NO. 19-7546

ORIGINAL

IN THE SUPREME COURT OF UNITED STATES

JUAN JORGE,
Petitioner,

vs.

STATE OF FLORIDA,
Secretary, Department of
Corrections,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JUAN JORGE, DC#439864, Pro-se
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QUESTION(S) PRESENTED

WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHERE: (1) THE U.S. DISTRICT COURT ERRED IN DENYING PETITIONER'S HABEAS CORPUS, AS CONSTITUTIONAL RIGHTS WERE SHOWN, (2) THE U.S. CIRCUIT COURT ERRED IN DENYING PETITIONER'S COA, AS CONSTITUTIONAL RIGHTS WERE SHOWN, (3) THIS U.S. SUPREME COURT SHOULD CLARIFY CONFLICT WITH SAID COURTS AND WELL-ESTABLISHED PRECEDENT

LIST OF PARTIES

The parties to the proceedings below were the Petitioner JUAN JORGE and the Respondent MARK INCH, Secretary of the Florida Department of Corrections.

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IN THE SUPREME COURT OF UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

JUAN JORGE, respectfully petitions for a Writ of Certiorari to review the judgment of the UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT, for the State of Florida in this case, entered on August 1, 2020.

OPINION BELOW

The opinion of the Eleventh Circuit Court to review the merits appears at Appendix B to the petition and is unpublished. A timely petition for reconsideration was denied without any written decision by the United States Court of Appeal, and a copy of the order denying reconsideration appears at Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 31, 2019. This Petition for Writ of Certiorari is filed within

ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

UNITED STATES CONSTITUTION AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

On August 7, 2006, the petitioner was charged by Amended Information with sexual activity with a child, by a person in familial or custodial authority, in violation of F.S.§794.011 (8) (B) and §777.011.The victim in this case (A.J.) was the Petitioner's biological daughter; A.J. was seventeen years old at the time that the alleged crime happened and twenty years old when she testified at trial (Tr. at 172, 211, 347-48, and 414-15). The Petitioner and the victim's mother, Roxanne Castillo, were married and later divorced when A.J. was a child.

On Saturday, June 25, 2006, A.J. had a disagreement with her mother, Ms. Castillo, was punished, and was not allowed to go out. Later, A.J. called the Petitioner and asked him to come and pick her up (Tr.at 173-74.) They also went to pick up A.J.'s friend, Mejia (Tr.175-76, and 271.) The Petitioner also confirmed that he picked A.J. up from Ms. Castillo's house (Tr. at 391-92.) The Petitioner stated that after the victim went to the movies, she and friend Mejia returned back to the house around 1:00 a.m., when A.J. woke the Petitioner up to take his truck to Bori's house.

At around 7:00 in the morning, A.J. and Mejia came back to the petitioner's house (Tr. at 394.) When they returned, A.J. told the Petitioner she and Mejia would be in the living room watching television until they fell asleep (Tr. at 395.) At that point, the Petitioner went into his bedroom and continued to sleep. At

around noon, Mejia's mother called her and asked her where she was (Tr.397-98.) Subsequently, at around two in the afternoon, the Petitioner drove Mejia and A.J. to Mejia's house and dropped them off (Tr. at 398.)

The next time the Petitioner heard from A.J. was when she made the controlled telephone call to him around 12:30 in the morning (Tr. at 300.) The Petitioner was asleep at that time. Petitioner testified that when he said it was a "mistake" during the controlled telephone call, he meant it was a mistake to allow A.J. to come over his house at that hour and to let her smoke pot (Tr. at 401.) Petitioner explained that when A.J. asked him if he used a condom he was really groggy and did not know what she was asking him (Tr. at 402-03.) He answered "yes" because he thought she was asking him if he uses a condom when he has sex with his girlfriend (Tr. at 403.) Petitioner also testified that he did not know what A.J. was talking about and said so during the controlled telephone call (Tr. at 404.)

Once Petitioner realized A.J. was accusing him of having sex with her, he thought she might be attempting to incriminate him because he did not want her to be with Julian (A.J.'s boyfriend) (Tr. at 405-06.) Petitioner explained that Julian was a bad influence on A.J. and introduced her to marijuana. Julian was also forbidden to be at the residence (Tr. at 411-12.)

