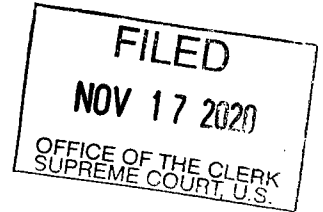


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20-6512
No. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

AMERICA

Davey Eugene Lewis — PETITIONER
(Your Name)

vs.

State of Florida — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second District Court of Appeal
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Davey Eugene Lewis
(Your Name)

Apalachee C.I. 35 Apalachee Dr.
(Address)

Sneads, Florida 32460
(City, State, Zip Code)

None
(Phone Number)

Cover Page

QUESTION(S) PRESENTED

Can the State Courts allow the Police to use promises, inducements, deceit and/or trickery when obtaining a Confession and then don't Suppress the Confession?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

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OTHER

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Davey Eugene Lewis - PETITIONER

VS.

State of Florida - RESPONDENT(S)

Case No. _____

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Comes Now, the Petitioner Lewis Pro Se' is Filing the listed above in Good Faith pursuant to Sup. Ct. R. 29.6. In support of this Certificate, Petitioner list the below interested person:

1. Abdoney, Kevin "Suppression Hearing, Trial Judge of Polk County, Fla."
2. Anderson, Kamie "Petitioner's Ex-Girlfriend and victim's stepmother"
3. Bushn, Greg "Assistance Public Defender"
4. Chastang, Graylin "Norgard, Norgard & Chastang Trial Lawyer"
5. Cortez, Jesus "School officer of Polk County, Fla. Sheriff's Office."
6. Dimming, Howard "Rex" II "Public Defender"
7. Durrance, Dale "Magistrate Judge of Polk County, Fla."
8. Ehrhart, Erik "Regional Counsel of the Public Defender's office"
9. Hass, Brian "State Attorney of Polk County, Fla."

10. Hill, Emily "Victim"
11. Hill, Michael "Victim's Father"
12. Hoffman, Pamela "Public Defender"
13. Kiefer, Maura J. "Special Assistant Public Defender Direct Appeal"
14. Knox-Benoit, Laurie "Assistance Attorney General"
15. Lewis, Davey "Petitioner"
16. Moody, Ashley "Attorney General of Florida"
17. Pitts, Sarah "Children's Advocacy Center"
18. Swenson, Jennifer "Assistance State Attorney"
19. Socha, Brett "Detective of Polk County, Fla. Sheriff's Office"
20. Tondreault, Mattie "Assistance State Attorney"
21. Vann, Ingrid "Assistance Principal Jesse Keen Elementary School"

In closing, Petitioner is unable to locate any subsidiaries, Conglomerates, affiliates and parent corporations, including any public held corporation that owns 10% or more of a party's stock or other identifiable legal entities related to a party in connection with this case

Petitioner's Proof of Service is located on
pg. 30 of this Certiorari

By x Davey E. Lewis

vi

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at Unknown to Petitioner; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the 10th Judicial Cir. Court of Fla. court appears at Appendix A to the petition and is (Appx. App. 50-51, 673-674)

☐ reported at Unknown to Petitioner; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Aug. 19, 2020.
A copy of that decision appears at Appendix E.

☒ A timely petition for rehearing was thereafter denied on the following date: Nov. 5, 2020, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____A____.

Petitioner filed a Motion for Extension of time due to Covid-19 and other reasons.
The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

This Petition is Filed pursuant to Order List : 589 U.S. (Thursday March 19, 2020 due to Covid-19). Petitioner could not type this Writ within the 90 days due to Covid-19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Constitutional Provisions that are involved is the 5th Amendment holding:

"nor shall be compelled in any criminal case to be a witness against himself"...

The Statutory provisions involved are located in Tit. 18 USCS 3482 Evidence and Witnesses - (Rule of Criminal Procedure).

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

The following record citations are used: Rx for the clerk's record, and Tx for Trial Transcripts, where "x" refers to the page number. The Record ("R") are located in Appendix A and the Trial Transcripts are located in Appendix B of this Action.

