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IN THE SUPREME COURT OF FLORIDA

WILLIE THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-1299
4th DCA Case No. 4D11-4265

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RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case, but adds the following facts from the opinion. The decision stated the following:

> Willie Thomas appeals his final judgment and sentence adjudicating him guilty of armed burglary of a dwelling, aggravated battery with a deadly weapon, and possession of cocaine. Thomas argues that we should reverse his conviction and sentence because the trial court abandoned its neutral role during the trial, including giving him incorrect legal advice, and incorrectly applied the excited utterance exception to the hearsay rule. We affirm on all grounds and write only to address the application of excited utterance exception to one of the trial court's evidentiary rulings.
>
> The testimony at issue is an eyewitness's description of an altercation between Thomas and the victim, during which the victim yelled out "he has a knife, he has a knife." The trial court allowed the eyewitness to testify regarding what she heard the victim say. Thomas asserts that the trial court erroneously admitted this testimony as an excited utterance.
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> An appellate court reviews evidentiary rulings for abuse of discretion, though the rules of evidence limit this discretion. Padgett v. State, 73 So. 3d 902, 904 (Fla. 4th DCA 2011). A trial court's determination regarding whether testimony is hearsay is reviewed *de novo*. *Id.*
>
> Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2008). Hearsay is inadmissible unless it falls within an exception. §§ 90.802-.803, Fla. Stat. (2008). An excited utterance, or "[a] statement ... relating to a startling event or condition made while the

> declarant [is] under the stress of excitement caused by the event or condition," is a hearsay exception. § 90.803(2), Fla. Stat. (2008). Courts have interpreted the statute as requiring three elements for an excited utterance to be admissible: "(1) there must have been an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the startling event." Mariano v. State, 933 So. 2d 111, 115 (Fla. 4th DCA 2006) (quoting Stoll v. State, 762 So. 2d 870, 873 (Fla. 2000)).
>
> The party seeking to qualify a statement as an excited utterance must lay proper foundation for its admission. Mariano, 933 So. 2d at 115. Here, the witness testified that she heard a loud noise coming from the patio late at night. She rushed outside to find a stranger fighting with the victim and she joined the struggle. During the altercation, the victim exclaimed, "He has a knife, he has a knife." This testimony establishes that all three requirements were met, since a home invasion constitutes a startling event, the statement was made at a time the struggle was in progress, and the person who made the statement was being attacked by a stranger holding a knife. On the testimony presented by the eyewitness, the trial court correctly ruled that the excited utterance exception applied to the eyewitness's statement.

Thomas v. State of Florida, 38 Fla. L. Weekly D1069 (Fla. 4th DCA May 15, 2013).

SUMMARY OF THE ARGUMENT

The order of the district court is not in direct and express conflict with the decision cited by Petitioner. Petitioner has failed to show that this Court has jurisdiction to review the opinion of the district court. This Court should decline to review this cause on the merits.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL NOT DOES NOT CONFLICT WITH PHILLIPS V. STATE, 816 So. 2d 161 (FLA. 3RD DCA 2002).

The opinion of the Fourth District in this case is not in direct and express conflict with decision cited by Petitioner.

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition).

This Court in Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975) made it clear that its "jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law to produce a different result in a case which conflicts with a rule previously

announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. In this second situation, the facts of the case are of the utmost importance." See also Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction").

In Phillips, the trial court allowed a victim who was shot in the leg to testify that **although the victim did not see who shot her** several unidentified bystanders told her that Phillips was the shooter. Id. Then a detective who arrived on the scene approximately fifteen minutes after the shooting was allowed to testify that he interviewed a woman who appeared "kind of in shock, a little excited" and had an attitude of disbelief that she witnessed a shooting. Id. "Detective Harrell's description of Ms. Burns some thirty minutes after the shooting was the sole evidence pertaining to her state of mind" and over hearsay objection the detective testified that Ms. Burns told him that she saw Phillips pull a gun. Id. The Court held that it was error to admit the statements of the victim that came from unidentified bystanders as excited utterances because there was no evidence proffered regarding their state of mind. Id.

Unlike Phillips, there was record evidence of the declarant's state of mind. In the present case, it was explained in the opinion:

> Here, the witness testified that she heard a loud noise coming from the patio late at night. She rushed outside to find a stranger fighting with the victim **and she joined the struggle**. During the altercation, the victim exclaimed, "He has a knife, he has a knife." This testimony establishes that all three requirements were met, **since a home invasion constitutes a startling event, the statement was made at a time the struggle was in progress, and the person who made the statement was being attacked by a stranger holding a knife.**

Thus, no conflict exists with the the decision of Phillips v. State, 816 So. 2d 161 (Fla. 3rd DCA 2002). This being so, this Court should decline jurisdiction in this case.

CONCLUSION

Since there is no conflict, this Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was sent by U.S. Mail to Willie Thomas, DC # 654663, Apalachee Correctional Institution, 35 Apalachee Drive, Sneads, FL 32460 on August 12, 2013.

__/s/_____
Monique Rolla
Counsel for Respondent

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

__/s/_____
Monique Rolla
Counsel for Respondent