A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

June 25, 2019

CASE NO.: 4D19-0945, 4D19-1021
L.T. No.: 312010CF000462A,
312010CF000427

CHRISTOPHER RUDOLPH BROWN v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that case numbers 4D19-945 and 4D19-1021 are consolidated for the purpose of consideration by the same panel. Further,

ORDERED that the petition for writ of habeas corpus filed in 4D19-945 (as to lower case number 2010CF000462) is denied. Further,

ORDERED that the petition alleging ineffective assistance of appellate counsel filed in 4D19-1021 (as to lower case number 2010CF000427) is denied.

MAY, KLINGENSMITH and KUNTZ, JJ., concur.

Served:

cc: Attorney General-W.P.B.
State Attorney-I.R.
State Attorney-Broward
Luke Robert Napodano
Clerk Indian River
Clerk Broward
Christopher Rudolph Brown
Hon. Cynthia L. Cox
Hon. Barbara Anne Mccarthy

kk

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

DISTRICT COURT OF APPEAL [SAT CITO SI RECTE] FOURTH DISTRICT STATE OF FLORIDA

B

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2014

CHRISTOPHER RUDOLPH BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D12-4591

[August 14, 2014]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Robert L. Pegg, Judge; L.T. Case No. 312010CF000462A.

Carey Haughwout, Public Defender, and Peggy Natale, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Luke R. Napodano, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

DAMOORGIAN, C.J., TAYLOR and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Dorian K. Damoorgian, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE:	September 12, 2014
CASE NO.:	**12-4591**
COUNTY OF ORIGIN:	**Indian River**
T.C. CASE NO.:	**312010CF000462A**

APPEALS
SEP 12 2014
RECEIVED

STYLE: **CHRISTOPHER RUDOLPH BROWN** **v.** **STATE OF FLORIDA**

DISTRICT COURT OF APPEAL FOURTH DISTRICT SAT CITO SI RECTE STATE OF FLORIDA

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

Served:

cc: Public Defender-P. B. Luke Robert Napodano
Attorney General-W. P. B.
Peggy Natale
State Attorney-I. R.
Clerk Indian River

tw

C

Supreme Court of Florida

THURSDAY, SEPTEMBER 19, 2019

CASE NO.: SC19-1582
Lower Tribunal No(s).:
4D19-1021; 312010CF000427AXXXXX

CHRISTOPHER R. BROWN vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. *See Wells v. State*, 132 So. 3d 1110 (Fla. 2014); *Jackson v. State*, 926 So. 2d 1262 (Fla. 2006); *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987); *Dodi Publ'g Co. v. Editorial Am. S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

td
Served:

CELIA TERENZIO
CHRISTOPHER R. BROWN
HON. BARBARA ANNE MCCARTHY, JUDGE
HON. JEFFREY R. SMITH, CLERK
HON. LONN WEISSBLUM, CLERK

Supreme Court of Florida

THURSDAY, SEPTEMBER 19, 2019

CASE NO.: SC19-1585
Lower Tribunal No(s).:
4D19-945; 312010CF000462AXXXXX

CHRISTOPHER R. BROWN vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. *See Wells v. State*, 132 So. 3d 1110 (Fla. 2014); *Jackson v. State*, 926 So. 2d 1262 (Fla. 2006); *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987); *Dodi Publ'g Co. v. Editorial Am. S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

td
Served:

CELIA TERENZIO
CHRISTOPHER R. BROWN
HON. JEFFREY R. SMITH, CLERK
HON. BARBARA ANNE MCCARTHY, JUDGE
HON. LONN WEISSBLUM, CLERK

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CHRISTOPHER RUDOLPH BROWN,

Petitioner,

VS

CASE NO.: 4D19-0945
(To Be Supplied By CLERK)

STATE OF FLORIDA, et.AL;
MARK INCH, Secretary;
FLA. DEPT. OF CORRECTIONS.