On September 22, 2009, the case was called for jury trial before the Honorable Julio Jimenez, Circuit Court Judge of the Eleventh Judicial Circuit in

Miami-Dade County. The Petitioner testified on his own behalf. Before he testified, defense counsel informed the trial judge that the petitioner had in the court room persons willing to testify. The Petitioner had listed three witnesses: Marisol Jorge, Jorge Rubio, and Fernando Masvidal. These were willing to testify to false accusations made by the victim, A.J., of sexual misconduct by her maternal and paternal grandfathers and a gym teacher. However, the trial court responded, "That's the ruling. Mr. Jorge, nobody can get into that. Based on the proffer that was made on the record, by your lawyer saying what those witness[es] would say, I found, under the law, that that was irrelevant and could not be brought out. That's the law. It's not me." (Tr. at 373) In confronting its ruling, the court prohibited the defense from discussing A.J.'s prior sexual allegations (Tr. 373-74.)

Subsequently, Petitioner was convicted as charged, following a jury verdict on September 24, 2009. The Petitioner was adjudicated guilty and sentenced, as a habitual violent felony offender, to a term of life imprisonment on November 19, 2009 (Tr. at 622.) Petitioner then filed his Direct Appeal on May 3rd, 2011, raising (5) five issues. Petitioner's appeal was affirmed on February 29, 2012 (mandate issued April 16, 2012; citation: 3D09-3450).

On March 18th, 2013 Petitioner filed a timely Motion for Postconviction relief pursuant to Florida Rules of Criminal Procedure 3.850, raising (5) five issues. Petitioner's motion was denied on August 28th, 2015. On September 15,

2015, Petitioner filed a Motion for Rehearing, which was denied on October 26th, 2015. On May 31st, 2016, Petitioner filed his Initial Brief to the Third District Court of Appeals; *per curiam* affirmed (See Jorge v. State, 231 So.3d 433 (Table) (Fla. 3d Dist. Ct. App.2017). On June 9, 2017, Petitioner filed his Petition for Writ of Habeas Corpus; Denied on December 19, 2019. On January 17, 2019, Petitioner filed his Petition for COA pursuant to 28 U.S.C. §2254(c); Denied on August 1, 2019. Lastly, Petitioner filed a Motion for Reconsideration, denied on October 31, 2019 (Appendix E).

REASONS FOR GRANTING WRIT

Petitioner JORGE was denied due process of law and equal protection of law when U.S. District Court denied his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254(Appendix A), and U.S. Circuit Court denied his Petition for COA pursuant to 28 U.S.C. § 2253 (c) (Appendix B). The Petitioner respectfully prays his petition would satisfy the requirements set forth in the RULES of the Supreme Court of the United States, Part.III Jurisdiction on Writ of Certiorari, Rule 10. Considerations Governing Review on Certiorari (a) (b) and (c).

The record in the instant case demonstrates conflict between said U.S. Courts and well-established precedent law. Such erroneous factual findings must be properly addressed. These Courts have failed to "guard against extreme malfunctions in the state criminal justice system" (*Harrington v. Richter*, 562 U.S.

86, 102-03, 131 S.Ct 770, 786 (2011)). The record case shows *Strickland* and *Brady* violations.

First, Petitioner would like to address the *Strickland* violation. In Petitioner's Habeas Corpus, he raised ten claims, five of which were ineffective assistance of counsel claims, and the other five related to violations of constitutional rights by the trial court (Appendix D). In addressing the first matter in which the U.S. District Court erred in denying Petitioner's Habeas petition, the Petitioner asserts that the states court's decision was contrary to, or involved in an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.

Petitioner asserts his *Sixth Amendment* rights guaranteed to him by the United States Constitution were violated: (1) He was denied effective assistance of counsel, where his lawyer failed to adequately cross examine two critical prosecution witnesses, the victim, A.J., and her friend, Katherine Mejia. In the Petitioner's Habeas Corpus he originally raised five *Strickland* violation claims; however, here Petitioner wishes to raise only one. Petitioner asserts trial counsel's performance fell below the objective standard of reasonableness and the Petitioner suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687-88, 691-92, 104 S.Ct. 2052, 2064, 2067 (1984).

