20-8435

No.: _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,,
Petitioner,

versus

ATTORNEY GENERAL OF FLORIDA, Ashley Moody,
Respondent(s).

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

AMENDED
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER OTHERWISE INADMISSIBLE NONTESTIMONIAL HEARSAY, WHICH FALLS WITHIN NO STATUTORY HEARSAY EXCEPTION, ADMITTED FOR NON-HEARSAY PURPOSE AND THEREAFTER USED FOR THEIR TRUTH AS SUBSTANTIVE EVIDENCE VIOLATES THE CONFRONTATION CLAUSE AND RIGHT TO A FAIR TRIAL?

II. WHETHER THE STATE COURT VIOLATES EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

III. WHETHER A COUNSEL'S FAILURE TO MOVE TO SUPPRESS AN ACCUSED'S POST-POLYGRAPH STATEMENTS PURSUANT TO *WYRICK V. FIELDS,* 459 U.S. 42 (1982) CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER STRICKLAND?

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

AMENDED PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the highest state court with jurisdiction to review the merits appears at Appendix "A" to this petition and is unpublished.

The opinion of the Fourth District Court of Appeal of Florida on direct appeal appears at Appendix "D" to the petition and is published at *Eugene v. State,* 53 So.3d 1104 (Fla. 4th DCA 2011).

JURISDICTION

The date on which the highest state court with jurisdiction decided my case was January 27, 2021. A copy of that decision appears at Appendix A.

A timely motion for rehearing was filed and thereafter denied on the March 19, 2021. A copy of that order appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(a)[1].

1 Because the Fourth District Court of Appeal of Florida's decision is without a written opinion, the Florida Supreme Court has no jurisdiction to review it. Petitioner did seek review in the Florida Supreme Court and was dismissed based on same ground. See Appendix F attached.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 9, Clause 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

United States Constitution, Amendment V, "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

United States Constitution Amendment VI, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be 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."

United States Constitution, Amendment XIV, Section I, "No State shall make or enforce any law which [...] shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code Annotated Title 28, §1257: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATEMENT OF THE CASE[2]

Petitioner was charged and convicted of premeditated first degree murder based on wholly circumstantial evidence and sentenced to life in prison. (Appendix E, 1). During the course of the investigation, On July 19, 2005, at the request of the detectives, Petitioner reported to the police department for a polygraph. Prior to the polygraph, the examiner read and Petitioner signed a Miranda waiver of rights which made no mention of post-polygraph interrogation and Petitioner was not told he would be subject to any. The examiner then administered the test. At the conclusion, the examiner called in the detectives, explained the results then told Petitioner "Well, hopefully umm, you know, you'll tell them what you need to tell them and you go from there. Good luck" then left. (Appendix C, 9). Subsequently, without re-advisement of his Miranda rights, the following exchange occurred:

> Det. Toyota: "So [Petitioner] where does that leave us?
> Petitioner: (no audible answer)
> Det. Toyota: You don't know?
> Petitioner: I have no idea sir." Id. 10

And the post-polygraph interrogation continued for twenty hours. During the twenty-hour post-polygraph interrogation, Petitioner: 1) was interrogated by four detectives with at least two present at all times; 2) was escorted to and from the restroom as needed with its door guarded open and was offered food and water; 3) was told they knew he committed the murder, was lying about it, and was the sole viable suspect; and 3) was never told he was free to leave at any time. Id.

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[2] Unless requested, to avoid unnecessary and voluminous appendix, the concise facts in this petition are cited as referenced in Petitioner's Petition for Writ of Habeas Corpus (Appendix C), Initial Brief and Reply Brief on direct appeal Repaginated in Appendix E.

Petitioner has consistently argued that trial counsel was constitutionally ineffective for failing to suppress his July 19th post-polygraph statements pursuant to *Wyrick v. Fields*, 459 U.S. 42 (1982). Id. 9-12, 19. The state court adopted the state's response that this claim is refuted by the record for Petitioner admitted he was advised of his Miranda rights before the polygraph and denied relief. Id. The state appellate court affirmed. *Eugene v. State*, 200 So.3d 70 (Fla. 4th DCA 2016). Id.

