No.

IN THE

SUPREME COURT OF THE UNITED STATES

RODNEY THOMAS TERNOVSKY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the Petitioner's Fourteenth Amendment due process right to a fair trial was violated when the trial court allowed the State to inform the jury that thumb drives found during the search of the Petitioner's residence contained videos of the Petitioner and his adult girlfriend engaging in consensual sex – evidence that was (1) irrelevant and immaterial (i.e., evidence that had no probative value to any contested issue at trial) and (2) extremely inflammatory and prejudicial.

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

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2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other

The Petitioner, RODNEY THOMAS TERNOVSKY, requests that the Court issue its writ of certiorari to review the opinion/judgment of the Florida Fifth District Court of Appeal entered in this case on November 28, 2023. (A-3).[1]

D. CITATION TO OPINION BELOW

The opinion below was not reported.[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

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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.

[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).

Florida Fifth 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."

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner was charged with twenty counts of possession of photographs/sexual performance by a child and one count of transmission of child pornography by electronic device. During the proceedings below, the Petitioner denied that he committed any of the charged offenses, and at trial, his defense was that he was set up by his mother.

Following a jury trial, the Petitioner was convicted as charged and sentenced to a total sentence of 266.55 months' imprisonment. (A-18).

During the trial, the State was permitted – over objection – to inform the jury that thumb drives found in Petitioner's safe and workbag contained videos of the Petitioner and his girlfriend having sex. On direct appeal, the Petitioner argued that the trial court's ruling was erroneous because evidence that the Petitioner made videos of himself having consensual sex with his adult girlfriend was irrelevant and immaterial – and extremely prejudicial. The Florida Fifth District Court of Appeal rejected this claim without explanation and affirmed the Petitioner's convictions and sentence. (A-3).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The question presented in this case is as follows:

> Whether the Petitioner's Fourteenth Amendment due process right to a fair trial was violated when the trial court allowed the State to inform the jury that thumb drives found during the search of the Petitioner's residence contained videos of the Petitioner and his adult girlfriend engaging in consensual sex – evidence that was (1) irrelevant and immaterial (i.e., evidence that had no probative value to any contested issue at trial) and (2) extremely inflammatory and prejudicial.

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

At trial, Detective Ryan Ellis stated that when the Petitioner's house was searched on February 15, 2018, thumb drives were found in the safe of a bedroom

and in the Petitioner's workbag – and the State asserted that the child pornography counts charged in this case were contained on those two thumb drives. During Detective Ellis' testimony, the State sought to introduce screenshots from video recordings that were found on those thumb drives – specifically recordings of the Petitioner having consensual sex with his adult girlfriend (Leslie Britt):

> Q [by the prosecutor] And what additional files were commingled on the thumb drive found inside the safe?
>
> A They were multiple files that we later discovered through forensics and through the simple viewing of it, they were GoPro videos, brands – specific brands, which was the same brand that we recovered. And they are intimate sexual nature videos depicting the Defendant and Leslie Britt.
>
> Q And Leslie Britt. Did you recognize her from encountering her at the search warrant that day?

A Yes.

Q So when you saw those videos you recognized her inside those videos.

A I did. Yes.

Q And as it relates to the driveway, the USB thumb drive found in the computer bag in the driveway, were there commingled GoPro videos on that as well?

A Yes. They were.

Q And what did those GoPro videos depict?

A They depicted the same intimate sexual acts involving the Defendant and Leslie Britt.

Q Were shots of the video images prepared in preparation for trial here today?

A Yes. They were.

Q And did those screenshots depict the Defendant's face to represent he is the person on those sexual videos?

A Yes. They do.

. . . .

Q Okay. In those GoPro videos you testified that they were of the Defendant engaged in sexual activity with Leslie Britt. Is that correct?

A Yes.

Q I asked you if you took screenshots of those videos.

A Yes.

Q Okay. And have you previously reviewed the State's O, P, and R in this case?

A I have.

