No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

INDEX TO APPENDICES

No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

Appendix A

(Order of the Fourth District Court of Appeal of the State of Florida)

Appendix A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

January 27, 2021

CASE NO.: 4D21-0023
L.T. No.: 06-7295CF10A

VLADIMIR EUGENE v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that the January 4, 2021 petition for writ of habeas corpus is denied. The above styled petition is frivolous and the claims are successive. *See* 4D18-2697; 4D16-583. We caution petitioner that his continued filing of abusive, repetitive, malicious, and/or frivolous filings may result in sanctions, such as a bar on pro se filing in this court or referral to prison officials for disciplinary procedures, which may include forfeiture of gain time. *See State v. Spencer*, 751 So. 2d 47 (Fla. 1999); § 944.279(1), Fla. Stat. (2020).

LEVINE, C.J., KLINGENSMITH and RTAU, JJ., concur.

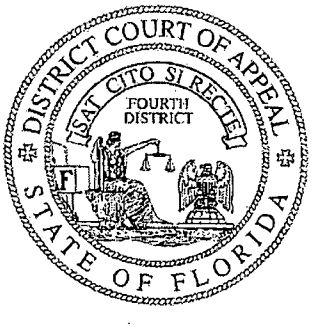
Served:

cc: Attorney General-W.P.B.
Clerk Broward
Hon. Barbara Anne McCarthy
State Attorney-Broward
Vladimir Eugene

kh

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

Appendix B

(Order of the Fourth District Court of Appeal of Florida denying rehearing)

Appendix B

No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

Appendix B

(Order of the Fourth District Court of Appeal of Florida denying rehearing)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

March 19, 2021

CASE NO.: 4D21-0023
L.T. No.: 06-7295CF10A

VLADIMIR EUGENE v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that petitioner's February 5, 2021 motion for rehearing, rehearing en banc, and written opinion is denied.

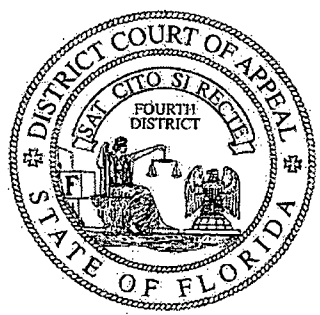
Served:

cc: Attorney General-W.P.B. Vladimir Eugene *W*

kr

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

Appendix C

(Petitioner's Petition for Writ of Habeas Corpus and Motion for Rehearing.)

Appendix C

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

VLADIMIR EUGENE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent. /

Case No: _____
Case No: 4D07-246, 4D16-583, 4D17-2454
Lt. Case No.: 06-7295 CF10A

PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to article V §4(b)(3) of the Florida Constitution and Florida Rules of Appellate Procedure, Rule 9.030(c)(3), Petitioner Vladimir Eugene, pro se, *in Good Faith*, petitions this Honorable Court to issue a writ of habeas corpus directed to the trial court to grant Petitioner a new trial in the interest of justice. In support, Petitioner states the following:

JURISDICTION

Pursuant to article V §4(b)(3) of the Florida Constitution and Florida Rules of Appellate Procedure, Rule 9.030(c)(3), this Honorable Court has jurisdiction to issue a writ of habeas corpus to correct previously issued rulings. This Court's jurisdiction is being invoked to correct this Court's previous rulings on the following issues:

I. Trial Court Committed Harmful Error by Admitting the Deceased's Emails to Petitioner.
II. Trial Counsel Was Constitutionally Ineffective Under Strickland for Failing to Move to Suppress Petitioner's July 19th Post-polygraph Statements.

III. The Prosecution's Use of Perjured Testimony Violates Petitioner's Due Process Right to a Fair Trial.

RELIEF SOUGHT

In good faith, Petitioner urges this Honorable Court to exercise its inherent authority, grant this petition, and reconsider and correct its previous rulings in the aforementioned three points of error to avoid incongruous, conflictive, and manifestly unfair results and a denial of his substantive due process rights to effective assistance of counsel and a fair trial and grant him a new trial.

STATEMENT OF THE PERTINENT FACTS

For clarity purposes, the pertinent facts are concisely stated within each respective issue. Further, unless the Court request otherwise, to avoid redundant records, the following symbols will be used followed by page number to refer to the pertinent facts herein:

"IB": Petitioner's Initial Brief on direct appeal;
"AB": Respondent's Answer Brief on direct appeal;
"RB": Petitioner's Reply Brief on direct appeal; and
"IB 3.850": Petitioner's Initial Brief appealing denial 3.850.

ARGUMENT

As a preliminary matter, Petitioner recognizes that the three issues in this petition are successive because they were presented in Case Nos.: 4D07-246, 4D16-583, and 4D17-2454. Hence, those decisions become the law of the case. However, "An appellate court has the power to reconsider and correct an erroneous

ruling that has become the law of the case where a prior ruling would result in a manifest injustice." ***State v. Akins***, 69 So.3d 261, 269 (Fla. 2011). As this Court held in Johnson "It is a manifest injustice to deny [Petitioner] the same relief afforded other defendants identically situated." ***Johnson v. State***, 9 So.3d 640, 642 (Fla. 4th DCA 2009).

It is well settled under Florida law that the writ of habeas corpus is the proper remedy to correct a manifest injustice and to avoid an incongruent and manifestly unjust result. ***Stephens v. State***, 974 So.2d 455, 457 (Fla. 2nd DCA 2008) ("... this court has exercised its inherent authority to grant a writ of habeas corpus to avoid incongruous and manifestly unfair results"); see also ***Prince v. State***, 98 So.3d 768 (Fla. 4th DCA 2012). Here, a writ of habeas corpus is warranted to correct this Court's previous rulings to avoid incongruous, conflictive, and manifestly unfair results and a manifest injustice.

ISSUE ONE

TRIAL COURT COMMITTED HARMFUL ERROR BY ADMITTING THE DECEASED'S EMAILS TO PETITIONER.

Supporting facts:

Petitioner was charged and convicted of premeditated first degree murder. Petitioner denied committing the murder. At trial, the State' presented a wholly circumstantial evidence case (no eyewitness, no DNA or fingerprint evidence linking Petitioner to the murder, and no confession of guilt). IB 19.

The State's theory was that Petitioner was the only person who had motive to murder the deceased since she had recently shunned him. In support, the State sought to introduce the deceased's emails to Petitioner. Defense counsel objected pre-trial and at trial that the emails were hearsay in violation of *Crawford* 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. IB 10 (internal citations omitted). The State responded that the emails were not offered for the truth but to put Petitioner's emails in proper context. Id. The trial court held that the emails were not hearsay and therefore were admissible. Id.

During closing argument, the State 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? <u>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</u>.***
>
> ***<u>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 she did. She cut him out of her life</u>".***
>
> ***<u>You know from that point on, the relationship severs. [the deceased] cuts him out. She is not going to let him in her life anymore. That is what starts all of this. This is where the motive comes from</u>.***

The man sitting right there is what caused what she looked like in this picture to become that picture. That man did that. ***It's because she rebuffed him. In the name of love, he couldn't take it, and killed her.***

You know what? I gave you this gift. I have done all this for you. I have been begging you. I have been pouring my heart out to you, and ***you still reject me****. You went out with this other guy on this night*

"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, and he did. He took her life.

And yet she rejects him. How angry is he getting? This is day after day after day. He is in the middle of the night pouring his heart out to her and nothing is working.

[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.'" IB 26-29.

On direct appeal, Petitioner argued the deceased's emails were inadmissible hearsay because the prosecutor single-mindedly used them for their truth in closing. IB 26-30; RB 4. This Court adopted the State's argument (AB 28, 30-35) and held that "the emails were not hearsay because they were offered not for the truth of the matters they contained but to establish the effect that the statements had on [Petitioner], the recipient of the emails." ***Eugene v. State,*** 53 So.3d 1104, 1109 (Fla. 4th DCA 2011). And subsequently denied rehearing on the same issue.

Legal Argument:

Petitioner contends that this Court should exercise its inherent authority to correct its manifestly unjust and conflictive decision in ***Eugene v. State,*** 53 So.3d 1104 (Fla. 4th DCA 2011) and afford him the same relief as the defendants in ***Conley v. State***, 620 So.2d 180 (Fla. 1993) and ***Banks v. State***, 790 So.2d 1094 (Fla. 2001). Further, the Court's decision allows the State to circumvent the holding in ***Crawford v. Washington***, 541 U.S. 36 (2004), and violate Petitioner's substantive due process rights to a fair trial and confront the witness against him guaranteed by the United States and Florida Constitutions.

The Florida Supreme Court has consistently held "*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". ***Conley v. State***, 620 So.2d 180, 184 (Fla. 1993); see also ***Adams v. State***, 195 So.3d 424, 429 (Fla. 4th DCA 2016) (citing *Conley*). In ***Banks v. State***, 790 So.2d 1094, 1099 (Fla. 2001), our supreme court held "Even when statements are properly admitted as verbal acts, it would be improper for the State to use the statements thereafter for the truth of the matter asserted therein".

Here, the deceased's emails were admitted for a non-hearsay purpose, to put Petitioner's emails in proper context. However, as evidenced by the above cited excerpts of the prosecutor's closing argument, once admitted, the prosecutor creatively used them for their truth to prove that the deceased had cut Petitioner out of her life which enraged Petitioner and to contradict Petitioner's statements to the police. By doing so, the deceased's emails were inadmissible hearsay ***regardless*** of the purpose the State claims it had offered them. The prosecutor's closing argument indisputably shows that those emails were used exclusively for their truth. The record is void of any evidence that the prosecutor used or *even attempted* to use those emails to show their effect on Petitioner, as argued for the first time on direct appeal and totally inconsistent with the prosecutor's closing argument. As

such, our Supreme Court's holdings in ***Conley*** and ***Banks*** are applicable and this Court had inadvertently failed to perceive this critical factor on direct appeal.

