IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1171

JULIANNE HOLT, Public Defender,
Thirteenth Judicial Circuit

Petitioner,

v.

MICHAEL EDWARD KEETLEY, and
STATE OF FLORIDA,

Respondents.

RESPONDENT MICHAEL EDWARD KEETLEY'S AMENDED ANSWER BRIEF

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PRELIMINARY STATEMENT

This appeal involves a challenge to the dismissal of the Office of Public Defender's (the "**PD Office**") petition for writ of certiorari by the Second District Court of Appeal (the "**Second District**"). The PD Office filed the writ from an order appointing it to represent Michael Edward Keetley ("**Keetley"**) as penalty phase counsel in a capital murder case.

On February 4, 2019, more than eight years after the commencement of the prosecution, and after this Court accepted jurisdiction, the State withdrew its notice of intent to seek the death penalty. The next day, February 5, 2019, the trial court entered an order discharging the PD Office from the case. Notwithstanding this development, the PD Office and the State of Florida (the "**State**") contend that the Court may properly consider this appeal.

The trial court's appointment of the PD Office as Keetley's penalty phase counsel was founded on the constitutional guarantee of a fair trial. The Sixth Amendment to the United States Constitution guarantees to every criminal defendant the right to have the assistance of counsel for his defense. "The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland v. Washington*, 466 U.S.

668, 684-685 (1984). Where an attorney fails to provide effective representation, a defendant is deprived of his Sixth Amendment right to counsel and a conviction obtained in violation of that right violates Due Process. *See Strickland*, 466 U.S. 668.

In death penalty cases, protecting the accused's right to due process of law should guide every decision of the Court. *See e.g., Harrison v. State*, 12 So. 2d 307 (Fla. 1943). When the trial court appointed the PD Office as penalty phase counsel, Keetley was indisputably indigent and was represented by counsel who steadfastly maintained that she could not single-handedly provide effective representation to Keetley in both phases of the trial. The trial court's decision was governed by unforeseen circumstances unique to the case that threatened Keetley's due process rights.

The trial court's order appointing the PD Office as penalty phase counsel is not an issue before the Court. The Second District dismissed the appeal without reaching the merits of the trial court's order. Furthermore, as the case now stands, the propriety of the appointment is of no consequence; the PD Office has been discharged. However, the PD Office and the State advance the false narrative that the trial court's appointment of the PD Office as penalty phase counsel commandeered public resources and somehow usurped the authority of the PD

Office over its resources in violation of the law. To avoid the perception that Keetley somehow has acquiesced to the State and PD Office's erroneous view of the merits, as a preliminary matter and so that the arguments may be considered in the appropriate context, Keetley emphasizes that the trial court did not err.

The trial court properly recognized that "a court must carefully guard all of a defendant's constitutionally protected rights before he forfeits his life." R. 86. "Denying Mr. Keetley relief would compel him to proceed to trial with retained counsel who has candidly expressed concern about her ability to effectively represent Mr. Keetley during both phases of the proceedings, or to terminate counsel and procure the assistance of two court-appointed attorneys based on his indigent status." R. 86. "[C]ertainly, it would raise grave constitutional concerns regarding Mr. Keetley's right to counsel if he suffered the consequences of circumstances completely outside the realm of his control." R. 86. "Where, as here, unforeseen circumstances threaten to compromise a defendant's right to the effective assistance of counsel, principles of due process demand that a court have the latitude to appoint an attorney paid for by the state." R. 86-87.

STATEMENT OF FACTS

Keetley was arrested on December 2, 2010, and has been held without bond. R. 21; R. 32. The next day, Keetley completed an Application for Criminal

Indigent Status, on which he indicated that he was seeking the appointment of the Public Defender. R. 89, ¶ 3; R. 320. The PD Office was initially appointed to represent the indigent Keetley. R. 320; R. 344; R. 350. But Keetley's family retained private counsel (the late Paul Carr) to represent Keetley. R. 32; *see* R. 54, lines 10-15.