Respondents

LEGAL MAIL
Provided to
Wakulla CI

MAR 19 2019

FOR MAILING

CRB

PETITION FOR WRIT OF HABEAS CORPUS RELIEF

COMES NOW, the undersigned Petitioner, Christopher Rudolph Brown, pro-se, procedurally correct in the interests of correcting an apparent manifest injustice which has occurred in the present case. Pursuant to Article I, §§§§ 2, 9, 13, and 16, Florida Constitution, (2018); Section 79.01, Fla. Stat., (2018); Rule 1.630(d)(4), Fla. R. Civ. P. (2018); Rule 9.030(b)(3) and 9.100(a), Fla. R. App. P. (2018); and the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution, (2018); herein. In support of the petition, the Petitioner will aver the following facts:

JURISDICTION

This Honorable Court has jurisdiction to entertain and issue the instant petition for extra-ordinary writ of habeas corpus relief in this case. Pursuant to Article I, §§§§ 2, 9, 13, and 16, of the Florida Constitution, Article 4, (b)(2), of the Florida Constitution, (2018); the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution, (2018); Section 79.01, Florida Statutes, (2018); Rule 1.630(d)(4), Fla. R. Civ. P. (2018); Rules 9.030(b)(3) and 9.100(a), Fla. R. App. P. (2018); herein:

STANDARD OF REVIEW

The standard of review applicable in the present case is the manifest injustice as a results of the disparate treatment of petitioner and his co-defendant, under which co-defendant's judgment of conviction and sentence for trafficking in 28 grams of cocaine and perjury was reversed on appeal based on holding that trial court erred in excluding prior exculpatory testimony from a witness at a civil forfeiture hearing in this case.

NATURE OF RELIEF

The nature of the relief sought from the instant petition is

an order to show cause directing the Respondents to show cause as to the legality of the Petitioner's detention in this case, in accordance with the Florida Statutes, §79.01, and Rule 1.630(d)(4) of the Fla. R. Civ. P. (2018), herein.

STATEMENT OF THE CASE AND FACTS

On October 12th, 2012, the Petitioner was convicted after a jury trial for the criminal offenses of trafficking in 28 grams or more of cocaine and perjury. In the Circuit Court of the Nineteenth Judicial Circuit Court, In And For Indian River County, Florida. The case was styled as case number: 312010-CF-000462-A.

On November 20th, 2012, the Petitioner was sentenced to a term of natural life as habitual felony offender on count 1; and to a term of five (5) years imprisonment as to count 2. Both to be ran concurrent herein. Both terms to be served within the Florida Department of Corrections.

Petitioner filed a timely notice of appeal to this Honorable Court which was (per curiam) affirmed on August 14th, 2014. Petitioner has filed timely motions for postconviction relief with the trial court which were summarily denied without a ruling on the merits

without record attachments in accord with proper due process of law herein. Which, were also (per curiam) affirmed by this court.

This petition is being filed in good faith, in accordance with the Supreme Court of Florida in Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965)("Appellate courts are vested with the power to reconsider and correct rulings that have become "Law of the Case", where adherence to the ruling would result in a manifest injustice.")

Such, as in the present case.

OATH

Petitioner declares that no other remedy exists to effectuate the relief of which he is entitled in this case, as a matter of law. Than a writ of habeas corpus as it is undisputable from the facts in this case, that he is being unlawfully detained as a direct results of an illegal conviction herein.

ARGUMENT

Petitioner argues that he is entitled to relief in the form of writ of habeas corpus relief herein, as an direct results of the disparate treatment of himself and his co-defendant, under which co-defendant's conviction and sentence for trafficking in 28 grams or more of cocaine and for perjury was reversed

on appeal based on holding that the trial court abused it's discretion in excluding Ms. James's former testimony at his trial. He asserts that her testimony was admissible under section 90.804(2)(a), because the sheriff's office, through the assistant state attorney's cross-examination, had an opportunity and similar motive to show that Ms. James's testimony was not trustworthy and to establish that the seized money belonged to petitioner and was intended for the purchase of narcotics.

The facts in this record plainly reveals the trial court's ruling in this case, resulted in manifest injustice warranting grant of habeas corpus relief here. Since, failing to grant the Petitioner the same relief afforded to co-defendant in this case, under virtually identical circumstances would be an incongruous and manifestly unfair result in the case sub judice.