Furthermore, in light of the State's wholly circumstantial evidence case and Petitioner's legal theory of defense, it was harmful error because the prosecutor made the deceased's emails a feature in closing argument, improperly used them as substantive evidence to bolster its closing argument and strengthen the contested issues of motive and identity. Consequently, it would be manifestly unjust to deny Petitioner the same relief as ***Conley*** and ***Banks***, a new trial. Otherwise, Petitioner prayerfully asks the Court to certify conflict with ***Conley v. State***, 620 So.2d 180 (Fla. 1993) and ***Banks v. State***, 790 So.2d 1094 (Fla. 2001), on this issue.

ISSUE TWO

TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE UNDER STRICKLAND FOR FAILING TO MOVE TO SUPPRESS PETITIONER'S JULY 19th POST-POLYGRAPH STATEMENTS.

Supporting facts:

On July 19, 2005, at the request of the detectives, Petitioner reported to the Miramar 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. IB 3.850: 3, 4. 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.

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.

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 18-21. The State responded this claim is refuted by the record for Petitioner admitted he was advised of his Miranda rights before the polygraph. Id 19. The court denied this claim based on the State's response. Petitioner argued on appeal that the court below reversibly erred for failing to apply Wyrick's "totality of the circumstances test". IB 3.850: 18-23. This Court affirmed. ***Eugene v. State***, 200 So.3d 70 (Fla. 4th DCA 2016).

Legal Argument:

It is well established whether a signed waiver before a polygraph extends to post-polygraph interrogation, a reviewing court ***must*** apply the totality of the circumstances, as *Edwards* requires, including the necessary fact that the suspect requested the polygraph, is controlling. ***Wyrick v. Fields***, 459 U.S. 42, 47 (1982).

In reversing the decision below, the Wyrick court held:

> "In reaching this result, ***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. ***Fields validly waived his right*** *to have counsel present* ***at 'post-test' questioning***, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." Id.

The Wyrick Court held further:

> "The eight circuit's 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.

Here, Petitioner maintains that the postconviction court erroneously denied this claim because its decision rest ***solely*** on Petitioner signing the Miranda waiver ***before*** the polygraph but failed to apply Wyrick's "totality of the circumstances test", including the fact that Petitioner did ***not*** request the polygraph, is controlling. Hence, this Court's affirmance, premised on the same, is also erroneous.

In ***Gillyard***, confronted with remarkably analogous facts, the Ninth Circuit Court of Appeals 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; see also ***United States v. León-Delfis***, 203 F.3d 103, 111 (Cir. 1st 2000); ***United States v. Johnson***, 816 F.2d 918, 921-22, n.4 (Cir. 3rd 1987).

In ***Croney v. State***, 495 So.2d 926 (Fla. 4th DCA 1986), this Court applied the Wyrick's totality of the circumstances test and distinguished Croney from the defendant in ***Gillyard*** then affirmed this issue. Id. 927. Here, however, applying Wyrick's totality of circumstances test leads to the inescapable conclusion that, like ***Gillyard***, Petitioner did ***not*** waive his rights delineated in Miranda for the twenty-

hour ***post-polygraph*** custodial interrogation because Petitioner: 1) did ***not*** request the polygraph; 2) did ***not*** initiate the twenty-hour post-polygraph custodial interrogation; 3) was ***not*** told he would be subject to post-polygraph interrogation or had any reason to believe otherwise; 4) was ***not*** represented by counsel; 5) was interrogated for twenty hours after the examiner left; and 6) the twenty-hour post-polygraph custodial interrogation was done by four detectives ***not*** the examiner.

As shown above and consistently argued, Petitioner's twenty-hour ***post-polygraph*** custodial statements should have been suppressed pursuant to ***Wyrick*** and counsel performed deficiently for failing to do so. Since counsel's deficient performance allowed these statements obtained in violation of Miranda to play a substantial role to convict Petitioner; and absent of these statements the evidence of Petitioner's guilt is tenuous, counsel's deficient performance is prejudicial because it undermines confidence in the outcome. Hence, trial counsel was constitutionally ineffective under Strickland. Consequently, the decision below is erroneous because it is rested ***solely*** on Petitioner signing the Miranda waiver ***before*** the polygraph but failed to apply Wyrick's "totality of circumstances test" as required, including the fact that Petitioner did ***not*** request the polygraph, is controlling. Thus, this Court's affirmance, premised on the same, is also erroneous. To avoid this incongruous, conflictive, and manifestly unjust result, and a denial of Petitioner's substantive due process rights to effective assistance of counsel and

fair trial, this Court should reconsider its previous ruling and grant Petitioner a new trial.

ISSUE THREE

THE PROSECUTION'S USE OF PERJURED TESTIMONY VIOLATES PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Supporting facts:

Petitioner was charged and convicted of premeditated first degree murder. Petitioner denied committing the murder. At trial, the State presented a wholly circumstantial evidence case (no eyewitness, no DNA or fingerprint evidence linking Petitioner to the murder, and no confession of guilt). Petitioner's legal theory of defense was that Adelyn committed the murder and left the victim's cordless house phone in Petitioner's car after borrowing it under the pretext that his car had problem starting.

Evidence adduced at trial revealed that Adelyn lived with Petitioner at the time of the murder. Petitioner drove his car to the deceased's house after receiving a call from the deceased's house. Shortly thereafter, Adelyn arrived at the scene in his own car. He then asked Petitioner to borrow his car keys. Petitioner complied. Petitioner next saw his keys later that night when a detective handed them to him and asked to search his car, which revealed the deceased's cordless house phone.

Adelyn testified he borrowed Petitioner's car to pick up Stephane because he knew his car was not working when he first arrived and parked it. He testified further, when he first arrived, he parked his car on the Eastside of the deceased's house. He walked around the block to the Westside because 'crime scene tape' was there and was not allowed to walk through. He stated further when he went to pick up Stephane, he did not attempt to use his car because he knew it was not working when he first parked it. He testified further when he went to take Stephane home, he explained the alarm problem to Stephane and Stephane fixed it by removing the fuse to the alarm. IB 3.850: 7, 8. Stephane testified that he has no background or experience in repairing or fixing cars. He does not know how to fix or repair alarm; and he did not fix the alarm in Adelyn's car to make it start that day. Id.

Days after Adelyn and Stephane testified, the State elicited the following testimony from Detective Smith:

"Prosecutor: Okay. And pursuant to that request, do you know if Adelyn was able to do that?

Detective: Adelyn was able to pick up Stephane, yes.

Prosecutor: Before he left to go do that, were there any problems in going to do that?

Detective: Yes Adelyn was unable to--

Defense: Objection. Hearsay.

Prosecutor: Do you know what car Adelyn wound up having to use?

Detective: He ended up using [Petitioner]'s vehicle.

Prosecutor: And without going into what was said, did you have a conversation with Adelyn about why he was having to use that car?

Detective: I did.

Prosecutor: And did Adelyn approach you with a problem?

Detective: He did.

Prosecutor: And did you make a request of Adelyn? Without telling us what it was, did you make a request of Adelyn to do something else to go get -- Stephane?

Detective: Yes I did.

Prosecutor: *After you made that request, **did you see** Adelyn go do something to go get Stephane?*

Detective: **I did**

Prosecutor: ***What did you see** Adelyn do, based upon all these other conversations?*

Detective: ***I observed Adelyn attempt to go pick up Stephane in his vehicle, however, his vehicle was not working. He came back and he used [Petitioner]'s vehicle to pick up Stephane.***
IB 3.850: 8, 9.

Below, Petitioner argued that the State's use of Detective Smith's false testimony or failed to correct it violates his due process right to fair trial. The State responded this claim is procedurally barred because it should have been raised on direct appeal. Alternatively the State characterized it as a sufficiency of the evidence claim which should have been raised on direct appeal. IB 3.850: 44, 45. The court adopted the State's response and summarily denied the claim. Id. Petitioner argued on appeal that the court below reversibly erred in denying this claim because the State's response is misleading because a Giglio claim is cognizable in a 3.850 motion and Petitioner made no argument about sufficiency of the evidence. Id. 44-46. This Court affirmed. ***Eugene v. State***, 200 So.3d 70 (Fla. 4th DCA 2016).

Legal Argument:

It is well established that the presentation of perjured testimony or failure to correct the false testimony of a witness known to be false violates due process if the false testimony could have affected the jury's verdict. ***Giglio v. U. S.***, 405 U.S. 150, 153-55 (1972); ***Napue v. Illinois***, 360 U.S. 264, 269-71 (1959).

Here, Petitioner has consistently argued the State's deliberate and knowing presentation of Detective Smith's false testimony or failure to correct it violates his substantive due process right to a fair trial. As Adelyn's testimony reveals, -***days before*** Detective Smith testified-, Adelyn never returned or attempted to return to his car to start it because he knew it would not start when he first arrived and parked it. Hence, Detective Smith's subsequent testimony, -"I ***observed*** Adelyn attempt to go pick up Stephane in his vehicle, however, his vehicle was not working. He came back and he used [Petitioner]'s vehicle to pick up Stephane"--, is patently false. The State knew or should have known because Detective Smith testified ***days after*** Adelyn and Stephane and failed to correct it. Further and troublingly so is, even with that knowledge, the State went to great length and deliberately and knowingly elicited Detective Smith's patently false testimony.

How could Detective Smith had seen or even ***observed*** (watched) Adelyn attempted to go pick up Stephane in his car and it was not working then he came back and used Petitioner's car; when Adelyn unequivocally testified he did not

attempt to use his car to pick up Stephane because he knew it would not start when he first arrived and parked it.

Materiality

In light of the State's wholly circumstantial evidence case -(no eyewitness, no DNA or physical evidence linking Petitioner to the murder, and no confession of guilt)- and Petitioner's legal theory of defense, (i.e., Adelyn committed the murder and left the deceased's cordless house phone in Petitioner's car after using it under the pretext that his car had problem starting when he went to pick up Stephane), it is indisputable that Adelyn was the State's star witness and the jury's assessment of his credibility was determinative of Petitioner's guilt or innocence. Equally indisputable is that Adelyn's pretext for using petitioner's car was plausible until Stephane unwaveringly testified that he knows nothing about fixing car or car alarms and he did not fix the alarm in Adelyn's car to make it start when Adelyn took him back home, as Adelyn testified. So, Adelyn's car had no problem starting. Stephane's testimony completely discredited Adelyn's pretext for using Petitioner's car; while Detective Smith's patently false testimony self-corroborated it and bolstered Adelyn's credibility because Detective Smith is a police officer and viewed by the jury as a disinterested and more credible witness.

