Aguero testified that, during Petitioner's attempt to persuade the Agueros to buy the car, Petitioner said that the car's owner was homosexual and that he intended to steal the owner's money and credit cards (V 12 T 1229-1230). When Petitioner returned alone the third time, Robert Aguero was angry and started yelling; they got into Maria's car, and Petitioner admitted that he had "fucked up"; Petitioner apologized, said that he would not "do it again," and asked for another chance (V 12 T 1226-1228). Petitioner said that he and the other white man "had fucked him [the victim] up" and that the victim was going to die (V 12 T 1230).

Det. Bright testified that he was the first law enforcement officer to speak with Petitioner regarding this case (V 13 T 1502, 1508). Petitioner initially claimed to have been in Haines City visiting a friend on the date in question, but, when confronted with the fact that someone else had seen him in Wahneta on the night in question, he admitted that what he had told Bright was all a lie (V 13 T 1509-1510).

Regarding the proffered testimony of Angela Tyler, the trial court initially stated:

The four factors, and I'm citing directly from...Jones ...citing Chambers versus Mississippi, which is 410 U.S. 284. It's a 1973 case. And what the proposition stands for, before I even say what the four factors are, is the general proposition that -- that hearsay statements such as this, that a third person confessed to someone, is generally not admissible.

However, in cases such as this one, the Court's held that from a due process consideration, as set forth in Chambers, that it requires that this testimony be evaluated as substantive evidence. Not as rebuttal, not as impeachment, but as substantive evidence.

And Chambers, a Supreme Court relied on the following factors to justify the admission of hearsay confessions of a third party despite evidentiary rules to the contrary.

One, each confession was made spontaneous to a close acquaintance after the murder occurred. Two, each confession was corroborated by some other evidence in the case. Three, each confession was self-incriminatory and unquestionably against interest. And, four, if there was any question as to the truthfulness of the statement, the declarant was available for cross-examination. That would be Brown obviously.

The problem I'm having is, I think the first prong is clearly met. The confession was made spontaneous to a close acquaintance after the murder occurred.

The second one, was it corroborated by some other evidence. Well, the only thing that corroborates what she says is what the defendant in this case said to the police. Otherwise, it's not just not corroborated by other evidence, it's disputed by all the other evidence in this case.

And in the case that was before the Second District Court of Appeals, in which Judge Campbell...wrote the decision...is C-Z-U-B-A-K versus State at 644 So.2d 93. It's a 1994 Florida Second District Court of Appeals case in which the trial court was affirmed for not allowing this.

It -- reasoning under the guise of impeachment, he in reality was offering impeaching witness hearsay tes-

timony as substantive evidence of Ragsdale, a different party's confession.

While we might be inclined to agree with -- and I guess it's pronounced Czubak -- there is circumstance in this case that prevents us from doing so. The trial judge in Czubak's second trial, after carefully reviewing the statements of the witness to Ragsdale's purported confession found not only there was no corroborating circumstances showing the trustworthiness of the statement, to the contrary, she found the circumstances such as to render the statement unreliable and untrustworthy.

I'm not talking about the person that's giving it, I'm talking about the statement. Chambers recognizes the necessity that an accused seeking to exercise his right to present witnesses to his own defense must comply with established rules, procedure, and evidence designed to assure both fair and reliability ....

...the Court didn't allow it because it wasn't corroborated, not -- of course, without hearing the proffered testimony, which I just now heard for the first time, my gut reaction is three of the four-prongs are met. And the three prongs again was, was it made spontaneously and to someone that was a close acquaintance; is it corroborated by some other evidence in the case; is it in itself incriminatory or against interest; and is the declarant available for cross-examination.

Well, Brown's available for cross-examination. It's clearly admissions against interest or self-incriminating.

The question I have...if it's only corroborated by the defendant's statement to the police, is that sufficient corroboration? Because that's the only thing that corroborates this, period.

In fact, all other testimony in this case is to the contrary that -- that Ray-Ray Brown was there was when this occurred.