STATEMENT OF THE CASE

Appellant, Davey E. Lewis, was charged by amended felony information filed November 2, 2018 in circuit case 53-2015-CF-009256-A000-XX with count one, attempted sexual battery, in violation of § 794.011, Fla. Stat.; count two, sexual battery, in violation of § 800.04, Fla. Stat. and count three, lewd molestation, in violation of § 800.04, Fla. Stat., all alleged to have occurred between October 1, 2015 and October 18, 2015 in Polk County, Florida. (R312, 313)

On November 7, 2018, appellant Lewis was convicted as charged (R370-372) and after a sentencing hearing on November 9, 2018 (R403-416) he was sentenced to a term of natural life on counts 1 and 2, concurrent with count 3, and on count 3 to natural life. (R393-394)

STATEMENT OF THE FACTS

Pre-Trial Motions

Pre-trial, appellant twice moved the court to exclude his statements made to detective Brett Socha and Kamie Anderson on December 2 and 3, 2015 because Socha promised him - directly and indirectly through a State agent - a sentence of 2 years

versus 20 years if he did not cooperate. (R47-48; 272-272) The State agent was Kamie Anderson², appellant's girlfriend and mother of his unborn child, who acted at the behest and direction of Detective Socha in a controlled phone call where a sentence of 2 years versus 20 years was discussed as an inducement for appellant to confess.

Appellant filed two pre-trial motions pursuant to Fla. R. Crim. P. 3.190(h) two suppress evidence of his statements and admissions allegedly to Detective Brett Socha of the Polk County Sheriff's Office on December 2 and 3, 2015. (R.47-48)

First Motion to Suppress Statement (5/10/2017)

The first motion to suppress focused on appellant's contention that he was inebriated when the Statements were supplied, and that the Statements were the product of threats and promises made by law enforcement, to wit:

- On December 2, 2015, Det. Socha informed appellant that if he admitted to the allegations made by the alleged victim, Emily Hill, he would assist him in receiving a sentence of two years prison; and,
- On December 2, 2015, Det. Socha informed appellant that if he did not admit to the allegations made by alleged victim, Emily Hill, he would have child welfare authorities (DCF) take custody of the children of his girlfriend, Kamie Anderson, including appellant's son with whom she was pregnant with at the time.

The motion alleged that in 2015, the alleged victim, Emily Hill ("Emily"), was living with Kamie Anderson who at the time was romantically involved with Defendant, Davey Lewis. (R47-48)

On December 2, 2015, Emily informed school authorities that while at the family home Mr. Lewis touched her in a sexual

manner on multiple occasions while Ms. Anderson was in the shower. (R. 47-48)

Law enforcement was immediately notified by school authorities and an investigation commenced. Pursuant to the investigation, Detective Brett Socha of Polk County Sheriff's Office conducted an interview of Mr. Lewis on December 2, 2015. (R. 47-48)

December 2, 2015 Non-Custodial Interview - No Admissions

Part of the December 2 interview was audio-recorded, and in it Mr. Lewis repeatedly denied touching Emily in a sexual manner. (R. 47-48)

In another part of the December 2 interview that was not audio-recorded, Det. Socha made threats if Mr. Lewis did not admit to the allegations, as well as promises of assistance if he did admit. (R. 47-48) First, Det. Socha promised Mr. Lewis that he would assist Mr. Lewis in receiving a two year prison sentence if he would admit Emily's allegations. (R. 47-48)

Second, Det. Socha threatened Mr. Lewis that if his did not admit Emily's allegations he would have DCF take custody of Kamie Anderson's children including his unborn son that she was pregnant with at the time. (R. 47-48)

December 3, 2015 Custodial Interrogation - Incriminating Admissions.

The motion alleged that on December 3, 2015, while heavily intoxicated on alcohol, Mr. Lewis was again questioned by Det. Socha. Prompted by a new round of questioning, and with Det. Socha's threats and promises of leniency still fresh in his mind, appellant said that he did touch Emily in a sexual manner while Ms. Anderson showered. (R. 47-48)

THE FIRST SUPPRESSION HEARING: JUNE 2, 2017

At the June 2, 2017 evidentiary hearing Det. Socha

testified he recorded a non-custodial interview with appellant on December 2, 2015 in response to Emily Hill's complaint to school officials that same day. (R127) Socha denied making any promises or threats to appellant to induce a confession. (R122)

He agreed that appellant did not make any incriminating admissions during this interview, and he did not have probable cause to arrest appellant. He took buccal swab and gave appellant his card. (R.129-130) The recording was admitted as State's Exhibit 1, and played for the court. (R136-172)

The December 3rd Controlled Phone Call Between Anderson and Appellant

The next day there was a recorded, controlled phone call made by Kamie Anderson at Det. Socha's request from the police station, under his supervision, influence and instructions. Socha was listening in and writing down things for Anderson, showing her his note pad instructions during the call. (R130) The recording was admitted as State's Exhibit 2 and played for the court. (R172-227) The salient excerpts are as follows:

Ms. Anderson: You and I need to talk. You know, I mean, the guy last night that was there - the detective - you know, he was even nice to you and even told you that if you did something to tell him - and that he can help you to make it a point where you aren't there that long. (R239-240)

