No. 19-8177

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Christopher Kyle Keys — PETITIONER

VS.

Mark Inch, Sec. Dep't of Corrections
Ashley Moody, Atty. Gen., State of Florida— RESPONDENT

After Denial of Plenary Appeal in the:
The Second District Court of Appeal of Florida

PETITION FOR A WRIT OF CERTIORARI

Christopher Kyle Keys
South Bay Correctional Rehabilitation Facility
PO Box 7171
South Bay, FL. 33493

QUESTION(S) PRESENTED

The State Trial Court denied a timely motion for severance of the charges from separate incidents. And the Trial Court allowed the State Attorney to present evidence of unproven, unrelated crimes without relevance to each other. This all only served to attack the character of the Petitioner and unfairly bolster the State's case. Does the trial court abuse its discretion, within the confines of substantive and procedural due process in the U.S. Constitution's 6th and 14th Amendment, by the admission of evidence of irrelevant collateral crimes or acts?

The State was allowed to acquire Petitioner's cellular phone data without a warrant and permitted, over objection, to use it against him at trial. Does a trial court abuse its discretion, within the confines of procedural due process in the U.S. Constitution's 6th and 14th Amendment, by impermissibly admitting evidence of cellular telephone data acquired without issuance of a warrant?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Christopher Kyle Keys

Mark Inch, Secretary, Florida Department of Corrections

State of Florida

Office of the State Attorney

Ashley Moody, Attorney General of Florida, Office of the Florida Attorney General

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **state courts**:

The opinion of the highest state court, the Second District Court Appeals, to review the merits appears at Appendix A to the petition and is

[X] reported at Florida Second District Court of Appeal,_Case # 2D18-4425; or,
[ ] has been designated for publication but is not yet reported; or.
[ ] is unpublished.

JURISDICTION

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The date on which the highest state court decided my Case # 2D18-4425 A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of the citizens of the United States; nor shall any Sate deprive any person of life, liberty or property, without due process of the law; nor deny any person with its jurisdiction the equal protection of the laws.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF CASE AND FACTS

The Florida Second District Court of Appeal *per curium* affirmed the decision of the Florida 6th Judicial Circuit Court, after jury trial, thereby adopting, without opinion, the judgment and sentence handed down there from, on November 22, 2019.

The Florida scheme for discretionary review in the Florida Supreme Court does not permit a motion for Supreme Court discretionary review unless a Florida District Court issues a written opinion in the case. A *per curium* affirmance is not considered a qualifying opinion. Thus, Petitioner because he had no right to discretionary review, nor by rule of court would the Fla. S. Ct. be allowed to grant any review, the *PCA* from the Second District serves as the highest state court in this case, due to the system for the Florida Court appellate reviews. In accord with U.S. S. Ct. Rule 13.3, the decision of Second DCA is attached. (See Appx. A).

The Petitioner, Christopher Keys, was convicted of Attempted Murder in the First Degree, pursuant to § 782.04 (1)(a), on November 30, 2015 and Aggravated Stalking, pursuant to § 784.048 (4) , on or about October 4, 2015 and November 30, 2015, of Maggie Wicken ("Wicken"). (R. 11-12, 72-77).

The evidence against the Petitioner consisted of a red car being near the scene, which looked similar to a car that Petitioner had access to, 2 tire track impressions that "could" have been made by the tires of that same red car, cell tower data that shows that Petitioner's phone connected to multiple towers in the general area and that a jailhouse snitch revealed, mid-trial, Petitioner "confessed"

to shooting Wicken. Beyond that, the State was allowed to present evidence of prior bad acts, of two alleged attempts to tamper with Wicken's brake lines on her vehicle, which the State attributed to Petitioner.