Furthermore, Detective Smith's patently false testimony undermined Petitioner's legal theory of defense because the jury could have rejected it inferring

that Adelyn could not have put the victim's cordless house phone in Petitioner's car because, if Adelyn did, Detective Smith would have seen him since Detective Smith testified he "***observed***" (watched) Adelyn attempted to pick up Stephane in his car and it was not working and he returned to use Petitioner's car. Further, since it was determined from Stephane's unwavering testimony that Adelyn took him home in his car without any problem and without fixing anything to make it start, Detective Smith's patently false testimony foreclosed Adelyn's re-cross-examination to expose his true motive for using Petitioner's car which would have: 1) acutely further damaged Adelyn's credibility --where the jury's assessment of his credibility was determinative of Petitioner's guilt or innocent--; 2) strengthened Petitioner's legal theory of defense, and 3) considerably undermined the State's case. Thus, Detective Smith's patently false testimony is material.

As shown above, the State deliberately and knowingly presented Detective Smith's patently false testimony or failed to correct it and this false testimony is material. In doing so, the State corrupted the truth-seeking function of the trial process which is "incompatible with rudimentary demands of justice" and violates Petitioner's substantive due process rights to a fair trial under the United States and Florida Constitutions. It would be a travesty of justice to allow the State to deprive Petitioner of his liberty through the deliberate and knowing presentation of

Detective Smith's patently false testimony. And this Court should grant this petition, reconsider its previous ruling, and grant Petitioner a new trial.

CONCLUSION

Through the lens of justice, based on the foregoing and in light of the State's wholly circumstantial evidence case and Petitioner's legal theory of defense, nothing could be more manifestly unjust than depriving Petitioner of his liberty with a murder conviction rested largely on the State's: 1) misuse of the deceased's hearsay emails as substantial evidence, violating Petitioner's fundamental due process rights to a fair trial and to confront the witness against him; 2) use of Petitioner's twenty-hour post-polygraph custodial statements obtained in violation of his fundamental constitutional rights delineated in Miranda as substantial evidence of his guilt -due to trial counsel's ineffectiveness; and 3) deliberate and knowing presentation of Detective Smith's patently false testimony or failure to correct it, violating Petitioner's substantive due process right to a fair trial. Against this compelling backdrop, Petitioner urges the Honorable Court to grant this petition, reconsider and correct its previous rulings and grant Petitioner a new trial; for failing to do so would be a travesty of justice and a denial of his substantive due process rights to: 1) fair trial; 2) confront the witness against him; and 3) effective assistance of counsel guaranteed by the United States and Florida Constitutions.

WHEREFORE, in good faith, in ashes and in dust, Petitioner prays the Honorable Court to grant this petition and correct its previous rulings and grant Petitioner a new trial or an evidentiary hearing on Issues Two and Three or such other relief the Court deems just and proper. Otherwise, Petitioner prayerfully asks the Honorable Court to certify conflict with ***Conley v. State***, 620 So.2d 180 (Fla. 1993), and ***Banks v. State***, 790 So.2d 1094 (Fla. 2001), on Issue One.

Respectfully submitted,

Vladimir Eugene, DC# B04065
Petitioner, pro se
DeSoto Correctional Institution
13617 S.E. Hwy 70
Arcadia, Florida 34266-7800

CERTIFICATE OF SERVICE

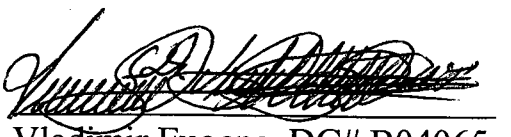
I HEREBY CERTIFY that on this 30th day of December 2020, I personally handed a true and complete copy of this "Petition for Writ of Habeas Corpus" to an official at DeSoto Correctional Institution Annex for the sole purpose of mailing via first class U.S. Mail postage prepaid to:

- Office of the Attorney General; 1515 North Flagler Drive, Suite 900; West Palm Beach, Florida 33401.

Vladimir Eugene, DC# B04065
Petitioner, pro se

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition for Writ of Habeas Corpus complies with the font requirements of the Florida Rule of Appellate Procedure 9.100(1) and is typed in Times New Roman 14-point font.



Vladimir Eugene, DC# B04065
Petitioner, pro se

IN THE DISTRICT COURT OF APPEALS OF FLORIDA
FOURTH DISTRICT

VLADIMIR EUGENE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent. /

PROVIDED TO DESOTO C.I.
2-2-21 FOR MAILING
INMATE INITIALS
OFFICER INITIALS DD

Case No: **4D21-0023**
Lt. Case No.: 06-7295CF10A

MOTION FOR REHEARING AND/OR REHEARING
EN BANC AND REQUEST FOR WRITTEN OPINION

COMES NOW, the Petitioner Vladimir Eugene, pro se, *in good faith,* respectfully moves the Honorable Court for Rehearing and/or Rehearing En Banc and Request for Written Opinion, pursuant to Florida Rule of Appellate Procedure 9.330. In support, Petitioner offers the following:

On January 27, 2021, the Court denied Petitioner's January 4, 2021 petition for writ of habeas corpus because it is "frivolous and the claims are successive". The claims are indeed successive. See 4D07-246, 4D16-583, and 4D17-2454. However, the Court has the authority to reconsider previously presented claims to prevent a manifest injustice. And, objectively, a manifest injustice will occur if the court fails to reconsider and correct its previous ruling and afford Petitioner the same relief as similarly situated defendants. See ***Johnson v. State***, 9 So.3d 640, 642 (Fla. 4th DCA 2009); ***Prince v. State***, 98 So.3d 768 (Fla. 4th DCA 2012).

ISSUE ONE

TRIAL COURT COMMITTED HARMFUL ERROR BY ADMITTING THE DECEASED'S EMAILS TO PETITIONER.

To conclude this issue is frivolous, the Honorable Court have apparently overlooked or misapprehended our supreme court's precedents in ***Banks v. State***, 790 So.2d 1094, 1099 (Fla. 2001), ***Keen v. State***, 775 So.2d 263, 274 (Fla. 2000), and ***Conley v. State***, 620 So.2d 180, 182-183 (Fla. 1993), most recently relied on by this Court in ***Adams v. State***, 195 So.3d 424 (Fla. 4th DCA 2016), concluding:

> "**Because the state used the dispatcher's 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 428. See also ***Tillman v. State***, 964 So.2d 785 (Fla. 4th DCA 2007) ((citing ***Conley***) "***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. at 789).

Similarly here, "***regardless*** of the purpose for which the state claimed it offered the [deceased's emails]", because the prosecutor *improperly* used the emails to argue and prove the truth of the matter asserted, --that the deceased had in fact cut Petitioner out of her life, not merely "to demonstrate their impact on [Petitioner]"--, "[the deceased's emails] constituted hearsay with no exception" and their admission was erroneous. Further, in stark contrast to the prosecutor in this case, *not one* of the

prosecutors, --in all the cases relied on by this Court to reach its conclusion in Petitioner's direct appeal[1]--, *improperly* used the out of court statements in closing arguments to argue or prove the truth of the matter asserted. And if, *objectively*, the prosecutor's repeated arguments, telling the jury:

> "'***[Petitioner] is angry at [the deceased] for what? You know from the emails that [the deceased] had the nerve to reject him.*** *[The truth of the matter asserted].* ***[The deceased] had the nerve to cut her out of his life.*** *[The truth of the matter asserted].* ***In the beginning, [Petitioner] told the police officers their relationship was fine. [The deceased] 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 [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. [The deceased] cut him out of her life'*** *[The truth of the matter asserted].*
>
> '***You know from that point on, the relationship severs*** *[The truth of the matter asserted].* ***[The deceased] cuts him out.*** *[The truth of the matter asserted].* ***[The deceased] is not going to let him in her life anymore.*** *[The truth of the matter asserted].* ***That is what starts all of this. This is where the motive comes from.***
>
> The man sitting right there is what caused what [the deceased] looked like in this picture to become that picture. That man did that. ***It's because [the deceased] rebuffed him.*** *[The truth of the matter asserted].* In the name of love, he couldn't take it, and killed her'.
>
> ***'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:*** *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*

---

1 ***Foster v. State***, 778 So.2d 906, 914-15 (Fla. 2000); ***Blackwood v. State***, 777 So.2d 399, 407 (Fla. 2000); ***Koon v. State***, 513 So.2d 1253, 1255 (Fla. 1987); ***United States v. Cruz***, 805 F.2d 1464, 1478 (11th Cir. 1986); and ***Stewart v. Henderson***, 207 F.3d 374, 377 (7th Cir. 2000).

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. ...

[The deceased] is saying right there that she is cutting him off; *[the truth of the matter asserted].* ***I will never see you again. 'How could you 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***' *[the truth of the matter asserted].*

'***She rebuffed him and that's it, it's over***. *[The truth of the matter asserted].* ***How dare she. She is going to leave him? He will show her, and he did. He took her life***'". IB 26-29.

is not competent, substantial evidence of the prosecutor's improper and extensive use of the deceased's emails as classic hearsay and substantive evidence to prove and convince the jury that the deceased had in fact cut Petitioner out of her life --the truth of the matter asserted in the deceased's emails-- then this issue is ***patently frivolous***, even malicious, warranting sanctions, including lost of all gain time and fifteen years of disciplinary confinement for wasting the Honorable Court's scarce and precious resources and any additional sanction the Court may deem appropriate.