Where, the Petitioner and his co-defendant, Mr. Aisto Jovan Wyatt, proceeded to jury trial as a joint trial. Based upon the same defense that neither he or his co-defendant were aware of the money that found on the back seat of the car in which he was a passenger. And that the $16,000.00 dollars was not his money, but belong to the owner of the vehicle, a Ms.

Rashonda James, and was not for the purposes of purchasing narcotics, alleged by the Indian River County Sheriff's Office, and the State herein.

Notwithstanding, the fact that the Indian River County Sheriff's Office initiated forfeiture proceeding for seized money naming Petitioner, Wyatt, and Ms. James, jointly as claimants of the money. However, the trial court found that there was not sufficient probable cause for forfeiture and ordered that the money be returned to Ms. James. Which, never occurred for this same money used at petitioner's trial to ascertain his conviction for trafficking in 28 grams or more of cocaine and perjury herein. This was fundamental error.

This error can not be deemed harmless error, because it deprived Petitioner of his constitutional rights to a fair trial in this case. Further, this Honorable Court must conclude in the present case, as it concluded in Wyatt v. State, 4D12-4377 (May 20, 2015); that the exclusion of Ms. James's testimony was not harmless. The state, as the beneficiary of the error, has not proven beyond a reasonable doubt that the error in excluding exculpatory testimony about the ownership and

intended use of money did not contribute to the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

No drugs were found in the car, and the state relied heavily upon the # 16,000.00 in currency seized from the car to support it's theory that Petitioner and co-defendant Wyatt intended to purchase cocaine from Leakes. At the forfeiture hearing, Ms. James claimed ownership of the currency and provided an explanation for it's presence in the car. Failure to allow the jury to hear this testimony deprived the jury of critical evidence in determining petitioner's guilt in this case. See Garcia v. State, 816 So. 2d 554 (Fla. 2002).

In 'Garcia' the Florida Supreme Court reversed the double murder convictions of a defendant who unsuccessfully sought to introduce the prior testimony of his co-defendant. Id. at 565-66. The co-defendant who was tried first in a severed trial, testified and confessed to committing the murders alone; he denied that the defendant was involved. Because the co-defendant invoked his Fifth Amendment right during Garcia's trial and refused to testify, Garcia attempted to introduce the co-defendant's trial testimony under section 90.804(2)(a), as former testimony

of an unavailable witness. The trial court denied the request. On appeal, the Florida Supreme Court reversed, concluding that the trial court erred in excluding the former testimony.

Just as in the present case, where both the Indian River County Sheriff's office and the assistant state attorney, from the same state attorney's office that prosecuted petitioner in this case, represented the Sheriff's office at the forfeiture hearing. Both shared a similar motive in the petitioner's trial, which was to establish probable cause that the money seized from the car was intended to be used to purchase narcotics. He cross-examined Ms. James at the forfeiture hearing.

As the Garcia Court went on to point out, however, that "section 90.804 (2)(a) does not require an 'identical motive but only a 'similar motive.'" In this case, as in Garcia's case, in both instances, the motive was "to discredit the witness's testimony and show it to be not worthy of belief." Id. at 565. The court stated:

Moreover, the failure to allow the jury to hear this testimony deprived the jury of important additional evidence that could have been critical to assessing Garcia's guilt. Indeed, where Garcia's alleged involvement in the crimes hangs on the testimony

of one individual the jury was entitled to consider the testimony of the co-defendant, who took the stand in his own trial and specifically testified that Garcia was not involved in these murders. (emphasis supplied)

In the present case, to prevent the jury from hearing the prior recorded testimony of Ms. Rashonda James, which the State subjected to cross-examination at the forfeiture hearing. At trial, petitioner sought to introduce a transcript of Ms. James's testimony at the forfeiture hearing, as former testimony of an unavailable witness under section 90.804(2)(a), Florida Statutes. The State objected, however, both the state and trial counsel stipulated that Ms. James was an unavailable witness because, if called to testify, she intended to exercise her Fifth Amendment right against self-incrimination. The trial court, however, sustained the state's objection to admission of Ms. James former testimony and excluded it.