A Motion for New Trial was filed, on August 31, 2018. (R. 78-82). Notice of Appeal was filed on October 30, 2018. (R. 88). Defense moved for Judgment of Acquittal (JOA) after the State rested from their case-in-chief. (T. 1427). The JOA was renewed by motion, on August 31, 2018. (R. 83-84). The grounds for the JOA, were the Failure to exclude the testimony of a last-minute alleged confession, provided by the jailhouse snitch and admission of *Williams Rule* evidence. (R. 83-84; T. 1427).

Motion for Severance/Collateral Bad Act Evidence

Petitioner's trial counsel filed a Motion for Severance to avoid the prejudice of having an aggravated stalking charge from dates unrelated to the attempted murder charge. (R. 16). A hearing on severance was held. (R. 551). The State's argument was that the charges were inextricably intertwined. (R. 552).

Specifically, the State's position was, "[T]hey're inextricably intertwined, in that the *Williams Rule*, which shows the premeditation for the first degree murder, also the violations of the injunction; the cutting of the brakes, two times. In addition, um, the credible threat, which is the act of shooting her in the head, is also the attempted murder." (R. 552). The trial court's denial of the Motion for Severance, without explanation. (R. 558). During the second hearing with a new Trial Court Judge, the court stated, "I'll hear it, but I'm going to—it's an exercise in

futility, I can tell." (R. 771). The Trial Court held, the evidence related to the aggravated stalking was relevant to the motive, absence of mistake, or intent. (R. 772). And that the aggravated stalking evidence would be relevant to premeditation. (R. 772).

There was a request to admit August 1, 2015 and October 4, 2015 incidents in which Wicken accused Appellant of tampering with her vehicle's brake line. (R. 812-813). This would include an injunction issued, based on the August 1, 2015 allegation. (R. 812-813). The October 4, 2015 incident was never reported, until Wicken informed the police of it, after the November 30, 2015 shooting. (R. 824-825). However, the Trial Court did find the incidents were not "strikingly similar," nor did they have unique characteristics. (R. 828-829).

The Trial Court's holding included that the State intended to use the previously unreported bad acts to show motive, intent, planning, absence of mistake, in accord with § 90.404 (2)(a) Fla. Stat. (R. 833-835). However, the Trial Court held that the State's use was not really cognizable under a *Williams Rule* exception and was, rather an exception under similar fact evidence of other crimes, wrongs, or acts, under § 90.402 Fla. Stat., which is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. The Trial Court found *sua sponte* that the evidence was admissible to establish motive. (R. 526-527). Also, that, although it is no reason for an exception, the Count also found the evidence admissible because the State's case was one of

only circumstantial evidence, so the evidence was permissible for this reason also. (R. 525, 526). In accord with the language outlined in § 90.404 (2)(a) Fla. Stat., there is no exception for the latter.

Motion to Suppress-Cell Tower Records

The State sought an affidavit in support of disclosure of cellular communications records on January 21, 2016. (R. 204-209). The Trial Court issued an order for disclosure of cellular communication records on January 22, 2016. (R. 210-214). Appellant's trail counsel filed a Motion to suppress Cell Tower Records following issuance of the order and the warrantless seizure of the cell tower records. (R. 26-27). Following hearing on the motion to suppress the Trial Court ruled that there was no Fourth Amendment protection for cell tower data and if there were the good-faith exception applies. (T. 283-322, 314-321).

State's Case-in-Chief

The State's opening statement was brief, but made multiple references to the prior bad acts, as well as the red car Petitioner had access to, the cell tower records. (T. 335-340).

The State called twenty-four witnesses who provided testimony as follows: Jeffery Johnson (Dr. Johnson), was a doctor to establish the type and extent of injuries to the Wicken. (T. 349-357).

Jose Vazquez (Vazquez), a cook who was at his home saw a red car in a in a driveway across the street from the shooting. He didn't know the make or model of the car. (T. 369).

Stacy Champion (Champion), another resident near the shooting, who believes she saw a car that may have been "dark red" or "older faded red." (T. 383).