Otherwise, Petitioner prays that the Court recognize it had failed to perceive while "*theoretically*" the deceased's emails may have been

properly admitted "to demonstrate their impact on [Petitioner]", the prosecutor's *improper* use of those emails in closing arguments forecloses such conclusion and grant this motion for rehearing, reverse and remand this case for new trial like similarly situated defendants in ***Adams***, ***Banks***, ***Conley***, ***Tillman***, and ***Keen*** to avoid a manifest injustice and violating Petitioner's right to equal treatment under federal and Florida constitutions. Else, the Court should certify conflict with our supreme court's precedents in ***Banks v. State***, 790 So.2d 1094 (Fla. 2001), ***Conley v. State***, 620 So.2d 180 (Fla. 1993), and ***Keen v. State***, 775 So.2d 263 (Fla. 2000) and/or issue a written opinion which would provide a legitimate basis for supreme court review to resolve this Court's conflictive decision.

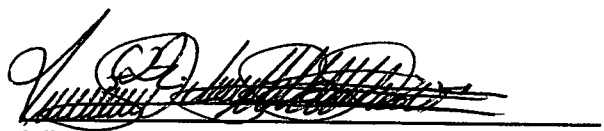
Request For Rehearing En Banc

Because the panel's decision on issue One is in conflict with this Court's decisions in ***Adams v. State***, 195 So.3d 424 (Fla. 4th DCA 2016), and ***Tillman v. State***, 964 So.2d 785 (Fla. 4th DCA 2007), Petitioner respectfully moves the Court for Rehearing En Banc to maintain uniformity of decisions within the Court.

WHEREFORE, Petitioner prays that the Honorable Court grant this Motion for Rehearing and/or Rehearing En Banc and reverse and remand this case for a new trial like similarly situated defendants in ***Adams***, ***Banks***,

Conley, ***Tillman***, and ***Keen*** to avoid a manifest injustice and violating Petitioner's right to equal treatment under federal and Florida constitutions. Else, Petitioner prays that the Court certify conflict with our supreme court's precedents in ***Banks v. State***, 790 So.2d 1094 (Fla. 2001), ***Conley v. State***, 620 So.2d 180 (Fla. 1993), and ***Keen v. State***, 775 So.2d 263 (Fla. 2000) and/or issue a written opinion which would provide a legitimate basis for supreme court review to resolve this Court's conflictive decision.

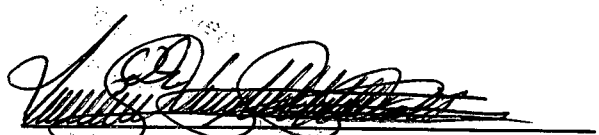
Respectfully submitted,



Vladimir Eugene, DC# B04065
Petitioner, pro se
DeSoto C. I. (Annex)
13617 S.E. Hwy 70
Arcadia, Florida 34266-7800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on FEBRUARY 2, 2021, I personally handed a true and complete copy of the foregoing "Motion for Rehearing and/or Rehearing En Banc" to an official at DeSoto Correctional Institution for mailing by first class U.S. Mail postage prepaid to: Attorney General Office; 1515 North Flagler Drive, Suite 900; West Palm Beach, Florida 33401.



Vladimir Eugene, DC# B04065
Petitioner, pro se

No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

Appendix D

(Fourth District Court of Appeal of Florida published decision on direct appeal.
Eugene v. State, 53 So.3d 1104 (Fla. 4th DCA 2011))

Appendix D

53 So.3d 1104
District Court of Appeal of Florida,
Fourth District.

Vladimir EUGENE, Appellant,
v.
STATE of Florida, Appellee.

No. 4D07–246.
|
Jan. 26, 2011.
|
Rehearing Denied Feb. 23, 2011.

Synopsis

Background: Defendant was convicted in a jury trial in the Circuit Court, Seventeenth Judicial Circuit, Broward County, Joel T. Lazarus, J., of first-degree murder. Defendant appealed.

Holdings: The District Court of Appeal, Gross, C.J., held that:

[1] victim's e-mail messages to defendant were nonhearsay offered to establish effect messages had on defendant, and

[2] detectives' statements during interrogation concerning their beliefs about guilt and theories about murder were not unfairly prejudicial.

Affirmed.

West Headnotes (8)

[1] **Criminal Law**
Exceptions to hearsay rule, and non-hearsay distinguished in general

Victim's e-mail messages to defendant, documenting the intense relationship between defendant and victim and the sudden deterioration of that relationship, were nonhearsay, and thus were admissible in first-degree murder prosecution, where State offered messages to establish the effect messages had on defendant rather than to establish the truth of the matters contained in messages. West's F.S.A. § 90.801(1)(c).

Cases that cite this headnote

[2] **Criminal Law**
Exceptions to hearsay rule, and non-hearsay distinguished in general

When a statement is not offered for the truth of its contents, but to prove a material issue in a case, it is not hearsay. West's F.S.A. § 90.801(1)(c).

2 Cases that cite this headnote

[3] **Criminal Law**
Hearsay in General

A recognized, non-hearsay use of an out of court statement is to show motive.

2 Cases that cite this headnote

[4] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

Statements detectives made during interrogation of defendant concerning detectives' beliefs about defendant's guilt and their theories as to events surrounding murder were not unfairly prejudicial under rule providing for exclusion of relevant evidence on grounds of prejudice or confusion, where defendant made no equivocal responses subject to being misconstrued by jury, defendant was alert and articulate during interrogation, defendant maintained that he did not commit murder no matter what interrogation technique the detectives threw at him, and jury had ample time to consider defendant's credibility over the course of the extensive questioning. West's F.S.A. § 90.403.

8 Cases that cite this headnote

[5] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

Whether evidence is admissible as more probative than prejudicial is a discretionary ruling for the trial court. West's F.S.A. § 90.403.

Cases that cite this headnote

[6] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

Not everything a detective says to a defendant during a recorded interrogation is unfairly prejudicial under rule providing for exclusion of relevant evidence on grounds of prejudice or confusion. West's F.S.A. § 90.403.

3 Cases that cite this headnote

[7] **Criminal Law**
Particular cases

A police officer's confronting a defendant with a codefendant's statements during an interrogation of the defendant may properly be used as provocation to observe a defendant's reactions.

3 Cases that cite this headnote

[8] **Criminal Law**
Statements by persons engaged in investigating or prosecuting offense

Statements made by police officers during interrogation of defendant may be heard by the jury to give context to the interview.

7 Cases that cite this headnote

Attorneys and Law Firms

*1105 Carey Haughwout, Public Defender, and Timothy D. Kenison, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

GROSS, C.J.

Vladimir Eugene was convicted of first degree murder and sentenced to life in prison. We affirm. We choose to address two of his arguments on appeal. First, he contends that the victim's emails to him were inadmissible hearsay. Second, he argues that the trial court erred in allowing the jury to hear four statements made by interrogating detectives during questioning of Eugene which suggested their belief as to his guilt or "theory as to what happened."

We provide a detailed review of the evidence to give better context to appellant's arguments. The 21–year old victim, Kathy Pierre, lived with her family at a house in Miramar. On a July Sunday in 2005, the victim's younger sister, Edna, woke up at 8:30 a.m. and got ready for work. She went into the victim's room to get some lotion. Nothing seemed unusual and nothing was out of place. Edna noticed the victim in her bed completely covered by a comforter; this was not the usual way for the victim to sleep.

After Edna left the house, the victim's mother, Florise, discovered her daughter's body. She saw marks on the victim's neck and mouth. The victim had been strangled from behind with some type of ligature, and something had applied pressure to her face. The victim was in her underwear. There was no evidence of sexual activity or assault; no alien DNA was found. There was also no evidence anywhere in the house that a struggle had occurred. There were no signs of forced entry. The only thing missing in the entire house was a cordless black house phone from a base in the victim's room.

Appellant, who was Florise's cousin, had an intensely close relationship with the victim and her family. Thirteen years older than the victim, he began to live with the family when the victim was in elementary school. He and the victim had a special and unique relationship. Although no one ever observed inappropriate sexual contact between them, appellant often slept in the victim's room. While he stayed with the family, appellant got married and started his own family. The victim did not like appellant's wife at first, but soon the women became friends. After appellant got married, he continued to frequently sleep in bed with the victim. The victim's stepfather and mother were aware of this sleeping arrangement but did not think it was

unusual. Shortly after *1106 appellant's first child was born, he moved his family to Boynton Beach.

Even after the move, appellant was a frequent visitor at the victim's home, often spending nights in the victim's room. He had a key to the house and knew the code to the alarm system. The victim often spent weekends with appellant and his family in Boynton Beach; during these visits the victim slept in a number of different places, sometimes in bed with appellant. Appellant's wife commented that it was normal for her husband and the victim to lounge around together in their underwear. Witnesses described appellant and the victim as having a father-daughter relationship, but with physical interaction like a boyfriend and girlfriend who were always "all over" each other and who would tell each other everything. They spent hours talking in each other's arms. When not together, appellant and the victim would speak every day by phone or over the Internet.

About six weeks before the murder, a rupture occurred in the relationship between appellant and the victim. Appellant got into an altercation with his wife and the victim intervened. Appellant pushed or hit the victim twice. She took offense and broke off the relationship. Her visits with appellant stopped. After the fight with the victim, appellant's behavior changed—he stayed home, lying in front of the television all day, not wanting to do anything. Appellant told the victim's mother that he could not afford to lose the victim's friendship and that he would give his life for her. Over the next few weeks, appellant repeatedly telephoned the victim. Many times the victim refused to take his calls. To try and repair the relationship, appellant sent text messages and emails in which he professed his friendship and love and made it clear that his life was torn apart by losing his best friend. He told Florise that it was "killing" him to lose the victim's friendship.

The victim's response to the changed relationship was different than appellant's. She cut appellant out of her life and, for the first time, began to spend time with other men. Three social friends of the victim were mentioned at trial: Adelyn, the brother of appellant's wife and a cousin of the victim's mother; Stephane, a friend of both the victim and Adelyn; and Benny, a boxing instructor. Appellant was jealous that the victim had started going out and having fun.

