

**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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**REPLY BRIEF OF PETITIONER JOSEPH ELI BEARDEN**

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TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT .....	1
I. 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 .....	1
A. The Second DCA in Bearden Incorrectly Held that Judges May Exclude Witnesses from Jury Trials on the Basis of Credibility, in Conflict with DeWolfe .....	1
B. Bearden and DeWolfe Also Conflict on Whether a Defendant’s Statement May Corroborate Another’s Confession .....	4
II. THE TRIAL COURT’S EXCLUSION OF ANGELA TYLER’S TESTIMONY DEPRIVED BEARDEN OF DUE PROCESS BY DENYING HIM HIS DEFENSE THAT RAY ALLEN BROWN WAS THE ONE PRESENT AT THE MURDER.....	5
A. Standards of Review.....	6
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.....	7
C. The Lower Courts Erred in Discounting Bearden’s Statement as Corroboration .....	7
D. The Second District and the State Wrongly Ignored the Other Corroboration of Tyler’s Testimony .....	8
E. These Errors Were Not Harmless.....	11

III. THE TRIAL COURT DEPRIVED BEARDEN OF DUE PROCESS  
WHEN IT DECLINED TO LET HIM CROSS-EXAMINE RAY  
ALLEN ABOUT RAY ALLEN’S CONFESSION. ....12

IV. THE JURY INSTRUCTION FOR MANSLAUGHTER DID NOT  
COMPORT WITH MONTGOMERY AND DANIELS. ....14

CONCLUSION .....15

CERTIFICATE OF SERVICE .....16

CERTIFICATE OF COMPLIANCE.....16

TABLE OF AUTHORITIES

	Page(s)
Federal Case	
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973) .....	<i>passim</i>
State Cases	
<u>Bearden v. State</u> , 62 So. 3d 656 (Fla. 2d DCA 2011).....	<i>passim</i>
<u>Carpenter v. State</u> , 785 So. 2d 1182 (Fla. 2001).....	1, 3, 6, 7
<u>Curtis v. State</u> , 876 So. 2d 13 (Fla. 1st DCA 2004) .....	9, 10
<u>Daniels v. State</u> , 121 So. 3d 409 (Fla. 2013) .....	14
<u>Demps v. State</u> , 761 So. 2d 302 (Fla. 2000) .....	7
<u>DeWolfe v. State</u> , 62 So. 3d 1142 (Fla. 1st DCA 2011).....	<i>passim</i>
<u>Frederick v. State</u> , 472 So. 2d 463 (Fla. 1985) .....	3
<u>Griffin v. State</u> , No. 2D11-4728, 2013 Fla. App. LEXIS 14804 (Fla. 2d DCA Sept. 18, 2013).....	14
<u>Hammett v. State</u> , 908 So. 2d 595 (Fla. 2d DCA 2005) .....	11, 13
<u>Jones v. State</u> , 709 So. 2d 512 (Fla. 1998).....	2, 3
<u>Sims v. State</u> , 998 So. 2d 494 (Fla. 2008) .....	15
<u>State v. DiGuilio</u> , 491 So. 2d 1129 (Fla. 1986) .....	12
<u>State v. Montgomery</u> , 39 So. 3d 252 (Fla. 2010) .....	14
<u>Trushin v. State</u> , 425 So. 2d 1126 (Fla. 1982).....	15
Rule	
Florida Rule of Criminal Procedure 3.850.....	3

## ARGUMENT

### **I. 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**

#### **A. The Second DCA in Bearden Incorrectly Held that Judges May Exclude Witnesses from Jury Trials on the Basis of Credibility, in Conflict with DeWolfe**

The State does not defend, and cannot defend, the Second District’s holding in Bearden that a trial court may exclude a witness from testifying to a jury about a declaration against penal interest because the court did not find the witness to be sufficiently credible. Nor does the State argue that the First District in DeWolfe held to the contrary. Florida law clearly prohibits a trial court from usurping the jury’s exclusive province in jury trials to determine matters of witness credibility. IB<sup>1</sup> at 24–27 (citing Carpenter v. State, 785 So. 2d 1182, 1203 & n.17 (Fla. 2001) (“We decline to change established Florida law on this point.”) and DeWolfe v. State, 62 So. 3d 1142, 1146 (Fla. 1st DCA 2011)).