Joe Anne Hawkins (Hawkins), a neighbor of Wicken, one early morning saw someone around Wicken's car, on August 1, 2015. (T. 388-391). She never saw anyone cut the brake line and couldn't say who the person was by the car. (T. 395-397). Hawkins is the first of multiple witnesses to provided testimony on the prior bad acts. (T. 396).

Lannette Reeves (Reeves), was Manager at Petitioner's former employer. (T. 399). Reeves testified the pharmacy has lint-free polyester gloves in bins and they are not closely monitored. (T. 401-402). Reeves testified the gloves are ordered in large quantities and are not exclusive t the pharmacy. (T. 403-404).

Wicken was the victim of the shooting that took place on November 30, 2015. (T. 436-607). Wicken never saw the Appellant the day of the shooting. (T. 528-529). However, she did not provide extensive testimony on the brake cutting allegations. (T. 451-454, 460-461, 466-467, 469-470, 490-492, 560, 577, 590). Wicken never saw Petitioner do anything to her car, on August 1, 2015, and never reported the October 4, 2015 incident. (T. 463). Wicken went on to [p]rovided additional extensive testimony on the injunction she was able to secure, based on the August, 2015. (T. 440-448, 450, 455-457, 459-461, 468-469, 471, 490, 515-520, 523-524, 526-527,529, 531-532, 534-535, 539, 558, 573, 576-577, 591-592, 601-602).

Robert Richardson (Corp. Richardson), a corporal for the Pinellas County Sherriff's Office, testified exclusively about the August 1, 2015 brake cutting

allegation, *but had not proven, per-trial, that it was done by Petitioner.* (T. 614-615, 617-618, 620, 626-628, 630).

Kevin Macmillan (Macmillan), a coworker of Petitioner, testified Petitioner asked him how to dissolve metal like a gun and where to buy a one. (T. 632-634). Macmillan believed this conversation took place in late October or early November of 2015. (T. 637).

Peter Mellor (Mellor), another coworker of Petitioner, testified he was asked about purchasing a gun. (T. 644-645). Mellor testified, he and Petitioner would discuss guns, over an eight or nine month period, the time they worked together. (T. 651). Mellor was also asked if Petitioner discussed the injunction against him. (T. 652).

Craig Giovo (Giovo), works in the forensic science division of Pinellas Sheriff's Office and testified solely to the bullet trajectory. (T. 656-692).

Harris and Petitioner share a child in common. (T. 705). Harris testified that on the morning of November 30, 2015, Petitioner came by the hotel where she lived and switched cars with her, which is what he always did. (T. 715). Petitioner arrived back at the hotel room around 8;00-8;10 A.M. (T. 716). Harris clarified later; she was asleep and did not know the time Petitioner returned. (T. 756). In addition, Petitioner was wearing his pharmacy uniform when he arrived and returned. Id. Harris was also asked to testify about the brake allegations from August and October. (T. 718, 752, 757).

Rebecca D'Jimas (D'Jimas), works for the Pinellas County Sheriff's Office and assisted with collecting tire mark impressions. (T. 764-765, 769).

Jonathan Tobeck (Det. Tobeck), detective with Pinellas County Sheriff's Office, assisted with processing the scene and the red car. (T. 774-775). In the vehicle, Tobeck found white gloves. (T. 776-777). Tobeck testified the vehicle was messy and found wrappers, cigarette boxes, vampire fangs, hair braids, sweatpants, shoes, along with the gloves and other assorted items. (T. 790-791). Det. Tobeck also testified about the brake cutting allegations. (T. 787).

Jerry Cirino (Cirino), is a senior crime lab analyst with the Florida Department of Law Enforcement, who conducted the tire track analysis. (T. 803). Cirino never testified as an expert in the tire impression evidence. (T. 809). There were no randomly acquired characteristics of the tires or the impressions to say the tires on Harris' car made the impressions at the scene of the shooting. (T. 835-837). Cirino did say the tire with the type of tread from Harris' car made the impressions. (T. 837-838). Harris' rear tire had the same tread pattern, but the impression *couldn't be uniquely identified as being from her car.* (T. 842-843). The other tire impression *did not match with front tires on Harris' car.* (T. 851-853). In fact, Cirino testified the front tires did not match to any of the impressions. (T. 860). Cirino further clarified during cross-examination that the rear ties were only "possible sources" of the impressions. (T. 864-865).

