No.

IN THE

SUPREME COURT OF THE UNITED STATES

KYLE PHILLIPS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether it is a violation of the due process guaranteed by the Fourteenth Amendment for irrelevant prior-act evidence to be received in a criminal trial.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, KYLE PHILLIPS, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida First District Court of Appeal entered in this case on February 11, 2020 (rehearing denied on March 10, 2020). (A-3, A-5).[1]

D. CITATION TO ORDER BELOW

Phillips v. State, 291 So. 3d 552 (Fla. 1st DCA 2020).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida First District Court of Appeal.[2]

F. CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number. References to the alleged victim and the collateral act witness will be made using the witnesses' initials.

[2] Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

The Petitioner was charged in Florida state court one count of sexual battery and one count of extortion. The offenses allegedly occurred in October of 2016. The case proceeded to a jury trial in May of 2018, and at the conclusion of the trial, the jury found the Petitioner guilty as charged for both counts. The trial court sentenced the Petitioner to five years' imprisonment followed by ten years of probation (a downward departure sentence). (A-8). At the conclusion of the sentencing hearing, the trial court granted the Petitioner's request for bail pending appeal. (A-326) ("[A]ny time the State's [sic] uses what we refer to as Williams rule evidence that's always subject to some debate."). On direct appeal, the Florida First District Court of Appeal *per curiam* affirmed the Petitioner's convictions without discussion. (A-3).

2. Statement of the facts.

a. The State's Case in Chief.

Mike Dilmore. Mr. Dilmore, an investigator with the Tallahassee Police Department, testified that he conducted an analysis of B.M.'s cell phone. (A-65). Investigator Dilmore stated that (1) State's Exhibit 1 represented messages between B.M. and the Petitioner between the dates October 8, 2016, and October 10, 2016; (2) State's Exhibit 2 represented messages between B.M. and Luke Hazen on October 10, 2016; and (3) State's Exhibit 5 is a portion of the call log from B.M.'s cell phone on October 10, 2016. (A-66-67).

B.M. The record establishes that in October of 2016, B.M. was a student at

Florida State University. (A-135). B.M. stated that she dated the Petitioner for approximately six months in 2016, and she said that the two ended their relationship in October of 2016. (A-82-83). B.M. testified that after her relationship with the Petitioner ended, he found out that just prior to the date that she broke-up with him, she had cheated on him with a student who was in a fraternity, and she said that the Petitioner proceeded to send her "vulgar" text messages (i.e., he called her a "whore" for cheating on him). (A-84). B.M. stated that the Petitioner sent her a text message stating the following:

> I have – anyone can see these pictures of you. Anyone can see these videos of you sucking my dick. If someone happens to see them on my phone, it's not my fault. Anyone who wants to look through my phone and see them, can.

(A-85). B.M. testified that she subsequently "blocked" the Petitioner from sending her text messages, but she said she that later received text messages from a phone belonging to the Petitioner's friend (Luke Hazen) – B.M. indicated that she read the text messages to mean that if she did not meet with the Petitioner, he would let others see the compromising/naked pictures/videos of her on his phone (hereinafter "compromising pictures").[3] (A-85-86).[4] During B.M.'s testimony, the text exchanges

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[3] The record is clear that B.M. agreed to allow the Petitioner to possess the compromising pictures. (A-105). (B.M. texts the Petitioner and states that the compromising pictures were "for you only" and then she responds "[y]es you are" when The Petitioner states that he is "allowed to have them").

[4] In one of his texts to B.M., the Petitioner specifically said:

> I'm not stopping anyone from looking through my phone. I'll never post them or send them. Get over yourself.