THE DEFENDANT: Two years, okay? It's 2 years out of my fuckin' life. (R240)

Ms. ANDERSON: I understand that. (R240)

THE DEFENDANT: Two years. (R240)

MS. ANDERSON: But you know what? That's better than how long? (R240)

THE DEFENDANT: Twenty. (R240)

MS. ANDERSON: I mean, why - why would you want to do 20 over 2? (R240)

THE DEFENDANT: If I call him and tell him one thing, I go to jail today. (R240)

MS. ANDERSON: Yes, but look, if you do that, what does that do? That gets this crap over with. That - (R240)

THE DEFENDANT: Are you gonna be there waitin' on me when I get out? (R240)

MS. ANDERSON: No. The crap will be over with. Oh, you know I'll be here waiting for you. (R240)

THE DEFENDANT: But if I go - (R241)

MS. ANDERSON: - this ain't gonna go away. And if you fail the polygraph, then what? You go away for 20 years. You know, that puts you at 48. (R241)

THE DEFENDANT: I'm breaking down. I'm sorry. (R243)

MS. ANDERSON: What? (R243)

THE DEFENDANT: I said I'm sorry. (R243)

MS. ANDERSON: For what? I mean, what did you do? Baby, I need you to talk to me. What did you do? I don't know how much more time I have before Mike comes out here for court. I need to know. (R243)

THE DEFENDANT: I did- name off the shit they prepared and I'll tell you "yes" or "no." (R243)

MS. ANDERSON: Did you touch her breast? (R243)

THE DEFENDANT: Yes. (R243)

MS. ANDERSON: Did you touch her vagina? (R243)

THE DEFENDANT: NO. (R243)

MS. ANDERSON: Did you try to put you penis in her mouth? (R243)

THE DEFENDANT: No. I swear to God, no. (R243)

MS. ANDERSON: Why did you touch her breast? (R243)

THE DEFENDANT: I don't know. (R243)

MS. ANDERSON: Why would you do that? (R243)

THE DEFENDANT: I don't know. Are you gonna leave me now? (R243)

MS. ANDERSON: No. I'm not gonna leave you. I mean, what-

when was this? Was it when I was in a shower like she's saying? Some time back I was in the shower did you really do that? Talk to me. (R243-244)

THE DEFENDANT: When we was arguin'. (R244)

MS. ANDERSON: When we were arguing? (R244)

THE DEFENDANT: Yes. (R244)

MS. ANDERSON: She's 12. Why would you even try - (R244)

THE DEFENDANT: I don't - I don't know, baby. I don't know. (R244)

MS. ANDERSON: No, you need to stop freaking out is what you need to do. You need to breathe. You need to try to relax. You know, I mean, do you want to talk later on tonight? I mean, I can try to sneak over there. Do you want - I mean would that make you happy? (R246)

THE DEFENDANT: Because I have to go-go through that tomorrow. (R247)

MS. ANDERSON: You need to call the detective? I mean, are you gonna confess to him so we can try to get this over with? (R246)

THE DEFENDANT: Yes. Tomorrow. (Indiscernible). He said if I just tell him (indiscernible) you know. (R247)

MS. ANDERSON: I would cooperate then. You want - I mean, you wanna have a life when you're done, right? (R247)

THE DEFENDANT: I love you

MS. ANDERSON: And I love you, but you need to - you need to call him, you need to let him know.

THE DEFENDANT: I need to tell him I talked to you.

The Arrest on December 3, 2015

Based on the information obtained from that recorded controlled phone call Socha now had probable cause to arrest appellant, brought him to the police substation and conducted a second recorded interview after Miranda warning. (R123-130, 132) The recording was admitted as State's Exhibit 2 and played for the court. (R172-227)

During appellant's Mirandized, custodial interrogation with Socha - conducted a few hours after the controlled call - he made one incriminating admissions to Det. Socha that he touched Emily on her breasts over her clothing, one time only, and he did not know when that occurred exactly. (R175-177; 179-180; 193-199). Otherwise, appellant consistently denied any other acts committed against Emily, after which the interrogation concluded. (R207)

Socha acknowledged there was a discussion between Anderson and appellant during the controlled call about a light prison sentence if he were to admit the allegations: "If I don't admit, it will be 20 years. But if I admit, it will be two years." (R133) But, Socha denied making any threats or promises to appellant in order to get a confession. (R124-126)

Appellant testified at the hearing that on December 2nd, after the recording was stopped, after Det. Socha took his buccal swab he told appellant that he could get him 2 years if he confessed, and if he did not cooperate they would come

take his unborn child. (R211-213)

Appellant was arrested at his home on December 3, 2015 by Det. Socha (R215). His reason for giving Socha a statement was "SO Kamie Anderson can keep our kids and keep our son after birth. I was thinking about the children." (R216)

First Order of Denial.