Margie Easters (Easters), was a resident at the location of the shooting. (T. 884-884). Easters saw a red car across the street, after the shooting occurred. (T.

886-887). Easters also saw a blue vehicle that passed the red car, and saw some kind of exchange between the two. (T. 894-895). During her initial interview with the police, Easters said she only saw a blue car. (T. 895-896). Easters described the driver of the car having a darker complexion, not white, but not black. (T. 898-900).

Clyde Brown (Dep. Brown), a deputy with the Pinellas County Sheriff's Office, was working civil suits serving restraining orders. (T. 910). Brown served Petitioner with an injunction. (T. 913). Dep. Brown's testimony was solely about the service of the injunction relating to brake cutting allegations. (T. 914-916).

Mike Celona (Celona), is a police officer for St. Petersburg Police Department. (T. 1079). Celona testified to cell phone data analysis. (T. 180-1081). Celona could not place Petitioner's cell phone at the scene of the shooting, rather he indicated it was in an area around a particular cell tower. (T. 1099). Further, his cell phone connected with the same cell tower, in the same area as late as 8:25 AM. (T. 1111-1112).

John Suess (Corp. Suess), a corporal for the Pinellas County Sheriff's Office, participated in the investigation. (T. 1115). Corp. Suess collected surveillance video from the hotel where Harris was staying. (T. 1116). Corp. Suess stated that Petitioner's car, a white impala, arrived at the hotel at 6:30 AM. (T. 1120); Harris' car left at 6:48 AM. (T. 1121; and the white impala then left the hotel again at 8:21 AM. (T. 1122).

Stephanie Keys (Keys), Petitioner's ex-wife also testified. (T. 1134-335). Keys testified that Petitioner seemed angry and emotional about the custody situation

with the victim. (T. 1141). Keys claims Petitioner told her he was going to get a gun and shoot the victim. (T. 1141-1142). Keys believed Petitioner was just "mouthing off." (T. 1142). However, Keys also provided testimony about reports for an injunction for the brake cutting allegations. (T. 1162, 1168).

Stephen Bergstrom (Corp. Bergstrom), a corporal with the Pinellas County Sheriff's Office, interviewed Petitioner. (T. 1174, 1176). Corp. Bergstrom collected a cigarette butt at the scene, which yielded no DNA evidence. (T. 1176-1177). Corp. Bergstrom testified that when confronted by him, Petitioner denied driving Harris' car regularly. (T. 123). After being confronted about video surveillance, Petitioner indicated he did take the car for a short drive that morning, because Harris was complaining it was not running properly. (T. 1207-1208). Corp. Bergstrom was also asked to provide extensive testimony on the brake incident. (T. 1197-1198, 1200-1201, 1298, 1323-1324, 1326-13301341-43). Further, Corp. Bergstrom provided considerable testimony on the injunction. (T. 1178, 1188-1190, 1283, 1285-1286, 1293, 1299, 1308, 1338).

Kevin Guthrie (Guthrie) is the nephew of Harris. (T. 1369). Guthrie testified Petitioner told him he wanted to kill Wicken. (T. 1371-1372). However, Guthrie testified that he did not take Petitioner seriously, or he would have told someone. (T. 1372). Guthrie, serving a five-year sentence on an unrelated crime, denied receiving any promises for sentence reduction in exchange for his trial testimony. (T. 1380). Guthrie did confirm that Harris' car was not in good working order and was not reliable. (T. 1388-1389). He also testified that when the police asked if

Guthrie knew if Petitioner had any guns, he told the police no. (T. 1389). Guthrie claimed Petitioner walked into the hotel room around 8:00-9:00 AM and admitted to shooting Wicken, then Guthrie went back to sleep. (T. 1395-1397). This was, however, contrary to the account of the morning of the shooting, which Guthrie gave the police, when they asked about Guthrie ever seeing a gun or having heard any confessions from Petitioner. (T. 1398). Guthrie's testimony resulted in a *Richardson* Hearing and Motion to Strike testimony which was detailed above.