Instead, the State asserts that the lower courts did not actually consider credibility in this case, arguing that the Second District in Bearden only mentioned

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<sup>1</sup> “IB” refers to the Amended Initial Brief of Petitioner Joseph Eli Bearden. “AB” refers to Respondent’s Brief on the Merits.

credibility “to indicate that even if her credibility *were* to be considered,” it would not offset the lack of corroboration of her testimony. AB at 13 (emphasis supplied). The Second District did not say that, however. The Second District directly addressed and rejected Bearden’s argument that the credibility of the witness, Angela Tyler, is solely for the jury to decide: “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. The trial court also directly addressed credibility and held, as the Second District noted, that the “second reason” of “two main reasons for its ruling” was “Tyler’s credibility.” Id. at 663.

The Second District considered the witness’s credibility in affirming the trial court’s ruling, stating, “We also consider the doubts expressed by the trial court about Tyler’s credibility as a witness,” id. at 664, including the finding that she presented a “questionable” scenario and that her recollection “seemed too good to be true,” and stating that “[i]n short, Tyler’s testimony about the purported statements was not credible.” Id. at 663–64.<sup>2</sup> In fact, not only did the Second

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<sup>2</sup> Judge Altenbernd disagreed with the majority’s assessment of credibility, stating that Tyler’s ability to recall details “is not necessarily surprising,” and further 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 Mr. Bearden.” 62 So. 3d at 666 (Altenbernd, J., concurring).

The State takes issue (AB at 17) with Bearden’s reading of Jones v. State, 709 So. 2d 512 (Fla. 1998), which the Second District cited for the proposition that

District address credibility rather than avoid the issue, it held, as the First District noted and quoted in DeWolfe, that “an evaluation of the credibility of the witness . . . is *unavoidable*.” DeWolfe, 62 So. 3d at 1146 (quoting Bearden, 62 So. 3d at 664 (emphasis supplied)).

The State says nothing more about credibility, other than noting DeWolfe’s use of a “but see” signal in its citation on this point to Bearden. AB at 11. This citation by itself reveals the conflict. This Court has found express and direct conflict jurisdiction over a district court opinion using the “but see” signal to refer to the conflicting opinion of another district. See, e.g., Frederick v. State, 472 So. 2d 463, 464 (Fla. 1985), affirming 459 So. 2d 326, 326 (Fla. 5th DCA 1984).

The State does not otherwise mention credibility in its brief, even though it is the primary issue Bearden raises in this appeal. On this basis alone, the Court

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a witness’s “substantial delay in coming forward with a hearsay account of a declarant’s confession to a crime may be considered in assessing the reliability of the recipient’s account of the confession.” 62 So. 3d at 663. The State correctly notes that Jones reviewed a Rule 3.850 post-conviction proceeding, in which a judge conducting an evidentiary hearing made findings on the testimony of witnesses. Jones therefore does not apply to Bearden’s appeal, which focuses on the *jury* not being permitted to hear a witness to a confession because the trial judge found the witness was not credible. Nothing in Jones changed longstanding Florida law, reaffirmed three years later by this Court in Carpenter, that a trial judge may not exclude from a jury trial an in-court witness to an out-of-court confession based on the judge’s assessment of credibility.

should affirm its earlier finding of conflict jurisdiction over this appeal and should reverse and remand for further proceedings untainted by this error.

**B. Bearden and DeWolfe Also Conflict on Whether a Defendant's Statement May Corroborate Another's Confession**

DeWolfe and Bearden also conflict regarding whether a defendant's statement counts as corroboration. The State does not dispute that DeWolfe held that it does count. Just as the State argued on credibility, however, the State attempts to argue that the Second District did not discount Bearden's statement as corroboration. AB at 14. But again, that is not what the Second District said. The Second District explicitly discounted Bearden's statement because it was "self-serving" and "carefully" worded. 62 So. 3d at 664.

