No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GILBERTO MULGADO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant's constitutional due process right to a fair trial is violated by the admission at trial of needlessly cumulative child hearsay testimony.

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, GILBERTO MULGADO, requests the Court to issue a writ of certiorari to review the judgment of the Florida Second District Court of Appeal entered in this case on August 18, 2021 (A-3)[1] (rehearing denied on October 28, 2021 (A-5)).

D. CITATION TO ORDER BELOW

Mulgado v. State, 326 So. 3d 1099 (Fla. 2d DCA 2021).[2]

E. BASIS FOR JURISDICTION

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

F. CONSTITUTIONAL PROVISION INVOLVED

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

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate page number. References to the state court record on appeal will be made by the designation "R" followed by the appropriate page number.

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

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

In 2015, the Petitioner was charged in Lee County, Florida, with one count of custodial sexual battery, pursuant to section 794.011(a)(b), Florida Statutes. The offense allegedly occurred between March 5, 2012, and October 28, 2016. The alleged victim of the offense is K.R.,[3] the Petitioner's daughter. At trial, the defense's theory was that K.R. fabricated the allegations one day after she was disciplined by her father for receiving bad grades at school.

The case proceeded to trial in the spring of 2019. During the trial, the prosecution was permitted to present – over objection – numerous repetitions of K.R.'s allegations through adult witnesses. At the conclusion of the trial, the jury found the Petitioner guilty as charged. The trial court subsequently sentenced the Petitioner to thirty years' imprisonment. (A-6).

On direct appeal, the Petitioner argued that the trial court erred by allowing the prosecution to introduce repetitive child hearsay statements at trial. The Florida Second District Court of Appeal affirmed the conviction and sentence without explanation. (A-3).

2. Statement of the facts (i.e., the facts presented during the trial).

a. The Prosecution's Case in Chief.

Natalie Brace. Ms. Brace stated that in October of 2016, she was a detective

[3] Only the initials of the alleged victim will be used in this petition.

with the Lee County Sheriff's Office. (T-238-239). Detective Brace testified that on October 28, 2016, she and other law enforcement officers executed a search warrant at the Petitioner's residence. (T-239-240). During Detective Brace's testimony, the prosecution introduced photographs of items that were seized by law enforcement officers when they executed the search warrant (i.e., a pile of latex gloves that were found on the floor of a bathroom closet and pornographic DVDs that were also found in the closet). (T-240-257).

Detective Brace stated that she met K.R. in November of 2016, and she said that she collected a buccal swab from her for purposes of DNA testing. (T-257). Detective Brace testified that she and other law enforcement officers later executed a body search warrant on the Petitioner. (T-258-259).

K.R. K.R., the Petitioner's daughter, stated that she was born in March of 2000. (T-288). K.R. testified that when she arrived home from school on October 27, 2016, her father and her grandmother were at her house and she said that her father was upset with her and he told her to "grab all of [her] stuff from the room and bring it all out." (T-292). K.R. stated that her father proceeded to cut her clothes – and she said that he told her that she would be wearing uniforms from that point forward. (T-293, 295). K.R. testified that on the following day (October 28, 2016), she met with her school counselor and told her that her father had sexually abused her. (T-296-301).

K.R. claimed that her father previously engaged in sexual activity with her (i.e., she alleged that his penis was in her "butt and vagina"). (T-301-302). K.R. alleged that when her father engaged in sexual activity with her, he wore a condom and they

both wore latex gloves,[4] and she said that those items were kept in the closet of the master bathroom.[5] (T-302-308). K.R. contended that her father would subsequently burn the gloves and condoms in the backyard of their house. (T-343). K.R. testified that the Petitioner has a mole in his genital region. (T-316). K.R. stated that "everything first started" when she was twelve years old. (T-320).

Kimberly Van Waus. Ms. Van Waus, a crime scene technician with the Lee County Sheriff's Office, testified that she sent various items that were collected in this case to the laboratory of the Florida Department of Law Enforcement for DNA testing (i.e., gloves from a bathroom closet and DNA standards from the Petitioner and K.R.). (T-435-441).