Steven Robinson (Robinson) was an inmate in the same facility as Petitioner. (T. 1408). Robinson stated that Petitioner told him that Guthrie was trying to snitch on him. *Id.* Robinson testified, Petitioner told him that the caliber of the gun he used in the shooting should have generated residue, but it did not. (T. 1409-1410). Robinson went on that Petitioner told him that gun blue can be used to remove residue. *Id.* Robinson then declared that nothing else was said pertaining to the case. (T. 1410). However, Robinson then went on to remark that he also heard Guthrie talking to someone about getting time knocked off of his sentence for testifying against Petitioner (T. 1417-1418), and Robinson specified that Petitioner was not saying he knew about the gun used, only that he was repeating what Guthrie was claiming. (T. 1418-1419).

Jeffery Richarz (Richarz), works for the Forensic Science Section of the Pinellas County Sheriff's Office. (T. 1499). Richarz collected Petitioner's clothes, swabbed him for DNA and conducted a gunshot residue test. (T. 1500-1501). None of the evidence gathered revealed gunshot residue. (T. 1499-1506).

The State's closing and rebuttal closing, both, regularly referenced the prior bad acts of the cutting of the brake lines on Wicken's car. (T. 1640-1643, 1681-1682, 1685-1687, 1697, 1699). The State Attorney was allowed to repeatedly present the jury with the evidence of the unrelated crimes. It was never proven beyond a reasonable doubt that Petitioner actually committed these prior bad acts against the victim of the shooting.

REASON FOR GRANTING PETITION

POINT ONE

The Second District's Adoption Of The Decisions Of The Trial Court Contradicts Rules Of Criminal Procedure Regarding Severance And Admission Of Prior Bad Act Evidence, Within The Confines Of Procedural And Substantive Due Process, Warranting This Court's Attention.

Motion For Severance

Petitioner argues that the state court erred in failing to grant his timely motion for severance of the offenses pursuant to state court rules and substantive due process.

The Second District Court erred in relying on the application of procedural and substantive due process by the Trial Court, in the denial of Petitioner's motion for severance of the charges in the case. The standard for severance, in Florida, being that charges may be severed if two or more offenses charged together are not based on the same act or transaction, or on two or more connected acts or transactions; see Fla. R. Crim. P., Rule 3.150

> "Rule 3.150 provides that two or more offenses can be charged as separate counts of a single indictment "when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on 2 or more connected acts or transactions." Fla. R. Crim. P. 3.150(a). Rule 3.150 requires that the criminal charges joined for trial be considered in an episodic sense. *Lugo v. State*, 845 So. 2d at 93 (quoting *Garcia v. State*, 568 So. 2d 896, 899 (Fla. 1990)."

In *Garcia*, the Florida Supreme Court stated that the 'connected acts or transactions' requirement, of Rule 3.150, means that the acts joined for trial must be considered in an episodic sense. The rules do not warrant consolidation of criminal charges based on similar but separate episodes, separated in time, which

are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances. *Paul v. State*, 365 So. 2d 1063, 1065-66 (Fla. 1st DCA 1979), adopted in part, 385 So. 2d 1371, 1372 (Fla. 1980). Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." *Bundy v. State*, 455 So. 2d 330, 345 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986). However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh Petitioner's right to a fair determination of guilt or innocence. *State v. Williams*, 453 So. 2d 824, 825 (Fla. 1984); *Wright v. State*, 586 So. 2d 1024, 1029-30 (Fla. 1991); see also *Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992), cert. denied, 113 S. Ct. 2377, 124 L. Ed. 2d 282, 61 U.S.L.W. 3773 (1993). There must be a "meaningful relationship" between or among the charges before they can be tried together. *Ellis v. State*, 622 So. 2d 991, 999 (Fla. 1993). That is, the crimes in question must be linked in some significant way. See *Thomas v. Julie L. Jones*, 2017 US Dist LEXIS 90707 (Dist. Ct. S.D. Fla. 2017).