The standard of review for a trial court's admission of evidence is abuse of discretion. Padgett v. State, 75 So. 3d 902,904 (Fla. 4th DCA 2011). The trial court's discretion, however, is limited by the rules of evidence. Id.

Section 90.804(2), Florida Statutes (2010) provides an exception to

the hearsay rule, when the declarant is unavailable, for:

(a) Former testimony.-- Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

A declarant is unavailable to testify if the declarant asserts his or her Fifth Amendment right against self-incrimination, as Ms. James did in this case. See Roussonicolos v. State, 59 So. 3d 238, 240 (Fla. 4th DCA 2011) (citing Henyard v. State, 992 So. 2d 120, 126 n.3 (Fla. 2008). As the state stipulated, Ms. James was unavailable to testify at the petitioner's trial.

In this case, as in the cases of Podgett, Roussonicolos, Henyard, and Garcia, this Honorable Court should similarly find that the assistant state attorney, acting on behalf of the sheriff's office, had an opportunity to cross-examine Ms. James at the forfeiture hearing. And the state attorney's office had a "similar motive" at both the trial and forfeiture hearing, specifically "to discredit the witness's tes-

timony and show it to be not worthy of belief," given the exculpatory nature of Ms. James's testimony, i.e., the currency did not belong to the petitioner and was not to be used to purchase drugs. . . . Accordingly, based on these facts and circumstances, the trial court erred in excluding Ms. James's former testimony.

And therefore, in accord with the appropriate standards of due process of law correct the instant manifest injustice of an illegal conviction. Where, this currency was introduced at petitioner's trial and served as the sole bases for his conviction in this case. See Johnson v. State, 226 So. 3d 908 (Fla. App. 4 Dist. 2017); wherein this Honorable Court expressly held:

"This Court has "inherent authority to grant a writ of habeas corpus to avoid incongruous and manifestly unfair results." Stephens v. State, 974 So. 2d 455, 457 (Fla. 2d DCA 2008). Disparate treatment of similarly situated co-defendants can result in manifest injustice, warranting habeas relief. See, e.g., McKay v. State, 988 So. 2d 51 (Fla. 3d DCA 2008); see also, Hragger v. State, 36 So. 3d 883 (Fla. 2d DCA 2010)(reversing a sentence on appeal from the denial of a postconviction motion, finding that failure to do so would result in manifest injustice where the same relief was granted to a co-defendant and others); . . . .

Harris v. State, 12 So. 3d 764, 765 (Fla. 3d DCA 2008) ("recognizing that "disparate treatment of co-defendants can result in manifest injustice," although "inconsistent decisions in separate unrelated case do not constitute disparate treatment.")

To give relief to one co-defendant but deny another co-defendant the same relief under virtually identical circumstances "is a manifest injustice that does not promote-in fact, it corrodes uniformity in the decisions of this court." Stephens, 974 So. 2d at 457.

Such, as in the present case, which presents this Honorable Court with the uncommon and extraordinary circumstances, in which it should exercise it's authority to grant the instant petition for writ of habeas corpus. As the facts in this case presents one of those rare circumstances, since, failing to grant petitioner the same relief afforded to Wyatt, under virtually identical circumstances, would be an "incongruous and manifestly unfair" result herein. Id. at 457. See Pierre v. State, 43 Fla. L. Weekly D298 (Fla. 4th DCA 2018).

Respectfully Submitted,

Christopher R. Braun

Petitioner

OATH

Under the penalties of perjury, pursuant to section 92.525 Fla. Statu, (2018). I declare that I have read the instant petition and the factual matters and issues of law contained therein is true and correct.

3 / 19 / 2019
Executed

Christopher R. Brown
Petitioner

CERTIFICATE OF SERVICE

I CERTIFY, that a true copy of the foregoing petition has been mailed to: Clerk of the court, J.R. Smith, P.O. Box 1028, Vero Beach, Fla. 32961-1028; Clerk of Court 110 South Tamarid Ave. West Palm Beach, Fla. 33401 The office of the Attorney General, 1515 N. Flagler Dr. #9 West Palm Beach Fla. 33401 - 3432 on this 19 day of, March, 2019.