Stuart Foreman. Mr. Foreman, a detective with the Lee County Sheriff's Office, testified that he assisted in executing a body search warrant in this case (i.e., he took pictures of the Petitioner's penis). (T-443).

Mickey Rosado. Mr. Rosado, a detective with the Lee County Sheriff's Office, stated that in October of 2016, he was involved in the execution of a search warrant at the Petitioner's residence. (T-446). Detective Rosado testified that when he attempted to enter a closet in the master bathroom of the residence, he discovered that it was locked, and he said that he proceeded to kick in the door of the closet. (T-447-448).

Natalie Brace (recalled). Detective Brace testified that when she executed

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[4] K.R. testified that her father did not want them to touch each other with bare hands. (T-307-308).

[5] K.R. said that there were also pornographic DVDs in the closet. (T-307).

the body search warrant on the Petitioner, she collected a buccal swab from him. (T-449).

Courtney Sutton. Ms. Sutton, a high school counselor, testified that K.R. – one of the students at her school – came to her office on October 28, 2016. (T-469-470). Ms. Sutton stated that K.R. proceeded to talk about her father, and she said that the following occurred:

> And then she said he treats me like a girlfriend, that he – he had – I said like a girlfriend like he has intercourse with you. And then she was like yes, and then she started crying.

(T-477). Ms. Sutton testified that she subsequently called the Department of Children and Families to report the allegation. (T-478).

Jaymie Waltz. Ms. Waltz, the Petitioner's ex-girlfriend, stated that K.R. has been living with her since 2016. (T-494). Ms. Waltz testified that she dated the Petitioner between 2012 and 2015, and she said that she and her children lived with the Petitioner and K.R. during this time period. (T-496-504). Ms. Waltz stated that when she lived with the Petitioner, she and the Petitioner slept on the couch, and she said that K.R. occasionally slept on the couch with them. (T-502). Ms. Waltz testified that in late 2016, she received a call from the Department of Children and Families asking her if she would be willing to take custody of K.R., and she said that she agreed (and K.R. has been living with her ever since). (T-498, 511). Ms. Waltz stated that K.R. subsequently told her that "me and my dad were having sex." (T-512). Ms. Waltz testified that the Petitioner has a birthmark on his penis. (T-525).

Christina Russo. Ms. Russo, a crime laboratory analyst with the Florida

Department of Law Enforcement, stated that she collected swabs from seven blue gloves that were provided to her for testing. (T-545-547).

Daniel Baker. Mr. Baker, a crime laboratory analyst with the Florida Department of Law Enforcement, stated that he supervised Christina Russo when she conducted her analysis of the seven blue gloves. (T-555-556).

John Robida. Mr. Robida, a crime laboratory analyst with the Florida Department of Law Enforcement, stated that he conducted DNA testing on swabs collected from seven blue gloves and he said that DNA from the swabs matched both K.R. and the Petitioner. (T-591-612).[6]

Diana Smith. Ms. Smith, a nurse practitioner with the Children's Advocacy Center, stated that she examined K.R. on November 1, 2016. (T-626, 630). On cross-examination, Ms. Smith testified that her examination of K.R. did not reveal whether K.R. had been sexually active. (T-635).

Sally Beckett. Ms. Beckett, the director of the Child Protection Team ("CPT") program at the Children's Advocacy Center of Southwest Florida, testified that she interviewed K.R. on November 1, 2016. (T-650-651). At the conclusion of Ms. Beckett's testimony, the recording of the November 1, 2016, interview was played for the jury. (T-669-722, 724-746).

Following Ms. Beckett's testimony, the prosecution rested. (T-747).

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[6] As argued by defense counsel during the state court proceedings, the DNA on the gloves "was not proven to be consistent with anything other than the fact the Victim and Mr. Mulgado had touched those gloves." (R-187).

b. The Petitioner's Case in Chief.