The Confrontation Clause of the Sixth Amendment guarantees an accused's

right, in a criminal prosecution, "to be confronted with the witnesses against him." It not only allows a defendant to physically confront the witness, but also, provides the defendant the opportunity to attack and explore the witnesses' credibility and bias (Davis v. Alaska, 425 U.S. 318 (1974)).

It is the Petitioner's right, secured by the amendment, to cross-examine witnesses, in order to test the veracity of their testimony. And if adequately done, jurors will be provided with the opportunity to make their best judgment, based on crystal clear information, on what weight to place on Petitioner's testimony (See Id. at 317.)

F.S. §90.608(1)(2001). Prior inconsistent statements can be admitted as substantive evidence if: (1) the declarant testified at trial, (2) is subject to cross-examination concerning the statements; (3) the statement is inconsistent with the delcarant's testimony; and (4) was given under oath subject to the penalty or perjury at trial. Id. It can be said, if a "witness had not told the truth in one of the statements, they jury should disbelieve both statements (See, Pearce v. State, 880 So.2d 561, 569 (Fla. 2004). When Petitioner's trial counsel failed to impeach key witness(es), using the deposition testimony, it constituted in an obvious deficient performance under Strickland (See Harris v. Artiz, 288 F.Supp. 2d 247, 260 (E.D.N.Y. 2003); Kegler v. State, 712 So.2d 1167, 1168-69 (2nd DCA 1998).

Discrepancies in the witnesses' testimony was the Petitioner's only defense

to the charged crime, being that other defenses were arbitrarily blocked by the Florida Rape Shield. Both parties case-in-chief revolved around A.J.'s and Mejia's credibility (See Petitioner's Supplemental Filing in Support of Defendant's Verified Motion for Postconviction Relief, Appendix C, for highlights of contradictions and inconsistencies of witnesses).

Trial counsel may have identified inconsistencies, but failed to effectively impeach, her conduct constituted ineffective assistance of counsel, which warrants relief. (See Tyler v. State, 793 So.2d at 137; Griggs v. State, 995 So.2d 994 (Fla. 1st DCA 2008); Kogler (supra) Id. This "has nothing to do with what the best lawyers would have done," (See White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992), but what reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel had acted at trial. (See Id.) Such effect is unacceptable performance and warrants relief.

Now, Magistrate Judge P.A. White argued that "contrary to the Petitioner's allegations here and in the State forum, there is nothing to suggest that counsel did not vigorously cross-examine the State's two key witnesses, focusing on their inconsistent statements, their motive for testifying, etc." (See Report of Magistrate Judge, Appendix D.) But it is clear from instant record that NOT ONCE during trial does Petitioner's counsel refer to, or use, the deposition testimony provided by Mejia and A.J. to impeach. This will not go away. It simply was not used, or

senseful avenue left unexplored by an attorney "was not reasonable under the circumstances of this case." See Kegler, Id. at 1167, 1168-69 (Fla. 2nd DCA 1998). Petitioner's trial counsel herself admitted, proper impeachment in a case like this was crucial, and served as Petitioner's only defense to the charged crime. Therefore, herein Petitioner has plead sufficient facts to prove that he is actually innocent and that his conviction resulted from a "constitutional violation." (See Schlup v. Delo, 513 U.S. at 327.)

Wherefore, since reasonable jurist would find the U.S. District Courts and subsequent U.S. Circuit Court's assessment of this claim to be debatable or wrong, the Honorable U.S. Supreme Court should GRANT a COA as Petitioner is entitled to one as he has made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2254.

Petitioner now focuses the court's attention to the Brady violations. This one in particular was a "fatal blow" to any defense Petitioner sought to introduce, and it went to the heart of this case. Was A.J. telling the truth? This right to a fair trial was violated by the trial court, who excluded evidence that the victim had previously made false accusations of sexual assault against other family members. (See: **Brady v. Maryland**, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)).