In April 2011, Carr retained Lyann Goudie to assist with first phase representation at no additional cost to Keetley's family. *See* R. 54, lines 10-15; R. 59, line 23 – R. 60, line 3; R. 85.

In August 2015, the trial court heard the first of three motions requesting the appointment of penalty phase counsel for Keetley.[1] The Justice Administrative Commission ("**JAC**") opposed the motion, acknowledging that due process concerns could form the basis for the appointment of co-counsel, but contending that due process required that Keetley be represented by two lawyers, not three. R. 46, lines 1-7; R. 48, line 10- R. 49, line 8. The JAC argued:

> Here we have two lawyers [Carr and Goudie]. Here we have the – what the rule [Fla. R. Crim. Pro. 3.112] envisions. So we would contest that there is no basis [sic] to appoint a third chair at state expense . . . So with two lawyers and a mitigation specialist, we believe that

[1] On November 14, 2014, the trial court granted a motion to declare Keetley indigent for the purposes of costs, finding that it was necessary to incur costs to assist counsel in the proper representation of Keetley. R. 41-42; *see* R. 32-37; R. 38-40.

> would meet due process . . . [w]e just believe that in this situation, the Defendant is represented by two lawyers, and that's what due process allows for."

R. 49; lines 3-8; R. 55, lines 6-8; R. 56, lines 22-25.

Although the elected PD appeared on the motion, she did not object or argue in opposition to the appointment of the PD Office. The trial court denied the motion, later explaining that it denied this request for penalty phase counsel because, at the time, two lawyers represented Keetley. R. 151, lines 3-5.

In June 2016, the State filed a petition for writ of certiorari from the trial court's declaration that Florida's 2016 death penalty statute was unconstitutional. The court declared Keetley to be indigent for appellate purposes and appointed the PD Office to represent Keetley in the certiorari proceeding. R. 362.[2] The PD Office's representation during this interlocutory proceeding was concurrent with Goudie's representation in the preparation of Keetley's defense. After the PD Office accepted the appointment, it transferred responsibility for representation to the Office of the Public Defender for the Tenth Circuit. *See State v. Keetley*, 2D16-2717.

On November 4, 2016, the Second District Court of Appeal denied the State's petition for writ of certiorari. *Id.*

[2] A motion to supplement the record on appeal with the Order Appointing the Public Defender for the Purpose of Appeal entered on June 30, 2016, is filed contemporaneously with this brief.

During the pendency of those certiorari proceedings, the trial court relieved Carr from representation of Keetley based upon emergency medical reasons disclosed during a closed hearing.[3] R. 65; R. 67, ¶ 6; R. 163, lines 17-20.

Carr's departure from the case predicated a second motion to appoint penalty phase counsel for Keetley. *See* R. 66-72. In the motion, Goudie asserted that alone she could not competently represent Keetley in the preparation and potential defense of both phases and that appointment of penalty phase counsel was necessary to provide effective assistance of counsel. R. 67, ¶¶ 6, 8, and 9. The trial court denied the second request for penalty-phase counsel as moot based on its order declaring Florida's death penalty statute unconstitutional. R. 73.

A third (renewed) motion to appoint penalty phase counsel for Keetley was filed on March 27, 2017, after this Court's decisions in *Evans v. State* and *Rosario v. State*, granted the State the authority to proceed with the death penalty. R. 74-81. The JAC relied on its prior written opposition and contended that under Florida law a defendant does not have the right to the appointment of counsel at public expense when represented by retained counsel and that Section 27.52(5)(h), Florida Statutes, and Rule 3.112(e) of the Florida Rules of Criminal Procedure

[3] Mr. Carr died on April 1, 2018.

prevented the court from appointing counsel paid by the state. R. 81; *see* R. 297-301.