Christopher R. Brown
Petitioner

E

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CHRISTOPHER RUDOLPH BROWN,

Petitioner,

VS.

STATE OF FLORIDA,

Respondent.

CASE NO.: 4DCA-19-1021
(To Be Supplied By Clerk)
DCA NO.: 4D13-4516
L.T. NO.: 31-2010-CF-000427

LEGAL MAIL
Provided to
Wakulla CI

APR 04 2019

FOR MAILING

CRB

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the undersigned Petitioner, Christopher Rudolph Brown, pro-se, procedurally correct in the interests of correcting an apparent fundamental error which amounts to a manifest injustice. And also, constitutes ineffective assistance of appellate counsel in this case. Pursuant to Rule 9.141(d)(5), Fla. R. App. P. (2014); Article I, § 2, 9, and 16, Florida Constitution, (2018); and 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution, (2018), herein.

In support of this petition allege ineffective assistance of appellate counsel, the Petitioner will aver the following facts:

JURISDICTION

This Honorable Court has jurisdiction to entertain and issue the instant petition in this case. Pursuant to Florida Constitution, Article I, §§§ 2, 9, and 16, (2018); the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution, (2018); and Rules 9.100(a); and 9.141 (d)(5) Fla. R. App. P. (2014), herein.

STATEMENT OF THE CASE AND FACTS

On November 8th, 2013, Petitioner was convicted after a jury trial for the criminal offense of R.I.C.O. in violations of his constitutional right to proper due process in this case.

On November 13th, 2013, the trial court sentenced Petitioner to Life imprisonment as habitual offender.

On April 15th, 2015, in case number: 4D13-4516, this Honorable Court per curiam (affirmed) the Petitioner's appeal in this case. As a direct results of appellate counsel's failure to raise an apparent from the face of the record fundamental error here.

The instant petition is timely and being filed in good faith in the interests of justice; to correct an apparent manifest injustice in this case. Pursuant to Rule 9.141 (d)(5), Fla. R. App. P. (2018).

ARGUMENT

The petitioner petition this Honorable Court for a writ of habeas corpus, alleging ineffective assistance of appellate counsel pursuant to Florida Rule of Appellate Procedure 9.141(d)(5); and Pierre v. State, 43 Fla. L. Weekly D298 (Fla. App. 4 Dist. 2018); in this case. The petitioner is arguing it was ineffective assistance of appellate counsel in this case. As a direct results of appellate counsel's failure to raise the meritorious issue of the apparent abuse of the trial court's discretion in excluding Ms. Rashonda James's former exculpatory testimony at his trial, in this case.

This exculpatory testimony of Ms. James was critical to his defense against the R.I.C.O. charge in the case sub judice. As Ms. James's $16,000.00 dollars was the sole evidence used against the petitioner as evidence of his intent. This was fundamental error and a manifest injustice in this case, where trial court ordered the 16,000.00 dollars be returned to Ms. James, by the Indian River County Sheriff's Office.

Since, there was insufficient probable cause for forfeiture, as the money in question was never intended for the purchasing of as alleged by the State, and the Indian River County Sheriff's

Office in this case.

Here, the petitioner is arguing a fundamental error and manifest injustice has occurred in this case. Because his appellate counsel failed to raise the meritorious and intrinsic issue about the 16,000.00 dollars used at his R.I.C.O. trial to convict him was established at the forfeiture hearing not to belong to him. Nor, did he have any Knowledge of this money prior to it being found on backseat of the vehicle in which he was passenger.

An argument which his co-defendant's appellate counsel successfully argued on appeal. See Wyatt v. State, 4 D12-4377 (May 20th, 2015). Here, the petitioner and the co-defendant were convicted of trafficking in 28grams or more of cocaine and perjury in case number: 312010-CF-000462-A, following a joint trial. This Court affirmed the petitioner's convictions on direct appeal. Brown v. State, 162 So.3d 1076 (Fla. App. 4 Dist. 2015)

However, this court reversed the co-defendant's conviction because the his defense was that neither he or the petitioner were aware of the money that was found on the backseat of the car in which he was a passenger. And that the $16,000.00 dollar was not his money, but belong to the owner of the vehicle, Ms. James, and

was not for the purposes of purchasing narcotics, as alleged by the Indian River County Sheriff's Office and the State.