At trial, the State theorized that Petitioner was the only person with motive to murder the deceased since she had recently shunned him. In support, the State sought to introduce the deceased's emails. Trial counsel objected and argued that the emails were hearsay in violation of *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and its progeny because they were: 1) offered for their truth; 2) not subject to cross-examination; 3) irrelevant; and 4) the deceased was unavailable. The State argued that the deceased's emails were not hearsay because they were offered to put Petitioner's emails in proper context, not for their truth. The trial court agreed with the State and admitted the deceased's emails. Counsel renewed his objection before the emails were admitted into evidence and at the conclusion of trial in a motion for new trial to no avail. (Appendix "E", 3-5).

During closing argument, the prosecutor argued in pertinent part:

> "You will see from the emails and you will see as we go through the evidence, that this is what the case comes down to. This man, in the name of some sick love, couldn't stand it anymore. On that day, he hit a boiling point and brutally killed [the deceased].
>
> 'You know it's a personal crime because not only does he suffocate her, he also does ligature and strangles her to death. Why both ways? That is rage. That is anger coming out.

He is angry at her for what? You know from the emails that she had the nerve to reject him. She had the nerve to cut her out of his life. In the beginning, he told the police officers their relationship was fine. 'She didn't cut me out of her life. You are talking like she cut me out of her life or something'.

'You will see from the emails, because he doesn't know that those are still on [the deceased]'s computer and the police will eventually get those. That is exactly what [the deceased] did. She cut him out of her life'.

'We know from the emails that she is no fan of [Petitioner's wife]. There is a relationship that can't be doubted between [the deceased] and [Petitioner] you saw it in the emails.'

'Going back to the [deceased]. Remember that he says that [the deceased] didn't cut him off. This is an email from [the deceased] written on May 18th: I will never get over the fact that you hurt me. I always believed in you. I always thought we would never part. Unfortunately, I can't get over the fact that the man I loved whole heartedly, nothing holding back, could ever do what you did. The sad thing is, I still love you the same. I just can't be around you yet I still love you. I could never hate you because I love you too much. It's funny how at the moment, you could look me in the eye and strike me twice, with no hesitation. It won't happen again, because I won't be there anymore for it to happen. It's funny how you can look me dead in the face, in my eyes, and strike me, not once but twice, the person that you claim you love so deeply. Yet, at the same moment, you didn't strike [Petitioner's wife]. That goes to show you who you really love.'

'She goes on to say: 'You will be extremely happy to know that me and Adelyn are broken up. I can't say broken up, because we were never together. I mean that our friendship is no longer there, as well. You and your lovely wife will be happy to know that. Although I never mentioned it to you, all I ever wanted was his friendship. Nothing else I cherished that friendship; all the flaws and great attributes that it had. I honest to God I thought he was an excellent friend.'

'She is saying right there that she is cutting him off; I will never see you again. 'How could you look me look me straight in the eye so coldly and strike me. Not only did I lose my heart and soul mate, but you and your lovely wife took a very good friend of mine, as well. Farewell. Goodbye. I will always remember the [Petitioner] that never hit me.'

'She rebuffed him and that's it, it's over. How dare she. She is going to leave him? He will show her, he did. He took her life'.

'[The deceased] said to him: 'We agreed to have distance between us, and you broke that today. [Petitioner]. It's already very hard emailing you and having to see you, but you are making it very hard for me when you come

> to me crying. I can't handle all of that. I am already in a lot of pain. I can't take no more. For God sake. I have you up on my ass crying, which makes me feel even worse. I have Adelyn in the midst of this. I think I honestly hurt his feelings. Now I believe he doesn't like me anymore. He wants nothing to do with me at all. He says he's okay, but his attitude is distant from me, so I just leave him alone. I do have a problem with you calling me crying, coming to me crying. Like I said, I don't promise you that I will ever talk to you again.'" (Id. 10-13).