Petitioner had a right to severance, based on his timely motion, because the three offenses were improperly charged in a single indictment. Prior to trial, severance was properly, appropriately and timely requested for the fair determination of the defendant's guilt or innocence. See Fla. R. Crim. P., Rule 3.152(a); *Thomas* at 2017 U.S. Dist. LEXIS 42-44; *Wright v. State*, 586 So. 2d at 1029-30 and *Garcia*, 568 So. 2d at 899.

Petitioner contends that there was no meaningful relationship between the two incidents from which the charges in this case arose. They were not part of a spree, etc., they cannot be considered in an episodic sense and the charges were not significantly linked. Thus, the severance of the cases was viable for the trial court, by law; see *Oehling v. State*, 109 So. 3d 1199 (Fla. 3rd DCA 2013):

> "...the trial court abused its discretion by denying defendant's motion to sever the firearms possession charge from the possession of a controlled substance charge. Although both offenses were part of the same criminal episode, the charge of possession of a controlled substance did not require proof of prior convictions. The prejudicial effect of this failure to sever required reversal;"

see also, Fla. R. Crim. P., Rule 3.152 (a) (1)-(2) (A) & (B).

Therefore, Petitioner contends, the state court erred in the denial of his motion for severance of the two charges against him, as the lesser only served to bolster the more serious one. There was no temporal and geographical proximity in them. See *Garcia* supra:

> "...where the only connection was that the offenses were allegedly committed in relation to the distribution of drugs, joinder did not promote a fair determination of the defendant's guilt or innocence of each offense pursuant to Fla. R. Crim. P., Rule 3.150."

Thus, Petitioner contends this Court ought grant review on this ground and order a new trial.

Admission Of Evidence Of Collateral Crimes Or Acts

The Petitioner argues that the trial court improperly admitted evidence of collateral bad acts, qualifying the evidence as 'inextricably intertwined' under Sect. 90.402 Fla. Stat. and/or in accord with *Williams v.*

***State*, 110 So. 2d 654 (Fla. 1959) known as the *Williams Rule*, pursuant to Sect. 90.404 (2) (a) Fla. Stat.**

Petitioner contends that the Trial Court admitted the collateral bad act evidence was not admissible in accord with the State's motion under *Williams Rule*. However, the Trial Court allowed the State to make the evidence of other crimes or acts a feature of the State's case during the trial. It should be noted, prior to the shooting, the brake cutting was never even reported.

Even if relevant, a trial court may not permit collateral crime evidence to become a *feature* of a trial. Collateral crime evidence becomes an impermissible feature of the trial when inquiry into the crimes "transcend[s] the bounds of relevancy to the charge being tried" and the prosecution "devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant." *Williams v. State*, 110 So. 2d 654 (Fla. 1959); see also, *Durousseau v. State*, 55 So 3d 543 (Fla. 2010).

Petitioner argues that, both, Florida's test for admissibility of collateral crime evidence and/or the federal due process standard would be applicable for review of the trial court's evidentiary ruling. The admission of the evidence infused the trial with unfairness so as to deny due process of law. See *Lisenba v. California*, 314 U.S. 219, 228, 62 S. Ct. 280, 86 L. Ed. 166 (1941); see also, *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring

guilt on a ground different from proof specific to the offense charged. See generally J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403, Fed. R. Evid. So, the Committee Notes to Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

The admission of the evidence on improper grounds caused the jury to generalize the Petitioner's earlier *alleged and previously unreported prior bad act* into bad character and taking that as raising the odds that he did the later bad act charged, or worse, as calling for preventive conviction even if he should happen to be innocent momentarily.