The court denied the first motion to suppress in its entirety, finding there was "no credible evidence that Detective Socha represented to appellant that if he admitted to sexually abusing the minor child victim that Detective Socha could get him two years in prison versus 20 years if he did not confess." (R50)

The court likewise found there was no credible evidence that Socha threatened appellant that if he did not admit to the allegations he would see to it that Kamie Anderson's children, including his unborn child, would be taken away from them by DCF. (R51)

The court also found "there is otherwise no evidence that any promises, threats, or other courses or overbearing tactics were utilized by Detective Socha in order to get the defendant to make statements or admissions in this case." (R51) The court held that under the totality of the circumstances appellant's statement to Socha were freely and voluntarily made. (R51)

SECOND (RENEWED) MOTION TO SUPPRESS APPELLANT'S STATEMENTS

10/02/2018

Subsequent to the suppression hearing, defense counsel re-deposed Kamie Anderson to ask about the circumstances of the controlled phone call she made under Socha's supervision and instructions. (R430)

Based on what defense counsel learned in Anderson's second deposition, he amended the motion to suppress appellant's Statements and admissions and added the following ground:

"On December 3, 2015 Detective Socha informed Kammie [sic] Anderson, now Kammie [sic] Shepherd, that if she obtained an admission, then Mr. Lewis would only receive a two year prison sentence. Detective Socha made the Statements in front of Michael Hill, the alleged victim's father." (R223)²

Second Suppression Hearing 10/30/2018

At an October 30, 2018 hearing on the renewed suppression motion, both Kammie Anderson and Michael Hill (the victim's father) testified.

Anderson said appellant was her brother-in-law; in 2015 they developed a sexual relationship and she had his child. (R539) Anderson spoke with Socha the day before the controlled phone call in her dining room. They were alone and it was at night. (R540-541; 543) Socha told her that "if he could get Mr. Lewis to admit to any allegations that he would only give him two years." (R542) And, if appellant fought the charges "he would get 20 years." (R542) Anderson had no personal knowledge of the actual sentencing laws for the crimes charged against appellant, so she took Socha at his word. (R543)

Socha asked her to make a controlled phone call to appellant to try and get an admission. (R543-544) Anderson was having problems with DCF as a result of Emily Hill's allegations of sexual abuse, and Socha told her that if she made the controlled call "I would have my children back immediately". (R541; 544)

They planned the call for the next morning around 7:00 a.m. (R545)

During the call (made from the police substation Socha would write down what Anderson was to say to appellant. (R545-546) He wrote down the 2 year lenient sentence for her to mention to appellant. He also wrote down for her to say that Emily Hill's Statements to police were "detailed". (R546; 558) "He was like wording it with his mouth but he was writing it down on his notepad as well." (R560) Socha kept his notes at that time. (R557) By this point Anderson had no intention of carrying on any relationship with appellant. (R548)

Michael Hill testified that Socha told him if he lied to Socha he could get arrested. (R564-565) Before they had a recorded conversation, Socha told him that if appellant admitted the crime "he would probably get about two years" versus 20 years. (R565; 570) That upset Hill, as he was not a fan of appellant. (R567)

Hill also testified that he did not believe his daughter's allegations. "Well, the thing is, is in the past she had been sexually abused by her stepfather." "And the stories that were between what he had done versus what Mr. Lewis had done were very identical." (R570)

Socha testified and denied saying anything to either Ms. Anderson or Mr. Hill about the 2 versus 20 year sentences for Appellant, or Anderson getting her kids back from DCF, (R574; 575; 578; 580). He did not keep the notes he wrote down for Anderson during the controlled phone call. (R584)

Appellant argued that Anderson was a de facto agent of the State when she was used by Detective Socha to make the controlled phone call and the court agreed and stated:

THE COURT:

"... she is an agent of the State at the point she is cooperating and makes these Statements about you know, he was a nice guy and said he could help you, and then there is this mention of you says, yeah. If I say something I'll get two years, and then and if you don't what is it then? And he says 20 (R610)

"So, it kind of sounds like she's referring to some-weather she told him, you know, separate and apart from Socha being involved or authorizing it, that, you know for whatever reason she said he said he could help you and- and then she tells him in this separate conversation he said two years but if you fight it it's 20. Did he have any duty, since she was an agent, to clear that up with him before taking his subsequent Statement or in fact before anything else happens in the case that would seek to elicit Statements from him?" (R610)

