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**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO. SC12-1314**

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**JOSEPH ELI BEARDEN,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

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**ON DISCRETIONARY REVIEW FROM THE  
SECOND DISTRICT COURT OF APPEAL**

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**INITIAL BRIEF OF PETITIONER JOSEPH ELI BEARDEN**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
PRELIMINARY STATEMENT .....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS .....	5
SUMMARY OF ARGUMENT .....	16
ARGUMENT .....	18
I. THIS COURT HAS JURISDICTION BECAUSE THE SECOND DCA’S DECISION IN THIS CASE CONFLICTS WITH THE FIRST DCA’S CORRECT DECISION IN <u>DEWOLFE</u> THAT JURIES, NOT JUDGES, DECIDE WITNESS CREDIBILITY AND THAT A DEFENDANT’S STATEMENT MAY CORROBORATE ANOTHER’S CONFESSION .....	18
a. <u>Bearden</u> and <u>DeWolfe</u> expressly and directly conflict as to whether a judge may exclude a witness from testifying at a jury trial to another’s confession because the judge does not find the witness credible .....	19
b. <u>Bearden</u> and <u>DeWolfe</u> also expressly and directly conflict on whether a defendant’s statement to police may be rejected as self-serving or whether it may corroborate another’s confession .....	21
II. THE TRIAL COURT’S EXCLUSION OF ANGELA TYLER’S TESTIMONY DEPRIVED BEARDEN OF DUE PROCESS BY DENYING HIM HIS DEFENSE THAT RAY ALLEN WAS THE ONE PRESENT AT THE MURDER .....	23
A. Standard of Review .....	23
B. The trial court erred when it excluded a witness to a confession that was crucial to Bearden’s defense because the court did not find her credible.....	23

i.	The exclusion of Angela Tyler’s testimony on the basis of credibility unfairly denied Bearden the right to present his defense.....	23
ii.	The lower courts confused credibility with corroboration when excluding Angela Tyler’s testimony .....	27
C.	The lower courts erred in ruling that Ray Allen’s confession to Tyler was not corroborated .....	31
i.	Applicable law requires admission of corroborated confessions .....	31
ii.	The lower courts erroneously disregarded Bearden’s statement as corroboration. ....	33
iii.	The lower courts ignored the corroboration in the record beyond Bearden’s statement .....	35
iv.	The Second District erred by holding that corroboration could not conflict with other evidence in the case.....	40
D.	These errors were not harmless .....	42
III.	THE TRIAL COURT DEPRIVED BEARDEN OF DUE PROCESS WHEN IT DECLINED TO LET HIM CROSS-EXAMINE RAY ALLEN ABOUT RAY ALLEN’S CONFESSION .....	44
A.	Standard of Review .....	44
B.	The trial court erred in preventing Bearden from cross-examining Ray Allen about Ray Allen’s confession .....	44
i.	The Florida Evidence Code permits Bearden to impeach Ray Allen .....	45
ii.	Courts should not apply the <u>Morton</u> rule to deprive a defendant of his constitutional rights.....	46
C.	These errors were not harmless.....	49

IV. THE JURY INSTRUCTION FOR MANSLAUGHTER DID NOT COMPORT WITH THIS COURT’S RULINGS IN MONTGOMERY AND DANIELS.....49

CONCLUSION .....50

CERTIFICATE OF SERVICE .....51

CERTIFICATE OF COMPLIANCE.....51

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
 <b>Federal Cases</b>	
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973) .....	<i>passim</i>
<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986).....	24
<u>Crawford v. Washington</u> , 541 U.S. 36 (2004) .....	48
<u>DeWolfe v. State</u> , 62 So. 3d 1142 (1st DCA 2011).....	<i>passim</i>
<u>Rivera v. Dir., Dep’t of Corr.</u> , 915 F.2d 280 (7th Cir. 1990) .....	41
<u>Washington v. Texas</u> , 388 U.S. 14 (1967).....	24
<u>Welcome v. Vincent</u> , 549 F.2d 853 (2d Cir. 1977) .....	44, 45
 <b>State Cases</b>	
<u>Daniels v. State</u> , 2013 Fla. LEXIS 1156 (Fla. June 6, 2013).....	49, 50
<u>Arthur v. Arthur</u> , 54 So. 3d 454 (2010), <u>revised on denial of reh’g</u> (Fla. 2011).....	21
<u>Bearden v. State</u> , 62 So. 3d 656 (Fla. 2d DCA 2011).....	<i>passim</i>
<u>Bionetics Corp. v. Kenniasty</u> , 69 So. 3d 943 (Fla. 2011) .....	21
<u>Brown v. Nagelhout</u> , 84 So. 3d 304 (Fla. 2012).....	21
<u>Carpenter v. State</u> , 785 So. 2d 1182 (Fla. 2001).....	<i>passim</i>
<u>Celeste v. State</u> , 79 So. 3d 898 (Fla. 5th DCA 2009) .....	42
<u>Curtis v. State</u> , 876 So. 2d 13 (Fla. 1st DCA 2004) .....	34, 40
<u>Czubak v. State</u> , 644 So. 2d 93 (Fla. 2d DCA 1994).....	29

<u>Delta Prop. Mgmt. v. Profile Invs., Inc.</u> , 87 So. 3d 765 (Fla. 2012) .....	21
<u>Demps v. State</u> , 761 So. 2d 302 (Fla. 2000) .....	23, 44
<u>England v. State</u> , 940 So. 2d 389 (Fla. 2006) .....	23, 44
<u>Florida Star v. B.J.F.</u> , 530 So. 2d 286 (Fla. 1988).....	18, 19
<u>Ford Motor Co. v. Kikis</u> , 401 So. 2d 1341 (Fla. 1981) .....	19
<u>Greenfield v. Daniels</u> , 51 So. 3d 421 (Fla. 2010) .....	21, 49
<u>Jones v. State</u> , 709 So. 2d 512 (Fla. 1998).....	29, 30, 31
<u>Masaka v. State</u> , 4 So. 3d 1274 (Fla. 2d DCA 2009) .....	32
<u>Mateo v. State</u> , 932 So. 2d 376 (Fla. 2d DCA 2006).....	43
<u>Montgomery v. State</u> , 39 So. 3d 252 (Fla. 2010) .....	4, 49
<u>Morton v. State</u> , 689 So. 2d 259 (Fla. 1997) .....	<i>passim</i>
<u>Patrick v. State</u> , 104 So. 3d 1046 (Fla. 2012) .....	23, 44
<u>Payne v. State</u> , 74 So. 3d 550 (Fla. 5th DCA 2011) .....	25
<u>Polite v. State</u> , No. SC10-1812 (Fla. June 6, 2013) (per curiam).....	20
<u>Reaves v. State</u> , 531 So. 2d 401 (Fla. 5th DCA 1988) .....	48
<u>Rodriguez v. State</u> , 753 So. 2d 29 (Fla. 2000).....	32, 46
<u>State v. DiGuilio</u> , 491 So. 2d 1129 (Fla. 1986) .....	42, 49
<u>Strand v. Escambia County</u> , 992 So. 2d 150 (Fla. 2008).....	28
<u>Tripoli v. State</u> , 50 So. 3d 776 780 (Fla. 4th DCA 2010).....	45

**Constitutions and Rules**

Fifth Amendment .....7

Sixth Amendment .....24

Fourteenth Amendment .....24

Fla. R. App. P. 9.030(a)(2)(iv).....19

Florida Constitution .....18

Article V, § 3(b)(3) of the Florida Constitution.....18

Florida Rule of Evidence § 90.608(5).....45

Florida Rule of Evidence § 90.804(1)(a) .....32

Florida Rule of Evidence § 90.804(2)(c) .....25, 32

Rule 90.804(2)(c) .....32, 33

**Other Authority**

Charles W. Ehrhardt, Florida Evidence, § 804.4 at 1070-71 (2013).....26

## **PRELIMINARY STATEMENT**

Petitioner Joseph Eli Bearden is currently serving a life sentence for allegedly being present at a murder to which another man instead confessed to being present. The jury in Bearden's trial never heard this confession because the trial court did not believe the witness to the confession to be credible and disregarded corroboration in the record, giving rise to the primary issue on this appeal.

In this brief, the petitioner Joseph Eli Bearden is referred to as "Bearden." The respondent State of Florida is referred to as "the State." The April 13, 2011 opinion under review, reported as Bearden v. State, 62 So. 3d 656 (Fla. 2d DCA 2011), is referred to as "the Second District opinion."

The twenty-volume trial record on appeal is cited as R:\_\_:\_\_, according to volume number (as determined by the Second District, not the court reporter) and page number (as determined by the court reporter). The Second District's record on appeal is cited as R:2DCA:\_\_, according to page number.

Bearden's initial brief in the district court is cited as IB:\_\_, according to page number. The State's answer brief is cited as AB:\_\_, according to page number. Bearden's reply brief is cited as RB:\_\_, according to page number. The statement of facts is not intended to be a stipulation of any facts disputed below or of facts the State was required to prove at trial.

## **STATEMENT OF THE CASE**

Bearden was indicted for first-degree murder and robbery with a deadly weapon on March 29, 2007 for involvement in the killing of Ryan Skipper (“Skipper”) by William “Bill Bill” Brown, which took place during the night of March 13-14, 2007. R:1:89-92. The State filed a notice of its intent to seek the death penalty on March 30, 2007. R:1:96.