(V 18 T 2284-2288)

Regarding the proffered testimony of Angela Tyler, the trial

court ultimately ruled:

> The only way that I can determine that the statements allegedly attributed to Ray Brown through Angela Tyler is through a Chambers type situation. And by Chambers, I mean Chambers versus Mississippi.
>
> * * *
>
> ...the cases I'm primarily relying on -- of course, Chambers is cited throughout every one of these cases. But I'm also relying on Curtis versus State, 876 So.2d 13. I'm relying heavily on Jones versus State, 709 So.2d 512, Florida Supreme Court case. That was 1998. I rely on the Second District Court of Appeals case that we talked about, Judge Campbell wrote the opinion on...C-Z-U-B-A-K, versus State, at 644 So.2d 93. And then to some limited amount, to Sli[n]ey, S-L-I-[N]-E-Y, versus State, Florida Supreme Court at 699 So.2d 6[6]2. It's a 1997 case.
>
> Now, there's no question that Chambers requires a four-prong test be met. Each confession must be made spontaneous to a close acquaintance or, in fact, a law enforcement after the murder occurred. Two, each confession was corroborated by some other evidence in the case. Three, each confession was self-incriminatory, and unquestionably against interest. And, four, if there was any question as to the truthfulness of the statements, the declarant had to be available for cross-examination.
>
> Well, in Jones..., [at 525], like the witness in 1992, the witness who testified at the most recent evidentiary hearing spoke only in general terms of Scofield, that's the third person alleged to have confessed to this, involvement in the murder of a police officer. No witness testified to any unique facts surrounding the murder. In fact, none of the witnesses related specific details of the crime.
>
> Then by analogy, I looked at how the Court reasoned in Curtis V State. Like the confessions in Chambers, the confession in this case was made under circumstances that provided an assurance of reliability. The first point the court made in Chambers was the confession was spontaneous; that is, it was made without any compulsion

or with any apparent motive to lie.

But they point out in this case that in Curtis, like in Chambers, the confession was made to a police officer, and it was a confession actually committing the act. In other words, committing the murder, in which another person is on trial and being accused.

In equating a confession made to a police ...with a confession made spontaneous to a friend, the Court said we would be more concerned if Butler had been bragging to his friends. But Butler confessed to police officers, knowing that they were not there to help him, and with full knowledge of the consequences.

Next, the Court in, again, Curtis, relying on Chambers, the confession was corroborated by other evidence. In Butler, his confession met that test because there was an eye witness that positively identified him as being the assailant.

Then last, and I've come to believe even more important is, there is little question that Butler's confession meets the third part of the test in Chambers in that it was truly -- and I highlight that word -- a statement against penal interest.

The state does not concisely test this point. Butler did not attempt to shift part of the blame to someone else, nor was the statement one that merely implied Butler was guilty. Butler categorically stated he was the one who shot Stevens, and there was no doubt that the statement was culpatory.

Now I put that with the facts of this case. Here, the statement was made to an alleged acquaintance, not the police. Two, the statement is shifting the burden. It's not saying I killed him, he said Bill-Bill Brown killed him.

Now, was there any unique facts given to us? Sort of. He said that there was an argument, may have been involved over a sexual advance, and Bill-Bill stabbed him. Any person in Polk County in the last year and a half could have surmised that information by reading the extensive press coverage on this case, and certainly could have picked it up from listening to television coverage of this case.

And, in fact, that's another concern about mine. Why in the world when this woman, that being Ms. Tyler, who admitted in her proffer that she knew every one involved in this case -- she knew the defendant, she knew Ray-Ray Brown, she knew Bill Brown, she knew their uncles, or their fathers. She knew all these people, and she claims, in spite of the fact that none of these people can even tell you what time of day it was, she claims to specifically remember that this occurred on the 17th.

That's three days or less after this crime was committed, and she didn't tell anybody until two years later, when she's watching this on television.

Nonetheless, the statements that she alleged he made that could be considered against penal interest was, he's, he's kin, and I helped him. And some of these cases talk about it can't be something vague. It must be truly against penal interest. I helped him, with nothing more than that, that's not chargeable.

And we don't have any evidence to corroborate how, if in fact he did help him, he helped him. And, in fact, the evidence we have is within a relatively short period of time, using this time line that's been established as to when he had dinner, when he dropped off the key, when he was speaking on the phone to Mr. von Hahmann, when he probably arrived the first time, went and got gas before the store closed. But a short period of time thereafter, the two people that were identified in the vehicle at the Aguero home were a skinny white boy and the defendant. So I don't see any corroboration to what he admits could be considered a statement against interest.