"That part of this bothers me a little bit." (R610)

"I think if that happened it's the States burden to show he was not under the influence of those promises. But if-if indeed that can be characterized as a State agent- and I don't know that I can't, I just- that's the only thing that concerns me about this is there is this discussion on the controlled phone call, regardless of whether the Socha actually told anybody- anything about penalties." (R612)

"The law is absolutely clear. They're a State agent." (R613)

"When it comes to eliciting Statements from a defendant-

in a controlled phone call, the caller is a State agent. I mean I defy you to find a case that says otherwise." (R613)

The State argued that there has to be evidence the appellant was under the influence that if I give this confession then I will get two years. (R616) The court responded as follows:

THE COURT

"so, what do you mean there has to be evidence? I would have thought the promise in and of itself is the evidence. That it is, as a matter of law, you can assume that one confesses after being told, 'If you admit this I'll get you two years'." (R617)

"You-you've got a State agent saying it, saying it in quotes, the night before a confession. So maybe that's enough that there is a break, a significant break in time." (R618)

Appellant argued that if Detective Socha had not made the promise of the 2 versus 20 years that he should have clarified it to appellant on December 3, and it was not clarified. (R620)

Appellant also pointed out that once Kamie Anderson discussed the 2 versus 20 years, it was at that point appellant said I'm going to call the detective, and so clearly it had an influence on appellant. (R624)

The State replied that Det. Socha was under no obligation to put himself in the defendant's shoes and determine whether or not defendant wouldn't give a confession based upon a promise or leniency (R626-627) and that the jury should determine whether or not appellants' confession was voluntary. (R629)

Second order of Denial (11/2/2018)

On November 2, 2018 the Court denied the second motion

to suppress appellant's Statements, stating:

"Based on my review of the evidence that was presented, the courts original finding that there was no direct promise at least or representation from Detective Socha to the defendant personally stands. The court finds that even if those Statements were made to the other witnesses that there is no evidence of any design on the part of law enforcement to communicate those things to the defendant in exchange for any confession or an admission. And most importantly, the State put it out and it's written response to prior testimony of the defendant in this case that his motivation for making the Statement had nothing to do with any promise or representation as to penalties that would be imposed but instead were made in response to an internal desire related to Ms. Anderson's children being kept in her care and not being taken away. So, the Court denies the motion to suppress." (R673-674) (emphasis supplied)

The Trial

The trial was very quick-two days including deliberations and the verdict. There was no forensic evidence presented, such as DNA, photos, prints, etc...

The State called 5 witnesses.

The victim Emily Hill ("Emily"), who was 15 years old at time of trial, was born October 19, 2003. (T139) She testified appellant moved in with her and her family in 2015. (T146) She said appellant touched her chest over her clothing. (T152) One time, "he put his thing in me." (T153) and said that was his "penis" in her "crotch" (R154) and he stopped when Kamie turned off the water in the shower. (T155) Once in the bedroom he touched her on her chest and her hip. (T156) Another time "He had sat

on the couch and tried to put his thing in my mouth and she was on the floor on her knees (T156) but she said no. (T157) Appellant never said anything to her about getting into trouble. (T158) These acts occurred over "Two weeks, I think. I'm not positive though." (T158) Appellant stopped once she told Kamie. (R158) She also told her Dad Michael Hill but he did not believe her. (T159) When DCF came to the house she told them appellant did not do anything to because we were told not to say anything and that we would get into trouble if we did. (T160) Emily told the Ms. Vann, the assistant principal at her school. (T160-161)

When Kamie became Emily's stepmom things changed (T163) and she had an unhappy life (T164) she found out that her stepmom Kamie and appellant were having an affair and that she was carrying appellant's baby. About one week before she told Ms. Vann at school about appellant, she saw them kissing on the couch and that upset her. (T166)

When asked about the exact timeframe that appellant did these sexual acts, she agreed she could not put a timeframe on them but she believed it went on for a few days. (T168)

Q. You don't know what month it happened in, do you?

A. No, I do not.

Q. So it is possible that it could have happen in November?"

A. There is a possibility, yes." (T169)

Ingrid Vann who worked at Jesse Keen Elementary school testified that Emily came to her on December 2, 2015 and told her that appellant would wake her up when everyone else was asleep and take her to the living room and get on top of her and make her do things. She said that appellant made

her put his penis in his mouth. (R65) "The only other thing she told me, that one time DCF went to her house and Davey went out the back door." (R66)