Bill Bill Brown, an acquaintance of Skipper, was separately tried for and convicted of first-degree murder for actually stabbing Skipper to death in Skipper’s car. Bearden v. State, 62 So. 3d 656, 657 & n.2 (Fla. 2d DCA 2011). Bill Bill is currently serving a life sentence in state prison. The principal issue in Bearden’s trial was whether he was present at the murder and assisted Bill Bill in killing Skipper. Bearden’s defense at trial was that Bill Bill’s cousin Ray Allen Brown (“Ray Allen”) was the one present in the car rather than Bearden, as Bearden told police when he was questioned shortly after the murder.

Jury selection in Bearden’s trial commenced on February 11, 2009. The trial judge, the Honorable J. Michael Hunter, did not permit Bearden to cross-examine Ray Allen about Ray Allen’s presence at the murder and did not permit Bearden to call a witness, Angela Tyler, to whom Ray Allen confessed that he, Ray Allen, was the one present at the murder. As argued below, these rulings were not merely harmful to Bearden’s defense; they eliminated his defense. The Second District

would later agree in its majority opinion that “Ray Allen’s purported admission would exonerate Bearden of any direct involvement in Skipper’s death.” 62 So. 3d at 659.

The jury found Bearden guilty of second-degree murder and theft of a motor vehicle on February 27, 2009. R:4:564-65. Judge Hunter sentenced Bearden to life in prison. R:4:571-78. Bearden spoke at his sentencing, stating that the one who was actually present at the murder instead of Bearden, Ray Allen, had been in court on the stand, but was allowed to walk away. Bearden said that Ray Allen “is walking the street. And he testified. If—if they wanted justice, it’s the man, he’s out there on the street.” R:20:2625.<sup>1</sup>

Bearden filed his notice of appeal of the trial convictions and sentence on March 10, 2009. R4:580-82. A panel of the Second District Court of Appeals affirmed Bearden’s conviction with written opinion on April 13, 2011. Bearden v. State, 62 So. 3d 656, 664 (Fla. 2d DCA 2011).<sup>2</sup> Judge Altenbernd joined the panel’s opinion and filed a separate concurrence noting that the evidence supporting Bearden’s conviction was “weak,” that “[t]here is no physical evidence” placing Bearden in the car at the time of the murder, and that Bearden’s

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<sup>1</sup> References to statements are taken from the trial record unless otherwise noted.

<sup>2</sup> The Second District opinion did find error in the trial court’s conclusion that Ray Allen’s declaration was not against his penal interest. 62 So. 3d at 662-63. Bearden agrees with this conclusion of the Second District opinion.

admissions put into evidence by the State—“hardly a full confession to any form of murder”—had “only a little more” corroboration than the Ray Allen confession that Bearden was blocked from presenting in his defense. 62 So. 3d at 665-66.

Bearden’s counsel filed a motion for rehearing en banc, contending that the jury instruction for the lesser-included charge of manslaughter had introduced fundamental error into the trial under the holding of Montgomery v. State, 39 So. 3d 252, 259-60 (Fla. 2010). R:2DCA:120-122. After a response from the State and notices of supplemental authority from both parties, the Second District denied the motion for rehearing without comment on June 7, 2011. R:2DCA:104.

Bearden, acting pro se, filed a Petition Seeking Belated Discretionary Review or Belated Appeal in this Court on February 17, 2012, claiming ineffective assistance of direct appellate counsel.<sup>3</sup> R:2DCA:62-102. Bearden claimed in his pro se petition that the Second District’s opinion expressly and directly conflicted with the opinion of another court, though he did not identify the opinion. R:2DCA:63. This Court assigned the case number SC12-320. On April 11, 2012,

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<sup>3</sup> In a footnote to his motion, Bearden stated that he had a “habeas corpus writ for ineffective appeal counsel on file in the 2 DCA appeals court.” R:2DCA:102 n. Bearden also apparently filed, on February 16, 2012, a petition in the Second District alleging ineffective assistance of appellate counsel, Case No. 2D12-831. That petition was stayed on July 18, 2013 pending the resolution of this appeal. This Court acknowledged receipt of a writ of habeas corpus from Bearden in a new case, SC12-1934, on September 12, 2012, and ordered it transferred to the Second District on October 15, 2012, case 2D09-1325. That case is marked “closed.”

this Court ordered Bearden's former appellate lawyer and the State to file sworn responses. R:2DCA:61. The Court also invited the Second District to respond to the petition, but it declined. R:2DCA:59-60.

On July 31, 2012, this Court granted Bearden's original petition seeking belated discretionary review, in a new case numbered SC12-1314, to review the opinion of the Second District. The first entry of the Court's docket for this case, dated July 31, 2012, states "Notice—Discretionary Jurisdiction (Direct Conflict)."

In an amended pro se jurisdictional brief filed in this Court on September 21, 2012, Bearden said the Second District's opinion conflicted with the opinion of the First District in DeWolfe v. State, 62 So. 3d 1142 (1st DCA 2011), which was issued the month after the Second District's opinion in this case. See Amended Original Pro Se Jurisdictional Brief. The State filed its jurisdictional answer brief, contending that no conflict existed, in this Court on October 15, 2012.

### **STATEMENT OF THE FACTS**

Ryan Skipper was found stabbed to death near the intersection of Morgan Road and Logan Lane in Wahneta, Polk County, early on the morning of March 14, 2007. R:11:1026,1043; R:11:1085. The night before, Skipper had dinner with a friend in Lakeland. R:11:1190-91. Skipper stopped home, and he talked on the telephone with his dining companion from earlier that night at 11:10 p.m. R:10:993; R:11:1195. Skipper left home driving his new car, a month-old 2007

Chevy Aveo. R:11:1150-53. Skipper encountered Bearden along the side of the road and picked him up. R:15:1770. The men returned to Skipper's house and smoked marijuana. R:15:1773.

Bearden suggested they drive to a house at 110 1st Wahneta Street West that belonged to James Thomas "J.T." Brown Sr., a methamphetamine dealer. R:14:1627-29,1631-32,1660; R:15:1776; R:16:1931-32,1938; R:17:2069-70;2079. J.T. Brown shared his house with his adult son Ray Allen Brown. Also living rent-free in the house and an adjacent shed was a friend of the Browns named John Kirchoff, along with Mr. Kirchoff's brother and sister-in-law. R:14:1626-30,1691; R:16:1932,1953,1959; R:17:2066. J.T. Brown and Kirchoff would become the principal witnesses for the State against Bearden at trial.

Also at the house that night was a frequent visitor, William David "Bill Bill" Brown, Jr., J.T. Brown's nephew and Ray Allen Brown's cousin. R:14:1630,1658; R:16:1937; R:17:2068,2077. Bill Bill often used drugs at the house with the other Browns. R:14:1658; R:17:2066-69. Bill Bill had previously told Kirchoff that Bill Bill's father had sexually molested Bill Bill at gunpoint and knife point. R:14:1679-80. In fact, later on, when Bill Bill admitted to Kirchoff that Bill Bill had killed Skipper, Kirchoff first thought that Bill Bill was talking about killing his own father instead. R:14:1679,1695.

The occupants of J.T. Brown's house used, bought, and sold methamphetamine. R:14:1627,1652,1655; R16:1935; R17:2069,2075. By the night of the murder, Kirchoff had been awake using the drug for "a couple days." R:14:1653. Kirchoff assumed everyone else in the house had been using drugs that night too. R14:1653-54. J.T. Brown, however, said no one was using. R:16:1961,1965. Ray Allen also denied using drugs that night. R:17:2075.

Skipper drove Bearden to the Brown house. R:15:1775,1780-81. Kirchoff thought Bearden arrived at the Brown house around 8:30 or 9 p.m., but he could not be sure. R:14:1658-59. J.T. Brown thought it was dusk. R:16:1966. Ray Allen thought Bearden arrived around 9 p.m. R:17:2079. A record of Skipper's phone call with his dinner companion suggests that Skipper had not yet arrived at the Browns' residence as of the time of that call at 11:10 p.m. R:11:1195.

While Skipper waited outside in his car, Bearden went inside J.T. Brown's house with a damaged laptop that Skipper had given him. Bearden tried to sell or trade the laptop for drugs. R:14:1631-32,1660-61; R:16:1938; R17:2079.

Kirchoff testified that Bearden, Bill Bill, and Kirchoff had a discussion inside the house about robbing Skipper. R:14:1636-38. Bearden said Bill Bill and Ray Allen "was talking about let's rob the dude." R:15:1782.<sup>4</sup> J.T. Brown denied

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<sup>4</sup> Bearden did not testify at trial, but he gave police a sworn pre-arrest taped statement two days after the murder, which the State played in its case-in-chief.

there was any discussion of robbing anyone. R:16:1941. Skipper was then invited from his car into the house. R:14:1633-34,1663; R:16:1940; R:17:2079,2088. Bill Bill had met Skipper before. R:14:1662; R:15:1785; R:16:1942-45.

J.T. Brown, Ray Allen, and Kirchoff said that Skipper agreed to give Bill Bill, Ray Allen, and Kirchoff a ride to a nearby gas station to purchase fuel for the Browns' generator. R:14:1638; R16:1944-45,1976; R17:2079-80,2095. Kirchoff said Skipper seemed nervous and out of place, R:14:1635-36, and had to be asked multiple times to take them on the errand. R:14:1668-69. J.T. Brown, on the other hand, said Skipper did not hesitate to go when asked. R:16:1973-74. Ray Allen stated that they visited the gas station at least half an hour before its normal closing time of 11 p.m., R:17:2080-82, though again, Skipper's phone records do not support Ray Allen's claim about this timing, R:11:1195.