Petitioner sought to introduce through the testimony of three witnesses evidence that A.J. had made false accusations of sexual misconduct against both

her maternal and paternal grandfathers and a gym teacher of which he was aware at the time of her accusation against him. And in one of these instances, concerning accusation her paternal grandfather, she had recanted. Petitioner attempted to introduce the testimony as "reverse Williams Rule (See **Williams vs. State**, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959) See: F.S. sec. §90.404(2)(a); **England vs. State**, 549 U.S. 1325(2007), quoting **Hugging vs. State**, 889 So.2d 743, 761 (Fla. 2004); cert. denied, 545 U.S. 1107 (2005). Evidence of false accusations made by the victim was admissible. **Jaggers vs. State**, 536 So.2d 321, 327 (Fla. 2nd DCA 1988) ("evidence that is relevant to the possible bias, prejudice, motive, intent or corruptness of a witness is nearly always not only admissible, but necessary, where the jury **must know** of my improper motives of a prosecuting witness in determining that witness' credibility.")[1] See: also **Fehringer vs. State**, 976 So.2d 121: 1222 (Fla 4th DCA 2008); **Cliburn vs. State**, 710 So.2d 669 (Fla. 2nd DCA 1998); **Williams vs. State**, 386 So.2d 25 (Fla. 2nd DCA 1980) In **Pantoja vs. State,** 59 So.3d 1100 (Fla. 2000) the Florida Supreme Court decided that as a general rule a false accusation made by an alleged victim in a sexual abuse case was not admissible under **§90.610,** unless a conviction for perjury or making a false statement had been obtained. The Supreme Court further held that prior false accusations were not admissible as

[1] This was good law at the time of the Petitioner's trial, but later it was overruled in **Pantoja vs. State, 59 So.3d 1100 (Fla. 2000)**

showing the witness was biased under §**90.610(2)**. False accusation evidence was not admissible as a character trait under §**90.405(2)**. The Florida Supreme Court held in **Pantoja** (supra), did not foreclose all cases admissibility by defendants or allegations that a victim of sexual abuse had previously made false accusations of sexual abuse unless the victim has first been convicted for perjury or making a false statement. See Justice **Pariente's** concurring opinion "that there may be circumstances where the failure to allow cross-examination of a witness about prior false accusations may constitute a constitutional infirmity." Id. at 1100 **(Pariente, J. Concurring in result).** It is the Petitioner's Sixth Amendment right to confront the witness against him, through cross-examination (**Davis vs. Alaska**, 415 U.S. 308, 316; 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). This U.S. Supreme Court held although consideration of bias is not specifically included in the Federal Rules of Evidence, the Sixth Amendment requires a defendant be allowed to present proof of bias (See: **United States vs. Abel**, 469 U.S. 45, 49-50, 150 S.Ct. 465, 467, 84 L.Ed.2d. 450 (1984)). Florida Statute §90.608(2) does not limit the presentation of bias evidence to cross-examination, it permits "[s]howing the witness is biased" See: **Tomengo vs. State**, 864 So.2d 525, 530 (Fla. 5th DCA 2004); citing **Hannah vs. State**, 432 So.2d 631 (Fla. 3rd DCA 1983); **Sweet vs. State,** 235 So.2d 40, 42 (Fla. 2nd DCA 1970)

In Petitioner's case, the victim, A.J., resorted to allegations of sexual abuse

in situations that did not suit her needs, and negatively impacted her relationship with her boyfriend, Julian, having successfully utilized allegations against both her paternal and maternal grandfathers to garner goodwill with her mother, earning entrance back to the United States. Now A.J. sought and achieved to accuse her father of sexual misconduct to prevent interference with her boyfriend, and obtained forgiveness from her boyfriend.

Courts allow inquiries "that might at first blush appear to be lacking any basis at all thus far in the trial, so long as counsel states a basis tending ultimately to show such bias" **Purcell vs. State**, 735 So.2d 579, 581 (Fla. 4th DCA 1999); **Davis vs. State**, 527 So.2d 962, 963 (Fla. 5th DCA 1988); **Mouery vs. State**, 884 So.2d 1029 (Fla. 4th DCA 2004). ***Mouery***, ***Jaggers***, and even ***Pantoja*** support the notion that prior instances of conduct demonstrating and supporting this motive can be brought out through cross-examination.