To survive Petitioner's motion for judgment of acquittal, the state relied almost exclusively upon Petitioner's motive as evidenced in the deceased's emails and argued:

> "Going to motive, [Petitioner] is the only person that had a motive in this case. Adelyn Severe, there is absolutely no motive whatsoever -that they had a relationship. If anything, the emails lay out that it was [the deceased] that wanted to get Adelyn back. Adelyn had moved on..... [the deceased] is the one that shuns [Petitioner] in the end, disrespects him in the end, and lays out what ultimately happened to her...." (Id. 14, 15).

On direct appeal, counsel argued "trial court committed harmful error by admitting the deceased's emails" because despite the prosecutor's assurance that the deceased's emails were not being offered for their truth but to put Petitioners' emails in proper context, this is precisely how the prosecutor extensively and single-mindedly used them in closing arguments. (Id. 6, 9-14, 16). The state appellate court adopted the State's argument and affirmed holding that "the [deceased's] emails were not hearsay because they were offered not for the truth of the matters they contained but to establish the effect that [they] had on [Petitioner], the recipient of the emails." *Eugene v. State,* 53 So.3d 1104, 1109 (Fla. 4th DCA 2011).

In 2017, the Fourth DCA decided *Gayle v. State*, 216 So.3d 656 (Fla. 4th DCA 2017), cited Petitioner's case and stated:

> "On May 19, 2015, [Gayle] allegedly sent a text message to the victim confirming that he was in a sexual relationship with her. This was clearly 'a statement, other than one made by the declarant while testifying.' § 90.801(1)(c). The State, however, argues that this message, as well as the others, was not introduced into evidence with the intent of proving the truth of the matter asserted. See *Eugene v. State*, 53 So. 3d 1104, 1109 (Fla. 4th DCA 2011) (holding that *emails were not hearsay because they were not used to prove the truth of the assertions therein*). But *unlike* in [*Petitioner's case*], the State's closing argument in [*Gayle's*] case proves otherwise. The State used this statement as part of its attempt to prove that [Gayle] was having sex with the victim, and referred to the message as the clearest evidence of the very thing the text asserted. This text message was hearsay.
>
> Although normally inadmissible, hearsay may be admitted when a statutory exception is met. § 90.802-804. The State relies here on the exception found in section 90.803(18)(a), which allows the admission of '[a] party's own statement' for use against that party. " Id at 658-59.

On July 27, 2017, Case# 4D17-2454, Petitioner petitioned and alerted the court of the disparity in its analysis. The court denied the petition. On January 4, 2021, Case# 4D21-0023, Petitioner petitioned and urged the state court again, inter alia, to reconsider its previous rulings regarding the deceased's emails and trial counsel's ineffectiveness for failing to move to suppress Petitioner's July 19th post-polygraph statements and grant Petitioner a new trial to prevent a manifest injustice and a violation of Petitioner's Federal and Florida constitutional due process rights to 1) a fair trial, 2) equal treatment / protection; and 3) effective assistance of counsel. (Appendix C).

On January 27, 2021, the court denied that petition as being "frivolous and the claims are successive". (Appendix "A"). On February 2, 2021, Petitioner filed a timely motion for rehearing. (Appendix C). On March 19, 2021, the court denied the same. (Appendix B). On March 21, 2021, Petitioner filed an all writ petition to

the Supreme Court of Florida (Case No.: SC21-490), seeking review of the Fourth District Court of Appeal (Case No.: 4D21-0023). On March 31, 2021, the Supreme Court of Florida dismissed the petition for lack of jurisdiction to review "an unelaborated decision from a district court of appeal that is issued without opinion or explanation...". See Appendix F.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant certiorari because Florida hearsay rule as applied is unconstitutional, allowing its agents to circumvent the framers' intent that in every criminal prosecution the accused has the right to confront his accuser. The Court has yet to address circumstances where otherwise inadmissible nontestifying witness's nontestimonial hearsay statements, which fall within no firmly rooted statutory hearsay exception, admitted for nonhearsay purpose and thereafter used for their truth as substantive evidence with the same effect as testimonial hearsay, raising an important issue deserving to be resolved because it is unfathomable that the framers did not intend for the Confrontation Clause to encompass such circumstances. Further, the issue is important because the Court's inaction will allow States' agents to continue using this and similar tactics indefinitely with complete impunity. Moreover, the decision below frustrates the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, the state court's decision conflicts with not only this Court's decision in *Wyrick v. Fields,* 459 U.S. 42 (1982); but also with the First, Third, and the Ninth Circuits as well as other district courts and failure to address this conflict will empower the state court to propagate its erroneous and conflictive decision. This case presents a unique and timely opportunity to provide clear guidance especially where written opinions are few at trial and appellate court levels.