At this point the prosecution and defense stories sharply diverge. J.T. Brown, Ray Allen, and Kirchoff stated that they went on their trip with Skipper (presumably with the plan of robbing him), but returned with Skipper to the Brown residence from the gas station a few minutes later without incident. R:14:1638-40,1670-72; R:16:1947,1981; R:17:2080-83,2095. These three witnesses insisted that Ray Allen Brown then went to sleep and remained at the house for the rest of the evening. R:14:1642-44; R16:1949,1983; R:17:2098. Ray Allen and J.T. Brown testified that Skipper then left the house with Bill Bill and Bearden, which

was the only evidence putting Bearden in the car when Bill Bill left the Browns' residence with Skipper. R:14:1672-73; R:16:1982-83; R:17:2096. Kirchoff testified that after he put gas in the generator, he went back into the house and Skipper, Bill Bill, and Bearden were gone. R:14:1673. Kirchoff and J.T. testified they were not present when Skipper was killed. R:14:1672; R:16:1993. Neither Ray Allen, nor J.T., nor Kirchoff, nor any other witness testified to Bearden's involvement in the stabbing. R:14:1625-96; R:16:1931-96; R:17:2065-2155.

Bearden, on the other hand, stated to the police and argued at trial that Ray Allen and Bill Bill left the house with Skipper, and that only Bill Bill and Ray Allen returned, driving Skipper's car and covered in blood. R:15:1787-92. There was blood all over their hands, arms and shoes; on a knife Bill had; and there was blood all over the inside the car. R:15:1788-92. Bearden stated that Bill Bill had said he "stuck him" and "I hope he don't live." R:15:1792. Bearden stated that Bill Bill and Ray Allen came in the house and began to wash blood off in J.T. Brown's sink. R:15:1790. Bearden said that J.T. saw the blood and told them to get the car out of there. R:15:1793.

Bearden further said in his statement that he told the others he knew a friend who would buy the car. R:15:1794. Bearden then accompanied Bill Bill, who drove the car, to the house of Adrian "Looney" Hernandez at 2131 Cypress Gardens Boulevard in Winter Haven. R:15:1737, 1794. After Looney came out

and saw Bearden and Bill Bill cleaning the car, he told them to leave. R:15:1741,1795-96. Bearden directed Bill Bill between 2-3 a.m. to drive to the Agüero siblings' house at 16 South 28th Street in Haines City. R:12:1205. The Agüeros bought and sold drugs. R:12:1246; R:13:1473,1476. Bearden thought the Agüeros might give them money or drugs for the car. R:12:1240, 1243.

Maria Agüero testified that she and her brother Robert Agüero had taken Bearden in off the street a few weeks before, because, in Robert's words, Bearden was a "good kid" who was being led astray. R:12:1209; R:13:1433. When Maria and Robert went into their yard, they saw a new car with all four doors open, and Bearden and another man on their knees scrubbing out the floorboards and the driver's seat. R:12:1213-14; R:13:1439. Robert testified that he was not happy to see Bearden there with a car he wanted to sell. R:13:1442-43. Robert assumed the car was stolen, and Bearden's claiming otherwise made him angry. R:13:1443. Maria testified that she asked Bearden if the car was stolen, and Bearden laughed. R:12:1218-19, 1223-1225; R:13:1477.

Maria testified that Bearden and his companion left in the car, and then a half-hour later Bearden returned in the car with another friend, "Chico." R:12:1224-25. Bearden said he was unable to find the title to the car. R:12:1225. Robert Agüero was angry and yelling at Bearden for returning to the house with a stolen car. R:13:1460. They left again, and Bearden later reappeared by himself.

R:12:1224-26. Robert Aguero testified that he was angry with Bearden and wanted to beat him up “because of what he did.” R:12:1226. Robert testified that Bearden was crying and said that “they did something to somebody, and he don’t know how bad it was,” R:13:1465-66 and “they beat him up.” R:13:1471.

Maria Aguero testified that Bearden told them that “[t]hey had f\*\*ked him up.” R:12:1230. On cross examination, Maria Aguero conceded that neither she nor her brothers knew there had been a murder until police told them a day or two later. R:12:1242,1244-45,1247,1251. As Judge Altenbernd would later state in his concurrence in the Second District opinion, “[t]his hearsay testimony is hardly a full confession to any form of murder.” The judge went on to note that “[t]he truth is that we have only a little more corroborative evidence to support the alleged confession of Bearden to the Agueros than the alleged confession of Ray Allen Brown to Ms. Tyler.” 62 So. 3d at 666.<sup>5</sup>

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<sup>5</sup> The trial transcript shows that this alleged confession was even weaker than as described in Judge Altenbernd’s concurrence, which quoted Bearden telling the Agueros that “*he* had ‘f\*\*cked up’ the victim.” 62 So. 3d at 666 (emphases supplied). Nowhere in the Agueros’ testimony or anywhere else in the record have undersigned counsel found any admission by Bearden that “*he* had ‘f\*\*cked up’ the victim.” Instead, the Agueros used only the pronouns “they” or “we” when quoting Bearden. R:12:1230, R:12:1251, R:12:1252, R:13:1471. These statements shed even less light on Bearden’s alleged level of personal involvement, if any, in the stabbing of Skipper, as opposed to complicity in the broader chain of events. Ray Allen’s confession, set forth below, more clearly and directly placed him in the car at the time of the stabbing than Bearden’s statements to the Agueros.

After initial investigation of the murder, the sheriff's office obtained an arrest warrant for Ray Allen in connection with the murder, but then dropped it. R:17:2141. The State proceeded with charges against Bill Bill and Bearden.

Bearden's trial began on February 16, 2009. The prosecutor told the jury in his opening statement that Ray Allen would testify and that he "will tell you that he had absolutely nothing to do with the murder of Ryan Skipper." R:10:1008-09. The State, however, presented little evidence against Bearden at trial other than the conflicting testimony of J.T. Brown and Kirchoff, the hearsay testimony of the Agueros, and Bearden's statement to police that Ray Allen was the one present at the murder, which was exculpatory. As Judge Altenbernd would later conclude, the "evidence supporting [Bearden's] conviction is weak." 62 So. 3d at 665 (Altenbernd, J., concurring). Judge Altenbernd stated that, among other things, that "[t]here is no physical evidence that places Mr. Bearden or anyone other than William Brown in the car at the time of the murder." *Id.* at 665-66.<sup>6</sup> In fact, as the Second District's majority opinion likewise concluded, "[t]he State offered *no*

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<sup>6</sup> The only physical evidence offered against Bearden was that his fingerprints were found on the outside of the right-front passenger door of the car. R:16:2027. However, this only establishes what was already undisputed, which was that Skipper gave Bearden a ride to the Browns' house. Bearden also did not contest that he later assisted with cleaning the car, which was the subject of a separate information and disposition for accessory after the fact, tampering with evidence, and dealing in stolen property that is not part of this appeal. R:15:1794-96.

*evidence* concerning how Bearden had allegedly assisted William in killing Skipper.” 62 So. 3d at 662 (emphasis supplied).

The defense’s case at trial was that Ray Allen and not Bearden was in the car when the murder took place, and that Ray Allen and Bill Bill returned with blood on their hands. R:17:2141. On the second day of Bearden’s trial, the prosecutor’s office got a call from Angela Tyler, who stated that Ray Allen had told her he was the one with Bill Bill at the time of the murder, R:11:1169, which was consistent with Bearden’s statement to police and with his defense at trial. The prosecutor informed the court and the defense. Tyler was deposed the following Monday morning. Afterward, the prosecutor said the State no longer planned on calling Ray Allen. R:16:2010-11. The judge noted that doing so would make it harder for Bearden to call Angela Tyler. R:16:2012.

During the defense case, Bearden called Ray Allen to the stand. R:17:2065. Ray Allen’s testimony, R:17:2065-2153, followed the outlines of the State’s theory and was, as noted by the Second District opinion, “not helpful to the defense.” 62 So. 3d at 659. In keeping with the court’s ruling that Bearden could not ask Ray Allen about his confession because it was hearsay, R:17:2061-64, the defense was not permitted to ask Ray Allen whether he was the one in the car with Bill Bill at the time of the murder rather than Bearden, and was not permitted to ask Ray Allen

about any statements he made to Angela Tyler implicating himself in the murder. Ray Allen was then excused, but subject to recall by the defense.

The defense then proffered the testimony of Angela Tyler, outside the presence of the jury. R:18:2275-83. Tyler testified that she knew Bearden and the Brown family, and had been dating Ray Allen's brother on and off for about three years. R:18:2276-77. She recalled that on or about March 17, 2007, a few days after the murder, she encountered an obviously upset Ray Allen in the yard of her parents' house while she was moving out, and she asked him what was wrong:

He said that he had got—that he was with his cousin, Bill Bill. Bill Bill had gotten into a confrontation with a gay guy, and they had an argument, and he had stabbed the guy. *And he was with his cousin when he did it.*

...

I had asked him if he was involved in the murder, or like stabbing, because I didn't know there was a murder at the time, and he said no, that he didn't involve in the murder, I guess, or whatever. He said that he had to help his cousin, though, was his exact words, because they was family.

...

He was just telling me about him and his cousin was in a vehicle with a guy, and the guy had tried his cousin, I guess like sexually, I don't know. *And his cousin had gotten upset and stabbed the guy. And that's when he told me he was in the car when it happened.*

R:18:2278-82 (emphases supplied). As noted above, the Second District stated that "Ray Allen's purported admissions would exonerate Bearden of any direct involvement in Skipper's death." 62 So. 3d at 659.