K.R. (recalled). K.R. acknowledged that one of her chores was to clean the toilets in her house, and she conceded that she wore gloves when she cleaned the toilets. (T-759-760). K.R. also recalled a time when she helped her dad with a painting project. (T-760).

Lillyan Mendez. Ms. Mendez stated that she is the daughter of one of the Petitioner's former girlfriends (Aracely Gonzalez) and she said that she and her mother lived with the Petitioner and K.R. when she was between the ages of four and ten. (T-775). Ms. Mendez testified that after the Petitioner was arrested, she had a conversation with K.R. and K.R. told her that "her family has the story wrong, and that it's not as bad as everyone thinks, and that one day [Ms. Mendez will] know the truth." (T-778-783). Ms. Mendez stated that she is familiar with K.R.'s reputation, and she said that K.R. "wasn't a very honest person." (T-823).

Aracely Gonzalez. Ms. Gonzalez stated that she has been friends with the Petitioner for a number of years, and she said that she and her daughter previously lived with the Petitioner and K.R. (T-867-868). Ms. Gonzalez testified that she developed a close relationship with K.R., and she said that they remained close until the Petitioner was arrested in this case. (T-868, 871-872). Ms. Gonzalez stated that the Petitioner made K.R.'s education a priority. (T-871). Ms. Gonzalez testified that K.R. never told her that her father had done anything inappropriate to her, and she said that she never witnessed any inappropriate behavior between the two. (T-872,

874). Ms. Gonzalez stated that prior to the Petitioner's arrest, K.R. was upset at her father because her father would not allow her to date due to her bad grades. (T-872-873).

Clara Mulgado. Ms. Mulgado, the Petitioner's sister, stated that she moved to Southwest Florida just before her brother was arrested. (T-880). Ms. Mulgado testified that after she moved to Florida, her brother informed her that K.R. was not doing well in school, and Ms. Mulgado said that she informed both her brother and K.R. that K.R. should be punished until her grades were better – and that one form of punishment could be to make K.R. wear uniforms (rather than brand name clothes) to school. (T-881-883). Ms. Mulgado stated that she never observed her brother act inappropriately (i.e., in a sexual or physical manner) towards K.R. (T-885). Ms. Mulgado testified that her brother always wore disposable latex gloves when cleaning the house, and she said it was common for him to burn trash in the yard. (T-886-887).

Yatiana Arouz. Ms. Arouz, the Petitioner's sister, testified that K.R. began living with her brother full-time when K.R. was five years old. (T-910). Ms. Arouz stated that she lived with or close to her brother and K.R. during K.R.'s childhood, and she said that she spent a lot of time with her brother and K.R. (T-910-914, 924-925, 927-928). Ms. Arouz testified that she was very close to K.R. up to the point in time that her brother was arrested. (T-914). Ms. Arouz stated that K.R. never told her that her brother had done anything inappropriate to her, and she said that she never witnessed any inappropriate behavior between the two. (T-915-916).

Ms. Arouz testified that her brother called her on October 27, 2016, and he (1)

informed her that K.R. had received bad grades at school and (2) asked her to take K.R. to the store to buy her some uniforms to wear to school. (T-918-919). Ms. Arouz stated that her brother is "germophobic" and therefore he always wore gloves when working around the house, and she said that her brother burned waste in his yard. (T-920).

Oreste Mulgado. Mr. Mulgado, the Petitioner's brother, testified that on October 27, 2016, he was present when his brother got very upset after reviewing K.R.'s report card, and he said that his brother proceeded to take K.R.'s clothes away from her. (T-937-938). Mr. Mulgado also recalled a time when he helped his brother and K.R. paint a bathroom in their house, and he said that (1) both his brother and K.R. wore gloves during this project and (2) he believed that after they were done, they "shoved everything into one of the closets" – including the gloves – because it was very late at night when they finished the project. (T-940). Finally, Mr. Mulgado stated that his brother became aware that K.R. had viewed some of his pornographic DVDs and therefore his brother subsequently locked the DVDs in the bathroom closet so she could not access them anymore. (T-946).