At sidebar defense counsel objected as inadmissible child hearsay which was sustained. (Y51-52) Counsel moved for a mistrial, which was denied. (Y53) Vann then contacted law enforcement and school resource officer Deputy Jesus Cortez responded the same day and spoke to Emily. (Y53) Emily told Cortez that appellant was touching her breasts (Y59) and her vagina (Y60)

Sarah Pitts worked for the Childrens Advocacy Center (CAC) and conducted a recorded forensic interview of Emily on December 2, 2015. (State's Exhibit 1) which was played for the jury. (Y66; 71)

Emily tells her that appellant "did it for two weeks". (Y84) The last time he did something he tried to put this thing in her mouth in the living room (Y85). And then he started "messing with this area" meaning her breasts. (Y90)

Then, the "first week" he made me go into his room, pulled down my pants, pulled up my shirt and then the water turned off (Y93-94) He did "that" to her breasts underneath her clothing, (Y97) but then she said he only touched her legs (Y98). Another time he put Emily on the couch and rubbed her back and touched her butt on top of her clothes and then went under my shirt and "then he messes with my boobs". (Y99-101) "After I told Mama he never did it again." (Y99; 100) Another time he pulled down my pants and underwear and "then he put his thing in me" meaning her crotch and it hurt a lot (Y105; 106)

Then the night before that he made me touch his thing. (Y109; 110)

Emily remembered it was in October: "Because when it was October, we were so excited for school because - and for the break. So we were counting the days up to it", referring to "Thanksgiving break". (Y86)

Emily told Ms. Pitts that the last night he did it "was the exact day that DCF came". (T112) Neither her Dad Michael Hill or Kamie Anderson believe her when she told them. (T114, 115)

Detective Brett Socha testified and the December 2 and 3 recording were played for the jury. State Exhibit 4 (T208-230) and Exhibit 5 (T230-260).³ The interview concluded Socha's investigation (T261) and the State rested.

Kamie Anderson testified for the defense that Emily was upset about her relationship with appellant. (T270) She said appellant was never alone with her children while she showered. (T270) Her relationship with Emily was not good and Emily was not happy with her. (T271) When Det. Socha interviewed her in December he said that appellant would get 2 years if he cooperated and 20 years if he didn't. (T272, 274) Socha asked her to make a phone call to appellant. He told her what to say and "he wrote it on a pad". (T274) On the morning (December 2) that Emily told police about appellant, Anderson drove her to school. (T275) They had a discussion about her friend Noah and Emily was upset. She told Anderson "That we would pay for it and she slammed the door". (T275) Anderson had no intention of having any relationship with appellant anymore. (T289)

Michael Hill said he had an argument with Emily over her friend Noah on the morning she made the allegations. (T292) He was also in the car with her and Anderson that morning and confirmed that Emily "got out of the van and said that we would pay for it and then she slammed the door". (T292)

REASONS FOR GRANTING THE PETITION

PETITIONER CONTENTS THAT THE TENTH JUDICIAL CIRCUIT COURT (KEVIN ABDONEY) COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS EXTRA-JUDICIAL STATEMENTS AND ADMISSIONS TO DETECTIVE SOCHA BECAUSE THEY WERE ILLEGALLY OBTAINED BY A STATE AGENT WHO PROMISED LENIENCY (2 YEARS) IF HE CONFESSED VERSUS SUBSTANTIAL PRISON (20 YEARS) IF HE DID NOT, AND THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA ERRED BY UPHOLDING THE TRIAL COURT'S RULING IN VIOLATION OF THE U.S. CONST. 5TH AMENDMENT RIGHT THAT BARS SELF-INCRIMINATION

I. THE FEDERAL LAW

Self-Incrimination. The Fifth Amendment right attaches only if a person's compelled testimony is self-incriminating. Estelle v. Smith, 451 U.S. 454, 462 (1981) 5th Amendment right applied to statements made by defendant to psychiatrist during competency exam because statements could be used against defendant at sentencing.

"[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. U.S. 479, 486-87 (1951). In Hoffman v. United States, the Supreme Court held that compelled testimony is self-incriminating if reasonable cause exist to believe that the testimony would either support a conviction or provide a link in the chain of evidence

leading to a conviction. To be self-incriminating, the compelled answers must pose a "substantial and 'real,' and not merely [a] trifling or imaginary, hazard[]" of criminal prosecution." U.S. v. Johnson, 437 F.3d 665, 678 (7th Cir. 2006) (5th Amendment applied when government had reasonable basis to believe that witness was possible subject of prosecution).