This issue is in fact similar to the first conflict issue above, because what the trial court and the Second District did in this case was disregard Bearden's statement as corroboration on the basis that they did not find it credible. Id. Such reasoning impermissibly treads upon the province of the jury to decide credibility in jury trials. The most troubling problem with this holding is that the Second District, even as it discounted Bearden's statement, acknowledged inconsistencies and bias in the accounts of the State's witnesses, but dismissed this incongruity 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. Witness credibility is

indeed for the jury to weigh, and that should hold true both for the State's witnesses and the defense's witnesses. Bearden directly conflicts with DeWolfe, which explicitly credited both the defendant's statement and her version of events at trial as corroboration of another's confession – *without* assessing the defendant's credibility, because that is solely the province of the jury, as the DeWolfe court correctly held. 62 So. 3d at 1145.

The State also argues that, putting aside the defendant's statements, there was "other" additional corroboration in DeWolfe that was absent in Bearden. AB at 14. Whether the "other" corroboration was stronger in DeWolfe than in Bearden is beside the point. The question is whether a defendant's statement counts as corroboration – a question on which DeWolfe and Bearden conflict. This conflict provides a second basis for this Court's jurisdiction. This Court should affirm its earlier finding of conflict jurisdiction. See Docket Entry July 31, 2012.

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

The trial court erred when it concluded that Angela Tyler was not credible enough for the jury to hear her testify about Ray Allen Brown's confession. In barring her testimony, the trial court stripped Bearden of his only defense, and thereby denied him due process of law. The Second District made three errors in

affirming the exclusion of Tyler’s testimony, any one of which requires reversal. First, the State is silent about the Second District’s violation of this Court’s “established” rule against judges excluding witnesses to out-of-court statements against interest on the basis of credibility, Carpenter, 785 So. 2d at 1203 & n.17, and the State has thus conceded the issue. Second, the Second District erred in discounting Bearden’s statement as corroboration which again, the State does not address, other than arguing, incorrectly, that the Second District did not discount his statement. Third, the Second District erred in holding there was no other corroboration besides Bearden’s statement, – in particular, by overlooking motive and opportunity corroboration noted by Judge Altenbernd. The State mostly ignores this Court’s decision in Carpenter, though it is the centerpiece of Mr. Bearden’s appeal. Finally, exclusion of Tyler’s testimony was harmful error because, as the Second District acknowledged – and as the State concedes by not briefing this issue – “Ray Allen’s purported admission would exonerate Bearden of any direct involvement in Skipper’s death.” 62 So. 3d at 659.

#### **A. Standards of Review**

The State’s claim that the sole standard of review here is abuse of discretion, AB at 16, is incorrect. The first two issues raised herein, whether a trial judge may exclude witnesses from jury trials on the basis of credibility and whether a defendant’s statement counts as corroboration, are pure questions of law. “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). Only the third issue, relating to the quantum of “other” corroborating evidence, is a mixed question subject to an abuse of discretion standard. See DeWolfe, 62 So. 3d at 1146–47.

**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**

The State never mentions Carpenter's holding that the trial court must not consider the credibility of an in-court witness to an out-of-court declaration against interest. 785 So. 2d 1182, 1203 (Fla. 2001). Although the State attempts to distinguish Carpenter on the third issue Bearden raises (“other” corroboration in addition to his statement) (AB at 16), the State's only response is to try to argue that the lower courts did not in fact consider credibility, which is incorrect for the reasons stated above. See Section I.A, supra. The State has thus conceded, as it must, the error of a trial court excluding from a jury trial a witness to a confession on the basis of her credibility. Reversal is warranted on this basis alone.

**C. The Lower Courts Erred in Discounting Bearden's Statement as Corroboration**

Both Carpenter and DeWolfe hold that a defendant's version of events, through the defendant's testimony or otherwise, may serve as corroboration of another's out-of-court confession. Carpenter, 785 So. 2d at 1203; DeWolfe, 62 So.