Adelyn lived with appellant and his family. Florise described him as a friend of her daughter. Edna characterized him as a close friend of her sister's, whose relationship with her did not change in the month before her death. Adelyn and the victim never argued and never had a falling out. Adelyn met the victim through appellant when she visited Haiti several years before the murder. He denied having an intimate sexual relationship with the victim and testified that he had engaged only in "kissing to more intense" heavy petting with her. Adelyn talked with the victim many times over the two days preceding her death. On the night that she died, he stayed in at appellant's home and had no contact with anyone between 11 p.m. and 8 a.m. the next morning.

About a month before the murder, Benny the boxing instructor started giving the victim boxing lessons for 2.5 hours every weekday. Three days before the murder, they went out on a date. While they were out, the victim received phone calls that upset her. They had plans to go on a second date the weekend of her death. After the murder, appellant told a friend that he never liked the boxing instructor and that he had gone to the gym to check him out, pretending to be a prospective customer. The instructor remembered *1107 showing appellant around on this visit to the gym. Appellant did not think the instructor should be dating a client and did not approve of the victim receiving his late night calls.

Stephane was a friend of both Adelyn and the victim who did not meet appellant until after the murder. The night of her death, the victim went out on a date with Stephane. While the victim was getting ready, Edna used the black cordless phone in her sister's room. When she was finished, she threw the phone onto the victim's bed. The victim was in a good mood. She left the house shortly after 9 p.m. About ten minutes later, Edna left the house for her evening out.

The victim picked up Stephane in her car and they went to dinner at Dave & Buster's. On the way, the victim received a call on her cell phone. Although she was not happy about it, she answered the phone, listened quietly, abruptly hung up, and then was quiet for a while. She received a second call during dinner. Her only contribution to the conversation with the caller was to ask, "Are you done yet?" Phone records later established that appellant called the victim twice while she was out with Stephane. Although his phone was turned off, Stephane received two

calls from the victim's house phone at 12:23 and 12:27 a.m. The victim dropped Stephane off at his house between 12:30 and 1:00 a.m. and said she would call him when she got home. Stephane never received the victim's call.

When Edna arrived home shortly after 3 a.m., she noticed nothing unusual. The front door was locked. The only way to have locked the door from the outside was with a key. Nothing seemed out of place.

After the victim's body was discovered, Florise called appellant's house and spoke to his wife. Appellant was already on his way to the victim's house. When he arrived, Florise confronted him, but he showed no emotion. Adelyn arrived at the house and spoke to appellant, who said he thought that the boxing trainer was a possible suspect. After talking with the police, Adelyn went to get Stephane, but his car would not start, so he borrowed appellant's car. Stephane and Adelyn both noticed a black house phone in the car, by the front seat.

When the police later searched appellant's car, they found the black cordless house phone, which had the same serial and model number as the phone base in the victim's room. The police called the victim's number, and the black cordless phone rang. The police also found some jewelry in the glove compartment. Appellant's conflicting stories about the phone and the jewelry were significant pieces of evidence in the trial.

Several weeks before the murder, Edna and Florise had seen the same jewelry in the victim's room. The victim showed the jewelry to one of her friends. Appellant told a friend that he had bought the jewelry for his wife and had let the victim look at it. He also told the friend that he had bought the jewelry for the victim. To the police, appellant claimed that he had bought the jewelry for his wife as a present for their fifth wedding anniversary. However, appellant's wife explained that, as a Jehovah's Witness, she did not celebrate her wedding anniversary and that her husband had never before given her an anniversary gift.

Several days before the murder, appellant's wife cleaned out his car. On the night of the murder, she used the car until 9:15 p.m. At no time did she see the jewelry or the black cordless telephone. However, during his first, extensive statement to the detectives, appellant said that he had bought this phone a month before ***1108** the murder and that the phone had been in his car ever since. In a later interview, appellant changed his story and told the police that he did not put the phone in his car.

On the night of the murder, appellant left his home around 10 p.m. and did not return until 4 or 5 a.m. He told the police that he was alone, sitting in his car, at a park by the water between 11 p.m. and 4 a.m. He told a friend a different story—that he had been fishing. Appellant had not been fishing for three years. When questioned by the detectives about this discrepancy, appellant maintained that he did not tell his friend anything about going fishing.

Text messages and emails between appellant and the victim gave definition to the intensity of their unique relationship. These are examples of the messages appellant sent to the victim:

> I want to reassure you the most important mission for the short time left on this planet is to spoil you with everything the best way I can. Love always, [appellant].
>
> Since the waiting list is long for a date with a hot chick like you, I figure I would ask early. Would you like to see "The Land of the Dead?" It comes out this Friday. Let me know ASAP because brother needs a makeover, to accompany a beautiful lady like you. I hope I am not far down the list.
>
> I am sorry if I sound like I am pressuring you. Have fun wherever you have to be at. Wherever you have to be, have some for me too.
>
> Hey, Love. I just made the deposit of 200 for you.

The state introduced 19 emails from appellant to the victim and three emails from the victim to appellant. Appellant's emails are needy and intense. He said he was hurting and mentioned killing himself. He was married to his wife, but his relationship with the victim was greater. He loved his wife, but was in love with the victim. Without the victim, he had no one with whom to discuss personal things. His life was meaningless without her. He liked Adelyn, but warned the victim not to let Adelyn take advantage of her, like kissing him when he was not even her boyfriend. It was killing him inside that he may have lost her to Adelyn, but he was at her mercy.

The victim's emails to appellant let him know that there had been a sea change in their relationship. For example, in one email the victim told appellant:

> 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 anymore. I can't promise you that I will ever contact you again or ever see you again. You hurt me, yet I still love you. I could never hate you because I love you too much.
>
> It's funny how at that moment, you could look me in my 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 look me dead in the face, in my eyes, and strike me, not once but twice, the person that you claim to love so deeply. Yet, at the same moment, you didn't strike [your wife]. That goes to show who you really love.

Other emails described the victim's feelings for Adelyn and her concerns that ***1109** other people were interfering in that relationship to "protect" her.

[1] Appellant contends that the victim's emails to him were inadmissible hearsay. However, the emails were not hearsay because they were offered not for the truth of the matters they contained but to establish the effect that the statements had on appellant, the recipient of the emails.

[2] **[3]** Subsection 90.801(1)(c), Florida Statutes (2008), defines "hearsay" 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." The Supreme Court has recognized that a statement may "be offered to prove a variety of things besides its truth." *Foster v. State,* 778 So.2d 906, 914–15 (Fla.2000). When a statement is not offered for the truth of its contents, but to prove a material issue in a case, it is not hearsay. *Id.* at 915. A recognized, non-hearsay use of an out of court statement is to "show motive." *Id.*

Thus, a victim's out of court statements were admitted to prove motive in the homicide case *Blackwood v. State,* 777 So.2d 399, 407 (Fla.2000). There, the Supreme Court considered a witness's statements that relayed certain comments that the victim had made *to the defendant*—that the victim had "had abortions from [the defendant]" and that the victim was "pregnant from someone else." *Id.* The Supreme Court held that the victim's statements were not hearsay. *Id.* Rather,

> the victim's statements were offered to show the effect such statements had on [the defendant]. His state of mind and knowledge were relevant to show both his motive and intent in committing murder. Certainly, the [defendant's] knowledge of the victim's past abortions, pregnancy, and intention not to see him anymore were material to the issue whether appellant possessed a motive to kill the victim.

Id.

Similar to *Blackwood,* in the homicide case *Foster v. State,* the state introduced the victim's out of court statements to the defendant about reporting an arson in a school auditorium to the campus police. The Supreme Court held that the statements were non-hearsay to "establish both knowledge and motive, rather than to establish the factual truth of the contents of the statements." 778 So.2d at 915. The Court observed that the defendant had a "motive for killing [the victim] as soon as he found out about [the victim's] promise to tell the authorities the next morning" about the arson. *Id.; see also Koon v. State,* 513 So.2d 1253, 1255 (Fla.1987) (holding that a magistrate's statement to the defendant at a preliminary hearing was not hearsay because it was relevant to defendant's formation of a motive to kill a prosecuting witness); *United States v. Cruz,* 805 F.2d 1464, 1478 (11th Cir.1986) (out of court statement not hearsay if offered "to show the effect it has on [the] hearer"); *Stewart v. Henderson,* 207 F.3d 374, 377 (7th Cir.2000) (out of court statements not hearsay where offered to demonstrate impact on listener's state of mind).

As were the statements in *Blackwood* and *Foster,* the victim's emails to appellant in this case were admissible to establish a motive for the homicide—the sudden deterioration of appellant's intense relationship with the victim. The state offered the statements not for their truth, but to demonstrate their impact on appellant. Because appellant was the recipient of the victim's emails, this case is distinguishable from the line of cases involving

a victim's statement to a third person expressing *1110 fear of a defendant. *See Johnson v. State,* 969 So.2d 938, 951 (Fla.2007); *Thomas v. State,* 993 So.2d 105, 109–10 (Fla. 1st DCA 2008). In such cases, the victim's statement cannot have had an effect on the defendant who did not hear it, so it cannot be offered for a material, non-hearsay purpose.

[4] Appellant's second point involves the statements he gave to the police. Appellant gave two statements, extending over eight hours. These DVD interviews were published to the jury with the benefit of a 746 page transcript. The detectives who questioned appellant used a variety of interrogation techniques: they worked to develop a rapport with appellant, pointing out similarities in their beliefs and backgrounds; they closely observed appellant's non-verbal reactions to questioning; they confronted appellant with facts in the case that pointed to his guilt; they developed themes about how and why the crime occurred to see if appellant would latch on to one of the themes and talk about the case; [1] they offered socially acceptable motives to appellant to see if he would choose one; they offered him opportunities to explain things in a way that would not indicate guilt, but which would require an acknowledgement that he had been lying about certain facts; [2] they encouraged appellant to refer to himself in the third person, as "Jimmy," to distance appellant from the case so that he would be more comfortable talking about it; they appealed to his closeness with the victim's family to help them solve the case and give the family closure. In spite of the detectives' efforts, appellant steadfastly refused to acknowledge any involvement in the murder.