(A-105). Another text sent from Mr. Hazen's phone said "I have already showed all of

between B.M. and the Petitioner were read for the jury (i.e., text messages from October 8, 2016, to October 10, 2016). (A-89-122).[5] B.M. stated that after texting with the Petitioner during the early morning hours of October 10, 2016, she offered to pick the Petitioner up from a bar named "Potbelly's" and drive him home, and she said that she did so in an effort to convince him to delete the compromising pictures from his phone. (A-119-122). B.M. testified that she subsequently picked up the Petitioner and drove him to his house (on Botany Drive). (A-123). B.M. stated that when they went inside, the two talked for over an hour and she said that they both calmed down. (A-124). B.M. testified that the Petitioner said "why don't you just – you just sleep here" and she indicated that she agreed because it was late and she did not want to drive home. (A-124). B.M. stated that when she got into bed with the Petitioner, he attempted to take her pants off and she claimed that she "said no repeatedly." (A-124). B.M. testified that the following occurred:

> So when he said things like, "I want to accept you, like, this will make me accept you," I thought, you know, maybe if I just make him happy, he'll leave me alone. So I just – I eventually just let him take my pants off, and he started to have sex with me.
>
> And at first, I was like, you know, this is – it's just sex, it's okay. Like, he's going to leave you alone after this. This is what he wants to make himself feel better about whatever – whatever closure he wants. Like, this will be it, and he'll leave me alone.
>
> And part of the way through – at this point, I was on my stomach.

607" (referring to the roommates of Apartment 607) (A-107), but the Petitioner said that it was Mr. Hazen – and not him – who sent this text to B.M. (A-269).

[5] B.M. indicated that during the time that she was texting with the Petitioner, she called the Tallahassee Police Department, but she said that the officer told her "if he's bothering you on social media, then why don't you just delete all social media and not use it anymore." (A-118).

He starts talking to me like a dog, saying, "Is this what it felt like when you fucked that Pike? Is this what you like?" And, "Look at you. You're a whore."

And I said, "Get the fuck off me." And I started sobbing, and he laughed. And he laughed at me, and he stayed inside of me for a minute or two and laughed.

(A-124-125).[6] B.M. also stated the following:

Q If it weren't for him telling you everything would be resolved and okay – or, I'm sorry, in your words, everything would be okay with you guys, and he would accept you if you had sex with him, would you have done it?

A If he hadn't said that?

Q Right.

A No.

Q Did you think that if you kept saying no and refused and left, that he would just drop this whole thing and stop harassing you with the pictures?

A No.

(A-127). B.M. testified that after the Petitioner got off of her, she "got up and got dressed and [] left." (A-129). B.M. stated that as she was leaving, the Petitioner

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[6] B.M. added:

Q Did you tell him to get off you one time or multiple times?

A I said, "Get the fuck off me," multiple times.

Q You said it was about a minute or two, once you started saying that, to when he got off?

A Yes.

(A-128).

followed her to her car, held up his phone – which displayed one of the compromising pictures of her – and called her a "whore" and said "I can't believe you just let me do that to you, you just – you just let me treat you like that." (A-129). B.M. testified that the Petitioner later texted her and said "Thanks for the ride[, t]he pictures are gone." (A-130). B.M. stated that later in the day following her encounter with the Petitioner (i.e., on October 10, 2016), she went to the victim advocate at Florida State University and said the following:

> I told her that my ex-boyfriend had been posting defaming things about me on social media and trying to contact me any way he could with, you know, derogatory language and whatnot.
>
> And I told her that he had told me that – he – well, what I believed him to be meaning was that if he – if I didn't have sex with him, that the pictures, the harassment, and all of that wasn't going to go away. And I know from her report, it doesn't say that in there; but I did tell her that when I went.

(A-135).

On cross-examination, B.M. stated that she broke-up with the Petitioner on October 2, 2016, and she conceded that she subsequently engaged in consensual sexual intercourse with the Petitioner on October 3, 2016, and October 5, 2016. (A-148, 152-153, 155). B.M. admitted that it was possible that it was her idea to sleep at the Petitioner's house on October 10, 2016. (A-168). B.M. also admitted that during the time that she was talking to the Petitioner at his house during the early morning hours of October 10, 2016, it was possible that the Petitioner was expressing that he would consider getting back together with B.M. (A-168). B.M. conceded that she did not remember whether she took her shirt off after she got into the Petitioner's bed. (A-173-

174). B.M. acknowledged that when she was interviewed by a police officer, she told the officer that she consented, but she asserted that what she meant by "consent" was that "when he tried to take my pants off, I didn't physically hit him or stop him." (A-173). B.M. testified that when she told the Petitioner to get off of her, he had already ejaculated:

> Q How long are you saying Mr. Phillips continued to have sex after he ejaculated before getting off of you?
>
> A I don't recall. He stayed inside of me after he ejaculated.
>
> Q So prior to you saying, "Get off of me," his penis was already inside of your vagina?
>
> A Yes.
>
> Q There had already been penetration and union at that time?
>
> A Yes.
>
> Q After you told him, "Get off of me," did he withdraw his penis and reenter it or reunion it?
>
> MS. DUGAN [the prosecutor]: I object to relevance.
>
> THE COURT: Overruled.
>
> THE WITNESS: No. He just stayed inside of me.