I don't believe it's based on that, that it is, in fact, truly a statement against interest. I go back to the case that I rely on that Butler didn't merely imply guilt, he said I killed him. In Chambers, the case that -- that this exception was created out of, he admitted he killed him. And, in fact, in every single case I've read, the party making the statement admitted to substantial involvement, not some vague involvement that he's kin, and I helped him.

So I don't think this meets the second part of the prong in that I don't think that there is -- and in Curtis, it says the question is whether there is, quote, substantial evidence to corroborate. I don't think

there's any evidence corroborating it beyond some evidence provided by the defendant in this case in his statements to the police. But more importantly, I think all the evidence directly conflicts with that as opposed to corroborating it.

And then more importantly maybe, the third prong -- I don't think this was truly a statement that could be considered against his penal interest because without substantially more than what we heard yesterday, I don't believe there's any way the state, or Mr. Brown, could believe that his statement was against his penal interest, or that the state could bring charges against him.

So, therefore, I'm not going to allow the testimony of Angela Tyler.

(V 18 T 2311-2318)

The following then occurred:

MR. HILEMAN: ...Just for our record's completeness, the defense would take the position with regard to the penal interest in question that one thing the Court did not mention, I don't know whether it was considered or not, is that the declarant in this case, Mr. Ray Brown, had made multiple statements under oath that he was not present when -- including in this Court, that he was not present when the murder occurred.

The expression of his presence in the car, which I believe is the way the witness put it, directly contradicts that, could be considered a basis for perjury in a capital case.

Secondly, with regard to -- with regard to the other issue of penal interest, certainly while I understand the Court's position that it was a generalized statement of I helped him because he was kin ---

THE COURT: Well, you're suggesting then that because he said in depositions or something that by making that statement it subjects him to criminal charges of perjury?

MR. HILEMAN: Uh-huh.

> THE COURT: I think it's got to be more to what he said the statement was about. That's the penal interest issue in my mind.
>
> MR. HILEMAN: I understand.
>
> THE COURT: And, plus, I believe that it's got to be a statement that he believes it. And I don't think there's any way in the world that I equate that Ray Brown would believe that.
>
> MR. HILEMAN: I just wanted to complete the record with those observations.

(V 18 T 2318-2319)

SUMMARY OF THE ARGUMENT

There is no conflict between the opinion below and *DeWolfe v. State*, 62 So. 3d 1142 (Fla. 1st DCA 2011), that would invoke this Court's conflict jurisdiction in this case.

The trial court correctly excluded testimony by Angela Tyler that Ray Allen Brown had told her that he had been present when Bill-Bill Brown stabbed the victim because Tyler's testimony was not shown to be reliable.

As to Petitioner's claim that the trial court improperly refused to allow defense counsel to cross-examine Ray Allen Brown regarding Tyler's testimony, this Court should decline to review it because it would not affect the outcome of the instant petition for review. Furthermore, this issue was waived because the defense never sought in the trial court to proffer Ray Allen Brown's testimony on this issue. And finally, the Second District's holding on the merits of this issue was correct.

As to the *Montgomery*[1] issue raised for the first time in a pleading entitled "APPELLANT'S MOTION FOR REHEARING EN BANC" following issuance of the opinion on review sub judice, this Court should not consider it in this case because it was not properly raised in or considered by the Second District Court of Appeal. However, even if this Court should consider it, the instruction on manslaughter given in this case was not fundamentally erroneous because the intent element was not disputed at trial.

ARGUMENT

ISSUE I: PETITIONER HAS FAILED TO ESTABLISH THAT THIS COURT HAS JURISDICTION IN THIS CASE BASED ON CONFLICT.

This is a question of law, which is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344 (1994); *State v. Glatzmayer*, 789 So. 2d 297, 301-02 n. 7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review.").

Petitioner claims express and direct conflict between the decision in the instant case, *Bearden v. State*, 62 So. 3d 656 (Fla. 2d DCA 2011), and *DeWolfe v. State*, 62 So. 3d 1142 (Fla. 1st DCA 2011), which was decided nearly six weeks after the decision in the instant case.