In the first interview, the detectives questioned appellant about his whereabouts the night of the murder, the nature of his relationship with the victim, discrepancies between his story and Stephane's, the jewelry found in his car, his lack of emotion or surprise when learning of the victim's death, how he had a key to the victim's house, his willingness to submit to DNA testing, how he had "strong reservations" about the "trainer guy," and the events that led to the deterioration of his relationship with the victim. They discussed voodoo, which appellant described as a "process" or "ritual" which causes the perpetrator to "come forward" to the family. They talked at length about the phone found in appellant's car, which appellant claimed he had purchased online and which he maintained was not the victim's. He insisted that the phone had been in his car for several weeks. The detectives *1111 wondered how the phone could maintain its electrical charge for that length of time, but appellant contended that it was possible.

Longer than the first interrogation, appellant's second interview with the detectives occurred several weeks later. At the beginning of the statement, appellant said he remembered that his wife had cleaned out the car on the day before the murder, so that he could not have been responsible for the phone discovered in his car. He suggested that this fact made Adelyn or Stephane the prime suspects, because they had been in his car the morning the victim's body was found. The police focused on the discrepancy between this story and appellant's adamant story about the phone in the first interview. The detectives asked appellant about the closeness of his relationship with the victim. They presented appellant with various theories about what had happened. Appellant never admitted his involvement in the crime.

Appellant argues that the trial court erred in allowing the jury to hear, over defense objection, four statements by the interrogating detectives that indicated their belief as to appellant's guilt or "theory as to what happened." Located in different parts of the lengthy interrogation, these are the four statements:

> Let me talk to a jury, a grand jury, a judge, and a state attorney and say, "Listen, I spoke with [Appellant]. It took a while. [Appellant] obviously knows he made a mistake."
>
> * * *
>
> I'm a little fearful you're gonna do something to yourself. You're gonna hurt yourself. And I'm being serious. I'm being sincere.
>
> * * *
>
> If you were a jury member and that's the way it was told to you, you would say, "That guy's lying." Right?
>
> * * *
>
> You know why? Because you know it's true, Jimmy. You drove down here—and I am not yelling. You drove down here to the City of Miramar because you didn't have control. Where the hell is she? She's going to be rude to me like that on the phone, in front of Stephane? I

> don't think so. I am going to humiliate her at the house. She ain't there. Now what, Jimmy? Are you going to humiliate her? Did you?

To the last question in the last quoted paragraph, appellant responded, "You are taking one situation and generalizing it." The questioning then moved on to other matters.

Appellant contends that, when considered in light of other statements contained in the two interviews, these four excerpts amount to reversible error under *Sparkman v. State,* 902 So.2d 253 (Fla. 4th DCA 2005). Distinguishable from *Sparkman,* this case does not present the great danger of unfair prejudice that was the basis of that case's holding.

Sparkman was a manslaughter case involving the death of a toddler. *Id.* at 254. Other than the defendant, there were no direct witnesses to the events leading up to the child's death. *See id.* at 254–57. The case was based largely upon after-the-fact testimony from the child's father, an emergency medical technician, and two medical examiners, one of whom testified that traumatic, and not accidental injury was the cause of the child's death. *Id.* In a tape recorded statement with a detective, the defendant maintained that she did not do anything that would have hurt the baby, that she just shook her a little to get her to wake up from a seizure. *Id.* at 256–57. During the statement, the detective launched into an extensive recitation of his theory of the case, outlining his version of ***1112** the facts of the crime. *Id.* at 257–58. The defendant responded to the detective's accusations with "Uh huh" and with silence. *Id.*

[5] We reversed based on the trial court's failure to exclude the detective's hypotheses about how the crime occurred from the tape recording. *Id.* at 258–59. The basis of the holding was that the probative value of the detective's words was "substantially outweighed by the danger of unfair prejudice" or "misleading the jury" under section 90.403, Florida Statutes (2005).[3] *See Shrader v. State,* 962 So.2d 369, 371 (Fla. 4th DCA 2007) (recognizing that basis of holding in *Sparkman* was that detective's statements were "blatantly prejudicial"). The danger of unfair prejudice in *Sparkman* was that the jury might have taken the defendant's responses to the detective's detailed and speculative narrative—silence and "Uh huh"—as admissions of guilt.

[6] **[7]** **[8]** Not everything a detective says to a defendant during a recorded interrogation is unfairly prejudicial under 90.403. The Supreme Court has recognized that a jury may hear an interrogating detective's statements about a crime when they provoke a relevant response from the defendant being questioned. For example, confronting a defendant with a codefendant's statements may properly be used "as provocation" to observe a defendant's reactions. *See Jackson v. State,* 18 So.3d 1016, 1031–32 (Fla.2009). Such statements may be heard by the jury to "give context to the interview." *McWatters v. State,* 36 So.3d 613 (Fla.2010). When placed in "their proper context," an interrogating detective's statements to a suspect could be understood by a "rational jury" to be "techniques" used by law enforcement officers to secure confessions. *Id.* at 637 (quoting *Worden v. State,* 603 So.2d 581, 583 (Fla. 2d DCA 1992)).

This case does not present the danger of unfair prejudice that informed *Sparkman.* Appellant made no equivocal responses that the jury might have misconstrued. Throughout the eight hours of interrogation, an alert, articulate appellant maintained that he did not commit murder, no matter what interrogation technique the detectives threw at him. The jury had ample time to consider the defendant's credibility over the course of the extensive questioning. When placed in the context of the entirety of the interrogation, the trial court did not abuse its discretion in admitting the four excerpts quoted above.[4]

***1113** We have considered the other issues raised by appellant and find no reversible error.

DAMOORGIAN and CIKLIN, JJ., concur.

DAMOORGIAN, J., did not participate in oral argument, but has had the opportunity to review the entire proceedings.

All Citations

53 So.3d 1104, 36 Fla. L. Weekly D176

Footnotes

1 For example, one detective told appellant:

> People do things for all different kinds of reasons. Love is a strong emotion. People have done crazy things for love. Not romantic love. Jealousy. Things happen. People make mistakes. Some you cannot reverse. But you can still do things to atone, to offer some relief to the family or whatever. Bad things happen.

2 For example, in the middle of the interrogation, this exchange occurred:

> Detective Smith: Last night, you may have gotten a call—you called Kathy [the victim], right? You had a spat on the phone or whatever. You went by the house, okay. And I know you—Jimmy goes by the house, okay? While she's out, he hangs out there after mom and dad go to sleep. Hangs outside the house. Kathy comes home. You confront Kathy, right? This is just a hypothetical. You confront her. You guys get in an argument. You take the phone last night. I am not saying you touched her. I am saying you took the phone last night because you did not want her to call the guy she was out with. But then, it's our job to look at Benny or whoever, because they did whatever they did. What do you think of that hypothetical?
>
> Appellant: Hypothetically, it would not add up. Because if I had a confrontation with her or argument with her, talking is not—she is not going to talk hush, hush.

3 Although *Sparkman v. State* makes reference to the detective's "hearsay statements," the hearsay rule cannot have been the basis for the holding. 902 So.2d at 259. The opinion references the rule that a "trial court's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion." *Id.* "[H]earsay evidence is inadmissible" under section 90.802, Florida Statutes (2008), so its admission is not a discretionary ruling of a trial judge. On the other hand, whether evidence is admissible under section 90.403, Florida Statutes (2008), *is* a discretionary ruling of a trial court. *See Sims v. Brown,* 574 So.2d 131, 133 (Fla.1991) (where the court wrote that the "weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two"); *Citrus County v. McQuillin,* 840 So.2d 343, 345 (Fla. 5th DCA 2003) (recognizing abuse of discretion standard of review for rulings on the admissibility of evidence).

4 A trial judge's application of section 90.403 to eliminate unfairly prejudicial statements is not a precise tool for addressing the problem of unfair prejudice. Given the wide discretion afforded to trial courts' section 90.403 rulings, that section hardly eradicates prejudice with laser like precision. Faced with a defendant's interrogation that contains non-hearsay statements by police officers, a trial court might also specially instruct the jury on the limited purpose for which the jury has been allowed to hear the interrogator's statements. *See* § 90.107, Fla. Stat. (2005). This is an example of such an instruction:

> A recorded police interrogation of the defendant has been introduced into evidence in this trial. During the interrogation, any statements made by the police interrogator are not to be considered by you jurors as evidence of the defendant's guilt. The statements made by the police interrogator during the interview of the defendant have not been introduced into evidence to prove the truth of the matters asserted in those statements. In fact, the statements made by the police interrogator during the interrogation of the defendant may be false and misleading. It is permissible for a police officer conducting an interrogation of a defendant to make false and misleading statements to the defendant in order to further the aims of the interrogation. However, it is not permissible for you jurors to rely on such police interrogator's statements as proof of the defendant's guilt.

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No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

Appendix E

(Repaginated Pertinent supporting records to Petitioner's petition)

Appendix E

STATEMENT OF THE CASE AND FACTS

Appellant was convicted by jury of premeditated first degree murder and was sentenced to life imprisonment with credit for 225 days time served. R 430-431, 433-434, 437-438, 440; B 415-419. Appellant denied killing Kathy Pierre, his second cousin nearly 13 years his junior; his defense was that someone else, possibly his brother-in-law Adelyn Severe, committed her murder.

In the mid-morning hours of Sunday, July 3, 2005, Florise Jean, Appellant's cousin, discovered her daughter, Kathy Pierre, laying lifeless in her bed wearing only a bra and panties and with marks on her mouth and neck. T 842-843. Kathy lived at home in Miramar with her mother, her sister Edna, and her step-father, Serg Delice. T 581-583. After Jean's horrific discovery, the police were called and she told Officer Ford that her daughter had been strangled. T 843, 1242-1244.