SEE 5 American Jurisprudence Trials 331 (May 2018) Sec. I B.24:

Use of promises or inducements, or of deceit and trickery by law enforcement officers, alone or with other factors, may establish a proper case for suppression. The following are illustrative promises and inducements improperly used to secure statements from an accused: 1. Direct or implied promise of a reduction or dismissal of the charge and 4. Direct or implied promise of aiding the defendant in obtaining probation, a shorter sentence, or an earlier parole. People v. Quinn 61 Cal 2d 551 (1964).

II. THE CLAIM AND MERITS

In the present case the court was provided with an audio-taped controlled phone call with Ms. Anderson and two audiotaped sessions with Det. Socha. Petitioner contends that the lower court misconstrued the facts as presented from the audiotapes, and misapplied the law to the facts.

First, the controlled phone call clearly showed that Petitioner was convinced that he should confess, or "cooperate" with Det. Socha to avoid the longer 20 year sentence. The court should have found that Petitioner was induced by the promise of leniency.

THE DEFENDANT: "Yes. Tomorrow. (Indiscernible). He said if I just tell him (indiscernible) you know." (R247).

Second, the court's denial was based on a finding that Det. Socha had no "design" to communicate the promise of leniency to Petitioner, and presumably that Ms. Anderson acted independently on the 2 versus 20 year promise during the controlled phone call. Such a finding ignores the fact that Anderson was a State agent acting at the behest, urging and instructions directly from Socha - this was not in dispute. Socha set up the call at the police station and wrote down directions to Anderson on his notepad. (He destroyed his notes prior to the hearing.) During the second hearing the trial court stressed that Anderson was a State agent, and questioned whether Socha should have cleared up the "2 versus 20 years" promise before he arrested Petitioner and interrogated him only hours later.

The involuntariness of Petitioner's first admission to Anderson was not dissipated by the time he spoke to Socha within the space of a few hours. Before Petitioner hung up the phone with Ms. Anderson he had resolved to call Socha - he made up his mind that he had to take the 2 years or else he would be in prison for decades. Indeed, Ms. Anderson "primed" Petitioner for Det. Socha so that he could swoop in and arrest Petitioner once he "took the bait" of the illegal "2 versus 20 years" promise.

But Socha never cleared it up. Instead, he ran with it and extracted a confession after Petitioner spoke with Anderson, while Petitioner was still harboring under the delusion that a sentence for sexual child abuse could be as light as 2 years.

Because Socha failed to clear up the illegal promise of leniency - and thus ensure Petitioner was not deluding himself before allowing him to confess - the second confession was likewise involuntary.

The lower court's faulty reasoning and finding in it's two

orders denying Petitioner two motions to suppress are similar to the faulty orders entered by the trial court in Albritton v. State, 769 so.2d 438 (Fla. 2nd DCA 2000).

Ms. Albritton's conviction of abuse of a dead body, a second-degree felony, was reversed on appeal after the 2nd DCA of Fla. held the trial court erred in denying her motion to suppress two confessions. At trial, two videotaped police interviews of Ms. Albritton were played to the jury. The first videotaped interview was made on June 26, 1998, and the second videotaped interview was made the next day.

In the videotaped interviews, Ms. Albritton explained that she mutilated Mr. Sutton's body as part of a religious ritual called the "helping hand"; this ritual had the intended effect of bringing peace to Mr. Sutton's spirit. Id., at 439.

Prior to trial, Ms. Albritton move to suppress the statements she gave to the police on the ground that they were involuntary. She alleged that her statements were induced by a promise that she would not be subjected to prosecution if the acts that were performed on Mr. Sutton's body were part of a religious ritual. Id., at 440.

Ms. Albritton testified at the hearing on the motion to suppress that only after she was told that the acts in question were protected by the Constitution if they involved religious activity did she decide to confess because she thought that what she was confessing to was legal and she could not be prosecuted. She further indicated that she confessed in order to protect her son, but she would not have done so except for Detective Petty's statements regarding rituals being constitutionally protected. Id., at 441.

First the trial court denied the motion to suppress and found that "the statement made by the detective to the effect that religious acts are protected by the United States Constitution

did not constitute a promise." *Id.*

Secondly, the trial court noted that Ms. Albritton testified at the hearing that she incriminated herself in order to protect her son and therefore the trial court found that Detective Petty's statement did not induce her confession. *Id.*

This Court disagreed on both points. On reversing the 2nd DCA of Fla. held:

"whatever her ulterior motive for the confession, it was clearly induced by the detective's assurance that if there were a religious motive behind the mutilation, Ms. Albritton would not be prosecuted. Initially, and for some period of time, Ms. Albritton denied any knowledge of the incident in question. However, immediately after the detective's statements regarding the constitutional protections applied to religious activity, Ms. Albritton confessed. In fact, just after the detective first explained the religious exemption, Ms. Albritton's initial inculpatory statement was, "Yeah, it was religious," and throughout her whole confession she explained all her acts as being part of a religious." *Id.* at 442.