(A-174-175). B.M. admitted that when she met with the victim advocate at Florida State University in October of 2016, she did not report that there had been sex without her consent. (A-178). Finally, when asked the following question:

> On October 13th, did you feel that Mr. Phillips had apparently not done anything illegal, so there was nothing you could get him on, but you were going to look for something?

B.M. answered "[y]es." (A-180-181).

Luke Hazen. Mr. Hazen stated that the Petitioner was his roommate in early 2016 and he said that they lived together in Apartment 607 at the Onyx building. (A-197).[7] Mr. Hazen claimed that the Petitioner occasionally used his phone. (A-198). During his testimony, Mr. Hazen was shown a series of text messages between his phone and B.M., and he said that he did not send the text messages – and he clarified that he never saw a naked picture. (A-198-199).

E.S. E.S. stated that in 2014, she dated the Petitioner for approximately one year. (A-213). E.S. testified that after she and the Petitioner ended their relationship, she received a communication from the Petitioner – via Facebook Messenger – containing a topless picture of her and a message stating "I will delete these and the others if you give me my stuff back." (A-214). E.S. stated that at the time she received the communication, she was in possession of several of the Petitioner's items (i.e., a tapestry, a mug, some hats, and a shirt). (A-214).

On cross-examination, E.S. acknowledged that the Petitioner never threatened to post the naked pictures of her. (A-216).

At the conclusion of E.S.'s testimony, the State rested. (A-216).

b. The Petitioner's Case in Chief.

Heather Pearce. Ms. Pearce, the director of the Victim Advocate Program at

[7] The record establishes that the Petitioner did not live with Mr. Hazen in Apartment 607 in October of 2016. (A-123). The record also establishes that the Oynx apartment complex is across the street from Potbelly's (i.e., when B.M. picked up the Petitioner during the early morning hours of October 10, 2016, the Petitioner had been at Mr. Hazen's apartment). (A-121).

Florida State University, testified that B.M. contacted her office in October of 2016. (A-220). Ms. Pearce stated (based on her review of her file) that when B.M. contacted her office, she made a sexual harassment complaint (i.e., sexual exploitation involving pictures), but she did *not* make any complaint regarding an alleged sexual battery. (A-221-222). Ms. Pearce testified that it was not until December of 2016 that B.M. "stated that the harassment had turned sexual." (A-223).

The Petitioner. The Petitioner testified that he dated B.M. for several months, and he said that during the relationship, the two regularly engaged in sexual activity and he explained that the two would often talk "dirty" to each other during sex (i.e., she would say "I love the way you fuck me" and he would say "w[]hose pussy is that?"). (A-246). The Petitioner stated that B.M. broke up with him on October 2, 2016, and he said that she "wouldn't really give a reason" when she broke up with him. (A-237). The Petitioner testified that he was in love with B.M., and he said that he "took it really hard" when she broke up with him. (A-237). The Petitioner stated that on approximately October 7-8, 2016, he found out that B.M. had slept with a fraternity student shortly before she broke up with him on October 2, 2016, and he acknowledged that after learning about the fraternity student, he sent some mean texts to B.M. (and he said that he regrets sending those texts). (A-251).[8] The Petitioner explained that