Because the *DeWolfe* opinion had not been issued when the opinion below was released, the opinion below could not and did not

[1] *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010)

mention any conflict with *DeWolfe*. *DeWolfe* does reference in a parenthetical, 62 So. 3d at 1146, the statement in the opinion below, 62 So. 3d at 664, that "an evaluation of the credibility of the witness the defense proposes to use to place the alleged statements on the record is unavoidable." However, the citation to the opinion below uses the "but see" signal; the *DeWolfe* panel does not express disagreement with or disapproval of the holding in the opinion below; and *DeWolfe* does not discuss the instant case beyond this passing reference to the opinion followed by the parenthetical quotation that omits the limiting language that precedes it.

At trial in the instant case, the defense sought to call Angela Tyler, a friend of Petitioner's, to testify that Ray Allen Brown, whom Petitioner sought to implicate in the murder of the victim, had admitted to her a few days after the murder that it was he, not Petitioner, who was in the car with William Brown when Brown stabbed the victim to death. In deciding whether to allow the presentation of this testimony, the trial court relied on *Chambers v. Mississippi*, 410 U.S. 284, 300-301, 93 S. Ct. 1038, 1048, 35 L. Ed. 2d 297 (1973), which discussed the circumstances that "provided considerable assurance" of the **reliability** of the hearsay statements involved in that case. The trial court considered what it referred to as the four factors that *Chambers* indicated were significant in determining whether this type of hearsay statement is sufficiently **reliable** to be admissible in evidence, and it con-

cluded that the proffered testimony was not a statement against Allen's penal interest and was not corroborated. The Second District disagreed with the trial court's finding on the penal interest issue, but it agreed with the trial court that the proffered testimony was not corroborated by any evidence in the case except Petitioner's pretrial statement, but rather was in direct conflict with all of the remaining evidence in the case.

The Second District explained:

> *Chambers* does not necessarily establish an immutable checklist of four requirements. Instead, the primary consideration in determining admissibility is whether the statement bears sufficient indicia of *reliability*:
>
> > Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury. A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination. Among the most prevalent of these exceptions is the one applicable to declarations against interest—an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made.
>
> *Chambers*, 410 U.S. at 298Ç99, 93 S. Ct. 1038[, 1047-1048] (footnote omitted) (citation omitted).

62 So. 3d at 661-662 (italics in original).

The Second District's holding was:

> In *Chambers*, the reliability of the alleged third party's out-of-court statements was bolstered by several factors. First, the statements were made to more than one witness. Second, the third party was seen with a gun shortly after the shooting. Third, there was evidence that the third party had previously owned a gun and then bought another one shortly after the crime occurred. 410 U.S. at 300, 93 S. Ct. 1038. In this case, there is nothing other than [Petitioner]'s self-serving statements to the detectives before his arrest. In his pretrial statement, [Petitioner] admitted committing several felonies, but he carefully avoided admitting any direct involvement in Skipper's murder. And the crimes to which [Petitioner] admitted were crimes that he was unable to deny because of the number of witnesses who knew that he had participated in cleaning Skipper's car and attempting to dispose of it. Under the circumstances, we cannot say that the trial court abused its discretion in concluding that Tyler's testimony about Ray Allen's purported statements failed to meet the test of reliability outlined in *Chambers*. It follows that the trial court did not err in excluding her testimony at [Petitioner]'s trial.

62 So. 3d at 664 (footnote omitted).

The Second District's discussion of the credibility of the proffered witness was included to indicate that, even if her credibility were to be considered to offset the lack of corroboration of her testimony, it fell short and contributed nothing positive to establishing the **reliability** of her testimony.

DeWolfe applied the same corroboration test as did the opinion below and reached the opposite result based on its facts, which, unlike the situation sub judice, included at least three other items of evidence that were consistent with the hearsay testimony in issue there.