At the conclusion of Mr. Mulgado's testimony, the defense rested. (T-947). The prosecution did not present any rebuttal witnesses. (T-966).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

Prior to trial, the prosecution filed a notice of intent to introduce the child hearsay statements of the alleged victim (K.R.). (R-70, 539). A hearing on the matter was held on April 4, 2018. (R-211-433). Following the hearing, the trial court rendered an order granting the prosecution's request to introduce child hearsay at trial. (R-105).

During the trial, the prosecution introduced K.R.'s hearsay statements through (1) the testimony of Courtney Sutton (K.R.'s high school counselor); (2) the testimony of Jaymie Waltz (the Petitioner's former girlfriend); (3) the testimony of Diana Smith (the nurse practitioner); and (4) the recording of K.R.'s interview with Sally Beckett (the director of the CPT program). Moreover, during K.R.'s testimony, the prosecution asked K.R. to repeat what she had previously told other people. As explained by defense counsel during the state court proceedings:

> . . . Our argument continued to be the evidence was cumulative and it was bolstering of the live testimony of the victim.
>
> She repeated her same account of events at least three times on the stand. In other words, she wasn't just saying what happened. She was saying what she told other people happened.
>
> Even though, as the State kept responding to these objections to saying this is live testimony, she can be crossed-examined, it was not a confrontation issue at that point, it was cumulative.
>
> Surely, if the defense had called a witness and said, tell us everything that you observed about the relationship between Mr. Mulgado and his daughter, and the witness spent 30 minutes doing that, I said, now that you've finished that, please tell us all that again, clearly, the State would have objected and said that's cumulative, asked and answered, whatever you may have. And the Court would rightly sustain an objection like that.
>
> However, there seems to be some type of different set of rules because these are child cases that allows the child to continuously testify,

> what did you tell Ms. Waltz, tell us in detail what you told Ms. Waltz. Tell us what you told the counselor. Tell us in detail what you told the counselor.
>
> So at least three times we have the same story from one witness presented by the State, plus a lengthy CPT tape, plus we have the account of the counselor, at least, and Ms. Waltz testifying in the trial as to what – all of them saying the same story. So that story is heard at least five, but I believe six times in this case.

(R-461-462). Throughout the trial, defense counsel repeatedly objected to the child hearsay and argued that it was cumulative, but the trial court overruled defense counsel's objections. (T-304-305, 322-324, 472-474, 514-518, 627-628, 656-658). The Petitioner submits that the trial court's child hearsay rulings denied him his constitutional due process right to a fair trial. In particular, the Petitioner submits the prejudicial impact of K.R.'s repeated statements – *presented to the jury at least five different times* – substantially outweighed any probative value of the evidence because the testimony/evidence improperly bolstered K.R.'s credibility.

Section 90.803(23), Florida Statutes, states in relevant part:

> (23) Hearsay exception; statement of child victim.–
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of

the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies.

"Section 90.803(23), the child-sexual-abuse-hearsay exception, was enacted by the Florida Legislature to enable trustworthy and reliable statements not covered under any other hearsay exception to be admitted in court." *State v. Townsend*, 635 So. 2d 949, 953 (Fla. 1994). To be admissible, however, such statements "must meet two specific reliability requirements: (1) the source of the information through which the statement was reported must indicate trustworthiness; and (2) the time, content, and circumstances of the statement must reflect that the statement provides sufficient safeguards of reliability." *Id.* at 954. The legislative purpose for imposing such stringent requirements is "to balance the need for reliable out-of-court statements of child abuse victims against the confrontation and due process rights of those accused of child abuse." *Id.*

"[I]n a situation involving several child hearsay statements determined to be admissible under section 90.803(23), a defendant may still invoke the protection afforded by section 90.403[, Florida Statutes,] by seeking to 'exclude successive hearsay witnesses whose testimony of prior consistent statements *merely bolsters and adds credence to the child victim's testimony*.'" *Garcia v. State*, 659 So. 2d 388, 392 (Fla. 2d DCA 1995) (quoting *Perry v. State*, 593 So. 2d 620, 621 (Fla. 2d DCA 1992)) (emphasis added). "Thus, such evidence, although properly admissible as an exception to the hearsay rule under section 90.803(23), may nevertheless be excluded under the

balancing test found in section 90.403 if the trial court determines that 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, *or needless presentation of cumulative evidence*.'" *Garcia*, 659 So. 2d at 392 (quoting *Pardo v. State*, 596 So. 2d 665, 667-668 (Fla. 1992)) (emphasis added).