Petitioner also states that even if evidence was deemed "inadmissible," it does not mean it was not "material" for a *Brady* violation. Inadmissible character evidence pursuant to F.S. §90.405 and §794.022 cannot trump the materiality standard. Defense had a right to this evidence to prepare for trial and this evidence was suppressed in violation of *Brady*. Petitioner asks this Honorable Supreme Court to draw its attention to the fact that when the trial court granted a motion in limine seeking to exclude evidence of victim's prior false accusations of

molestation, the results conflicted with well-established precedent. **Mateo vs. State**, 932 So.2d 376 (Fla. 2nd DCA 2006) quoting **Chambers vs. Mississippi**, 410 U.S. 284, 302 (1973) noting that Florida law is clear, "where evidence tends in any way even indirectly, to establish a reasonable doubt of a defendant's guilt, it is error to deny its admission," and explaining that "any evidence that tends to support the defendant's theory of defense is admissible, and it is error to exclude it." See: also **Patrick vs. Gatien**, 103 So.3d 132 (Fla. 2012); **Sumbry vs. State**, 310 So.2d 445, 447 (Fla. 2nd DCA 1975) noting the defendant was entitled to due process, which requires that a defendant have a reasonable opportunity to present his defenses.

Wherefore, Petitioner herein asserts he was not afforded a "meaningful opportunity to present a complete defense" (**Crane vs. Kentucky**, 476 U.S. 683, 690 (1986)). Accordingly, the Due Process Clause guarantee a fair trial and the several provisions of the Sixth Amendment provide for the basic elements of a fair trial. (Id).

For Petitioner's Third claim, he will show his constitutional rights were violated on the basis that the trial court permitted the State to amend the information during trial, to add the phrase "and/or penetrate" A.J's vagina with his penis. Records show that from the time Petitioner was arrested to the time the trial had begun, three years had elapsed, and State had more than enough time to amend

information. Petitioner's counsel had already prepared a defense. This prejudiced the Petitioner.

Although the U.S. District Court Magistrate's Report (Appendix D) contends that there was no fatal variance, as Petitioner was on notice of the charges, regardless of whether the word "inserted" or "penetrated" was used. This in fact, prevented Petitioner from adequately mounting up defense. U.S. District Court also asserts that this claim is procedurally defaulted, unexhausted, and fails on the merits, this is not correct.

U.S. Supreme Court has held that the accused has a constitutional right to notice of the case the prosecution will present at trial, meaning before trial, not after jurors have been sworn in, in order that the defense may prepare for trial, (**Kotteakos vs. United States**, 328 U.S. 750 (1946)). See also **United States vs. Prince**, 883 F.3d 953, 959 (11th Cir. 1993) for two-step when considering allegations of variance between indictments and proof at trial: (1) the court must first determine whether material variance did indeed occur, and if so, (2) whether the defendant suffered substantial prejudice because of variance. See also **United States vs. Caporale**, 806 F.2d 1487, 1500 (11th Cir. 1986). Petitioner had relied upon the changes, as they existed when the trial started and articulated a defense absent of the allegation of penetration. This issue was not procedurally defaulted nor exhausted because it calls to mind a Due Process violation under the United

States Constitution. See Fifth Amendment See in trial transcripts pages 250-251 when the amendments were made. Basic rules of an indictment or information is that it must include legally sufficient allegations that outline charged, See **Insko vs. State**, 969 So.2d 992 (Fla. 2007) **State vs. Dye**, 346 So.2d 538 (Fla. 1977). Elements cannot be so vague as to prejudice defendant (See: **Hamling vs. United States**, 418 U.S. 87, 94 S.Ct. 2887 (1974); **Hagner vs. United States**, 285 U.S. 427, 52 S.Ct. 417 (1932); **United States vs. Debrow**, 346 U.S. 374, 74 S.Ct. 113 (1953); **United States vs. Carll**, 105 U.S. 611, 612 (1882)). Elements must be crystal clear for a defendant to prepare a defense and avoid second prosecution (**State vs. Butler**, 418 So.2d 1221 (Fla. 2nd DCA 1982)).

The prosecution in instant case was coached by trial court after trial began to include certain elements of the charged offense, and without trial courts assistance no amendment would have been made, thus, Petitioner is entitled to relief, as guaranteed by the Fifth, Sixth, and Fourteenth Amendment of the United States.