Petitioner does not support his additional argument that "DeWolfe correctly holds that consistency between a witness's statement about a confession and the defendant's statement corroborates and therefore supports admission of the confession," while the Second District's *Bearden* opinion "in contrast, incorrectly holds that the defendant's statement is not corroboration because it is 'self-serving'" (Petitioner's initial brief on the merits at p. 21) with any authority. Indeed, *DeWolfe* does *not* hold "that consistency between a witness's statement about a confession and the defendant's statement" is sufficient to support admission of the hearsay statement concerning a confession by someone other than the defendant. Rather, *DeWolfe* states:

> In making the decision whether to admit evidence of a declaration against penal interest, the trial judge should consider "the language used and the setting in which the statement was made," and decide whether the statement is "consistent with **both** the defendant's general version of events **and the other evidence presented at trial**." *Masaka v. State*, 4 So. 3d 1274, 1282 (Fla. 2d DCA 2009) (citing *Carpenter v. State*, 785 So. 2d 1182, 1203 (Fla. 2001); *Machado v. State*, 787 So. 2d 112, 113 (Fla. 4th DCA 2001)).

62 So. 3d at 1145 (emphasis supplied). And the Second District below, although noting that Petitioner's statement to law enforcement was self-serving, did *not* hold that the trial court could not consider Petitioner's statement to law enforcement in deciding whether to admit Angela Tyler's hearsay testimony. Rather, it held only that, because Tyler's testimony was uncorroborated by anything

other than Petitioner's self-serving statement to law enforcement *and* due to the time and circumstances under which Tyler came forward, Tyler's testimony "failed to meet the test of reliability outlined in *Chambers*." 62 So. 3d at 664.

Thus, the decision below does not conflict with *DeWolfe* or any other decision of this Court or another district court of appeal.

Because the decision below does not expressly and directly conflict with a decision of this Court or another district court of appeal, there is no basis for this Court to exercise its discretionary jurisdiction in Petitioner's case. Accordingly, this Court should dismiss the instant petition for review as improvidently granted.

In the absence of conflict on the issue concerning Tyler's testimony, this Court should also decline to consider Petitioner's issue concerning the trial court's refusal to allow Petitioner to call Ray Allen Brown for the sole purpose of impeaching the testimony he was expected to give regarding Angela Tyler's assertion that he had confessed to her that he was present when the victim was murdered. This Court should also refuse to consider this issue because it was waived, Petitioner having failed to proffer Brown's testimony on this issue in the trial court.

ISSUE II: THE TRIAL COURT CORRECTLY EXCLUDED TESTIMONY BY ANGELA TYLER THAT RAY ALLEN BROWN HAD TOLD HER THAT HE HAD BEEN PRESENT WHEN BILL-BILL BROWN STABBED THE VICTIM.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *E.g.*, *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla.), *cert. denied*, 531 U.S. 858, 121 S. Ct. 143, 148 L. Ed. 2d 94 (2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997), *cert. denied*, 523 U.S. 1051, 118 S. Ct. 1370, 140 L. Ed. 2d 519 (1998).

The Second District's analysis and holding on this issue are correct.

Petitioner's argument to this Court on this issue relies primarily on his claim that the decisions by the trial court and by the Second District that Tyler's testimony should not be admitted were based on findings that her testimony lacked credibility. However, as discussed in Respondent's argument on Issue I, *supra*, this claim is incorrect.

Thus, Petitioner's reliance on *Carpenter v. State*, 785 So. 2d 1182, 1203 (Fla. 2001), is misplaced because in *Carpenter*, as in *DeWolfe* and the cases on which *DeWolfe* relies, the hearsay statement in question "was consistent not only with the general version of events recounted in [the defendant]'s recorded statement, but it was also consistent with other evidence presented at trial." *Id*.

Petitioner's reliance on *Payne v. State*, 74 So. 3d 550 (Fla. 5th DCA 2011), is similarly misplaced. And *Allen v. State*, 38 Fla. L. Weekly S592 (Fla., Jul. 11, 2013), on which Petitioner further relies, is *not* distinguishable from the instant case.