In the instant case, the trial court erred by allowing the prosecution to introduce K.R.'s hearsay statements at least five different times (i.e., her numerous accounts of what she told other people, at least three different witnesses (Ms. Sutton, Ms. Waltz, and Ms. Smith), and the taped interview. Pursuant to section 90.403, the presentation of this hearsay testimony amounted to "needless presentation of cumulative evidence."

In *Kopko v. State*, 577 So. 2d 956, 960-961 (Fla. 5th DCA 1991), the state appellate court recognized the danger in allowing child hearsay statements to be repeated by more than one witness:

> What the advent of legislation like section 90.803(23), Florida Statutes, has done is to create an invitation to repetitive testimony consistently prohibited in Florida prior to the amendment. The statute itself suggests at least one repetition is permissible by providing that the victim's hearsay statements are admissible if the child testifies. By having the child testify and then by routing the child's words through *respected adult witnesses*, such as doctors, psychologists, CPT specialists, *police* and the like, with the attendant sophistication of vocabulary and description, *there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony*. It is worrying to see, in a case such as this one, with virtually no evidence to corroborate the testimony of either the alleged victim or the alleged abuser, that only the victim's version of events is allowed to be repeated through different (professional) witnesses.

(Citations omitted) (emphasis added) (footnote omitted). The *Kopko* court proceeded

to explain that repeated references to an alleged victim's prior consistent statements has the effect of improperly bolstering the alleged victim's credibility. *See Kopko*, 577 So. 2d at 960-961 & n.9.

In *Kopko*, the court held that even if the criteria of section 90.803(23) are satisfied, where the child is able to testify fully regarding the circumstances of the alleged abuse, hearsay statements regarding the abuse are inadmissible prior consistent statements. In *Pardo*, the Florida Supreme Court disapproved this holding from the *Kopko* opinion. *See Pardo*, 596 So. 2d 665. However, *the Florida Supreme Court acknowledged that it is appropriate in section 90.803(23) cases for a trial court to conduct an analysis pursuant to section 90.403 in order to ensure that repetitious accounts of the alleged victim's statements do not unfairly bolster the alleged victim's testimony*:

> Of course, the same concerns embodied in section 90.403 are those which underlie the common law rule against prior consistent statements. As Wigmore explained:
>
> > When the witness has merely testified on direct examination, without any impeachment, *proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it.* Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.
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> 4 John H. Wigmore, Evidence § 1124 (Chadbourn rev. 1972) (emphasis added). The propriety of the rule was also noted by the First District in *Allison v. State*:
>
> > The salutary nature and the necessity of such a rule are clearly apparent upon reflection in cases like the present,

> for *without that rule a witness's testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness*. This danger would seem to us to be especially acute in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers.
>
> 162 So. 2d 922, 924 (Fla. 1st DCA 1964) (emphasis added). . . . . Consequently, a trial court must weigh the reliability and the probative value of a child victim's hearsay statement against the danger that the statement will unfairly prejudice the defendant, confuse the issues at trial, mislead the jury, or result in the presentation of needlessly cumulative evidence. In weighing these concerns, the courts will be able to balance the rights of criminal defendants with those of the child victims that the statute seeks to protect.

Pardo, 596 So. 2d at 668.