For a confession to be voluntary, it cannot be obtained through direct or implied promises. See Johnson v. State, 696 so.2d 326, 329 (Fla. 1997). A confession obtained as a result of a direct or implied promise of benefit or leniency is involuntary and inadmissible. Wittemen v. State, 735 so.2d 538, 539 (Fla. 2d DCA 1999). If the interrogator induces the accused to confess by using language which amounts to a threat or promise of benefit, then the confession may be untrustworthy and should be excluded. Fillinger v. State, 349 so.2d 714, 716 (Fla. 2d DCA 1977).

In Albritton the trial court found that the detective's statements did not constitute a promise. "However, a promise does not have to be direct to render a confession

involuntary, but can be implied". Id. at 441, 442, citing Almeida v. State, 737 so.2d 520 (Fla. 1999) (holding that to exclude confession as testimony, it is not necessary that any direct promises or threats be made to the those present, be calculated to delude suspect as to his true position, and exert improper and undue influence over his mind).

The facts in Albritton are nearly identical to the instant case as far as the court's flawed reasoning in denying the suppression motions. Specifically, here, the State argued, and the court found, that Petitioner confessed in order to protect Anderson's children. (R673-674). However, as in Albritton, whatever Petitioner "ulterior motive" for his confession it was clearly induced by Socha's promise (communicated through Kamie Anderson) of leniency (2 years versus 20 years):

MS. ANDERSON: I mean, why-why would you want to do 20 over 2? (R240)

THE DEFENDANT: If I call him and tell him one thing, I go to jail today. (R240)

MS. ANDERSON: Yes, but look, if you do that, what does that do? That get's this crap over with. That- (R240)

MS. ANDERSON: I would cooperate then. You want - I mean, you wanna have a life when you're done, right? (R247)

MS. ANDERSON: No, you need to stop freaking out is what you need to do. You need to breathe. You need to try to relax. You know, I mean, do you want to talk later on tonight? I mean, I can try to sneak over there. Do you want - I mean would that make you happy? (R246)

THE DEFENDANT: Because I have to go-go through that tomorrow.
(R247)

THE DEFENDANT: I love you.

MS. ANDERSON: And I love you, but you need to - you need to call him, you need to let him know.

THE DEFENDANT: I need to tell him I talked to you.

Clearly, Petitioner's will was overcome when he spoke with Ms. Anderson who convinced him that he needed to confess to Det. Socha so he would not do 20 years. Petitioner made the decision then and there to call Socha the next day and confess. Then next day did not come as Socha arrested Petitioner right after the phone call, took him to the police station, Mirandized him and extracted the same incriminating admission from Petitioner that he touched Emily's breasts.

Once it is established that a confession is involuntary, a subsequent confession is presumed to be involuntary also unless it is clearly shown the "influences attendant upon [the] initial confession" were dissipated prior to the subsequent confession.

Brewer v. State, 386 So.2d 232, 236 (Fla. 1980). In Albritton, the Court concluded that "the influence of Detective Petty's promise to Ms. Albritton that she would not be prosecuted for a second-degree felony if she had been engaging in a religious ritual was not sufficiently dissipated at the time of her second confession on June 27 to allow its introduction into evidence". Id., at 442.

Likewise, in the present case, the influence of "the promise" to Petitioner during the controlled call that he would only serve 2 years in jail as opposed to 20 if he chose to fight

the charges was not sufficiently dissipated at the time of his second confession the same day to allow its introduction into evidence.

At trial, Petitioner testified that he did not commit the acts he was charged with, (I.347), meaning Petitioner's testimony contradicted the controlled phone call.

CONCLUSION

Petitioner's right to a fair trial as guaranteed by the Constitution, Amendments 5, 6, and 14 was violated when Petitioner's inadmissible, prejudicial admissions were heard by the jury. It was Petitioner's word against the victim's. The erroneous admission of his statements to Ms. Anderson and Det. Socha cannot be said to constitute harmless error. There was no forensic evidence produced by the State, and the victim's trial testimony differed from her previous forensic interview. The erroneous denial of Petitioner's motions to suppress warrants a reversal and new trial without the admissions.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Davey C. Lewis

Date: Nov. 17, 2020