Dr. Reinhard Motte confirmed that Kathy had ligature marks on her neck and died as a result of being asphyxiated or strangled. B 114-117, 126. However, he found no evidence that Kathy had been subjected any sexual activity. B 133. Detective Suchomel said that the ligature marks on Kathy's neck appeared to be the same width as a cord. T 1135-1136. He hypothesized that Kathy's killer may have hidden in her bedroom closet and then approached her from behind, looping something around her neck and pulling back to constrict. T 1190, 1222, 1227. He acknowledged that he did

Foster, decedent's friend, recognized the jewelry as belonging to Kathy. B 180-181. Suchomel also found some bungee cord in Appellant's trunk (B 190); however, he discovered several bungee cords and cables to the side and in the backyard of decedent's residence. T 1147, 1170, 1600-1604. Nothing of evidentiary value was found in either Stephane Raphael's or Adelyn Severe's car. T 1269, 1309-1310.

After the phone was found in Appellant's car, Detective Danny Smith said Appellant was brought to the police station, where he waived his *Miranda* [1] rights and gave an 8-hour taped statement. T 1316, 1318; INT 1-342. Appellant gave a subsequent interview on July 19, 2005. INT2 1-432; INT2a 360-406. Appellant's taped interview was published to jury with the benefit of transcript. INT 1-342, INT2 1-432; INT2a 360-406; Unnumbered Exhibits. Detective Toyota obtained a search warrant for two computers (T 1544) and retrieved emails from the accounts of both Appellant and decedent. T 1546, 1552-1614.

Defense counsel sought in limine exclusion of Kathy's emails sent to Appellant on grounds of hearsay and relevance. R 69-75. T 1508, 1511, 1513, 1515. B 12, 44. The State responded that the emails were not offered for the truth but to put Appellant's emails in proper context. T 1508-1509. The trial court held that the emails were not hearsay and therefore were admissible. T 1512, 1515, B 12, 44.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

ARGUMENT

I. HARMFUL, PREJUDICIAL ERROR OCCURRED WHEN THE TRIAL COURT ADMITTED THE VICTIM'S HEARSAY STATEMENTS AND EMAILS TO APPELLANT, WHICH SHOWED THAT SHE WAS CUTTING APPELLANT OUT OF HER LIFE, SINCE THE HEARSAY IMPERMISSIBLY PROVED APPELLANT'S STATE OF MIND AND MOTIVE TO MURDER AND THE VICTIM'S STATE OF MIND WAS IRRELEVANT

At trial, the State offered less-than-overwhelming circumstantial evidence of Appellant's guilt. There were no eyewitnesses, no DNA or fingerprint evidence linking Appellant to Kathy Pierre's homicide, and no confession of guilt. Appellant's defense was that someone else killed Pierre. Without a motive, the State's evidence was equally susceptible of an interpretation of Appellant's innocence and Adelyn Severe's guilt. Thus, the prosecutor sought to introduce three emails from Pierre to Appellant, as well as four hearsay statements from Appellant's interview, to prove that Appellant had a motive to kill her because she shunned him.

Defense counsel moved in limine to exclude the victim's emails (R 69-75), arguing that the emails were hearsay offered for the truth asserted and that Pierre's state of mind was neither relevant nor subject to cross-examination. T 1508, 1511, 1513, 1515. B 12, 44. The State responded that the emails were not offered for the truth of what Pierre was stating but were necessary to put Appellant's emails in proper context. T 1508-1509. The trial court held that the emails were not hearsay and

therefore were admissible. T 1512, 1515, B 12, 44.

Counsel also sought in limine exclusion of the recitation of five hearsay statements made by Kathy, which were utilized by the detectives during their questioning of Appellant. B 23-24; R 363-364, 366-367, 371. These portions of the taped interviews were again offered to prove Kathy's state of mind: 1) "Look what [Appellant] gave me, I'm not going to accept it [the jewelry]" (INT2 192); 2) "No, Mommy. I don't want to talk to [Appellant]" (INT2 230); 3) "As much as I love the kids, I'm not going over there anymore" (INT2 264, 327-328); 4) "If you are going by that, you could come to that conclusion. You can. After that incident happened, she had a key to my house. What did she do with it, the key? She said take your keys. I am not coming over to your house...She take the key off her key chain and she said she want nothing to do with me" (INT2 265); 5) "The relationship was over that Saturday" (INT2 267). However, the trial judge admitted these statements. B 23-24.

After the emails were admitted and published with transcripts to aid the jury (T 1557-1559, 1562, 1565-1567; B 12-14, 44-46, 295-297, 304-305; Unnumbered Exhibits), defense counsel filed a second motion in limine, arguing that hearsay cannot be used to prove Appellant's motive or state of mind. R 342-351. The trial court denied the motion and defense request to instruct the jury to disregard the emails. R 401. Counsel's motion for a new trial on the same grounds (R 443-455)

was also denied. T 560.

Generally a trial court's evidentiary rulings are reviewed for abuse of discretion, that discretion is limited by the rules of evidence, and a judge lacks discretion to make rulings contrary to the law or the facts. *Johnson v. State*, 969 So.2d 938, 949 (Fla. 2007). However, plain, reversible error occurs when a trial court admits hearsay to prove motive in a case that relies solely on circumstantial evidence. *Thomas v. State*, 993 So. 2d 105 (Fla. 1st DCA 2008) (admission of deceased's hearsay email to landlord stating that defendant (deceased's boyfriend) refused to move out was harmful error); *Gosciminski v. State*, 33 Fla. L. Weekly S810 (Fla. October 8, 2008) (statements of murder victim, before her death, to her sister and to her brother-in-law, that defendant had noticed her jewelry, were inadmissible, prejudicial hearsay).

Here, the trial court's erroneous ruling to admit Kathy Pierre's three emails was harmful error that deprived Appellant of a fair trial. The State was permitted to establish Appellant's motive to commit murder with Kathy Pierre's hearsay statements. Motive was critical component lacking in the State's circumstantial case, and the prosecutor took full advantage of the inadmissible hearsay by arguing repetitiously that Appellant was enraged because Kathy shunned him. Without this erroneously admitted evidence of motive, the State's evidence would have been

legally insufficient to sustain Appellant's conviction.

An e-mail "statement" sent to another is always subject to the limitations of the hearsay rule. *Bowe v. State*, 785 So. 2d 531, 532-533 (Fla. 4th DCA 2001) (caller I.D. readout and numbers appearing on digital display of defendant's pager were not "hearsay;" however, message would have been hearsay if offered to prove that the sender wanted to purchase the cocaine). Emails that are intended to assert or communicate a thought or idea are hearsay when offered to prove the truth of the matter asserted in the transmission. *Id.* In the absence of an applicable statutory exception, hearsay evidence is inadmissible. *Thomas*, 993 at 105.

Kathy Pierre's emails sent to Appellant qualified as inadmissible hearsay. As a homicide victim, Pierre was unavailable to testify and was not subject to cross-examination. Her statements were offered to prove the truth of the matter asserted, i.e. she wanted Appellant to stay away from her and to cease contacting her and fell under no statutorily recognized exception for admission.

While Pierre's statements as contained in the emails could cognizable fall under the state-of-mind exception, Pierre's state of mind lacked relevance here. A victim's state of mind prior to the fatal events is irrelevant in a premeditated murder prosecution, unless it is made relevant to rebut a defense raised by the defendant or to prove a material element of the crime. *Taylor v. State*, 855 So. 2d 1, 19-20 (Fla.

2003) (citing *Woods v. State*, 733 So. 2d 980, 987-988 (Fla. 1999).

However, Appellant never made Pierre's state of mind relevant, so none of these exceptions, recognized by the courts in homicide prosecutions, apply to Pierre's hearsay statements. *See Peede v. State*, 474 So.2d 808 (Fla.1985) (holding that victim's state of mind was relevant as an element of kidnapping to show that she was forcibly abducted against her will); *Pacifico v. State*, 642 So.2d 1178, 1185 (Fla. 1st DCA 1994) (holding that state of mind of victim was at issue to show she did not consent to sexual intercourse in trial for sexual battery); *Stoll v. State*, 762 So. 2d 870, 874 (Fla. 2000) (holding that "the victim's state of mind may become relevant to an issue in the case where the defendant claims: (1) self-defense; (2) that the victim committed suicide; or (3) that the death was accidental."); *State v. Bradford*, 658 So.2d 572, 574-575 (Fla. 5th DCA 1995)) (a homicide victim's state of mind "may become an issue to rebut a defense raised by the defendant.").

Additionally, Appellant never testified nor introduced evidence. Florida law prohibits the prosecution from introducing rebuttal evidence to explain or contradict evidence that the *state itself* offered. *Stoll*, 762 at 875. (Emphasis supplied). Here, the prosecutor told the trial judge that she was offering the hearsay statements not for the truth of the matter but to put Appellant's emails "in context," arguing that"his emails don't make sense anymore because [the jury] doesn't know what he responding to."

T 1508-1509. This reason advanced by the prosecutor is disingenuous, since Pierre's emails were plainly offered for the truth asserted, i.e. that she wanted Appellant out of her life. The hearsay statements were introduced exclusively to highlight Kathy Pierre's difference of opinion concerning the status of her relationship with Appellant, which impermissibly rebutted his statements to police characterizing the relationship with Pierre as rocky but otherwise good.