Notably, if this case had involved an alleged adult victim, *none* of the hearsay statements would have been admissible. In *Barnes v. State*, 576 So. 2d 439, 439 (Fla. 4th DCA 1991), the state appellate court explained:

> A witness's prior consistent statement may not be used to bolster his trial testimony. The rationale prohibiting the use of prior consistent statements is to prevent "putting a cloak of credibility" on the witness's testimony. When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, *the danger of improperly influencing the jury becomes particularly grave.*

(Emphasis added) (citations omitted). It is because of this "particularly grave" danger that the court in *Kopko* admonished against allowing child hearsay statements to be repeated by numerous witnesses.

The presentation of the hearsay testimony through Ms. Sutton (K.R.'s high school counselor),[7] Ms. Beckett (the director of the CPT program) and the playing of her taped interview of K.R.,[8] Ms. Smith (the nurse practitioner),[9] *and* Ms. Waltz (the Petitioner's former girlfriend)[10] amounted to "needless presentation of cumulative evidence." While it may have been permissible to introduce the CPT interview and the testimony of the person who first received the report of the allegation (Ms. Sutton), *there was clearly no need to also hear the hearsay allegations through Ms. Waltz* – and her testimony was *particularly prejudicial* because she was the Petitioner's *former*

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[7] Ms. Sutton stated the following to the jury about her conversation with K.R.:

> And then she said he treats me like a girlfriend, that he – he had – I said like a girlfriend like he has intercourse with you. And then she was like yes, and then she started crying.

(T-477).

[8] (T-669-722, 724-746).

[9] Ms. Smith told the jury that K.R. told her that "she and her father were having sex." (T-627). *See also* (T-630).

[10] Ms. Waltz' recounting of the K.R.'s hearsay statements spanned several pages of the trial transcripts (T-520-525) and included the following:

> She said, yes, it happened at the house on Bell and 23rd, both houses, sex – sex happened.
>
> We had it – but she said it wasn't always sex. Sometime we were just making out. Sometimes we were just kissing. Sometimes it was just him wanting me to touch myself. Sometimes it was just him touching himself. So it wasn't – every single time wasn't always sex.
>
> But, yes, the house on Bell, we mostly did it on the couch.

(T-522-523).

girlfriend.[11] As explained by the state appellate court in *Kopko* – and *repeated* by the Florida Supreme Court in *Pardo*:

> By having the child testify and then by routing the child's words through respected adult witnesses, such as . . . [Child Protection Team] specialists, police and the like, with the attendant sophistication of vocabulary and description, *there [was] a real risk that the testimony [took] on an importance or appear[ed] to have an imprimatur of truth far beyond the content of the testimony.*

Pardo, 596 So. 2d at 668 (emphasis in the original). Furthermore, as argued by defense counsel below, there was absolutely *no need* to have K.R. repeat during her testimony what she had previously told other people about the sexual allegations.

In the instant case, allowing the prosecution to repeatedly present K.R.'s child hearsay statements had the effect of improperly bolstering K.R.'s credibility through repeated prior consistent statements. This was a close case and K.R.'s credibility was the focus of the trial. *See, e.g., Peterson v. State*, 874 So. 2d 14, 18 (Fla. 4th DCA 2004) ("In this case, where the victim's credibility was at the heart of the trial and there was no physical, corroborative evidence against appellant, we cannot say that the error [in allowing the prior consistent statement] was harmless beyond a reasonable doubt."). Therefore, the trial court erred by allowing the prosecution to present – repeatedly –

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[11] On appeal, the State alleged in its brief that "each hearsay witness . . . provided a different perspective of the evidence she received." Answer Brief at 18. Contrary to the State's contention, the alleged "different perspectives" were not relevant and any minimal probative value in the purported "different perspective" was substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. For example, Ms. Waltz could have testified about the appearance of the Petitioner's penis and his germ phobia without repeating – in extensive detail – K.R.'s hearsay statements regarding the sexual allegations.

K.R.'s child hearsay statements. The repetitive child hearsay became *the* feature of this trial. There is a line between admissible child hearsay evidence and the needless presentation of cumulative evidence – and that line was clearly crossed in the instant case.