The defense then made two requests: first, to recall Ray Allen to the stand to ask him whether he made the statements to Tyler; and second, assuming Ray Allen denied the statements, to present Tyler's testimony to the jury. The judge heard argument, and then said he would take the issue under advisement. The next morning, the judge ruled that Tyler's testimony was not admissible because the statements attributed to Ray Allen were not against his penal interest, that they lacked corroboration in the record beyond Bearden's taped statement to the police which the court disregarded, and that the judge did not find Tyler to be credible. R:18:2315-18. The judge questioned Tyler's credibility in view of her delay coming forward, her relationship with the Brown family, her specific recollection of the date of the conversation, and the public availability of details about the trial because it was being televised. R:18:2315-16. The judge also ruled that Bearden could not re-call Ray Allen to the stand to impeach Ray Allen with his confession. R:18:2319-20. Bearden sought to call Bill Bill as a defense witness, but Bill Bill claimed Fifth Amendment protection and declined to testify. R:17:2058.

The trial judge instructed the jury on the law of homicide, including that, in order to convict Bearden of manslaughter by intentional act, "it is not necessary for the state to prove that the defendant had a premeditated intent to cause death, only

an intent to commit an act which caused death.” R:19:2552.<sup>7</sup> The jury convicted Bearden of second-degree murder and theft of a motor vehicle on February 27, 2009. R:20:2610. The judge sentenced Bearden to life in prison on the murder conviction, with five years concurrent for theft of a motor vehicle. R:20:2626.

### **SUMMARY OF ARGUMENT**

The trial court denied Bearden due process of law and eliminated his only defense when it excluded evidence that someone else had confessed to the crime. It is a bedrock principle of Florida law that in a jury trial, witness credibility is for the jury to assess, not the judge. The trial court, however, ignored this principle when it prevented the jury from hearing from Angela Tyler, the witness to Ray Allen’s confession, because the court did not find her credible. The Second District wrongly affirmed that error. This error infected the lower courts’ rulings that Tyler could be excluded, as well as the rulings that Bearden could not confront Ray Allen that it was Ray Allen, not Bearden, who was present at the murder.

The lower courts also imposed improperly narrow limits on the corroboration for Ray Allen’s confession, rejecting Bearden’s corroborating statement to police as “self-serving” and ignoring the other evidence that

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<sup>7</sup> A review of the charge conference transcript does not reveal a contemporaneous objection by trial counsel to the manslaughter instruction as given. See R:18:2380-19:2414.

corroborated Angela Tyler's testimony. The jury should have learned of Ray Allen's confession, particularly given the "weak" evidence against Bearden, the absence of any physical evidence placing Bearden in the car at the time of the murder, and the absence of any evidence at concerning how Bearden had allegedly assisted Bill Bill in killing Skipper. The State should not be permitted to prevent a jury from hearing outcome-determinative confessions like the one by Ray Allen through its charging decisions and decisions whom to call as witnesses.

Admitting Ray Allen's confession "would exonerate Bearden of any direct involvement in Skipper's death," the Second District stated. These errors deprived Bearden of a level playing field and an opportunity to fairly and fully defend himself against capital charges. Had the trial court not erred, the outcome of the trial likely would have been different. The Second District opinion erred in affirming the evidentiary rulings of the trial court.

On a separate issue, the standard manslaughter instruction in Bearden's trial was word-for-word the same as one this Court recently struck down on the grounds of fundamental error. While this issue may not have been timely preserved below, it is a distinct and independent basis upon which to grant Bearden a new trial.

This Court has jurisdiction to resolve a conflict between the Second and First Districts on a defendant's right to have a jury rather than a judge evaluate the

credibility of witnesses in a jury trial, as well as the nature of corroboration sufficient to admit a confession by another.

Bearden's trial resulted in an injustice. This Court should grant Bearden a new trial, with instructions that Bearden may confront Ray Allen with his confession and may call Angela Tyler as a witness to that confession, in front of a jury of his peers, and with a correct manslaughter instruction.

### ARGUMENT

**I. THIS COURT HAS JURISDICTION BECAUSE THE SECOND DCA'S DECISION IN THIS CASE CONFLICTS WITH THE FIRST DCA'S CORRECT DECISION IN DEWOLFE THAT JURIES, NOT JUDGES, DECIDE WITNESS CREDIBILITY AND THAT A DEFENDANT'S STATEMENT MAY CORROBORATE ANOTHER'S CONFESSION**

The Florida Constitution grants "conflict jurisdiction" to the Florida Supreme Court. "This Court in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself." Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988); see also Fla. R. App. P. 9.030(a)(2)(iv). That jurisdiction has two components: first, a general grant of discretionary subject-matter jurisdiction; and second, a constitutional command limiting the exercise of that discretion. Id. "[T]his Court has the final and inherent power to determine what constitutes express and direct

conflict.” 530 So. 2d at 288. The opinion of the district court being reviewed on the basis of conflict jurisdiction must discuss the legal principles that are the basis for the conflict. See Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). That requirement is satisfied here.

**a. Bearden and DeWolfe expressly and directly conflict as to whether a judge may exclude a witness from testifying at a jury trial to another’s confession because the judge does not find the witness credible**

The First District correctly held in DeWolfe v. State, 62 So. 3d 1142 (Fla. 1st DCA 2011), that a judge may not consider the credibility of a witness to a confession in determining whether the jury may hear the testimony, because that is the exclusive province of the jury. The First District also noted the conflict with the Bearden decision:

“Under Florida law, however, the credibility of an in-court witness who is testifying with regard to an out-of-court declaration against penal interest is not a matter that the trial court should consider in determining whether to admit the testimony concerning the out-of-court statement. Instead, it is the jury's duty to assess the credibility of the in-court witness who is testifying about the out-of-court statement.” Carpenter, 785 So. 2d at 1203. But see Bearden v. State, 62 So. 3d 656, 664 (Fla. 2d DCA Apr. 13, 2011) (stating “an evaluation of the credibility of the witness the defense proposes to use to place the alleged statements on the record is unavoidable”).

62 So. 3d at 1146 (citing Carpenter v. State, 785 So. 2d 1182 (Fla. 2001)). This passage establishes that this Court has jurisdiction over the express and direct conflict between DeWolfe and Bearden.

DeWolfe correctly holds that credibility is solely for the jury, not the judge, to decide, and follows a long line of Florida precedent to that effect (see, e.g., Carpenter, 785 So. 2d at 1203 n.17 (“We decline to change established Florida law on this point.”)). In contrast, Bearden incorrectly holds that a trial judge may exclude a witness to a confession because he did not find the witness credible. 62 So. 3d at 664. The passage quoted above from DeWolfe explicitly discusses the principle at issue here: whether the judge or jury should decide the credibility of a witness to a confession. Though its use of the “But see” signal, the DeWolfe court identified its conflict with the Second District’s decision in Bearden. Moreover, both the quotations from DeWolfe and Bearden are within the four corners of the majority opinions of each court, as required for a finding of conflict.

These two opinions are in express and direct conflict. This Court regularly finds it has jurisdiction over direct conflicts between district courts regarding the application of statutes, rules of procedure, and legal doctrine. See, e.g., Polite v. State, No. SC10-1812 (Fla. June 6, 2013) (per curiam) (requirements for past recollection recorded hearsay exception); Delta Prop. Mgmt. v. Profile Invs., Inc., 87 So. 3d 765, 767 (Fla. 2012) (law-of-the-case); Brown v. Nagelhout, 84 So. 3d 304, 306 (Fla. 2012) (venue); Bionetics Corp. v. Kenniasty, 69 So. 3d 943, 944 (Fla. 2011) (safe harbor for litigation sanctions); Arthur v. Arthur, 54 So. 3d 454, 455 (2010), revised on denial of reh’g (Fla. 2011) (petitions for parental relocation);

and Greenfield v. Daniels, 51 So. 3d 421, 422 (Fla. 2010) (surviving child’s claim for wrongful death). This Court should conclude that it has jurisdiction.

**b. Bearden and DeWolfe also expressly and directly conflict on whether a defendant’s statement to police may be rejected as self-serving or whether it may corroborate another’s confession**

The two cases also expressly and directly conflict on their use of a defendant’s statement as corroboration of confessions. 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. Bearden, in contrast, incorrectly holds that the defendant’s statement is not corroboration because it is “self-serving.”

In DeWolfe, the First District admitted a statement against interest that was “consistent with both the defendant’s general version of events and the other evidence presented at trial.” 62 So. 2d at 1145 (quotation and citations omitted). The First District further stated that there was corroboration in the fact that the statement against interest “was consistent, moreover, with the trial testimony of Ms. DeWolfe,” the defendant. Id. at 1146. In Bearden, on the other hand, the Second District disregarded the corroboration provided by Bearden’s statements as “self-serving,” 62 So. 3d at 664, though the court did not apply that litmus test to

the self-serving statements of the State's witnesses, the Browns, Kirchoff, and the Agueros.<sup>8</sup>

The Bearden court immediately followed this disqualification of Bearden's statement as corroboration with a footnote acknowledging inconsistencies and bias in the accounts of the State's witnesses, but then dismissing this dissonance on the basis that "inconsistencies in the evidence and the credibility of the witnesses were issues for the jury to weigh." 62 So. 3d at 664 n.6. In other words, when it comes to the State's witnesses, credibility and inconsistency were for the jury to weigh, but when it comes to the defense's witness—even though completely consistent with the defendant's statement to police and with other evidence in the case—then credibility is for the court to weigh, not the jury. This ruling unfairly assigns weight and preference to the State's case at the expense of Bearden's case, tilting the playing field in the State's favor on the most important issue in this trial. It also shows the direct conflict with DeWolfe, which explicitly credited both the defendant's statement and her version of events at trial as corroboration of

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<sup>8</sup> J.T. Brown and his houseguest Kirchoff clearly had a motive to protect J.T.'s son Ray. Maria Agueros testified on cross-examination that she and her two brothers were placed in a police car and told they would be charged with conspiracy to commit first-degree murder if they did not cooperate with investigators.  
R:12:1248.

another's confession. This is a second reason why the opinions are in express and direct conflict, and a second reason why this Court has jurisdiction.