On April 24, 2017, over the objection of the JAC, the trial court appointed the PD Office to serve as Keetley' penalty phase counsel. R. 82-88. The trial court rejected the JAC's argument, interpreting Section 27.52(5)(h) and the comments to Rule 3.112(e) as affording the court the discretion to appoint a second attorney to assist an indigent defendant's privately retained counsel where reasons other than the defendant's indigent status justify the appointment. R. 84-87. The court ruled:

> Where, as here, unforeseen circumstances threaten to compromise a defendant's right to the effective assistance of counsel, principles of due process demand that a court have the latitude to appoint an attorney paid for by the state. A contrary reading of section 27.52(5)(h) would yield an untenable result and the Court may not construe this subsection in such a manner.

R. 87-88.

Although plainly on notice of Keetley's third motion for penalty phase counsel and of the hearing on the motion, the Public Defender did not appear at the hearing on the motion or file a response to the relief requested. R. 72; R. 347.

However, on May 15, 2017, twenty days after the entry of the order appointing the PD Office, the PD Office filed a Motion for Reconsideration. R. 89-97. This was the first participation by the PD Office in the protracted efforts by

Goudie to obtain state-funded penalty phase counsel notwithstanding the relief sought potentially implicated the PD Office.

In the Motion for Reconsideration, the PD Office substantially reiterated the JAC's argument, which it had never previously adopted, for the first time asserting the argument on its own behalf. *See* R. 89-97. Acknowledging that the standard of practice for a defendant in a death penalty case is for representation by "at least two lawyers," the PD Office contended that because Keetley's constitutional right to choose private counsel had been served, Florida law barred the appointment of penalty-phase counsel at public expense. R. 96.

During the hearing on the Motion for Reconsideration, the PD Office argued that the office's available resources for investigating and developing mitigation would somehow be detrimental to Keetley. R. 162, lines 21-24. During the hearing, Goudie stated that without the assistance of penalty phase counsel, it would be necessary for her to withdraw from the case entirely. R. 160, line 7 – R. 161, line5.

In the Motion for Reconsideration and during argument to the trial court, the PD Office never suggested that an evidentiary hearing was necessary or that the order appointing the PD Office should be vacated because it was not supported by substantial competent evidence.

The trial court denied the Motion for Reconsideration stating:

> Through no fault of his own, and for emergency medical reasons that are clear on the record, I was forced to relieve Paul Carr's duties. Now [Keetley] has one attorney. That was not the original intent of this case. He always had multiple attorneys. He has been declared indigent for costs by courts prior to me taking over this case. There is no allegation that there are any funds available via his parents or anyone else to retain counsel and that meets the fact of the case and the United States Supreme Court and Florida Supreme Court[']s constant admonition to us that death cases are different.

R. 163, line 17 – R. 164, line 4.

The PD Office filed a petition for writ of certiorari for review of the April 24, 2017 order appointing it as penalty phase counsel. R. 4-14; R. 15-165.

The Second District dismissed the petition on the grounds that the error raised in the petition (and also in a response filed by the State) had not been preserved for review, noting that the Order Appointing the Public Defender rather than the *ore tenus* denial of the Motion for Reconsideration was the order under review. R. 360–362. In pure dicta, the Second District stated that the PD Office had failed to address the element of material injury in the petition, and that under the circumstances of the case, the court would be "hard-pressed to hold that her appointment as co-counsel will result in material injury so as to invoke this court's certiorari jurisdiction." R. 350. This appeal followed.

ARGUMENT

I. NONE OF THE ISSUES ARE APPROPRIATE FOR THE COURT'S DISCRETIONARY JURISDICTION.

The Court's jurisdiction to review decisions of the district courts of appeal is limited and strictly prescribed. *Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980). Florida Constitution, Article V, § 3(b)(3) provides this Court with discretionary jurisdiction to review the decisions of the district court of appeals that expressly affect a class of constitutional or state officers or that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The PD Office seeks review under the authority of the jurisdictional grants.