I. The Florida Hearsay Rule, As Applied, Is Unconstitutional

It is well established by this Court's holding in "*Crawford v. Washington* that 'witnesses,' under the Confrontation Clause, are those 'who bear testimony,' and we

defined 'testimony' as 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Ohio v. Clark*, 576 US 237, 243; 135 S.Ct 2173, 2179; 192 L Ed 2d 306 (2015) (internal quotation marks and alteration omitted).

In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the court announced what has come to be known as the "primary purpose" test and explained: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Ohio v. Clark*, 576 US 237, 244; 135 S Ct 2173, 2179-80; 192 L Ed 2d 306 (2015).

The court further expounded on the primary purpose test announced in *Davis* emphasizing "that the inquiry must consider 'all of the relevant circumstances.' And reiterated its view in that, when 'the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the Confrontation Clause. At the same time, [the court noted] that 'there may be other circumstances, aside from ongoing

emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.'" *Ohio v. Clark*, 576 US 237, 244-45; 135 S Ct 2173, 2180; 192 L Ed 2d 306 (2015).

The court concluded that "under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." However, this approach allows States' agents to use nontestifying witness's nontestimonial hearsay statements with the same effect as testimonial hearsay by offering the former under the guise of some nonhearsay purpose and thereafter used them for the very truth of the matter asserted with complete impunity, even when it falls within no firmly rooted statutory hearsay exception, which frustrates the framers' intent that every accused has the fundamental right to confront his/her accuser.

It is axiomatic that the United States Constitution provides a solid floor of constitutional protections and the states may build a ceiling of protections over that federal floor. Simply put, States may provide more constitutional protections for their citizens than the United States Constitution, *not less*. However, the Florida hearsay rule, as applied, provides less constitutional protections than the United States Constitution by making it easier for its agents to introduce otherwise inadmissible nontestifying witness's nontestimonial hearsay statements for their truth under the guise of some nonhearsay purpose and thereafter use such statements for their truth as substantive evidence with the same effect as

testimonial hearsay statements, even when such statements fall within no firmly rooted statutory hearsay exception, which offends the framers' intent that every accused has the fundamental right to confront his accuser and is therefore unconstitutional.

Here, over hearsay and Confrontation Clause objections, the prosecutor sought and introduced the deceased's emails under the guise of putting Petitioner's emails in context. However, the prosecutor's true intent for offering the deceased's emails became apparent during closing arguments when she persistently argued and told the jury that the deceased had in fact cut Petitioner out of her life, the very truth of the matter asserted, and to contradict Petitioner's version of the status of his relationship with the deceased. The prosecutor specifically told the jury:

> "You will see from the emails and you will see as we go through the evidence, that this is what the case comes down to. This man, in the name of some sick love, couldn't stand it anymore. On that day, he hit a boiling point and brutally killed [the deceased]."
>
> "He is angry at her for what? **You know from the emails that she had the nerve to reject him. She had the nerve to cut her out of his life. In the beginning, [Petitioner] told the police officers their relationship was fine. 'She didn't cut me out of her life. You are talking like she cut me out of her life or something'.**
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> **You will see from the emails, because [Petitioner] doesn't know that those are still on [the deceased]'s computer and the police will eventually get those. That is exactly what [the deceased] did. She cut him out of her life**
>
> "We know from the emails that she is no fan of [Petitioner's wife]. There is a relationship that can't be doubted between [the deceased] and [Petitioner] you saw it in the emails."
>
> **"Going back to the [deceased]. Remember that [Petitioner] says that [the deceased] didn't cut him off. This is an email from [the deceased] written on May 18th: [...]**
>
> **She is saying right there that she is cutting him off; I will never see you again. 'How could you look me look me straight in the eye so coldly and strike me. Not only did I lose my heart and soul mate, but you and your**

lovely wife took a very good friend of mine, as well. Farewell. Goodbye. I will always remember the [Petitioner] that never hit me."