Most importantly, Florida courts have repeatedly held that a homicide victim's hearsay statements can not be used to prove the defendant's motive or state of mind. *Stoll*, 762 at 874 (Fla. 2000) (reversible error occurred by admitting victim's hearsay statement that she was afraid the defendant was going to kill her, where defendant made statements to police contending that someone else killed his wife); *Brooks v. State*, 787 So. 2d 765, 771 (Fla. 2001) (new trial required based on erroneous admission of homicide victim's hearsay statements by victim to her coworkers, including an e-mail sent by victim to co-defendant, to show that defendant had driven to location where victim was found murdered); *Sybers v. State*, 841 So. 2d 532, 545 (Fla. 1st DCA 2003) (harmful error to admit witness's hearsay testimony that defendant's girlfriend had told her that defendant was going to divorce the murder victim, equating motive with defendant's state of mind); *Wells v. State*, 492 So. 2d 712, 715-716 (Fla. 1st DCA 1986) (reversible error to admit taped statements by one

homicide victim accusing defendants of kidnaping and attempting to murder such victim was not admissible under state of mind exception to hearsay rule, since victim's state of mind was not issue in case; state took advantage of the error by arguing the hearsay proved defendants' motive to protect marijuana trafficking business); *Downs v. State*, 574 So. 2d 1095, 1098-1099 (Fla. 1991) (victim's hearsay statements relating her fear of defendant inadmissible to prove her state of mind or that of defendant's); *Selver v. State*, 568 So. 2d 1331 (Fla 4th DCA 1990) (harmful error to admit murder victim's statements expressing generalized fear of defendant for a drug deal gone sour, especially since state relied on statements to prove defendant's motive); *Fleming v. State*, 457 So 2d 499, 502 (Fla. 2d DCA 1984) (introduction of evidence of victim's state of mind prior to her death held reversible error).

Plainly, the State used Kathy Pierre's hearsay statements to prove Appellant had a motive to kill her because he was enraged that she shunned him. The hearsay statements show that 1) Pierre was at one time madly in love with Appellant; 2) he broke her heart; 3) she bids him farewell. Pierre also pleads for Appellant to stay away because she cannot eat, sleep, and is on the verge of a breakdown. Without this hearsay evidence, the State's evidence showed Appellant as nothing more than an over-protective father figure lacking a motive to commit murder. T 583, 587-588,

635, 650, 816, 819-820, 973, 975, 978, 1040-1043. Yet, the erroneous trial court ruling allowed the State to transform these hearsay statements into substantive proof that Appellant killed Pierre because he could not accept her rejection.

Thus, the ominous warning issued in *Fleming* went unheeded here, and the danger of imputing hearsay to Appellant's motive deprive him of a fair trial:

> Certainly the danger that the jury would misuse this evidence [that the victim utilized a romantic pretense to gain admission into defendant's apartment to discuss personal and financial aspects of their divorce] for the impermissible purpose of imputing a state of mind to appellant (specifically, rage resulting from a confrontation, and thus a motive for murder) outweighs the minimal importance of establishing the true purpose of [the victim's] visit to defendant's apartment.

457 So. 2d at 499.

Despite the State's assurances that emails were not offered for the truth of the matter asserted (T 1508-1509), that is precisely how the State used them in closing:

> You will see from these 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 Kathy.
> 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 that 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 Kathy's computer and the police will eventually get those, that is exactly what she did. She cut him out of her life.

B 282.

You know from that point on, the relationship severs. Kathy cuts him out. She is not going to let him in her life anymore. That is what starts all of this. This is where the motive comes from.
The man sitting right there is what caused what she looked like in this picture to become that picture. That man did that. It's because she rebuffed him. In the name of love, he couldn't take it, and he killed her.

B 284.

You know what? I gave you this gift. I have done all this for you. I have been begging you. I have been pouring my heart out to you, and you still reject me. You went out with this other guy on this night.

B 285.

Going back to Kathy. Remember that he says that Kathy didn't cut him off. This is an email from Kathy 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 anymore. I can't promise that I will ever contact you again. You hurt me 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 Claudia. 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 really wanted was his friendship. Nothing else I cherished than friendship; all the flaws and great attributes that it had. I honest to God 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 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 [Appellant] that never hit me."

B 295-297.

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

B 301.

And yet, she rejects him. How angry is he getting? This is day after day after day. He is up in the middle of the night pouring his heart out to her, and nothing is working.

B 303.

Kathy said to him:
"We agreed to have distance between us, and you broke that today. [Appellant], 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's 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."

B 304-305.

Kathy writes back to him:
"I know I lost Adelyn for real now. There is no one to blame but myself. But when you told me what Claudia said, and how she is trying to protect me from him, I snapped at him asked him what did he have planned for me. I asked him that the wrong way. I didn't mean it that way. I simply asked him what I was told, and I know I hurt him, and now he's gone.
I can't do this anymore. I am dying inside. I can't eat, sleep, breathe. I am weak all of the time. I can barely lift a spoon to my mouth. So, of course, I'm sick."

B 307-308.

Now he finally says I'm getting the feeling you don't want anything to do with me. It's been how many emails? He is trying everything. He goes down there. The emails and the calls. The gifts of expensive jewelry. She is rebuffing all of it. He is growing angrier and angrier and angrier.

B 310.

Now, she is doing this? She is going to do this to me? She is going to cut me off? She is going to the beach with another guy? No way. I will drive down there and confront her.

B 315.

Remember in your minds that this comes down to one thing: motive, means, and opportunity. There's only one person on the face of this earth that had a reason to take this poor girl's life away from her, and

that is the man seated across the courtroom from you. Thank you.

B 325-326.

These are not isolated remarks. Rather, the prosecutor emphasized the email evidence to such an extent that she argued little else during her initial closing statement. This was harmful error.

But for the erroneous admission of Kathy Pierre's hearsay statements, the evidence would have been legally insufficient to sustain a conviction. *See Hawkins v. State*, 933 So. 2d 1186, 1191 (Fla. 4th DCA 2006) (without erroneously admitted expert opinion that defendant caused victim's death, the state's circumstantial evidence failed to prove the necessary elements of felony third degree murder; however improper admission of expert's testimony does not bar re-trial under *Lockhart v. Nelson*, 488 U.S. 33, 34 (1988)).The State relied almost exclusively upon Appellant's motive, particularly as evidenced in Kathy Pierre's emails to Appellant (T 1658, 1660, 1663-1664), to survive Appellant's motion for judgment of acquittal,

> Going to motive, [Appellant 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 Kathy that wanted to get Adelyn back. Adelyn had moved on. Adelyn wasn't sending emails, Adelyn wasn't sending text messages. He wasn't doing anything...
> [Kathy] is the one that shuns Appellant in the end, disrespects him in the end, and lays out what ultimately happened to her. And that's why, in reference to again – in versus the – the Biggs case and our case, there's

> only one person that had access to this victim, that had a motive to kill this victim, and that was Appellant.
> And there is no evidence to suggest any reasonable inference that Adelyn had any reason whatsoever to stalk her, to see her, to sneak into her house and kill her.

T 1663-1664.

This argument, although on a much smaller scale, was nearly identical to the prosecutor's closing argument. The erroneous admission of Kathy Pierre's hearsay statements was plain, harmful error that deprived Appellant of a fair trial. Reversal with remand for a new trial is now required.

victim's state of mind expressed in the email was irrelevant hearsay. Further, Appellee never addresses the fact that the purpose of this evidence was to clarify the State's own evidence, not to rebut evidence introduced by Appellant. AB 28-30.

Appellee also asserts that the email evidence was admissible not for the truth of the matter asserted but as a state-of-mind hearsay exception to show the effect of the statements on Appellant's mind. AB 30-35. In support of this contention, Appellee relies exclusively on cases pertaining to the state-of-mind hearsay exception. Yet the prosecutor's single-minded use of the victim's emails during closing arguments makes very clear that they were offered for only one reason: to prove that the victim was sincere in her desire to end her relationship with Appellant. IB 26-31. Because the emails were offered for the truth of the matter asserted and not for the effect that they had upon Appellant's mind, the caselaw relied upon by Appellee does not apply.

II. TRIAL COURT COMMITTED HARMFUL ERROR IN ADMITTING DETECTIVES' OUT-OF-COURT COMMENTS DURING APPELLANT'S TAPED INTERVIEW THAT IMPERMISSIBLY CREATED ASPERSIONS OF APPELLANT'S GUILT; EXCLUDED EVIDENCE THAT WAS NOT PROPERLY REDACTED WAS ADMITTED INTO EVIDENCE FURTHER DEPRIVING APPELLANT OF A FAIR TRIAL

Appellant relies on his argument as stated in the initial brief. IB 26-31.

No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
Petitioner,

versus

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

Appendix F

(Order of the Florida Supreme Court Dismissing Petitioner's All Writ Petition Seeking Review of the Fourth District Court of Appeal of Florida)

Appendix F

Supreme Court of Florida

WEDNESDAY, MARCH 31, 2021

CASE NO.: SC21-490
Lower Tribunal No(s).:
4D21-23; 062006CF007295A88810

VLADIMIR EUGENE vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This case is hereby dismissed. This Court's jurisdiction to issue extraordinary writs may not be used to seek review of an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. *See Foley v. State*, 969 So. 2d 283 (Fla. 2007); *Persaud v. State*, 838 So. 2d 529 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Grate v. State*, 750 So. 2d 625 (Fla. 1999).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

td
Served:
VLADIMIR EUGENE
HON. BRENDA D. FORMAN, CLERK
HON. LONN WEISSBLUM, CLERK
CELIA TERENZIO

No.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

VLADIMIR EUGENE,
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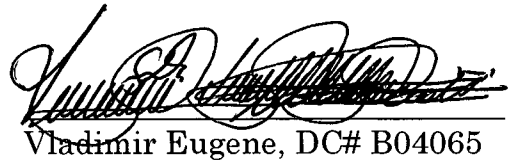
versus

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

PROOF OF SERVICE

I, Vladimir Eugene, Petitioner pro se, do hereby certify under the penalty of perjury that on this 16th day of June 2021, I personally handed a true copy of Appendices "A" thru "F" to Petitioner's Petition for Writ of Certiorari to an official at DeSoto Annex for the sole purpose of mailing via first class U.S. Mail postage prepaid to all parties required to be served as follow:

- Office of the Clerk, Supreme Court of the United States, 1 First Street Northeast, Washington, DC 20543-0001; and
- Office of the Attorney General; 1515 North Flagler Drive, Suite 900; West Palm Beach, Florida 33401[4]



Vladimir Eugene, DC# B04065
Petitioner, Pro se

6/16/21 V.E.

4 Petitioner only mailed Appendix F to the Office of the Attorney General to avoid redundancy.