Even if admitted as 'propensity evidence,' the risk that the jury convicted for the collateral unproven acts or crimes, other than those charged, should have made them inadmissible. The risk is also that the jury, uncertain of guilt, convicted anyway, because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance.

Courts almost unanimously have come to disallow the prosecution to use any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character; *Greer v United States*, 245 US 559, 62 L Ed 469, 38 S Ct 209 (1918).

The court should simply have closed the whole matter of character, disposition and reputation in the prosecution's case-in-chief. The state should not

have been allowed to show Petitioner's prior trouble with the law, specific criminal acts, or ill name among his neighbors—particularly the allegation that he previously tampered with the victim's brakes, admitted as inextricably intertwined, although previously unreported and unproven.

The evidence here only served to bash Petitioner's character before the jury. That evidence of his bad character weighed too much with the jury and over-persuade them to prejudge him with a bad general record and deny him a fair opportunity to defend against the particular charges in this matter. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical avenue to take, as it's disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. *Michelson v United States*, 335 US 469, 475-476, 93 L Ed 168, 69 S Ct 213 (1948).

The Trial Court improperly assessed whether the probative value of the brake cutting incidents substantially outweighed the danger of unfair prejudice; see *McLean v. State*, 934 So. 2d 1248, 1259 (Fla. 2006). Petitioner avers that the Trial Court improperly weighed the evidence, as established by prior decisions of the Florida Supreme Court. They have held that before admitting collateral crime evidence, the Trial Court failed to properly make four determinations: whether the defendant committed the collateral crime; whether the collateral crime meets the similarity requirements necessary to be relevant; whether the collateral crime is too remote, so as to diminish its relevance; and whether pursuant to Florida Statutes Section 90.403, the probative value of the evidence is substantially outweighed by

the danger of unfair prejudice. See *McWatters v. State*, 36 So. 3d 613, 627 (Fla. 2010) (citation omitted).

The State presented evidence of the brake line cutting incidents via their opening remarks, 31 witnesses and closing remarks and rebuttal closing remarks. All of the closing remarks regularly referenced the prior bad acts as well. (T. 1640-1643, 1681-1682, 1685-1687, 1697, 1699). The State Attorney was allowed to repeatedly inundate the jury with the evidence of the unproven, unrelated crimes of the cutting of the brake lines on Wicken's car. This was error. See *Jackson v. State*, 570 So.2d 1388, 1389 (Fla. 1st DCA 1990).

The brake cutting evidence was misleadingly presented to the jury as being admitted because it was inextricably intertwined with evidence of wrongdoing in the current case; see *Shively v. State*, 752 So. 2d 84, 85 (Fla. 5th DCA 2000). Further, the collateral evidence was not sufficient to constitute similar fact evidence. And it was clearly not inextricably intertwined with the evidence of the charged offense, as would have been required for proper admission; see *Joseph v. State*, 153 So. 3d 992 (Fla. 4th DCA 2015). As a result of the Trial Court's error the evidence caused the State's case to be unfairly and inadmissibly bolstered.

The 'inextricably intertwined' rule, is a rule of necessity: 'Evidence necessary to describe the manner in which a criminal offense took place, or how it came to light, is generally admissible as relevant evidence, even though it might otherwise be objectionable as prior bad act evidence, because it is 'extricably intertwined' with the underlying crime.

In Petitioner's case the admission of these prior acts mislead the jury into believing that if Petitioner committed the prior acts then he most likely committed the charged crimes. Certainly this Court would err if it is not held that this admission was harmful; see *Robertson v. State*, 829 So. 2d 901, 913-14 (Fla. 2002):

> "Erroneous admission of collateral crimes evidence is presumptively harmful."