Notwithstanding, the fact that the Indian River County Sheriff's Office initiated forfeiture proceeding for seized money named Petitioner, Wyatt, and Ms. James, jointly as claimants of the money. However, the trial court found that there was not sufficient probable cause for forfeiture and ordered that the money be returned to Ms. James.

Which, was never done by the Indian River County Sheriff's Office in this case. Since, this same money was used by the State to ascertain petitioner's conviction for R.I.C.O. this was fundamental error and manifest injustice in the present case. This error can not be deemed harmless error, because it deprived Petitioner of his constitutional right to a fair trial and an correct appellate review in this case.

In the present case, as 'in 'Pierre' and Johnson v. State, 226 So. 3d 908 (Fla. App. 4 Dist. 2017); based on the co-defendant's successful appeal, the petitioner contends that he is entitled to habeas relief because his appellate counsel did not raise the argument that the prosecutor improperly used this $16,000.00 dollars which was the property of Ms. James, as proof of intent and invited the jury to convict the

petitioner solely on the fact that he was purportedly in possession of such a large sum of money and drugs were mentioned in this case. See Johnson v. State, 226 So. 3d 908 (Fla. App. 4 Dist. 2017).

In 'Johnson' the Fourth District Court of Appeal expressly held: "We agree with the defendant's argument. As we recently stated in 'Johnson,'

This Court has 'inherent authority to grant a writ of habeas corpus to avoid incongruous and manifestly unfair results. Relief may be granted even on a successive petition or claim where failing to do so would result in manifest injustice.

Disparate treatment of similarly situated co-defendants can result in manifest injustice, warranting habeas relief. To give relief to one co-defendant but deny another co-defendant the same relief under virtually identical circumstances is a manifest injustice that does not promote 'in fact, it corrodes - uniformity in the decisions of this court. Id. at 910-11 (internal citations and quotations marks omitted)."

Such, as in this case, where had petitioner's appellate counsel argued as his co-defendant's appellate counsel herein, the out come of this direct appeal would most certainly been different in the case sub judice.

NATURE OF THE RELIEF SOUGHT

That based upon the facts in the instant record that this Honorable Court will proper afford the Petitioner the appropriate due process of law in this case, by reversing and remanding it's previous opinion herein. And remand for a new trial in this case.

Respectfully Submitted,

Christopher R. Brown
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true copy of the foregoing petition has been mailed to:

Clerk of the Court
110 South Tamari Ave
West Palm Beach, Fla.
33401

The Office of The
Attorney General
1515 North Flagler Dr.
Ste. #9
West Palm Beach, Fla.
33401-3432

on this 4 day of, April, 2019

Christopher R. Brown
Petitioner

F

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

RISTO JOVAN WYATT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D12-4377

[May 20, 2015]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Paul Kanarek, Judge; L.T. Case No. 312010CF000462B.

Marcia J. Silvers of Marcia J. Silvers, P.A., Miami, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Luke R. Napodano, Assistant Attorney General, West Palm Beach, for appellee.

TAYLOR, J.

Risto Jovan Wyatt appeals his judgment of conviction and sentence for trafficking in 28 grams or more of cocaine and for perjury. Because the trial court erred in excluding prior exculpatory testimony from a witness at a civil forfeiture hearing, we reverse and remand for a new trial. We affirm as to appellant's other points on appeal without discussion.

Appellant and his co-defendant, Christopher Brown, were under investigation for drug trafficking. Police monitored their phone calls over a three-month period via an authorized wiretap. A surveillance team also followed appellant and Brown on trips to Orlando, where police believed they were purchasing cocaine to distribute in Indian River County. During the surveillance, law enforcement officers never saw appellant or Brown in physical possession of cocaine.

Based on information received from the wiretap, officers decided to stop appellant and Brown on one of their return trips to Indian River County, expecting to seize cocaine that they believed appellant and Brown were carrying. When officers stopped and searched the car, they did not find

any drugs in the car, but they discovered a plastic bag containing approximately $16,000 on the backseat. Officers seized the money and allowed appellant and Brown to leave.