In relying on *Jones v. State*, 709 So. 2d 512 (Fla. 1998), opposing counsel appears to be confused. The hearsay testimony concerning another man's confession was *not* admitted at Jones' *trial*. Indeed, this issue was brought up in a claim of newly discovered evidence made in a Rule 3.850 motion. The men who claimed to have heard the other man's confession, fellow prison inmates of this other man, testified at an *evidentiary hearing*—as Angela Tyler was permitted to testify on proffer sub judice—and this Court ultimately affirmed the trial court's denial of a new trial for the defendant, holding, inter alia, that "the alleged confessions in this case lack indicia of trustworthiness." *Id*. at 525. Notably, as here, there was an unexplained delay in these inmates coming forward, on which this Court commented as follows:

> All of the statements were allegedly made after Jones had been sentenced to death; in many cases more than a decade elapsed before the inmate came forward to testify as to Schofield's alleged statements. As to the five inmate witnesses who testified at the most recent hearing, none came forward until after Jones' most recent death warrant was signed, waiting anywhere from four to fifteen years to report their information.

Id.

The Second District considered the trial court's finding that

the only direct corroboration of Tyler's account of the purported statements was Petitioner's prearrest statement to detectives and found it to be accurate. Respondent agrees with this assessment. Petitioner points to no other evidence at trial that conflicts with the testimony given by the State's witnesses and is corroborative of Ray Allen Brown's purported statements to Tyler.

As for this Court's reiteration in *Carpenter* that "it [i]s improper to exclude a codefendant's self-inculpatory, out-of-court statement merely because the statement did not 'exonerate' the defendant," 785 So. 2d at 1203, the Second District did not hold otherwise in the instant case.

As for Petitioner's argument that "Ray Allen's subsequent threats to Tyler, R:17:2120, and Ray Allen's attempts to persuade Robert Aguero that he had no involvement in the case, R:13:1481-91, both suggest Ray Allen's motive to conceal his true involvement in the crime," Petitioner's initial brief at p. 37, firstly, this is circular reasoning at best. More important, there was a lengthy discussion concerning Ray Allen Brown's purported threat against Tyler (V 17 T 2119-2152) culminating in Brown's denial of making any such threat (V 17 T 2152-2153). No testimony from anyone claiming to have heard such a threat was presented. Similarly, there is no testimony from Robert Aguero (or anyone else) at V 13 T 1481-1491 concerning any "attempt" by Ray Allen Brown "to persuade Robert Aguero that [Brown] had no involvement in the case."

How the inconsistencies in the evidence presented by the State, such as what time the victim first arrived at the Brown house on the night in question, or whether the behavior of Petitioner and Bill-Bill after the murder of the victim was logical helps Petitioner is unclear. The question is whether Angela Tyler's testimony regarding Ray Allen Brown's purported admissions to her is corroborated by other evidence in the case, not whether there were any inconsistencies in the State's evidence or whether the perpetrators of the murder in question were reasonable people.

Curtis v. State, 876 So. 2d 13 (Fla. 1st DCA 2004), upon which Petitioner relies, is factually distinguishable from the instant case, both because the third party confession in *Curtis* was corroborated by an eyewitness—someone other than the defendant—who identified the confessor as the victim's killer (*Chambers* prong 2) and because the confessor actually took personal responsibility for having committed the murder and made his confession to the police, not to a friend or family member. That Ray Allen Brown had knowledge of the fact that the victim was homosexual and that Bill-Bill Brown himself had admitted involvement in the murder and the subsequent attempts to dispose of the victim's car is not corroboration of Ray Allen Brown's claim to have been present during the killing of the victim. And, having found that Tyler's testimony was not trustworthy, the trial court correctly relied on the Second District's opinion in *Czubak v. State*, 644 So. 2d 93 (Fla. 2d DCA

1994).

In sum, the trial court correctly excluded testimony by Angela Tyler that Ray Allen Brown had told her that he had been present when Bill-Bill Brown stabbed the victim because Tyler's testimony was not shown to be reliable.

ISSUE III: THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY BY RAY ALLEN BROWN CONCERNING ANGELA TYLER'S TESTIMONY ABOUT HIS "CONFESSION" TO HER REGARDING THE VICTIM'S MURDER.

First, while this Court has the authority to entertain issues ancillary to those over which this Court has jurisdiction based on conflict between the opinion in question and a decision of this Court or another District Court, this Court generally will refrain from using that authority unless such an ancillary issue affects the outcome of the petition after review of the issue found to have given rise to its conflict jurisdiction. *E.g.*, *Lee v. State*, 501 So. 2d 591, 592 n. 1 (Fla. 1987). Under the circumstances, consideration of this issue by this Court would not affect the outcome of the instant petition for review, and this Court should therefore decline to consider this issue.