Thus, Petitioner contends this Court ought grant review on this ground and order a new trial.

POINT TWO

The Second District's Adoption Of The Decision Of The Trial Court To Allow Use Of Petitioner's Cell Phone Data Without Issuance Of A Warrant Was An Abuse Of Discretion, Within The Confines Of Procedural And Substantive Due Process, Warranting This Court's Attention.

The second ground by which the Second District erred, raised in Petitioner's plenary appeal, was the Trial Court's improper determination regarding the admission of his cell-site data.

It has been established that the data was not available to the State after *Carpenter v. U.S.*, 138 S. Ct. 2206, 2219, 201 L. Ed. 2d 507 (2018) and *Tracey v. State*, 152 So. 3d 504 (Fla. 2014). The State Court erred in that the Trial Court should have suppressed the cell phone evidence, because seizure of such records without a warrant, is in violation of the Fourth Amendment. In accord with *Carpenter* and *Tracey* supra, Petitioner was in the state appellate court "pipeline" for a decision to reverse in accord with *Tracey*, meaning his case was not final,

because it was still in the pendency of the plenary appeal. Application of the standard set in these decisions and their progeny, would apply to Petitioner.

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

> "The 'basic purpose of this Amendment,' our cases have recognized, 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Camara v. Municipal Court of City and County of San Francisco*, 387 U. S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

The Court declined to extend *Smith v. Maryland*, 442 U. S. 735, 741, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) and *United States v. Miller*, 425 U. S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) to overcome protections by the Fourth Amendment. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether Florida leverages the technology from a wireless carrier, the Court has held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.

The location information obtained from Petitioner's wireless carrier was the product of a search.

Petitioner did not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, what he seeks to preserve as private, even in an area accessible to the public, is constitutionally protected. See *Katz v. United States*, 389 U. S. 347, 351-352, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Petitioner had a reasonable expectation of privacy in the whole of his physical movements. See

United States v. Jones, 565 U. S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). Allowing government access to cell-site records contravenes that expectation. Although cell-site records are generated for commercial purposes, that distinction does not negate Petitioner's anticipation of privacy in his physical location.

This Court's having found that the acquisition of Petitioner's CSLI was a search, causes the legal conclusion that the State must obtain a warrant supported by probable cause *before* acquiring such records. Although the ultimate measure of the constitutionality of a governmental search is 'reasonableness,' the Court has established that warrantless searches such as Petitioner's, are typically unreasonable where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing. *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 652-653, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). This Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. CSLI is an entirely different species of business record-something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than common business record/documents. When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. See *Riley v. California*, 573 U.S. 373; 134 S Ct 2473; 189 L Ed 2d 430; 2014 US LEXIS 4497; 82 USLW 4558 (2014) ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in prior precedents."). This Court is obligated-as subtler and more far-reaching means of invading privacy

have become available to the Government-to ensure that the progress of science does not erode Fourth Amendment protections. See *Olmstead v. United States*, 277 U. S. 438, 473-474, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. See *United States v. Di Re*, 332 U. S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948).

The Court should decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The State's acquisition of the cell-site records here was a search under that Amendment. If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. Law enforcement acquired the cell-site records pursuant to a court order and there is an absence of a warrant, the search in this case was unreasonable. Thus, the State courts' failure to apply the finding in these cases was reversible error.

This Honorable Court should grant the reversal Petitioner has a right to, and issue an order for a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

/s/ R36280

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Objection to Petition For Discharge has been hand-delivered to institutional staff at South Bay Correctional Facility for mailing to: Second District Court of Appeal Clerk of Court, PO Box 327, Lakeland, FL. 33802-0327; Tampa Regional Office of the Attorney General, 3507 E. Frontage Rd., Ste. 200, Tampa, FL 33607, on this 19th day of February, 2020.

R36280

Christopher Kyle Keys DC#