## **II. THE TRIAL COURT'S EXCLUSION OF ANGELA TYLER'S TESTIMONY DEPRIVED BEARDEN OF DUE PROCESS BY DENYING HIM HIS DEFENSE THAT RAY ALLEN WAS THE ONE PRESENT AT THE MURDER**

### **A. Standard of Review**

This Court reviews the trial court's evidentiary rulings for an abuse of discretion. England v. State, 940 So. 2d 389, 400 (Fla. 2006). The trial court abuses its discretion if its ruling follows from an "erroneous view of the law." Patrick v. State, 104 So. 3d 1046, 1056 (Fla. 2012) (citations omitted). "A trial court's ruling on a pure question of law is subject to de novo review." Demps v. State, 761 So. 2d 302, 306 (Fla. 2000).

### **B. The trial court erred when it excluded a witness to a confession that was crucial to Bearden's defense because the court did not find her credible**

#### **i. The exclusion of Angela Tyler's testimony on the basis of credibility unfairly denied Bearden the right to present his defense**

The trial court denied Bearden his due process rights when it kept the jury from hearing the confession Ray Allen made to Angela Tyler on the basis of the trial court's credibility determination, which is the sole province of the jury under Florida law. "Few rights are more fundamental than that of an accused to present

witnesses in his own defense.” Chambers v. Mississippi, 410 U.S. 284, 302 (1973)  
A criminal defendant’s right of due process is at the core of the right to defend  
against the accusations made by the State. Id. at 294.

Whether “rooted directly in the Due Process Clause of the Fourteenth  
Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth  
Amendment, the Constitution guarantees criminal defendants a ‘meaningful  
opportunity to present a complete defense.’” Crane v. Kentucky, 476 U.S. 683,  
690 (1986) (citations omitted). Working in concert with the Confrontation Clause,  
the Compulsory Process Clause protects the right of a defendant to offer the  
testimony of witnesses in his defense so the defendant can present his “version of  
the facts as well as the prosecution’s to the jury so it may decide where the truth  
lies.” Washington v. Texas, 388 U.S. 14, 19 (1967). “This right is a fundamental  
element of due process of law.” Id.

This Court’s own precedent reinforces that Florida law likewise does not  
permit a trial judge to take credibility determinations away from a jury. In  
Carpenter v. State, 785 So. 2d 1182 (Fla. 2001), this Court reversed a murder  
conviction because the trial court excluded another man’s confession, on the basis  
that the trial court “apparently questioned the credibility of the in-court witnesses”  
to the confession, precisely as in this case. In Carpenter, this Court held:

Under Florida law, however, the credibility of an in-court witness who is testifying with regard to an out-of-court declaration against penal interest is not a matter that the trial court should consider in determining whether to admit the testimony concerning the out-of-court statement. Instead, it is the jury's duty to assess the credibility of the in-court witness who is testifying about the out-of-court statement.

785 So. 2d at 1203 (citations omitted); accord Payne v. State, 74 So. 3d 550, 553 (Fla. 5th DCA 2011) (stating that the credibility of the cellmate who heard defendant's confession and who was in court to testify "was for the jury to determine") (post-conviction); DeWolfe, 62 So. 3d at 1146. Although Carpenter ruled on Florida Rule of Evidence § 90.804(2)(c) instead of Chambers, 785 So. 2d at 1201, 1203 n.18, Chambers is merely an outlet for the same rule where the witness is available (as discussed below), and there is no difference in the protections against a trial judge excluding witnesses to confessions on the basis of the judge's view of their credibility. As Professor Charles Ehrhardt says in his Florida Evidence treatise:

Florida courts have adopted the position that the credibility of the in-court witness who is testifying to the out-of-court declaration against interest is not a matter that the trial judge should consider in determining whether to admit the testimony concerning the out-of-court declaration against penal interest. The jury is able to consider the credibility of the in-court witness as it does with all other witnesses.

Charles W. Ehrhardt, Florida Evidence, § 804.4 at 1070-71 (2013).

The heart of the error in the Second District opinion lay here: “Bearden argues that Tyler’s credibility was a matter for the jury to decide. Although this argument has some appeal, we disagree.” 62 So. 3d at 664. This Court’s decision in Carpenter that “the credibility of an in-court witness who is testifying with regard to an out-of-court declaration against penal interest is not a matter that the trial court should consider” but rather “is the jury’s duty to assess” could not be clearer that the Second District’s ruling was erroneous. 785 So. 2d at 1203.<sup>9</sup>

The trial court wrongfully substituted its judgment for that of the jury when it decided that Angela Tyler was not credible, and the Second District incorrectly ratified that error. This ruling contrasts strongly with the latitude the trial court afforded the State’s witnesses who, as recognized by the Second District opinion, testified “inconsistent[ly]” and with a “motive to protect Ray Allen Brown from prosecution.” 62 So. 3d at 664 n.6. The Second District stated that

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<sup>9</sup> In Allen v. State, this Court reaffirmed its position in Carpenter that the credibility of a witness is an issue for the jury to decide, not the court. No. SC11-1206, 2013 Fla. LEXIS 1421, at \*1, \*19 (Fla. July 11, 2013). The Court in Allen affirmed the defendant’s conviction only because, while the trial court erred in assessing the credibility of a witness, it found that the court did not base its ruling of admissibility on credibility. Instead, the Court found that the trial court in Allen based its ruling on the fact that there were no corroborating circumstances to support the confession. Id. Allen is therefore distinguishable from this case, in which the trial court both explicitly relied on its credibility determination and also wrongly rejected Mr. Bearden’s statement and the other record evidence corroborating Angela Tyler’s testimony.

“inconsistencies in the evidence and the credibility of the witnesses were issues for the jury to weigh,” id., but the Second District violated Bearden’s right to present a defense when it denied the jury an opportunity to see Angela Tyler testify and assess her credibility themselves. This error infected the trial court’s determination to exclude Angela Tyler and warrants reversal of the Second District’s decision.

**ii. The lower courts confused credibility with corroboration when excluding Angela Tyler’s testimony**

The trial court unquestionably erred when it usurped the jury’s role by evaluating the credibility of a witness and relying on that evaluation as a basis for excluding the witness. In doing so, the trial confused its responsibility to assess corroboration of Ray Allen’s out-of-court confession with the jury’s responsibility to determine the credibility of the in-court witness, Angela Tyler. Indeed, at one point the trial court mistakenly stated that “credibility” was one of the four prongs of the Chambers test. R:18:2273-74.

The Second District opinion likewise confused the credibility determination with the corroboration inquiry, which is the only inquiry a trial court is permitted to make, when it held that an evaluation of the credibility is “unavoidable” in assessing indicia of reliability. 62 So. 3d at 664. The Second District opinion demonstrated the danger of this erroneous policy when it concluded that Tyler’s specific memory of the date of Ray Allen’s statements was “too good to be true. In

short, Tyler’s testimony about the purported statements was not credible.” 62 So. 3d at 663. Judge Altenbernd was sufficiently troubled by the credibility determination that he stated, “The trial judge was in a position to evaluate Angela Tyler’s credibility, but I admit that on the basis of the cold record, I would have allowed the jury to make the evaluation of her credibility given the weakness of the evidence against Bearden.” 62 So. 2d at 666 (Altenbernd, J., concurring).

Bearden agrees that the State’s evidence was weak and that this further supports that the jury should have been allowed to evaluate Tyler’s credibility. However, as a policy matter, courts should not be required to engage in weighing the overall weakness of the evidence against a defendant in determining whether witnesses the judge does not find credible may be excluded, nor should a defendant have to convince courts of that. Such a test likely would not be practicable at the trial level, where the trial judge typically has to decide admissibility before all the evidence has come in for the trial judge to weigh—which is a job for the jury in any event, not the judge. Instead, this Court should maintain its historical bright-line rule that credibility determinations in jury trials are solely the province of the jury, not the judge. See Carpenter, 785 So. 2d at 1203 n. 17 (“We decline to change established Florida law on this point.”); see also Strand v. Escambia County, 992 So. 2d 150, 159 (Fla. 2008) (“We have stated that we are committed to the doctrine of stare decisis. . . . [T]he obligation of a court to abide by its own

precedent . . . is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries.”).

The Second District opinion cited Czubak v. State, 644 So. 2d 93 (Fla. 2d DCA 1994), but that case does not support the Second District’s conclusion that an evaluation of credibility is unavoidable. 62. So. 3d at 664. In fact, the Second District opinion’s interpretation of Czubak exemplifies its confusion between its proper role to evaluate corroboration of out-of-court statements, as opposed to the jury’s role to evaluate the credibility of the witness’ testimony as to those statements. For one, the word “credibility” does not even appear in the Czubak opinion. And second, Czubak is distinguishable, because there the trial judge in Czubak’s second trial, “after carefully reviewing the statements of the witnesses to Ragsdale’s purported ‘confessions,’ found not only that there were no corroborating circumstances showing the trustworthiness of the statements, to the contrary she found the circumstances such as to render the statements unreliable and unworthy of trust.” 644 So. 2d at 95. The court in Czubak did not exclude an in-court witness because it did not find the witness credible, but rather because of the lack of corroboration that would have established sufficient reliability. Id.