Although the Second District addressed the merits of this issue, this issue was waived because Petitioner never sought in the trial court to proffer Ray Allen Brown's testimony regarding the statement Tyler claimed he had made to her. "A proffer is necessary to preserve a claim such as this because an appellate court

will not otherwise speculate about the admissibility of such evidence." *Lucas v. State*, 568 So. 2d 18 (Fla. 1990).

Finally, even if this Court should decide to consider this issue, the Second District was correct in its holding on this issue. Petitioner's argument on this issue is predicated on his argument concerning Angela Tyler's proffered testimony. Because that argument is without merit, so, too, is his argument on the merits of this issue.

> **ISSUE IV**: PETITIONER HAS FAILED TO ESTABLISH THAT THIS COURT HAS JURISDICTION TO CONSIDER THIS ISSUE WHEN IT WAS RAISED FOR THE FIRST TIME ON APPEAL IN PETITIONER'S "MOTION FOR REHEARING EN BANC" AND, EVEN IF THIS COURT DOES HAVE JURISDICTION, PETITIONER HAS FAILED TO ESTABLISH CONFLICT BETWEEN THE OPINION BELOW AND THIS COURT'S OPINIONS IN *STATE V. MONTGOMERY*, 39 SO. 3D 252 (FLA. 2010), AND *DANIELS V. STATE*, 121 SO. 3D 409 (FLA. 2013).

In his final issue raised in this Court, Petitioner argues that the jury instruction on manslaughter given in this case was erroneous. However, this contention was neither made in the trial court nor briefed in the Second District—appellate counsel attempted to raise it for the first time in his "MOTION FOR REHEARING EN BANC."

New issues or arguments may not be raised for the first time in a motion for rehearing, *Sarmiento v. State*, 371 So. 2d 1047, 1053 (Fla. 3d DCA 1979), *approved on other grounds*, 397 So. 2d 643 (Fla. 1981); *Price Wise Buying Group v. Nuzum*, 343 So. 2d 115 (Fla. 1st DCA 1977), and the Second District did not address this issue

either in its opinion or in its order denying rehearing en banc.

Because there is no indication that the Second District ever considered this issue in the instant case, this issue is, in practical effect, being presented for the first time to this Court. Under these circumstances, this Court should decline to address this issue. *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982).

However, even if this Court should decide not to decline to consider this issue based on lack of preservation in either court below, Petitioner has failed to demonstrate conflict with *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), or *Daniels v. State*, 121 So. 3d 409 (Fla. 2013).

This Court held in *Daniels* that "a defective instruction in a criminal case can only constitute fundamental error if the error pertains to a material element that is disputed at trial." *Id*. at 418.

In *Griffin v. State*, 38 Fla. L. Weekly D1972 (Fla. 2d DCA Sept. 18, 2013), the Second District followed this holding in *Daniels*. In *Daniels*, the defendant admitted firing the gunshot that killed the victim, and the defendant's intent in firing that shot was in issue. In *Griffin*, however, the defendant denied being the shooter of the victim, claiming that someone else had fired the fatal shot, and the Second District held:

> There is no dispute regarding the elements of an offense when the manner of the crime is conceded and the sole

> defense is mistaken identity. *Battle v. State*, 911 So. 2d 85, 89 (Fla. 2005). Because there was no dispute regarding the element of intent, the erroneous jury instruction on the intent element of the lesser included offense of manslaughter did not constitute fundamental error.

Similarly, in the instant case, Petitioner did not dispute the manner in which the victim was killed, but rather claimed that he had not been present at the time of the killing or otherwise involved in the killing of the victim. Accordingly, *Daniels* is factually distinguishable from the instant case, and Petitioner has not shown any conflict with *Daniels*.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the district court below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail to Michael P. Matthews, Esq., at mmatthews@foley.com, and to Lawrence J. Dougherty at ldougherty@foley.com, 100 North Tampa St., Ste. 2700, Tampa FL 33602-5810 this 9th day of December, 2013.

CERTIFICATE OF FONT 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).

Respectfully submitted,

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