The Indian River County Sheriff initiated forfeiture proceedings regarding the seized money. Appellant, Brown, and Rashonda James, the owner of the car, were joined as claimants. An assistant state attorney, from the same state attorney's office that prosecuted appellant in this case, represented the Sheriff's office at the forfeiture hearing. The assistant state attorney sought to establish probable cause that the money seized from the car was intended to be used to purchase narcotics. He cross-examined Ms. James at the forfeiture hearing.

Ms. James testified that the money seized from her car belonged to her. She said she was in a romantic relationship with appellant and that he often borrowed her car. Ms. James testified that she had placed the money in the back seat of the car behind the driver's side. It was inside a Walmart bag and tied up in a black jacket. Ms. James maintained that appellant and Brown did not know that the money was in the car.

Ms. James, a pharmacist, testified that she had been withdrawing money from her bank account to set aside for savings for over a year. On the day her car was stopped, she had placed the money in her car because she was planning to meet someone to buy rental property. She explained that she intended to pay cash for the investment property because she hoped to get a lower price.

Appellant testified that he borrowed Ms. James's car that day without her knowledge. Both appellant and co-defendant Brown testified that they did not know there was a Walmart bag filled with money on the backseat of the car.[1] The trial court found that there was not sufficient probable cause for forfeiture and ordered that the money be returned to Ms. James.

At trial, the law enforcement officers who monitored the calls testified and provided foundation evidence for the admission of fifty-six telephone recordings. During the phone calls, appellant and Brown discussed purchasing "polos," "rims," and "t-shirts." The officers testified that those were code words for quantities of cocaine.

Mark Leakes was arrested and charged with conspiracy to traffic in over 400 grams of cocaine. At trial, he testified that he supplied co-defendant Brown with cocaine in Orlando. He conducted most of his business with

[1] They were both charged with perjury based on this testimony.

Brown, but appellant accompanied Brown during some of the transactions.

At trial, appellant sought to introduce a transcript of Ms. James's testimony at the forfeiture hearing, as former testimony of an unavailable witness under section 90.804(2)(a), Florida Statutes. The state and appellant stipulated that Ms. James was an unavailable witness because, if called to testify, she intended to exercise her Fifth Amendment right against self-incrimination. The trial court, however, sustained the state's objection to admission of Ms. James' former testimony and excluded it.

On appeal, appellant argues that the trial court abused its discretion in excluding Ms. James's former testimony at his criminal trial. He asserts that her testimony was admissible under section 90.804(2)(a), because the sheriff's office, through the assistant state attorney's cross-examination, had an opportunity and similar motive to show that Ms. James's testimony was not trustworthy and to establish that the seized money belonged to appellant and was intended for the purchase of narcotics. We agree.

The standard of review for a trial court's admission of evidence is abuse of discretion. *Padgett v. State*, 73 So. 3d 902, 904 (Fla. 4th DCA 2011). The trial court's discretion, however, is limited by the rules of evidence. *Id.*

Section 90.804(2), Florida Statutes (2010) provides an exception to the hearsay rule, when the declarant is unavailable, for:

> (a) *Former testimony.*--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

A declarant is unavailable to testify if the declarant asserts his or her Fifth Amendment right against self-incrimination. *Roussonicolos v. State*, 59 So. 3d 238, 240 (Fla. 4th DCA 2011) (citing *Henyard v. State*, 992 So. 2d 120, 126 n.3 (Fla. 2008)). As the state stipulated, Ms. James was unavailable to testify at appellant's trial.

In *Garcia v. State*, 816 So. 2d 554 (Fla. 2002), the Florida Supreme Court reversed the double murder convictions of a defendant who

unsuccessfully sought to introduce the prior testimony of his co-defendant. *Id.* at 565-66. The co-defendant, who was tried first in a severed trial, testified and confessed to committing the murders alone; he denied that the defendant was involved. Because the co-defendant invoked his Fifth Amendment right during Garcia's trial and refused to testify, Garcia attempted to introduce the co-defendant's trial testimony under section 90.804(2)(a), as former testimony of an unavailable witness. The trial court denied the request. On appeal, the Florida Supreme Court reversed, concluding that the trial court erred in excluding the former testimony.