3d at 1147. Again, the State does not challenge this, nor could it. Instead, the State argues that the Second District in Bearden did not actually discount Bearden's statement as corroboration (AB at 14), which is incorrect for the reasons set forth above in Section I.B, supra. Again, the State concedes that a jury trial judge may not exclude a witness to a confession because a defendant's statement may be discounted as corroboration. This concession requires reversal as well.

**D. The Second District and the State Wrongly Ignored the Other Corroboration of Tyler's Testimony**

The State asserts that the Second District held that there is no "direct" corroboration for Ray Allen's confession beyond Bearden's pre-trial statement, and that "Respondent agrees with this assessment." AB at 18. The State argues in conclusory fashion that "Petitioner points to no other evidence" corroborating Tyler's testimony, but almost completely ignores the corroboration cited by Bearden, see IB at 35–40, as well as the corroboration noted by Judge Altenbernd in his concurrence. 62 So. 3d at 666 (Altenbernd, J., concurring).

First, the State ignores the motive and opportunity corroboration noted by Judge Altenbernd and in Bearden's opening brief. IB at 37. Judge Altenbernd found the assertions about corroboration to be "confusing," as "[i]t is undisputed that Mr. Skipper was murdered shortly after being in a house with Ray Allen Brown. Ray Allen Brown certainly had the ability and even a motive to be

precisely where his alleged confession to Angela Tyler placed him.” 62 So. 3d at 666 (Altenbernd, J., concurring). The State ignores this corroboration entirely.

Second, Bearden’s initial brief cites six points of Ray Allen’s confession to Tyler that are corroborated by trial evidence apart from Bearden’s statement: (1) Bill Bill was with Skipper (2) who was gay (3) and who was stabbed (4) by Bill Bill (5) in Skipper’s car; and (6) Ray Allen and Bill Bill are related. IB at 35, 37. The State does not challenge any of these points.<sup>3</sup>

Third, the State incorrectly fails to give any weight to other parts of the record that corroborate Ray Allen’s confession, in particular Ray Allen’s threats (IB at 37), apparently on the basis of Ray Allen’s “denial of making any such threat.” AB at 18. This is one example of the State’s erroneous position that corroboration does not count if it is disputed. Although the state tries in vain to distinguish Curtis v. State, 876 So. 2d 13 (Fla. 1st DCA 2004), AB at 19,<sup>4</sup> Judge Padovano’s opinion in Curtis lays bare the State’s error in this regard:

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<sup>3</sup> The State disputes Bearden’s statement of facts (AB at 1–2) but identifies no material discrepancy. For example, Bearden in his initial brief correctly quotes the Agueros’ use of “they” and “we” in connection with his statements that “they” had “f\*\*cked up” the victim. The State cites to Bearden saying “They had f\*\*cked him up,” R:12:1230, but the State drops the word “They” from its quote. The State also cites to Bearden saying “I f\*\*cked up” but the context makes clear that Bearden is only admitting a mistake and apologizing for it. R:12:1228.

<sup>4</sup> First, Chambers does not require confession to a police officer. Admissions to a “close acquaintance,” 410 U.S. at 300, as occurred here, suffices. Next,

The state argues that Butler’s confession was not reliable, because some of the facts were contradicted by other evidence. This argument misses the point. It is true that certain aspects of Butler’s statement, such as the location of the purse and the kind of weapon used, were inconsistent with other facts, but the question is not whether there is some evidence casting doubt on the confession. Rather, the question is whether there is substantial evidence to corroborate the confession. See Rivera, 915 F.2d at 282; United States ex rel. Gooch v. McVicar, 953 F. Supp. 1001, 1009 (N.D. Ill. 1997). If so, the confession should be admitted in evidence, and the *jurors should be allowed to consider the alleged discrepancies*, along with the evidence of corroboration.