In a similar vein, the Second District opinion wrongly applied Jones v. State, 709 So. 2d 512 (Fla. 1998). In fact, Jones emphasizes the injustice of what happened to Bearden. In Jones, the court *did* allow the admission of another man’s

confessions, and the issue there was whether the confessions should have come in as substantive evidence or only as impeachment. 709 So. 2d at 526. In Bearden’s trial, by contrast, the *jury never knew* that Ray Allen had confessed to being the one present at the murder.

Moreover, the Jones Court’s basis for distinguishing Chambers, that the confessions in Jones “were not made prior to the original trial in circumstances indicating trustworthiness, such as spontaneously to a close acquaintance as in Chambers,” 709 So. 2d at 525, does not apply here. Here, Ray Allen made his confession shortly after the murder, unlike the post-trial declarant in Jones, and Ray Allen confessed to a close acquaintance, Angela Tyler, who had been dating Ray Allen’s brother on and off for three years, not to the random collection of inmates in Jones.<sup>10</sup> Unlike in Jones and most other cases dealing with confessions by another, Angela Tyler was no jailhouse snitch. Moreover, the court in Jones emphasized that none of the inmates related any specific details of the crime—

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<sup>10</sup> Indeed, a jury could have accepted the explanation why Tyler came forward when she did mid-trial as easily as the trial court rejected it. Judge Altenbernd noted in his concurrence that “entirely innocent reasons” could explain Tyler’s delay and her account. 62 So. 3d at 666 (Altenbernd, J., concurring). Moreover, in testifying, Tyler ran the risk of alienating an entire family of neighbors whom she knew well (including Ray Allen’s brother who she had been dating on and off for three years), R:18:2276-78, and some of whom she could reasonably suspect to be capable of violence. R:18:276; R:16:1935; R:14:1655; R:17:2073. In fact, Ray Allen threatened Tyler. R:17:2120. But this weighing of credibility is really beside the point for a judge. That job falls to the jury.

which is the hallmark of a corroboration inquiry, not a credibility inquiry. 709 So. 2d at 525-26. Ray Allen's confession to Angela Tyler, in contrast, was corroborated, as the next section explains.

**C. The lower courts erred in ruling that Ray Allen's confession to Tyler was not corroborated**

The trial court's skepticism of Tyler's credibility infected its assessment of corroboration. The trial court's mistaken statement that "credibility" was one of the four Chambers factors rather than corroboration was the first sign. R:18:2273-74. The court failed to properly consider corroborating evidence supporting Ray Allen's out-of-court confession, due in part to its misconstruction of the law. The Second District opinion then ratified the trial court's errors by affirming the conviction through repetition of the same erroneous principles. By excluding Angela Tyler on the basis of the trial court's assessment of her credibility and failing to acknowledge corroborating evidence, the lower courts deprived Bearden of his right to present affirmative evidence to support his defense. As set forth below, there was in fact corroboration of Tyler's recitation of Ray Allen's confession to her, not just Bearden's statement to police and story at trial (which should have qualified as corroboration) but other evidence as well.

**i. Applicable law requires admission of corroborated confessions**

As an initial matter, there is some question about whether Chambers is the only basis on which to admit the confession of Ray Allen. Ray Allen was available to testify and did testify, but as set forth in Section III.B below, it was only the trial court's overly rigid application of the Morton rule (pursuant to Morton v. State, 689 So. 2d 259, 264 (Fla. 1997), receded from on other grounds, Rodriguez v. State, 753 So. 2d 29, 47 (Fla. 2000)) that made Ray Allen "unavailable" to testify as to whether he was the one present at the murder. Application of the Morton rule is analogous to a court's finding of witness unavailability under Florida Rule of Evidence § 90.804(1)(a), which makes statements against interest admissible pursuant to Rule § 90.804(2)(c). Because both Chambers and § 90.804(2)(c) require corroboration in criminal cases, which is the only element at issue in this case, the Court need not decide which applies here.

It is clear that Florida case law applying Rule 90.804(2)(c) informs the corroboration inquiry under Chambers. See, e.g., Masaka v. State, 4 So. 3d 1274, 1282-84 (Fla. 2d DCA 2009) (applying both 804(2)(c) corroboration caselaw and Chambers to conclude that the trial court wrongly excluded statements against interest by an unavailable declarant). There is no reason to use a different corroboration standard under Chambers than under Rule 90.804(2)(c), as Chambers is meant to stand in for statement-against-interest evidentiary rules

where the declarant is available.<sup>11</sup> One Florida case in particular, this Court's decision in Carpenter, also informs the corroboration inquiry and, Bearden submits, requires reversal of the Second District's decision in this case.

**ii. The lower courts erroneously disregarded Bearden's statement as corroboration.**

First, this Court in Carpenter ruled that the confession of another should have been admitted at trial because it was "consistent not only with the general version of events recounted in Carpenter's recorded statement, but it was also consistent with other evidence presented at trial." 785 So. 2d at 1203. This standard of corroboration was echoed by the First District in DeWolfe, which held that the "declaration against penal interest was consistent with both the defendant's general version of events and the other evidence at trial." DeWolfe, 62 So. 3d at 1147. As set forth above, moreover, both the First District in DeWolfe and this Court in Carpenter reaffirmed that credibility is solely for the jury to decide.

The Second District opinion in this case, however, did not adhere to these precepts. Instead, the Second District rejected "Bearden's self-serving statements to the detectives before his arrest," 62 So. 3d at 664, apparently on the basis that Bearden "carefully avoided admitting any direct involvement in Skipper's murder"

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<sup>11</sup> If anything, the need for safeguards is arguably greater where witnesses are unavailable to testify, as they cannot be cross-examined by the opposing party. Here, however, both Angela Tyler and Ray Allen were available and subject to full cross-examination by the State.

while admitting only the “crimes he was unable to deny.” Id. The Second District apparently did not credit Bearden’s “carefully” worded and “self-serving” statement; in other words, the court rejected the statement as corroboration because it did not believe Bearden. Again, this repeats and amplifies the trial court’s twin errors in making a credibility determination and rejecting what every other Florida appellate court to decide the issue has concluded does qualify as corroboration. See, e.g., Carpenter, 785 So. 2d at 1203; DeWolfe, 62 So. 3d at 1147.<sup>12</sup>

Carpenter and DeWolfe therefore make it clear that Bearden’s statement and version of events provide corroboration for Ray Allen’s confession, particularly because there is no dispute that every aspect of Tyler’s testimony was consistent with Bearden’s statement.<sup>13</sup> The trial court and the Second District erred in dismissing Bearden’s statement as corroboration of Ray Allen’s confession.

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<sup>12</sup> Moreover, incriminating oneself in numerous serious crimes is arguably not “self-serving” but instead supports the reliability of the statement. See Curtis, 876 So. 2d at 21 (“[A] confession made to a police officer may be considered reliable, because it subjects the declarant to prosecution.”). Bearden also made his statement to police (R:15:1768) prior to Ray Allen’s confession to Tyler (R:18:2279), denying Bearden any conceivable opportunity to tailor his statement to match Ray Allen’s, if Bearden had even known about it.

<sup>13</sup> The primary facts in Tyler’s testimony about Ray Allen’s confession that are corroborated by Bearden’s statement are as follows, with citations to Bearden’s statement for each fact: (1) Ray Allen was with Bill Bill, R:15:1787; (2) along with a gay man, R:15:1781; (3) whom Bill Bill referred to as gay, R:15:1782; (4) and all three were in the gay man’s car, R:15:1788; (5) where Bill Bill had stabbed him, R:15:1790; and (6) Ray Allen and Bill Bill were family, R:15:1779.

**iii. The lower courts ignored the corroboration in the record beyond Bearden's statement**

Ray Allen's confession to Angela Tyler, as testified to by Tyler, was that: (1) Ray Allen and Bill Bill were in a car with Skipper (2) who was gay (3) and was stabbed (4) by Bill Bill (5) in Skipper's car (6) after making a sexual advance toward Bill Bill; and (7) that Ray Allen and Bill Bill were "family" (that is, cousins). R:18:2276-83; IB 32. Every aspect of this confession was corroborated by Bearden's statement, with the sole possible exception of the sexual advance, which Bearden was not in position to witness. Moreover, every aspect of this confession was also corroborated by other evidence presented at trial, with the only real issue being the phrase "Ray Allen and" in the above account.<sup>14</sup> Careful review of the record shows corroboration for Ray Allen's involvement, including the acts and statements of Ray Allen and the weak and conflicting evidence in the State's case—not just the holes noted by the Second District, but also the fact that the State's theory of the alleged killers' movements immediately after the crime makes little sense in terms of simple geography and logic.

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<sup>14</sup> Kirchoff's testimony that Bill Bill had expressed anger and violent thoughts in relation to sexual advances from his father, and that Kirchoff thought that Bill Bill was talking about killing his father when Bill Bill was admitting to killing Skipper, R:14:1679-80,1694-95, supports Ray Allen's statement to Tyler that Bill Bill had reacted violently because Skipper had "tried him" sexually. R:14:1680,1694-95.