In essence, the prosecutor used those emails as substantive evidence, *testified* for the deceased, and told the jury that 1) the deceased had in fact cut Petitioner out of her life and 2) the deceased's version of the status of their relationship is true while Petitioner's is false. Obviously, the prosecutor did not nor could have told the trial court at the outset that this was her true intent for offering the deceased's emails because the judge would have been compelled to deny their admission for they would have constituted inadmissible hearsay under Florida Statutes §90.802, which establish that hearsay is inadmissible as evidence at trial ***except as provided by statute***; and the emails fall within *no* statutory hearsay exception. *Bearden v. State*, 161 So.3d 1257, 1264 (Fla. 2015); see also *Gayle v. State*, 216 So.3d 656, 659 (Fla. 4th DCA 2017) ("Although normally inadmissible, ***hearsay may be admitted when a statutory exception is met***. § 90.802-804"). However, clothed with some nonhearsay purpose, i.e., to put Petitioner's emails in context, the judge admitted the emails; and thereafter, during closing arguments, the prosecutor single mindedly and extensively used them for the truth of the matter asserted as substantive evidence with the same effect as testimonial hearsay statements with complete impunity. It is unfathomable that the framers did not intend for the Confrontation Clause to encompass such circumstances.

Furthermore, despite the aforementioned prosecutor's extensive arguments and Petitioner's relentless arguments to the state appellate court, the court adopted the state's arguments and maintained that the deceased's emails were *not* hearsay

because they were *not* used for their truth but *merely* to show their effect on Petitioner their recipient. Hence, this case presents a timely opportunity for this Court to reinforce the framers' intent to protect the accused's fundamental constitutional right to confront his accuser, including in circumstances, like here, where otherwise inadmissible nontestifying witness's nontestimonial hearsay statements, which fall within no firmly rooted statutory hearsay exception, are introduced in evidence under the guise of some nonhearsay purpose and thereafter used for their truth as substantive evidence with the same effect as testimonial hearsay statements. Further, this issue is important because this Court's inaction will allow States' agents to continue using this and similar tactics to circumvent the Confrontation Clause indefinitely and with complete impunity.

II. The Florida Hearsay Rule, As Applied, Violates the Equal Protection Clause of the Fourteenth Amendment.

It is well settled that the Fourteenth Amendment's Equal Protection Clause mandates equal treatment under the law. Essential to that protection is the guarantee that similarly situated persons be treated equally. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439; 105 S. Ct. 3249; 87 L. Ed. 2d 313 (1985); see also *Village of Willowbrook v. Olech*, 528 U.S. 562, 564; 120 S. Ct. 1073; 145 L. Ed.2d 1060 (2000). The court held in *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591; 128 S.Ct. 2146; 170 L.Ed.2d 975 (2008), that "When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances

and conditions. Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a rational basis for the difference in treatment. Id at 602 (citing Olech, 528 U.S., at 564, 120 S.Ct. 1073).

Hearsay is defined as "*...a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.*"§ 90.801(1)(c), Fla. Stat.(2014); Federal Rule of Evidence 801(c)(1)(2) (2014). Unless it falls within a firmly rooted statutory hearsay exception, hearsay may only be offered for nonhearsay purpose. However, if a hearsay statement is used for its truth and falls within no firmly rooted statutory hearsay exception, .such statement is inadmissible hearsay regardless of the purpose for which the party claim to have offered the statement in evidence.

In *Banks v. State*, 790 So.2d 1094, 1099 (Fla. 2001), the Florida Supreme Court determined that in its closing argument, the State clearly used the out-of-court statement to establish the truth of the matter asserted therein and held:

> "Even when statements are properly admitted [...], it would be improper for the State to use the statements thereafter for the truth of the matter asserted therein. [And] regardless of the purpose for which a party claims it has offered evidence, when an out-of-court statement is thereafter used as evidence to prove the truth of the matter asserted, such use is improper" Id. (internal quotation marks and alteration omitted).