The issues advanced by the PD Office in the appeal simply do not qualify for the exercise of the Court's discretionary jurisdiction. Moreover, the underlying issue, the propriety of the appointment of the PD Office to assist in representation of an indigent defendant represented by private counsel, was waived in 2016 when the PD Office accepted appointment and undertook representation of Keetley in the prior certiorari proceedings without complaint. Finally, the issue is moot because the Court cannot grant any effective relief given that the trial court discharged the PD Office from the complained of representation on February 5, 2019.

A. The Second District's opinion does not expressly affect a class of constitutional or state officers.

The PD Office and the State urge the Court to review pure dicta in the Second District's decision and for the Court to rule that the appointment of the PD Office as penalty phase counsel in a case where the defendant is represented by privately retained counsel constitutes a per se material injury for the purposes of certiorari jurisdiction. The Second District dismissed the petition on the grounds that none of the issues raised were preserved for its review. The Second District noted that "Even if we were to consider the merits of the Public Defender's arguments, we would be unable to grant her certiorari relief because she has not established one of the jurisdictional prerequisites." R. 349.

Dicta does not have precedential value, because it is not part of the reasoning process. *State ex rel. Biscayne Kennel Club v. Board of Business Reg. of Dep't of Business Reg. of the State of Fla.*, 276 So. 2d 823, 826 (Fla. 1973) (stating that obiter dictum "was not essential to the decision of that court and is without force as precedent"). The dismissal of the petition was based on preservation of error, accordingly, the Second District's observation that no material injury was demonstrated was unnecessary to the resolution of the case and does not have precedential value. Accordingly, this Court's discretionary jurisdiction to review decisions that expressly affect a class of constitutional or state officers is not

implicated here because the Second District's discussion of material injury is dicta, not binding precedent.

B. The Second District's opinion does not does not expressly and directly conflict with *Bailey* and is in accord with controlling precedent.

The Court's conflict jurisdiction arises from Article V, Section 3(b)(3) of the Florida Constitution which allows review of only those District Court decisions that "*expressly and directly* conflic[t] with a decision of another DCA or of the supreme court on the same question of law." Fla. Const. art V, §3(b)(3). By definition, the term "expressly" requires some written representation or expression of the legal grounds supporting the decision under review. This Court defines "expressly" by its ordinary dictionary meaning: "in an express manner." *See State ex rel. Biscayne Kennel Club,* 276 So. 2d at 826. A decision of a District Court is only reviewable if the conflict can be demonstrated from the District Court's opinion. A test of Supreme Court jurisdiction is whether it has been shown from the opinions that the two decisions are irreconcilable. *See Aravena v. Miami-Dade County,* 928 So. 2d 1163 (Fla. 2006); *Crossley v. State,* 596 So. 2d 447 (Fla. 1992).

The PD Office contends that the Second District's opinion conflicts with *Bailey v. Treasure,* 462 So. 2d 537 (Fla. 4th DCA 1985). The different result reached in *Bailey* was the consequence of the particular facts of this case and the decision is not in conflict with the Second District's decision in this case. In

Bailey, during a hearing on a receiver's motion for court approval of a proposed sale contract, the receiver orally raised matters not contained in the written motion without giving any prior notice that the matters would be heard. A few days after the court granted the receiver's relief, Bailey moved for rehearing on the ground that he had insufficient notice of the matters raised for the first time at the hearing. The trial court denied the motion for rehearing, and Bailey petitioned the Fourth Circuit for a writ of certiorari. The *Bailey* court rejected the receiver's argument that *Bailey* did not preserve the issue because he did not raise lack of notice at the hearing, finding that Baily's objection was sufficient to preserve the issue for appeal. The *Bailey* court did not hold that every motion for reconsideration was sufficient to preserve an issue for appeal.

The controlling facts in this case are distinctly different from those in *Bailey*. In this case the Second District declined to consider arguments raised in a motion for reconsideration filed twenty days after the entry of the order, where the PD Office having notice of the relief sought, failed to attend the hearing on the motion and failed to file a response prior to the hearing on the motion.