However, as set forth below, the law does not require a defendant to clear the high hurdle of 100% corroboration of every jot and tittle of a confession by multiple pieces of evidence, nor does it require the “essential fact” of the confession, i.e. the involvement of the other person, to be corroborated. Instead, the inquiry under Chambers is whether there is “some” corroboration, 410 U.S. at 300, or under Florida law whether there is “sufficient” corroboration, Carpenter, 785 So. 2d at 1203, for the confession as a whole. In this case, the corroboration by Bearden’s statement, combined with the corroboration of the confession by other record evidence and the substantial doubt about Ray Allen’s version of events, is sufficient corroboration under both Carpenter and Chambers.

First, this Court in Carpenter correctly declined to require corroboration for the “essential fact” of the confession—i.e., the involvement of the true perpetrator. 785 So. 2d at 1202-03. The Carpenter Court noted that existing Florida law holds that it is improper to exclude another’s confession “merely because the statement did not ‘exonerate’ the defendant.” Id. at 1202-03. In Carpenter, the trial court excluded another man’s confessions because the other man did not explicitly say that the defendant was not involved, and because the trial court found that “there’s no corroborating evidence of the essential fact, “ i.e. “who did the murder.” 785 So. 2d at 1203 (quoting trial court). This Court reversed, holding that the confessions were admissible because they strengthened the defendant’s theory of

reduced culpability. Id. Corroboration of the essential fact of who did the murder was not required. This Court noted the evidence in the record that corroborated the other parts of the confession, including the fact of (1) how the victim was killed, (2) that the victim's car was burned, (3) the location of the victim's body, and so forth. Id. at 1203-04. None of this evidence exonerated the defendant or proved the "essential fact" of who did what, but this Court found it "sufficient" corroboration of the confession to reverse and remand for a new trial. Id.

Here, the record likewise provides sufficient corroboration for the confession of Ray Allen. There should not be any dispute that items (2) through (7) in the Ray Allen confession, as recited above, are supported by record evidence. In addition, as the Second District opinion noted, Ray Allen had both motive and opportunity to be in Skipper's car at the time of the stabbing. 62 So. 3d at 665 (Altenbernd, J., concurring). Moreover, 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. The record also corroborates Ray Allen's confession because the evidence shows that it is at least as likely, if not more likely, that Ray Allen was present at the stabbing than that Bearden was. As the Second District noted, 62 So. 3d at 662-63, 665-66, the State's case against Bearden was "weak." "No physical evidence" put Bearden in the car at the time of

the murder. 62 So. 3d at 665-66 (Altenbernd, J., concurring). There was no blood or DNA evidence against Bearden. The State offered “no evidence” of Bearden’s involvement in assisting Bill Bill in the killing. 62 So. 3d at 662-63.

The State’s witnesses failed to agree on basic points such as the time Skipper arrived at the house—J.T. Brown claimed it was dusk,<sup>15</sup> while Kirchoff suggested 8:30 or 9 p.m. Ray Allen said the errand to buy gas took place half an hour before the store closed at 11. But it cannot be controverted that Skipper did not even receive his friend’s telephone call, before he arrived at the Browns, until 11:10 p.m. R:11:1195. Crucially, the State produced no corroboration that the alleged trip to the gas station that the Browns and Kirchoff testified about even took place: no pump receipt, no security videotape, no eyewitnesses. The lead detective admitted on cross-examination that no detective interviewed anyone who worked at the gas station and might have witnessed the purchase. R:13:1396-98.

A thorough review of the record raises the question of whether the State’s account of how the suspects fled the murder scene even makes sense. Skipper’s body was found near an intersection less than two miles and five minutes south of J.T.’s Brown’s house via largely direct, two-lane Rifle Range Road. Bearden told

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<sup>15</sup> The sun set at 7:35 p.m. on March 13, 2007 in nearby Lakeland, Florida, according to the online almanac of the United States Naval Observatory at [http://aa.usno.navy.mil/data/docs/RS\\_OneYear.php](http://aa.usno.navy.mil/data/docs/RS_OneYear.php).

deputies in his statement that Bill Bill and Ray Allen arrived back to Brown's father's house, excited and fearful, with their hands, arms, shoes, the car, and the knife covered in blood. They naturally would have wanted to clean themselves and the car as quickly as possible to avoid detection. Bearden's account of the killers' panic and their desire to eliminate evidence makes sense.

The State's witnesses, J.T. Brown, Kirchoff, and Ray Allen, however, claimed that once Skipper, Bill Bill, and Bearden drove off, they were gone, never to return that night. They claimed Bill Bill did return the next morning, and when he did, he was not shy about waking them up and admitting he had killed someone – though Bill Bill did not say Bearden was with him or participated in any way. R:14:1647,1678; R:17:2108. The State's witnesses offer no explanation for Bill Bill's and Bearden's whereabouts until they appear at close to 2 a.m. at Adrian Hernandez's house, which is almost eight miles and fifteen minutes northeast of the location of Skipper's body. The State therefore suggests that Bill Bill and Bearden killed Skipper and drove north, right past the Brown house where they could have hidden and cleaned themselves and the car quickly, and instead directed the blood-soaked car onto multi-lane U.S. Highway 17 and State Road 540 to

arrive unannounced at the house of someone eight miles away who might or might not want to buy the car. This account makes little sense.<sup>16</sup>

The totality of the record, including but not limited to Bearden's statement, corroborates the confession of Ray Allen to Angela Tyler, particularly in light of the dearth of evidence corroborating the State's theory that Bearden was with Bill Bill at the murder rather than Ray Allen. There is sufficient corroboration under Carpenter and Chambers to reverse and remand for a new trial.

**iv. The Second District erred by holding that corroboration could not conflict with other evidence in the case**

The Second District erred when it mistook conflicts in the evidence for a lack of corroboration: “[T]he purported statements were not corroborated by any evidence in the case except for Bearden’s pretrial statement. Indeed, the remaining evidence in the case was in direct conflict with the substance of the purported statements.” 62 So. 3d at 663. A confession, however, does not become unreliable because of contradiction by other evidence. Curtis v. State, 876 So. 2d 13, 22 (Fla. 1st DCA 2004). Chambers requires that a confession be “corroborated by some other evidence in the case.” 410 U.S. at 300. If a confession has sufficient corroboration, “the confession should be admitted in evidence, and the jurors

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<sup>16</sup> This point is driven home if one types the record addresses for the houses and the location of Skipper’s body into a mapping service such as Google Maps.

should be allowed to consider the alleged discrepancies, along with the evidence of corroboration.” Curtis, 876 So. 2d at 23.

Here, the only evidence in the case contradicting Ray Allen’s statement is the inconsistent, conflicting, “weak” testimony from other witnesses. But Bearden’s whole purpose in introducing Ray Allen’s confession is to challenge the account of the State’s witnesses. Conflict in the evidence is not a legitimate basis on which to exclude a confession that has at least some corroboration pursuant to Chambers. See Rivera v. Dir., Dep’t of Corr., 915 F.2d 280, 282 (7th Cir. 1990) (citing Chambers and dismissing as “silly” the state of Illinois’s argument that a confession that conflicted with other evidence was therefore unreliable).

In excluding Ray Allen’s confession, the trial court prevented the jury from testing a weak and circumstantial prosecution case with the defense’s evidence of innocence. Bearden was thereby denied the opportunity to present a defense to the detriment of his right to due process. The Supreme Court in Chambers contemplated that witnesses in this type of case would have “demeanor and responses weighed by the jury.” 410 U.S. at 301. Both Tyler and Ray Allen were available for cross-examination. If believed—an issue solely within the province of the jury—there can be little question that Tyler’s testimony “would exonerate Bearden of any direct involvement in Skipper’s death.” 62 So. 3d at 659.

This Court should find that there was sufficient corroborating evidence supporting admission of Tyler’s testimony based on Bearden’s statement, the other corroborating evidence in the case, and the lack of evidence showing Bearden’s involvement in the stabbing. On the facts of this case, where the State presented a circumstantial “weak” case against a capital defendant, the jury should be allowed to hear that someone else confessed to being the one there at the murder.<sup>17</sup>

**D. These errors were not harmless**

As noted above, the Second District opinion concluded that Ray Allen’s confession “would exonerate Bearden of any direct involvement in Skipper’s death.” 62 So. 3d at 659. This finding easily clears the harmless error threshold, which is “whether there is a reasonable possibility that the error affected the verdict.” State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The harmless error test places the burden on the State to prove beyond a reasonable doubt that the error did not contribute to the verdict. Id. at 1135.

The State cannot satisfy that heavy burden here. There can be little question that a decision to admit Ray Allen’s confession would have created at least a

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<sup>17</sup> Florida has already recognized a special standard of review on a motion for judgment of acquittal in a case based on circumstantial evidence. See, e.g., Celeste v. State, 79 So. 3d 898, 899 (Fla. 5th DCA 2009) (“[W]hen the State relies on circumstantial evidence to support a conviction, a motion for judgment of acquittal should be granted if the State fails to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt.”).

reasonable possibility of a different result. The jury apparently compromised on a conviction of second-degree murder. And the Second District, even as it affirmed, noted the weakness of the state's case against Bearden:

The State offered no evidence concerning how Bearden had allegedly assisted William in killing Skipper. The State's evidence about Bearden's involvement in the killing was vague and general;. . . . The State's evidence was no more specific about Bearden's involvement in the killing than the statements that Ray Allen purportedly made to Tyler.

62 So. 2d at 662-63. There was "no physical evidence" that placed Mr. Bearden in the car at the time of the murder. 62 So. 3d at 665-66 (Altenbernd, J., concurring). Bearden's statements to the Agueros were so vague that they did not even realize at the time that that Bearden was describing a murder; Judge Altenbernd agreed that Bearden's statement to them (even as misconstrued that "he" f\*\*cked up the victim, which no one said) was "hardly a full confession to any form of murder." 62 So. 3d at 666 (Altenbernd, J., concurring).