In *Conley v. State*, 620 So.2d 180, 182-183 (Fla. 1993), the court held:

> "The State argued in closing that [the out-of-court statement] about the weapon helped to prove that Conley used a rifle to commit the offenses of armed burglary, armed sexual battery, and armed robbery. Regardless of the purpose for which the State claims it offered the evidence, the State used the evidence to prove the truth of the matter

asserted. In so doing, the statement constituted hearsay and fell within no recognized exception to the rule of exclusion.") Id.

In *Keen v. State*, 775 So.2d 263, 274 (Fla. 2000), the court held:

"The State argues that the subject matter of the testimony challenged was not hearsay because it was not elicited to prove the truth of the matter asserted, but only to show a sequence of events. We reject such contention. [The out-of-court statements] were used by the State during closing argument for substantive support not 'sequence of events' purposes. Thus, regardless of the purpose for which the State now claims the testimony to have been directed, the evidence was in fact used to prove the truth of the content rendering the content of the statement hearsay. Id. (internal quotation marks and alteration omitted).

In Adams *v. State*, 195 So.3d 424 (Fla. 4th DCA 2016), the court concluded:

"...it appears that the state, in two ways, used the dispatcher's out-of-court statement to prove the truth of the matter asserted:

(2) The state's closing argument repeatedly argued that the vehicle's tag corroborated the victim's identification of the defendant.

Because the state used the ... out-of-court statement to prove the truth of the matter asserted, we conclude the trial court erred in admitting the dispatcher's statement." Id at 428-29.

In *Tillman v. State*, 964 So.2d 785 (Fla. 4th DCA 2007), the court concluded:

"The state used the [out-of-court statements] to suggest in closing that appellant may have had a gun, which was the reason he fled the scene. Regardless of the purpose for which the state claimed it offered the evidence, the state used the evidence to prove the truth of the matter asserted. In so doing, the statement constituted hearsay with no exception. Id. 789 (internal quotation marks and alteration omitted).

Here, like in *Adams*, *Banks*, *Conley*, *Keen*, and *Tillman*, the trial court admitted the deceased's out-of-court statements (emails) for nonhearsay purpose, to put Petitioner's emails in context. Thereafter, in closing arguments, far more so in here than in *Adams*, *Banks*, *Conley*, *Keen*, *Tillman,* the prosecutor improperly used the emails as substantive evidence to argue and prove the very truth of the matter asserted, i.e., that the deceased had in fact cut Petitioner out of her life and to

contradict Petitioner's statement to the police. It was harmful error because the prosecutor made the deceased's emails a feature in closing argument and there is a reasonable possibility that the error affected the verdict. While the defendants in *Adams, Banks, Conley, Keen,* and *Tillman* received a new trial based on the same harmful error, the state court affirmed Petitioner's conviction and sentence, maintaining that the "emails were *not* hearsay because they were *not* used to prove the truth of the assertions therein" but *merely* to show their effect on Petitioner.

The state court's decision is: 1) *irrational* because, far more so in here than in *Adams*, *Banks*, *Conley*, *Keen*, *Tillman,* and contrary to the state court's conclusion and plainly on the face of the record, the prosecutor extensively and single-mindedly used the deceased's emails for their truth and substantive effect on the jury during closing arguments; and 2) *arbitrary* because while those defendants in *Adams*, *Banks*, *Conley*, *Keen*, and *Tillman* received a new trial based on the same harmful error, Petitioner was denied one with no rational basis, which frustrates the spirit of the Fourteenth Amendment's Equal Protection Clause. Further, the state court exacerbates the irrationality and arbitrariness of its decision by distinguishing the prosecutor's arguments in Petitioner's case from *Gayle*, stating "But *unlike* in [*Petitioner's case*], the State's closing argument in [*Gayle*'s] case proves otherwise." *Gayle v. State*, 216 So.3d at 658.

III. The State Court Erroneously Applied *Wyrick v. Fields*, 459 U.S. 42 (1982).

In *Wyrick*, this Court establishes whether a Miranda waiver for a polygraph extends to post-polygraph accusatory interrogation, a reviewing court must apply

the totality of the circumstances, as *Edwards*[3] requires and the facts that the suspect requested the polygraph is controlling.