The Second District's focus on the fact that the Order Appointing the Public Defender rather than the denial of the Motion for Reconsideration was the subject of its review underlines the critical distinction between this case and *Bailey*. The

PD Office did not seek reconsideration of a motion that it had previously opposed, it opposed the motion for the first time in the Motion for Reconsideration.

Here, the PD Office was a mere bystander until twenty days after the court appointed it to serve as penalty phase counsel. It never participated or even sought to adopt the JAC's objection despite having notice of Goudie's repeated requests, which, if granted, could result in its appointment. The Motion for Reconsideration was the very first time the PD Office engaged on the issue, perhaps for the reason that it had previously represented Keetley in an interlocutory appeal and recognized that this prior representation was inconsistent with the JAC's position that Keetley could not obtain the services of a publicly funded lawyer while represented by a private lawyer. In seeking reconsideration, the PD Office sought to chime in on an issue that PD Office had long elected to ignore. For reasons not apparent from the record, upon its appointment as penalty phase counsel, the PD Office determined that it was opposed to the appointment after all.

Bailey, unlike the PD Office, did not rest on his rights. He opposed the motion for a proposed sale contract that was withdrawn prior to the hearing and at the hearing was confronted with requests by the receiver that were not the subject of a written motion and had not been noticed for the hearing. Bailey's objections at the hearing did include the lack of sufficient notice, however, he raised an

additional objection on that basis in a motion for rehearing filed a few days after the hearing and prior to the entry of the order granting relief.

Accordingly, there is no direct and express conflict because the cases are factually distinct.

C. The PD Office's acceptance of the appointment to defend Keetley in the State's petition for writ of certiorari precludes it from challenging appointment as penalty phase counsel.

The PD Office's fails to support its argument that it makes a difference that after it was appointed to represent Keetley in the State's petition for certiorari proceedings, the representation was transferred to another public defender's office with any reasoned basis. If as the PD Office urges, the trial court could not appoint the PD Office to represent Keetley for the reason that Keetley had privately retained counsel, then the no Public Defender could properly represent Keetley. Moreover, PD Office's argument that the representation was not concurrent with the representation of Keetley by Goudie is made up out of whole cloth. Much like the death penalty phase of a capital trial, the interlocutory appeal was a distinct proceeding in the same case. Goudie continued to represent Keetley at the same time Keetley was represented by the public defender. The comparison to a post-judgment appeal is inapt. But the PD Office accepted the appointment without objection. Accordingly, the PD Office is precluded from contending that is would

be materially harmed by representing Keetley concurrently with privately retained counsel.

D. The appeal is moot.

The definition of when a case or issue is moot and the three exceptions to when an otherwise moot case will not be dismissed was explained in *Godwin v. Stat*e, 593 So. 2d 211 (Fla. 1992):

> An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. *Dehoff v. Imeson*, 153 Fla. 553, 15 So. 2d 258 (1943). A case is "moot" when it presents no actual controversy or when the issues have ceased to exist. Black's Law Dictionary 1008 (6th ed. 1990). A moot case generally will be dismissed. Florida courts recognize at least three instances in which an otherwise moot case will not be dismissed. The first two were stated in *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984), where we said: "[i]t is well settled that mootness does not destroy an appellate court's jurisdiction . . . when the questions raised are of great public importance or are likely to recur." Third, an otherwise moot case will not be dismissed if collateral legal consequences that affect the rights of a party flow from the issue to be determined. *See Keezel v. State*, 358 So. 2d 247 (Fla. 4th DCA 1978).

Id. (alteration in original).

The State and the PD Office do not contend that there is any exception to the mootness doctrine that would apply to the Second District's ruling that the PD Office failed to preserve any error for review. The challenge to the dismissal was

rendered moot upon the entry of the order by the trial court discharging the PD Office. That inescapable fact should cause the Court to dismiss the appeal.