Curtis v. State, 876 So. 2d at 22–23 (emphasis supplied). While Bearden and the State obviously presented conflicting accounts at trial, the Second District was wrong to cite that conflict as a reason to exclude Ray Allen’s confession. 62 So. 3d at 663–64. As for the State’s argument criticizing as “circular reasoning” the conclusion that Ray Allen’s threats corroborate his involvement (AB at 18), it is not circular at all – why would he threaten people if he were not involved?<sup>5</sup>

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corroboration by “someone other than the defendant ” (AB at 19) incorrectly discounts Bearden’s statement, for the reasons set forth above in Section I.B, supra. Also, the State’s insistence that the confessor must have taken “personal responsibility for having committed the murder” (AB at 19) is both ironic – as the State presented “no evidence” of Bearden’s involvement in committing the murder, 62 So. 3d at 662 – and wrong, as it is undisputed that Ray Allen’s admissions would “exonerate” Bearden.” Id. at 659. Finally, Bearden need not present corroboration for the “essential fact” of Ray Allen being present in the car for the murder, for the reasons explained in Bearden’s initial brief (IB at 36–37) (citing Carpenter, 785 So. 2d at 1202–03), a point to which the State does not respond.

<sup>5</sup> The State seems to argue that the threats cannot be corroboration because the trial court excluded them from evidence. Those erroneous rulings, however, denied Bearden his defense. Bearden’s lawyers sought to introduce testimony from a

Finally, inconsistency and weakness in the State’s evidence are relevant to the corroboration inquiry. Due process entitles the defendant to a level playing field. The evidence supporting Bearden’s conviction was “weak,” as Judge Altenbernd noted. 62 So. 3d at 665–66 (Altenbernd, J., concurring). As even the Second District majority conceded in upholding the conviction, the State’s witnesses – Ray Allen’s own father and their rent-free housemate – “likely had a motive to protect Ray Allen Brown from prosecution,” and their testimony was “often inconsistent.” 62 So. 3d at 664 n.6 (majority opinion). The State itself seems to acknowledge questions about whether its version of events reflects the acts of “reasonable people.” AB at 19. Inconsistencies, gaps, and weaknesses in the State’s case against Bearden strengthen the conclusion that Ray Allen was the one present at the time of the murder.

#### **E. These Errors Were Not Harmless**

The State presents no argument why any error below was harmless. The State of course bears the burden to show the harmlessness of an error, by proving

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defense investigator who overheard Ray Allen’s threats to harm Tyler because of her testimony, R:17:2120–53, but the trial judge denied the request, R:17:2136. Nor did the trial court permit Robert Aguero to repeat his deposition testimony that Ray Allen approached him while both were in jail and tried to convince him he was not involved in the crime. R:13:1481–91. Proffers were not required because the substance was apparent and the trial judge made it clear the effort was unavailing. Hammett v. State, 908 So. 2d 595, 597 (Fla. 2d DCA 2005).

beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). By not presenting any such argument, the State has conceded the harmfulness of any error this Court finds.

There can be little question of harmfulness in any event, as the Second District itself conceded that “Ray Allen’s purported admission would exonerate Bearden,” and that the State’s case against Bearden was weak:

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. 3d at 659, 662–63. The exclusion of Tyler’s testimony was harmful error, and therefore this Court should reverse.

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

The trial court denied Bearden due process when it restricted his right to question Ray Allen about his confession. The State does not present any substantive reply to Bearden’s arguments on this issue. Instead, the State simply refers back to its earlier argument to affirm the exclusion of Angela Tyler’s

testimony,<sup>6</sup> and asserts that this issue was “waived.” AB at 20. Because this issue was not waived, the State has conceded this issue by not responding to it.

As Bearden set forth in his initial brief (IB at 48 n.18), a proffer was unnecessary because the substance of the evidence was apparent and the court indicated the effort is unavailing. R:18:2319–20; R:17:2061–64; see also Hammett v. State, 908 So. 2d 595, 597 (Fla. 2d DCA 2005). Therefore, it was not waived.