In reversing the Eight Circuit Court of Appeals' decision, this Court held:

> "The court of appeals did not examine the totality of circumstances, as *Edwards* requires. Fields did not merely initiate a meeting. ***By requesting a polygraph examination, he initiated interrogation.*** That is Fields waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected." 459 U.S. 42, 49.

The Court held further:

> "The eight circuits' rule certainly finds no support in *Edwards*, which emphasizes that the totality of the circumstances, including ***the fact that the suspect initiated the questioning, is controlling.***" Id at 48.

The Court reversed "Because the court of appeals misapplied *Edwards* and created an unjustified per se rule, ...". Id at 49.

The state court erroneously applied *Wyrick* because its decision is based only on the fact that Petitioner was advised of his Miranda rights *before* the polygraph but failed to apply the totality of the circumstance test mandated by this Court in *Wyrick*, including the critical and *controlling* factor which this Court emphasized, i.e.,["... ***By requesting a polygraph examination, [Fields] initiated interrogation.*** That is Fields waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected"]-which is missing here. Had Fields *not* requested the polygraph, the court would have been compelled to reach a different conclusion.

Here, however, Petitioner merely complied with the detectives' request to take the polygraph; and significantly, Petitioner did *not* initiate the post-polygraph

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[3] Edwards v. Arizona, 451 U.S. 477; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981).

interrogation. Thus the conclusion below that Petitioner had waived his Miranda rights for the post-polygraph accusatory interrogation is flawed and find no support in *Edwards* because it is hinged solely on the fact that Petitioner was advised of and signed the Miranda waiver *before* the July 19th polygraph but it failed to apply the totality of the circumstances, as *Edwards* requires and the fact that the Petitioner did *not* request the polygraph is controlling. Had Petitioner requested the polygraph, like in *Wyrick*, or initiated the post-polygraph interrogation, the conclusion below would have been supported by *Edwards*; however, Petitioner did neither.

In concluding that re-advisement was not required because Petitioner was advised of and signed the Miranda waiver *before* the polygraph, the state court simply ignores this Court's clear mandate in *Wyrick* and creates a per se rule that once an accused is advised of and signed a Miranda waiver prior to a polygraph, no re-advisement is required before post-polygraph accusatory interrogation initiated by the police began. Unlike the state court, the First, Third, and Ninth Circuits as well as other district courts recognize and properly apply *Wyrick* to determine whether a Miranda waiver for a polygraph extends to post-polygraph accusatory interrogation. See *United States v. Gillyard*, 726 F.2d 1426 (9th Cir. 1984); *United States v. Johnson*, 816 F.2d 918 (Cir. 3rd 1987); *United States v. Leon-Delfis*, 203 F.3d 103 (1st Cir. 2000); *Ghee v. Artuz*, 2004 US Dist LEXIS 18998 (E.D.N.Y., 2004); *United States. v. Vaile*, 2008 U.S. Dist. Lexis 69373 (U. S. Dist. ID 2008); and *United States v. Fluckes*, 297 F. Supp.3d 778 (E. D. MI. 2018).

IV. The State Court's Application of *Wyrick v. Fields, 459 U.S. 42 (1982)*, Conflicts with this Court, the First, Third, Ninth Circuits, and Other District Courts.

In *Gillyard*, confronted with facts remarkably similar to the totality of the circumstances in Petitioner's case, the Ninth Circuit applied *Wyrick* and held:

> "The difference between the facts in *Wyrick* and [*Gillyard*] is much greater than any generalized appearance of similarity. They are:
>
> 1. In *Wyrick* the defendant and his attorney requested the examination. [In *Gillyard*] the defendant consented after the agents suggested that he take one.
>
> 2. In *Wyrick* the defendant was represented by counsel. [In *Gillyard*], he was not.
>
> 3. In *Wyrick* the statement read to the defendant included a clause much broader than the standard Miranda warning given [in *Gillyard*]. [In *Wyrick*], and not [in *Gillyard*], [Fields] was advised: "If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate." The *Wyrick* warning made it clear to [Fields] that he was not merely taking a polygraph examination but was going to be asked questions about a specific offense under investigation.
>
> 4. [In *Wyrick*] the post examination questioning was done by the same person who conducted the polygraph examination after he had merely switched off the machine. [In *Gillyard*] the questioning was not done by the polygraph operator but by two officers who questioned the defendant for a considerable period of time after the operator had left the room." *United States v. Gillyard*, 726 F.2d 1426, 1429 (9th Cir. 1984)

The Ninth Circuit concluded: "... [The district court] properly applied the totality of circumstances test repeated many times in *Wyrick*, and found no valid waiver." Id.