The State and the PD Office contend that the exceptions to the mootness doctrine allow review of the issue whether a trial court may appoint a public defender as penalty phase counsel when the defendant is represented by privately retained counsel. The State expressly recognizes that the issue was not reached by the Second District and urges that the case be remanded to the Second District for determination of the issue because this Court may not review this issue for the first time on appeal.

However, the arguments that the issue is one of great public importance or likely to reoccur are only summarily raised and lack merit. The argument that the case is not moot because collateral consequences flow from the appointment of a public defender is silly. The collateral consequence relied upon, the possibility that Keetley will be subject to a lien based on the PD Office's appointment ignores that the entitlement to the lien arose from the appointment of the PD Office to represent Keetley in the State's certiorari petition. In other words, Keetley is already subject to a lien based upon the PD Office's appointment.

II. THE SECOND DISTRICT PROPERLY DISMISSED THE PETITION.

The case came before the Second District on a petition for writ of certiorari. Use of the writ of common law certiorari has always been narrowly applied.

Citizens Property Insurance Corp. v. San Perdido Ass'n, 104 So. 3d 344, 356 (Fla. 2012). Very few categories of non-final orders qualify for the use of this extraordinary writ. *Id.* at 351-52. A writ of certiorari is not available simply because "strong policy reasons support interlocutory review." *Id.* at 353.

An appellate court can grant a certiorari petition only where there has been "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case, (3) that cannot be corrected on postjudgment appeal." *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) (quoting *Reeves v. Fleetwood Homes of Fla. Inc.*, 889 So. 2d 812, 822 (Fla. 2004)). The threshold jurisdictional question is whether there is irreparable harm which cannot be corrected on appeal. *Citizens Prop. Ins. Corp.*, 104 So. 3d at 351. Accordingly, an appellate court must first address irreparable harm. *Id.*

The costs, time, and effort in defending litigation do not constitute irreparable harm. *Rodriguez v. Miami-Dade County*, 117 So. 3d 400, 405 (Fla. 2013). This Court has emphasized that "equating the defense of a lawsuit with the type of irreparable harm necessary for the threshold decision to invoke certiorari has the potential to eviscerate any limitations on the use of this common law writ . . ." *Citizens Prop. Ins. Corp*., 104 So. 3d at 356. Thus, the use of certiorari review is improper in such an instance. *Rodriguez*, 117 So. 3d at 405.

If the requirement of irreparable harm is met, the appellate court must determine whether the decision below constitutes a departure from the essential requirements of the law, which requires "an inherent illegality or irregularity, and an abuse of judicial power, or act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Haines City Community Development v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995). "Certiorari jurisdiction cannot be used to create new law where the decision below recognizes the correct general law and applies the correct law to a new set of facts to which it has not previously applied. In such a situation, the law at issue is not a clearly established principle of law." *Nader v. Department of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012). Certiorari jurisdiction is not available to redress claimed error by the court below in statutory interpretation unless there has been a departure from the essential requirements of law. *Citizens Prop. Ins. Corp.*, 104 So. 3d at 356. Certiorari review is not available to redress mere legal error. *Id.* at 352.

The State acknowledges that the Court should not address the merits of the certiorari petition. State brief at 10. Recognizing that the Second District's decision is not a decision on the merits, the State seeks a remand for the Second District to "consider in the first instance whether the trial court departed from the

essential requirements of law" by appointing the PD Office as penalty phase counsel. *Id.* The absurdity of requiring the Second District to expend judicial labor this on issue, in light of the trial court's February 5, 2019 order discharging the PD Office, underscores that there is no justiciable issue before this Court.