[8] The Petitioner explained that (1) when he first started dating B.M., she gave him chlamydia and (2) after B.M. broke-up with him – i.e., after she had sex with a fraternity student without the Petitioner's knowledge – she had sex with the Petitioner on three occasions (and when she had sex with the Petitioner on these occasions, he was not aware that she had just slept with someone else and therefore he was concerned that she had again given him a sexually transmitted disease). (A-241-249,

when he asked B.M. to come see him on the night of October 9, 2016, he wanted her to apologize to him in person so he could get closure and move forward. (A-257). The Petitioner testified that he never told B.M. that she had to have sex with him again in order for him to delete the compromising pictures that he had of her on his phone. (A-257). The Petitioner stated after B.M. picked him up from Potbelly's during the early morning hours of October 10, 2016, he deleted the compromising pictures of B.M. as she was driving him to his house. (A-260). The Petitioner testified that after they arrived at his house, he went inside and closed the door, but he said that B.M. knocked on his door and insisted on coming inside. (A-262).[9] The Petitioner stated that after B.M. came inside his house, the two talked for over an hour, and he said that he subsequently asked her to leave, but she indicated that she was too tired and therefore she stayed at the house. (A-263-264). The Petitioner testified once it was settled that B.M. would sleep at his house, she went into his bedroom, took off her clothes, and got into his bed. (A-264). The Petitioner stated that when he got into his bed, B.M. asked him to perform oral sex on her, and he said that they later engaged in consensual vaginal sex. (A-264-265). The Petitioner testified that after he ejaculated, he said "whose pussy is that" – but he said that B.M. got upset by this comment (explaining that she had been sleeping with someone else) and therefore she told him to get off of

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252). During her testimony, B.M. admitted that she gave a sexually transmitted disease to the Petitioner when she first met him. (A-102).

[9] The Petitioner videotaped B.M. knocking on his door and requesting to come inside. (A-123).

her, which he did. (A-265-266). The Petitioner explained that when B.M. told him that she had been sleeping with someone else, he realized that there was "zero reconciliation" and therefore he told her to leave his house. (A-266-267).

The Petitioner stated that he was subsequently interviewed by the police, and he explained that he voluntarily talked to the police about his relationship with B.M. (A-270). The Petitioner testified that the police looked through his phone and did not find any compromising pictures of B.M. (A-270-271).

On cross-examination, the Petitioner stated that his sexual activity with B.M. on October 10, 2016, was consensual. (A-295).

At the conclusion of the Petitioner's testimony, the defense rested. (A-307). The State did not present any rebuttal witnesses.

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The question presented in this case is as follows:

> Whether it is a violation of the due process guaranteed by the Fourteenth Amendment for irrelevant prior-act evidence to be received in a criminal trial.

As explained below, the Petitioner requests the Court to grant his certiorari petition and thereafter consider this important question.

Prior to trial, the State filed a "Notice of Intent to Introduce Similar Fact Evidence" (hereinafter "State's Notice"). (A-16). In the State's Notice, the State indicated its intention to introduce at trial collateral/prior-act evidence concerning an alleged attempt "to extort an ex-girlfriend, [E.S.], with nude pictures of [E.S.] . . . ." (A-16). During the trial, the trial court ruled that the State would be permitted to introduce the prior-act evidence concerning E.S.'s allegation. (A-208). ("I'm going to allow the testimony.").

"A right to a fair trial is a right . . . protected by the due process clause of the Fourteenth Amendment." *Adamson v. California*, 332 U.S. 46, 53 (1947). In *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991), the Court expressly refused to determine whether the introduction of prior-act evidence to show propensity to commit a crime violates constitutional due process principles:

> Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of "prior crimes" evidence to show propensity to commit a charged crime.

The Petitioner requests the Court to accept the instant case and now reach this issue.

In a criminal case, the jury should base its decision regarding innocence or guilt solely on the evidence relating to the charge(s) alleged in the charging document. The concern is that "the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law." *Snowden v. State*, 537 So. 2d 1383, 1384 (Fla. 3d DCA 1989) (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)).[10] "Although reasonably and logically, the fact that a certain person has committed a certain wrongful act in the past does not prove that that person has committed another particular similar act (the charged act), nevertheless, it is the experience of centuries that when an average juror learns that a defendant has committed a particular type of wrongful act in the past, that juror is strongly emotionally inclined to believe that the defendant probably committed the similar act with which he is charged." *Anderson v. State*, 549 So. 2d 807, 811-812 (Fla. 5th DCA 1989) (Cowart, J., dissenting).

As set forth below, the Petitioner submits that the prior-act evidence in this case (1) failed to meet the similarity requirement necessary to be relevant and (2) the prejudicial effect of the prior-act evidence substantially outweighed its probative value.