Again in *León-Delfis*, faced with the same issue, the First Circuit applied *Wyrick* and reversed the decision below concluding:

> "While looking at the totality of the circumstances, several courts have articulated relevant facts to be considered in identifying 'the background,

> experience, and conduct of the accused' in determining whether a signed waiver of one's Fifth or Sixth Amendment right to counsel for purposes of a polygraph test carries over to post-polygraph interrogation. Those circumstances include who requested the polygraph examination; who initiated the post-polygraph questioning; whether the signed waiver clearly specifies that it applies to post-polygraph questioning or only to the polygraph test; and whether the defendant has consulted with counsel. (citations omitted)
>
> After careful review, we cannot accept the district court's holding that León-Delfis waived his right to counsel for purposes of the post-polygraph questioning. The difficulty began when the district court applied the wrong legal standard. The district court stated that 'the onus is not on the F.B.I. agent or the government agent' to avoid questioning. However, because León-Delfis' Sixth Amendment right to counsel had clearly attached, the government could not initiate questioning in the absence of counsel without potentially violating that right. *Had León-Delfis initiated the post-polygraph discussion, we might reach a different outcome. But he did not.* ...
>
> In addition, the evidence indicates that León-Delfis did not waive his right to counsel. León-Delfis was neither told that post-test questioning would occur nor signed a waiver that specifically mentioned the possibility of post-test questioning. Additionally, the FBI agents who questioned León-Delfis knew ...; that he did not request the polygraph test but only consented to it after suggestion by the Assistant United States Attorney; and that Agent López initiated the post-polygraph conversation and questioning, not León-Delfis." 203 F.3d 103, 111 (Cir. 1st 2000); see also *U. S. v. Johnson*, 816 F.2d 918, 921-22, n.4 (925) (Cir. 3rd 1987).

Contrary to this Court's decision in *Wyrick*, the state court's decision creates an unjustified per se rule that once an accused is advised of and signed his Miranda waived before a polygraph exam there is no need for re-advisement before police initiated post-polygraph accusatory interrogation began. This rationale is flawed and contravenes this Court's holding in *Wyrick* and conflicts with the First, Third, Ninth Circuits and other district courts on the same point of law. Accordingly, this Court should grant certiorari to review and resolve these important conflicts.

In sum, the Florida hearsay rule, as applied, is unconstitutional because it lessens the United States Constitution's mandated protections of the Confrontation

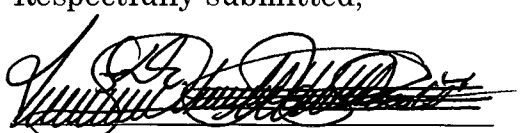
Clause by making it easier for its agents to introduce otherwise inadmissible nontestifying witness's nontestimonial hearsay statements for their truth under the guise of some nonhearsay purpose and thereafter use such statements for the truth of the matter asserted as substantive evidence with the same effect as testimonial hearsay statements, even when such statements fall within no firmly rooted statutory hearsay exception, which offends the framers' intent that every accused has the fundamental rights to confront his accuser and fair trial. Further, it also violates the Fourteenth Amendment's Equal Protection Clause, guaranteeing that similarly situated persons be treated equally.

Therefore, as it stands, this Court should seize this unique and timely opportunity and set viable precedent to end this practice which violates the Confrontation Clause and the Fourteenth Amendment's Equal Protection Clause of the United States Constitution. Further, it should also seize this unique and timely opportunity to address this important conflict and bring uniformity in the application of its mandate in *Wyrick v. Fields*, 459 U.S. 42 (1982) across the courts.

CONCLUSION

Wherefore, based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Date: June 16, 2021