Exclusion of Tyler's testimony effectively left Bearden with no clear affirmative evidence to present to the jury in support of his defense that Ray Allen was the one present, other than Bearden's own statement. "Such a decision is generally considered harmful error." Mateo v. State, 932 So. 2d 376, 380-81 (Fla. 2d DCA 2006) (finding harmful error in exclusion of an audiotape that effectively left the defendant with no evidence to support his theory). In fact, the trial court's

exclusion of Tyler’s testimony left Bearden in an even worse position than the defendant in Chambers. Although Chambers was prevented from questioning the actual perpetrator as an adverse witness, he was able to introduce the perpetrator’s written confession into evidence. 410 U.S. at 291. But in Bearden’s trial, the jury had no inkling that another man confessed that he was present at the time of the murder. The exclusion of Tyler’s testimony was harmful error.

### **III. THE TRIAL COURT DEPRIVED BEARDEN OF DUE PROCESS WHEN IT DECLINED TO LET HIM CROSS-EXAMINE RAY ALLEN ABOUT RAY ALLEN’S CONFESSION**

#### **A. Standard of Review**

As stated in section II.A above, while this Court reviews evidentiary rulings for an abuse of discretion, England, 940 So. 2d at 400, the trial court abuses its discretion if its ruling follows from an “erroneous view of the law,” Patrick, 104 So. 3d at 1056, which is “subject to de novo review.” Demps, 761 So. 2d at 306.

#### **B. The trial court erred in preventing Bearden from cross-examining Ray Allen about Ray Allen’s confession**

The conclusion that the trial court wrongly excluded Tyler’s testimony leads directly to a second conclusion: that the trial court also was wrong in preventing Bearden from cross-examining Ray Allen about his confession to Tyler. In Welcome v. Vincent, 549 F.2d 853 (2d Cir. 1977), the Second Circuit, following Chambers, reversed the trial court for refusing to allow a defendant to cross-examine a witness about the witness’s confession. The court held that “where

another person, present on the witness stand, has previously confessed that he, rather than the defendant on trial, has perpetrated the crime, ..... to restrict examination of such a witness, so that his prior confession may not be proven, is to deny the defendant a fair trial,” where the confession has at least “some semblance” of reliability. Id. at 858-59. Because that is so here for the reasons set forth above, barring Bearden from impeaching Ray Allen was error. Moreover, Bearden should have been allowed to impeach Ray Allen pursuant to the Florida Evidence Code when he denied involvement in the murder. The court’s barring of Bearden from impeachment of Ray Allen was an overly rigid application of the Morton rule that unfairly hamstrung Bearden with an unimpeached witness pointing the finger at Bearden, who was unable to point back.

**i. The Florida Evidence Code permits Bearden to impeach Ray Allen**

Florida Rule of Evidence § 90.608(5) permits a party to impeach its own witness with “proof by other witnesses that material facts are not as testified to by the witness being impeached.” Tyler offered proof of the most material fact in Bearden’s trial: that Ray Allen was in the car when Bill Bill stabbed Skipper. This allegation is central to both the State’s theory of the case and Bearden’s defense. The proof of Ray Allen’s confession was not collateral, see, e.g., Tripoli v. State, 50 So. 3d 776 780 (Fla. 4th DCA 2010), and it should have been admitted.

The only thing that could stand in the way of the admission of this evidence is the Morton rule, which for the reasons set forth in the next section below should not be applied so rigidly as to deprive a criminal defendant of his rights to present a defense, as occurred in this case.

**ii. Courts should not apply the Morton rule to deprive a defendant of his constitutional rights**

The Morton rule is that a party generally may not call a witness for the primary purpose of developing impeachment evidence. See 689 So. 2d at 264. However, the Morton rule should not be applied in a way that deprives a criminal defendant of constitutional rights, particularly when the prosecution's case is circumstantial and the defendant faces the death penalty. Both Morton and its follow-up case Rodriguez dealt with allegations that the *prosecution* improperly injected hearsay testimony into guilt and penalty proceedings. A rule that keeps the prosecution honest does not necessarily guarantee justice for a defendant, who does not have the State's ability to control what evidence gets admitted through deciding whom to charge and whom to call to the stand.

If Bearden had been defending a civil wrongful death suit brought by Skipper's family, he could have sued Ray Allen as a third-party defendant, and the court would have admitted Ray Allen's confession as a party admission. Bearden therefore would have been afforded a fuller defense in a civil case than in the

criminal trial in which he faced the death penalty. Because the State chooses who will be a defendant and who will be a witness in a criminal matter, it effectively draws the line between admission and hearsay. That reality, combined with the trial court's rigid application of the Morton rule against calling witnesses to impeach them, deprived Bearden of his right to put on a defense.

Tempering the Morton rule here is consistent with Chambers' due process command to provide a fair opportunity to defend. Chambers did not strike down Mississippi's voucher rule, standing alone. Rather, Chambers held that the interaction of the voucher rule and the rulings excluding the confessions, within the facts of Chambers' case, worked to deny Chambers due process. 410 U.S. at 302. This Court should hold here that, under Chambers, the interaction of the Morton rule with the trial court's evidentiary rulings denied Bearden due process and a fair opportunity to defend himself.

At a minimum, the court could have allowed the questioning but instructed the jury to limit the impact of the questioning, as courts routinely do. Morton itself contemplates that in some situations a trial court "should also consider the effectiveness of a limiting instruction in avoiding improper use of the impeachment evidence." 689 So. 2d at 263. For Bearden to have Ray Allen on the stand before the jury, and yet be prevented by the trial court, R:18:2319-20, from asking him the essential question of the trial—Weren't you the one in the car with Bill Bill?—is

unfair and falls short of the “traditional and fundamental standards of due process” expounded in Chambers. 410 U.S. at 302. As Justice Scalia noted in addressing the problems posed by an unavailable declarant, “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Crawford v. Washington, 541 U.S. 36, 69 (2004).<sup>18</sup>

The error to limit Ray Allen’s cross had a special sting for Bearden. The State clearly decided to pull Ray Allen as a witness to take unfair advantage of the Morton rule to prevent Bearden from being able to put on his defense. The Morton rule was created to prevent gamesmanship by the State, not to permit it to deprive a defendant of his rights to call witnesses in his defense, confront witnesses against him, and present his defense to a jury. When a defendant is on trial for his life, and another who has confessed to being the actual perpetrator is in the witness chair, elemental fairness requires that the defendant be able to challenge him. As the U.S. Supreme Court said in Chambers, “where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.” 410 U.S. at 302.

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<sup>18</sup> In its answer brief before the Second District, the State argued that Bearden’s failure to proffer his cross-examination of Ray Allen meant he had waived his right to it. However, a litigant is not required to proffer evidence if its substance is apparent or if the court indicates the effort is unavailing, which occurred here. R:18:2319-20; Reaves v. State, 531 So. 2d 401, 403 (Fla. 5th DCA 1988).

### **C. These errors were not harmless**

As Bearden argued in Section II.D, supra, the error in limiting the cross-examination of Ray Allen was not harmless because of the power of his confession to exonerate Bearden, and the weakness of the State's case. The record unquestionably demonstrates "a reasonable possibility that the error affected the verdict." DiGuilio, 491 So. 2d at 1139. The ruling that Bearden could not impeach Ray Allen with his confession is a second ground for reversal.

### **IV. THE JURY INSTRUCTION FOR MANSLAUGHTER DID NOT COMPORT WITH THIS COURT'S RULINGS IN MONTGOMERY AND DANIELS**

While respecting the Court's jurisdiction and also acknowledging the general rule that a petitioner may not argue issues that may not have been timely preserved in the court below, Bearden wishes to alert this Court that the manslaughter jury instruction given at his trial does not comport with this Court's rulings in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), and Daniels v. State, 2013 Fla. LEXIS 1156 (Fla. June 6, 2013). In Montgomery, this Court held that a manslaughter instruction that the jury find proof of the defendant's intent to kill the victim introduced fundamental error into a jury verdict for second-degree murder, necessitating a new trial. 39 So. 3d at 257-60. In Daniels v. State, 2013 Fla. LEXIS 1156 (Fla. June 6, 2013), this Court recently held that an amended manslaughter instruction matching word-for-word the one given in Bearden's trial

(see R:19:2552) introduced fundamental error, requiring a new trial. 2013 Fla. LEXIS 1156 at \*\*26-27.<sup>19</sup>

The correct wording of the manslaughter instruction is essential for the jury to make an informed choice between degrees of lesser-included offenses. Prejudice of a faulty instruction to a defendant like Bearden is even greater where, as here, the State's evidence is "weak." Bearden respectfully submits that the Montgomery/Daniels defect in his manslaughter instruction provides an independent basis for this Court to grant him a new trial.

### **CONCLUSION**

For the foregoing reasons, Bearden respectfully requests that this Court reverse the judgment of the Second District and grant him a new trial.

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<sup>19</sup> A review of the charge conference transcript does not reveal an objection by Bearden's counsel to this instruction as given. See R:18:2380-19:2414.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail this 18th day of September, 2013, to: Susan Dunlevy, counsel for the State, at Susan.Dunlevy@myfloridalegal.com.

/s/ Michael P. Matthews  
Attorney for Petitioner

**CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY** that this petition complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Michael P. Matthews  
Attorney for Petitioner