The Petitioner submits that the error in allowing the prosecution to introduce the repetitive child hearsay testimony was not harmless. In support of this argument, the Petitioner relies on *Garcia*, wherein the state appellate court held the following:

> We also conclude, after a thorough review of the record, that there is a reasonable possibility that the erroneous admission of these four separate hearsay statements affected the jury's verdict and thus constituted harmful error. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As the trial court noted in its order, the child's testimony constituted the only evidence against appellant. Hence, in our view, these improperly admitted statements "might well have had a significant reinforcing effect in the minds of the jury regarding the [child's] credibility." *Arney v. State*, 652 So. 2d 437, 438-439 (Fla. 1st DCA 1995).

Garcia, 659 So. 2d at 393. As in *Garcia*, in the instant case, K.R.'s testimony was the only direct evidence of the Petitioner's guilt. Consistent with *Garcia*, the improperly cumulative child hearsay testimony might well have had a significant reinforcing effect in the minds of the jury regarding the K.R.'s credibility. And the repetitive hearsay statements "might well have had a significant reinforcing effect in the minds of the jurors" regarding K.R.'s credibility – especially the testimony from Ms. Waltz (the Petitioner's former girlfriend). *See Peterson*, 874 So. 2d at 18 ("In this case, where the victim's credibility was at the heart of the trial and there was no physical, corroborative evidence against appellant, we cannot say that the error [in allowing the prior consistent statement] was harmless beyond a reasonable doubt.").

Undersigned counsel also notes that during closing arguments, the prosecutor *repeatedly* referred to the child hearsay statements in an effort to bolster K.R.'s credibility. (T-968, 970, 976-979, 1018-1022). In fact, the *final words* the prosecutor spoke to the jury were as follows:

> *I ask you to consider this Child Protect Team, her testimony, and all the witnesses together* because all of it are pieces to a puzzle that came together on the day she told Courtney Sutton, finally, what – how she had had enough.
>
> The State would be asking you to come back with a verdict of guilty for custodial sexual battery. Thank you.

(R-1022) (emphasis added). *See Allen v. State*, 192 So. 3d 554, 558 (Fla. 4th DCA 2016) ("[T]he fact that the state emphasized this erroneously admitted evidence in its closing argument also may have tainted the validity of the jury's verdict."); *Fiore v. State*, 967 So. 2d 995, 999 (Fla. 5th DCA 2007) ("[I]n closing, the prosecutor continually addressed all three offenses.").[12] As summed up by defense counsel during the state court proceedings:

> [C]hild hearsay should not become the feature of a case. Not only was child hearsay virtually all of the State's case, it was so cumulative as to be become *overpowering and smothering*. It denied Mr. Mulgado a fair trial.

(R-190) (emphasis added).

Just days after the state appellate court affirmed the Petitioner's conviction,

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[12] *Cf. Ayalavillamizar v. State*, 134 So. 3d 492, 497 (Fla. 4th DCA 2014) ("[A]ny error in admitting this testimony was harmless. Here, the testimony was brief, isolated, *and never repeated or commented upon in the state's closing argument*.") (emphasis added).

another appellate court in Florida issued the following opinion:

> Following a jury trial, Joseph Knight was convicted of lewd or lascivious molestation of a child under the age of 12 and lewd or lascivious exhibition by a defendant 18 years of age or older. He was sentenced to life in prison on the first count and 15 years on the second, running concurrently. Knight raises two issues on appeal: first, that the trial court erred by failing to conduct a competency hearing before proceeding to trial; *and second, that it erred in admitting child hearsay statements.*
>
> The State properly concedes error on the first issue. The record does not establish that the trial court held a competency hearing following Knight's evaluation by an expert. As a result, we remand for a competency hearing and a *nunc pro tunc* determination, if possible, as to whether Knight was competent to proceed to trial.
>
> *The second issue is more problematic.* In all cases, regardless of the nature of the charges, trial courts should diligently exercise their role as gatekeepers and ensure that needlessly cumulative evidence is excluded. *See McLean v. State*, 934 So. 2d 1248, 1261-1262 (Fla. 2006) (recognizing trial court's "critical" gatekeeping function in determining admissibility of prior acts evidence); *see also Pardo v. State*, 596 So. 2d 665, 668 (Fla. 1992) ("[A] trial court must weigh the reliability and the probative value of a child victim's hearsay statement against the danger that the statement will unfairly prejudice the defendant . . . or result in the presentation of needlessly cumulative evidence.").
>
> *That gatekeeping function is especially important when addressing the admissibility of child hearsay, as such evidence is often highly prejudicial. See Perry v. State*, 593 So. 2d 620, 621 (Fla. 2d DCA 1992) (noting that admission of "repetitious child hearsay from multiple witnesses is unfair to a defendant" (citations omitted)); *see also Garcia v. State*, 659 So. 2d 388, 392 (Fla. 2d DCA 1995) (noting that defendant may seek to exclude successive hearsay witnesses when such testimony "merely bolsters and adds credence to the child victim's testimony." (citation omitted)). *In this case, the trial court allowed not one, not two, but four witnesses to testify to out-of-court statements made by the victim, with much of that testimony being similar. See Perry*, 593 So. 2d at 621 (affirming introduction of repetitive child hearsay but noting, "[W]e can envision the prosecution parading an *endless stream of hearsay witnesses* before the jury, *smothering the defendant in an avalanche of consistent statements.*"). *We expect trial courts to adhere to their gatekeeping role by excluding needlessly cumulative evidence to avoid unfair prejudice to defendants.*
>
> Nevertheless, Knight has failed to preserve his cumulative

> evidence argument for appellate review, as he did not raise it at the child hearsay hearing nor object on that basis at trial. Even if Knight had preserved that argument, his damaging admissions introduced at trial would have rendered any error in the admission of the cumulative evidence harmless.

Knight v. State, 324 So. 3d 64, 65-66 (Fla. 5th DCA 2021) (emphasis added) (some citations omitted). In *Knight*, the court was clearly concerned that the prosecution was permitted to present "not one, not two, *but four witnesses* to testify to out-of-court statements made by the victim." And as explained above, in the instant case, the prosecution also presented the alleged victim's child hearsay statements through *four* different witnesses: (1) Ms. Sutton, K.R.'s high school counselor; (2) Ms. Beckett, the director of the CPT program (and in addition to Ms. Beckett's testimony, the prosecution also played her taped interview of K.R.); (3) Ms. Smith, the nurse practitioner; and (4) Ms. Waltz, the Petitioner's former girlfriend. As a result, the prosecution was able to present an "endless stream of hearsay witnesses before the jury, smothering [the Petitioner] in an avalanche of consistent statements." Ultimately, the trial court in this case did not "adhere to [its] gatekeeping role by excluding needlessly cumulative evidence to avoid unfair prejudice to [the Petitioner]." Most notably, during the appellate oral argument in this case, the State *conceded* that the presentation of Ms. Waltz' testimony was "gratuitous." *See Case Number 19-2362, OA Date 08/10/2021, Gilberto Mulgado v. State of Florida*, Florida Second District Court of Appeal, Archived Oral Argument Videos, oral argument video recording at 18:31, https://www.2dca.org/Oral-Arguments/Archived-Oral-Argument-Videos. But unlike *Knight*, in the Petitioner's case, the "cumulative evidence" claim *was properly*

objected to and preserved by the Petitioner's trial counsel. And unlike *Knight*, the Petitioner did *not* make any "damaging admissions" that would render the error harmless (and K.R.'s allegation – repeated through four different witnesses – was the only direct evidence of the Petitioner's guilt).

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to consider the important question presented in this case. The issue in this case has the potential to impact numerous criminal cases nationwide – as more states are now adopting laws that except child hearsay from the rules that normally apply to the admission of hearsay testimony. Thus, the Petitioner prays the Court to exercise its discretion to hear this important matter.

I. CONCLUSION

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

Respectfully Submitted,

/s/ Michael Ufferman

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