First, the Petitioner's text to E.S. was not similar to his texts to B.M. As argued by defense counsel during the trial:

> And what we've got here is an offer to delete something that was

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[10] *See also Jones v. State*, 944 So. 2d 533, 536 (Fla. 5th DCA 2006) ("Evidence that a defendant committed a collateral crime is inherently prejudicial because it creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof he committed the charged offense.").

> lawfully owned in exchange for property.
>
> What we have in this other case is very upset emotions where it's being alleged that he attempted to get consent to sex for offering to delete something.

(A-207). E.S. testified that the specific message that was sent to her said "I will delete these and the others if you give me my stuff back." (A-214). She admitted that the Petitioner *never threatened* to post the naked pictures of her (A-216), and, more importantly, there were no texts/messages sent to E.S. indicating that the pictures had been viewed by roommates or anyone else – and no texts/messages stating that anyone could look through his phone and see the pictures. Most notably, there is nothing in the record showing that the Petitioner's pictures of E.S. were in any way related to some subsequent sexual activity between the Petitioner and E.S. Ultimately, there was *nothing illegal* about the Petitioner's message to E.S. Thus, the prior-act evidence was not relevant, as the State failed to prove that the prior-act evidence was similar to the charged crime. *See Rogers v. State*, 89 So. 3d 990, 993 (Fla. 2d DCA 2012) ("These circumstances are not so strikingly similar that they rise to the level of 'fingerprint evidence.'"); *Thermidor v. State*, 50 So. 3d 1184, 1188 (Fla. 4th DCA 2010) ("In this case, it appears that the dissimilarities outweigh the similarities, especially in light of the addition of two other robbers in the instant case."); *Carbonell v. State*, 47 So. 3d 944, 947 (Fla. 3d DCA 2010)("Here, the victims in both cases were the subject of a strong armed robbery where the robber took chains and a purse, and left in a pick-up truck. However, we cannot say that the two crimes were so unique to justify the admission of the uncharged crimes."); *Fitzsimmons v. State*, 935 So. 2d 125, 128

(Fla. 2d DCA 2006) ("The State did not establish that Fitzsimmons' actions at the SouthTrust Bank were so strikingly similar to the perpetrator's actions at the Regions Bank that the evidence was properly admissible as *Williams*[11] rule evidence.").

Second, the Petitioner submits that the probative value of prior-act evidence was substantially outweighed by the danger of unfair prejudice. As argued by defense counsel below:

> At the same time, we would object under 403 that it's prejudicial, and it will cause the jury to judge him not based on his behavior with this individual but based on his behavior with [E.S.] as well.

(A-208).

The Petitioner was substantially prejudiced by the introduction of the prior-act evidence in this case. The improper admission of similar fact testimony is presumed to be harmful error." *Pastor v. State*, 792 So. 2d 627, 630 (Fla. 4th DCA 2001). *See also Rogers*, 89 So. 3d at 993 ("Evidence of the prior robbery should not have been allowed. The minds of an average jury might have found the State's case significantly less persuasive had the testimony of the prior robbery been excluded.").

Thus, as explained above, the prior-act evidence in this case was irrelevant and admitted solely to show propensity. The Petitioner submits that it was a violation of his due process rights for this irrelevant evidence to have been received in his trial. *See, e.g., McKinney v. Rees*, 993 F.2d 1378, 1384-1385 (9th Cir. 1993) (holding in the context of a murder prosecution that "[t]he character rule [i.e., the use of character

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[11] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

evidence to show propensity] is based on . . . a 'fundamental conception of justice' and the 'community's sense of fair play and decency'"); *Old Chief v. United States*, 519 U.S. 172, 182 (1997) (stating in *dicta* that "[t]here is . . . no question that propensity would be an 'improper basis' for conviction"); *Michelson v. United States*, 335 U.S. 469, 475-476 (1948) (noting in *dicta* that "[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt").

The question presented in this case has the potential to impact numerous criminal prosecutions nationwide. By granting this petition, the Court will the have the opportunity address this important question and thereafter decide whether it is a violation of the due process guaranteed by the Fourteenth Amendment for irrelevant prior-act evidence to be received in a criminal trial. Accordingly, for the reasons articulated above, the Petitioner prays the Court to grant his certiorari petition in order to address this important issue.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

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