Finally, Petitioner asserts that in fact his constitutional rights were violated on the basis that court erred by allowing the introduction of hearsay testimony from detective Foote regarding the content of text messages. According to A.J., after the alleged incident, she sent a text message to the Petitioner's cell phone asking him why he did it. She also said Petitioner allegedly responded that he was sorry and to "pretend" it was Bori. A.J. stated she showed her boyfriend, Julian,

the text messages, and later to Detective Foote. The trial Court then permitted Detective Foote to testify about the text messages, contrary to its inadmissibility due to hearsay and in violation of Petitioner's Confrontation Clause rights. Florida Statute section §**90.801(1)(c).**

Prosecution claimed it was proper for the detective to have testified of the text messages, which were not preserved, if in fact they existed at all. Under the Admissions of a party exception to hearsay rule in Florida Statute Section §**90.803(18)(a).** But please keep in mind that these messages were not in fact sent to the detective, but allegedly to A.J., who in turn, was the one who attributed these so-called incriminating texts to the Petitioner. Detective Foote, therefore, was testifying to double hearsay corroborated by A.J.'s recollection based on his report.

Based on A.J.'s way her text message was posed, as recounted by Detective Foote, any response by Petitioner would have been considered inculpatory. U.S. District Court's Report stated, "The minor's text message and Petitioner's response thereto were not testimonial in nature; and, thus their admission did not implicate the Confrontation Clause" (See Report of Magistrate Judge, Appendix D). But in fact the text messages were testimonial in nature "Causing the Declarant to be a 'witness' within the Confrontation Clause" pursuant to **Davis vs. Washington**, 547 U.S. 813,821, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006). Here, just as in Davis, the testimonial character of the statement separated it from other hearsay

and was subject to the Confrontation Clause.

Being that the actual "material" evidence did **not** exist, and cross-examination by defense was futile, for Petitioner could not prove a negative. Therefore, the testimony was whatever the detective wanted it to be and could not be impeached or contradicted. It's important to know, the victim could not recall the contents of the text messages. Nothing in the record before this court or any other court establishes the Petitioner could effectively confront the accusations of the text messages, or whether they actually took place.

In **Crawford vs. Washington**, 541 U.S. 36, 124 S.Ct. 1354 (2004) this Supreme Court significantly changed its confrontation analysis and held that the admission of testimonial hearsay complied with the confrontation clause if, (1) the Declarant testified at trial, or (2) was unavailable and the accused had an opportunity for cross-examination. Petitioner herein wishes this Supreme Court specifically defined the term testimonial hearsay. However, this court held statements in response to police interrogations were included within the definition and indicated prior testimony, affidavits, depositions, and confessions, were as well.

So what we are seeing here is the victim did not recall the content of the alleged text messages, the detective testified and attributed the text messages to the Petitioner, and all this without any proof or evidence to establish that text messages

even existed. How can the Petitioner solidify his innocence in the light of such a burden? The U.S. District Court said in the Magistrate's Report (Appendix D, pg.67-68) Id. "even if testimonial, no confrontation issue occurred as the minor was available at trial and was subject to cross-examination by the defense." But what kind of cross-examination could the Petitioner possibly construct that would prevail against something unseen? Petitioner has the absolute right to be confronted by the writing itself as the best evidence of what the text said. Florida Statute Section §90.952, the best evidence Rule states:

> Except as otherwise provided by statute, an original writing, recording, or photographs is required in order to prove the contents of writing, recording, or photographs.

The exception to this rule states:

> The original of the writing, recording, or photograph is not required,..., and other of its contents is admissible when:
>
> 1. All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith.
> 2. An original cannot be obtained in this state by any judicial process or procedure.
> 3. ....
> 4. The writing, recording, or photograph is not related to a controlling issue.

Alleged recipient of those statements, A.J., could not testify (honestly) to the content of the text message until she was shown the same police report, which Detective Foote testified from. Record does, however, demonstrate that victim,

A.J., on the night prior to allegation against Petitioner, "admitted" she was not out with her boyfriend. She had met other friends, including a young man named Bori, and they had gone to a friend's house to listen to music, take drugs, and "party". A.J. also admitted her and her boyfriend, Julian were fallen out, because A.J. went out with Bori. These text messages, if they existed, could very well have been about A.J. and Julian. But one thing is clear; the text messages don't exist, because of detective's failure to preserve.

Petitioner respectful prays, for the foregoing reasons, that the Petitioner for a Writ of Certiorari should be **GRANTED**

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: 01/29/20.

Respectfully Submitted,

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