The State fails to present any response to the fundamental unfairness of the use against Bearden of the Morton rule, which is intended to curb prosecutorial abuse, not to enable it by allowing the State to deprive a defendant of his defense through its charging and witness-calling decisions. IB at 46–47. Bearden would have enjoyed a fuller defense in a civil trial in which he could have impleaded Ray Allen as a third-party defendant and put his confession before the jury as an admission. Bearden should have been allowed to ask Ray Allen the critical question of the trial – weren’t you the one in the car at the time of the murder?

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<sup>6</sup> Although Bearden agrees that the Court may reverse on the basis of the erroneous exclusion of Tyler’s testimony without addressing this issue, Bearden does not agree that resolution of the error of excluding Tyler’s testimony necessarily resolves this issue. Bearden was not even permitted by the trial court to ask Ray Allen if he was the one who in fact was present when the murder occurred, R:17:2065–2155, which is a separate (and arguably more egregious) error than excluding Tyler’s testimony, for the reasons set forth in Bearden’s initial brief. See IB at 44–49.

Finally, as noted in section II.E supra, the State presents no argument why any error below was harmless, including this one. By not presenting any such argument, the State has conceded harmfulness.

#### **IV. THE JURY INSTRUCTION FOR MANSLAUGHTER DID NOT COMPORT WITH MONTGOMERY AND DANIELS.**

There can be no question that Bearden's trial was fundamentally flawed because the jury instructions misstated the intent required for manslaughter, a point the State does not contest. Intent was a disputed issue at trial, contrary to the State's assertion.<sup>7</sup> The incorrect jury instruction provides an independent basis for this Court to reverse.

Having lost its motion to strike this issue on jurisdictional grounds, see Dec. 4, 2013 Order of this Court, the State now urges this Court not to address it. The State fails however to address the rationale of judicial economy and the need to

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<sup>7</sup> Bearden's counsel told the jury in closing argument that "one of the issues in this case, we believe, will be what Joseph Bearden knew, when he knew it, and what his state of mind was, and what he did about it." R:19:2508. The judge instructed the jury that to convict Bearden of manslaughter, the State must prove "One, Ryan Keith Skipper is dead; Two, Joseph Eli Bearden intentionally caused the death of Ryan Keith Skipper." R:19:2552. Because no one disputes that Skipper is dead, the *only* element at issue was the second, flawed one, which was the focus of the appeals in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), and Daniels v. State, 121 So. 3d 409 (Fla. 2013). The State's citation of Griffin v. State, No. 2D11-4728, 2013 Fla. App. LEXIS 14804 (Fla. 2d DCA Sept. 18, 2013), is inapposite, because Bearden did not concede "the manner of the crime" – nor at trial did the State offer any evidence of how Bearden allegedly participated in the stabbing. 62 So. 3d at 662.

avert “years of unnecessary litigation” that this Court articulated in Sims v. State, 998 So. 2d 494, 502 (Fla. 2008).<sup>8</sup> This Court may have discretion to decline to address this issue as the State urges, but Bearden submits that forcing him to raise this issue only through collateral attack would be inefficient and unjust.

### CONCLUSION

For the foregoing reasons, and for the reasons set out in his Amended Initial Brief, Bearden respectfully requests that this Court reverse the judgment of the Second District and grant him a new trial.

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<sup>8</sup> The State’s citation to Trushin v. State, 425 So. 2d 1126 (Fla. 1982), actually supports addressing this issue now, because even Trushin notes that “[o]nce an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case.” 425 So. 2d at 1130.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been filed this 28th day of January, 2014 at [www.myflcourtagency.com](http://www.myflcourtagency.com), which automatically furnishes a copy by e-mail to Assistant Attorney General Susan D. Dunlevy, counsel for Respondent, at [crimaptpa@myfloridalegal.com](mailto:crimaptpa@myfloridalegal.com) and [Susan.Dunlevy@myfloridalegal.com](mailto:Susan.Dunlevy@myfloridalegal.com).

/s/ Michael P. Matthews  
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that this brief 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