The *Garcia* Court noted that "because Garcia was not tried with [co-defendant], the State did not have the identical motive in cross-examining [the co-defendant] as it would have had if the State tried [co-defendant] and Garcia together." *Id.* at 564. The court went on to point out, however, that "section 90.802(2)(a) does not require an identical motive but only a 'similar motive.'" *Id.* The supreme court considered the state's motive at both trials as similar. In both instances, the motive was "to discredit [the witness's] testimony and show it to be not worthy of belief." *Id.* at 565. The court stated:

> Moreover, the failure to allow the jury to hear this testimony deprived the jury of important additional evidence that could have been critical to assessing Garcia's guilt. Indeed, where Garcia's alleged involvement in the crimes hangs on the testimony of one individual . . . the jury was entitled to consider the testimony of the [co-defendant], who took the stand in his own trial and specifically testified that Garcia was not involved in these murders. In this case, to prevent the jury from hearing the prior recorded testimony of the [co-defendant], which the State subjected to cross-examination, is to apply the hearsay rule "mechanistically to defeat the ends of justice." For all these reasons, the exclusion of [co-defendant's] prior sworn testimony constituted error, which . . . was not harmless beyond a reasonable doubt.

Id. at 565-66 (internal citation omitted).

In *Roussonicolos*, 59 So. 3d at 241, we followed *Garcia* in holding that a witness's testimony at a pre-trial bond hearing was admissible in the defendant's criminal trial under the former testimony exception. There, the defendant and the witness were charged with fraud. The theory of defense was that the witness acted alone. At the defendant's bond hearing, the witness testified that he acted alone and was solely responsible for the

fraud. However, by the time of the defendant's trial, the witness had invoked his Fifth Amendment right against self-incrimination and was unavailable to testify. In concluding that the witness's prior testimony at the pre-trial bond hearing was admissible at the defendant's criminal trial, we explained:

> We do not read Section 90.804(2)(a) to require that, in order for prior testimony to be admitted as an exception to the hearsay rule, the opponent of the evidence must have the same motivation to examine the witness in both the prior proceeding and the one in which the prior testimony was being introduced. Nor, as the State suggests, must the scope of inquiry conducted at the bond hearing be the same as the scope of the examination at trial. *Garcia,* 86 So. 2d 554. To require such a high standard would render this hearsay exception useless.

Id. at 241.

We further explained:

> The State had an opportunity to cross-examine [the witness] at the bond hearing. It also had a "similar motive" at both the trial and the bond hearing, specifically "to discredit [the witness's] testimony and show it to be not worthy of belief" given the exculpatory nature of [the witness's] testimony.

Id. at 242-43.

Similarly, in this case, the assistant state attorney, acting on behalf of the sheriff's office, had an opportunity to cross-examine Ms. James at the forfeiture hearing. The state attorney's office had a "similar motive" at both the trial and the forfeiture hearing, specifically "to discredit the witness's testimony and show it to be not worthy of belief," given the exculpatory nature of Ms. James's testimony, i.e., the currency did not belong to the defendant and was not to be used to purchase drugs. Accordingly, based on these facts and circumstances, the trial court erred in excluding Ms. James's former testimony.

We conclude that the exclusion of Ms. James's testimony was not harmless. The state, as the beneficiary of the error, has not proven beyond a reasonable doubt that the error in excluding exculpatory testimony about the ownership and intended use of money did not contribute to the verdict. *See State v. DiGuilio,* 491 So. 2d 1129, 1135 (Fla. 1986). No drugs

were found in the car, and the state relied heavily upon the $16,000 in currency seized from the car to support its theory that appellant and co-defendant Brown intended to purchase cocaine from Leakes. At the forfeiture hearing, Ms. James claimed ownership of the currency and provided an explanation for its presence in the car. Failure to allow the jury to hear this testimony deprived the jury of critical evidence in determining appellant's guilt.

Reversed and Remanded for a new trial.

STEVENSON and CIKLIN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.