Preservation of error for appellate review requires the party to make a timely, contemporaneous objection at the time of the alleged error. *See Ails v. Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010); *Overton v. State*, 976 So. 2d 536, 547 (Fla. 2007); *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005). In addition, for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection motion below. *Harrell*, 894 So. 2d at 940; *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

The PD Office and the State contend that the Motion for Reconsideration preserved the PD Office's opposition to appointment as penalty-phase counsel for appellate review. But the Petition is not from the denial of the Motion for Reconsideration, rather, it is from the order appointing the PD Office as penalty

phase counsel. The PD Office cannot rely on the JAC's opposition to the motions to appoint penalty phase counsel because the PD Office did not attempt to adopt the JAC's position. *See Johnson v. State*, 348 So. 2d 646, 647 (Fla. 3d DCA 1977). In fact, the PD Office did not even attend the hearing on Keetley's third request for penalty phase counsel. The request for reconsideration of an issue that the PD Office had entirely disregarded, made twenty days after the entry of the order appointing it to represent Keetley in the penalty phase does not qualify as a timely, contemporaneous objection.

Without question, a petitioner must raise the particular issue to be determined in the lower court in order to be entitled to relief. *See Tillman*, 471 So. 2d at 35; *Firstservice Residential Fla., Inc. v. Rodriguez*, 261 So. 3d 674, 676 (Fla. 5th DCA 2018). The cases relied upon by the PD Office and the State in support of the claim that the PD Office sufficiently preserved error for the Second District's review mostly concern evidentiary issues at trial which are inapposite to the issue in this case. As discussed above, *Bailey v. Treasure* is factually distinguishable. Any suggestion that *Bailey* holds that raising an issue for the first time in a motion for reconsideration automatically preserves an issue for appeal lacks merit. The District Courts cannot overrule this Courts well-established precedent requiring a timely, contemporaneous objection to preserve an issue for

appellate review. *See Ails*, 29 So. 3d at 1109; *Overton*, 976 So. 2d at 547; *Harrell*, 894 So. 2d at 940.

The PD Office did not contend that it would suffer material harm from representing Keetley in the trial court, and did not address this threshold requirement for certiorari relief in its briefing to the Second District. During the appellate proceedings, however, the State has urged irreparable harm arising from the supposition that as penalty phase counsel the PD Office was subordinate to private counsel and that private counsel would usurp the PD Office's authority to manage and direct its personnel and the conduct of the representation. State Brief at 7-9. Similarly, the PD Office now argues that its appointment as penalty phase counsel diminished its authority over the management of the office and the conduct of the office's affairs because, Florida Rule of Criminal Procedure 3.112(e) grants the PD Office authority to designate lead and co-counsel in capital cases. PD Office brief at 12-13.

This theory of material harm, is contrary to the position of the PD Office in the trial court, where the PD Office's expressed concern that its appointment would be disruptive and prejudicial to Keetley's existing representation: "Obviously the Office of the Public Defender have our own mitigation, our own investigators and that would disrupt what has already been done by Ms. Goudie." R. 162, lines 21-

14. Accordingly, the theory of material harm argued to this Court, is undermined by the PD Office's argument to the trial court and was not preserved because it was not advanced in the initial certiorari petition.

Additionally, the PD Office did not raise any challenge to the sufficiency of the evidence in the trial court. Its attempt to raise the issue for the first time in its reply brief in the certiorari proceedings did not preserve the issue for review. See *First Call Ventures, LLC v. Nationwide Relocation Services, Inc.*, 127 So. 3d 691, 693 (Fla. 4th DCA). Moreover, this Court need not consider PD Office's argument in Issue IV regarding lack of substantial competent evidence in the trial court for the same reason.

The PD Office's assertion that "[t]he District Court could not, and therefore did not, uphold the trial court's order" on the basis of the record evidence is, at best, disingenuous. PD Brief at 27. The Second District never reached the issue because, as discussed, the PD Office failed to preserve this claim of error for appellate review.

CONCLUSION

This Court should determine that the exercise of discretionary jurisdiction in this case was improvidently granted and dismiss the case.

CERTIFICATE OF SERVICE

I Certify that a true and correct copy of this amended answer brief has been furnished by electronic service though the Florida Courts E-Filing Portal on this 29th day of April 23, 2019 to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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