Q Okay. And do they fairly and accurately represent just one capture of the video of the Defendant in engaged in sexual activity with his girlfriend?

A Yes. They do.

MS. BARGE [the prosecutor]: Your Honor, at this time I'd like to move into evidence State's O, P, and R, based on the

Court's previous ruling.

THE COURT: Okay.

MR. STONE [defense counsel]: Subject to the same objection I raised earlier.

THE COURT: Understood. All right. It would be overruled and be admitted as State's Exhibit 3, I believe.

MS. BARGE: Three, four, and five.

THE COURT: Three, four, and five. Very well.

(State's Exhibit O, P, and R for Identification received into Evidence as State's Exhibits 3, 4, and 5.)

BY MS. BARGE:

Q And Detective Ellis, we're not going to play those videos, just the screenshots from them. I would like to put on the screen, State's Exhibit O, Your Honor.

THE COURT: You may publish.

BY MS. BARGE:

Q Thank you. State's O into evidence now as State's 3. Do you recognize the person on the screen?

A I do.

Q And who is that?

A That's the Defendant, Mr. Ternovsky.

Q To the right of State's 3 we see a leg. Does that depict the leg of Leslie Britt?

A Yes. It does.

Q And is this, State's 3, a still shot of the video that you reviewed?

A It is a still from the GoPro video.

Q State's 4. Who is that on the screen?

A The same. The Defendant, Mr. Ternovsky.

Q And is this a still shot from the video that you reviewed related to this case?

A Yes.

Q Specifically a video of the Defendant and his girlfriend engaged in sexual activity.

A Yes.

Q We see his hand in a downward motion. What was he doing?

A He actually had the GoPro and was arranging it, setting it up.

Q In State's 5 here, who is depicted in that screenshot?

A The Defendant.

Q Same thing. Is this a screenshot from one of the videos – GoPro videos commingled on the thumb drives?

A Yes.

Q The Defendant's hand is seen reaching in a downward motion. What is he doing – what was he doing in the video at this time?

A Adjusting, positioning.

Q The GoPro?

A Yes. The GoPro.

(A-28-30; A-30-35).

At the beginning of the jury selection proceeding, the trial court addressed the admissibility of the screenshots from the thumb drives. Although defense counsel conceded that the State should be permitted to introduce a screenshot from the thumb drives depicting the Petitioner's face, defense counsel argued that it was irrelevant and overly prejudicial to allow the jury to hear that the screenshot was taken while the Petitioner was engaged in sexual activity with Ms. Britt:

> [MR. STONE:] The concern I have is just from a standpoint of the necessity of explaining that video. It was of a sexual nature and I don't believe that that is of any value to the point of the trial, and it would simply be either prejudicial to Mr. Ternovsky or embarrassing to the witness. So I don't

know that it's necessary to talk about the nature and substance of that video or even to show that video, other than to say – and I imagine that the point of it is to say: This was a file commingled into the flash drive with the child pornography, and this file is of Mr. Ternovsky and his girlfriend Leslie Britt. And I don't think they need to go any further. I don't know if they intended to go any further in describing that video or discussing that video other than the salient fact is that they're trying to place Mr. Ternovsky – or use that file as though it was a file that Mr. Ternovsky created and put it onto the flash drive. And I think that could be done without discussing the nature of the actual video.

THE COURT: All right. Ms. Barge?

MS. BARGE: Your Honor, I brought this issue up multiple times prior to today for counsel to advise the State if he had objection so we could litigate it.

The case law that I previously provided to the Court about the Williams Rule evidence did touch on this. I don't have the argument ready right now as I sit here today for the Court, but this is a case of possession. The Court obviously

understands what that requires to prove. And the videos are of the Defendant engaging in sexual activity which is a personal and intimate act, and possessing that in conjunction with child pornography helps strengthen the State's argument that this defendant's personal videos of his intimate act with his girlfriend with the CP shows that this is his thumb drive. That he possessed it. And that ties it all to him, what we have to prove beyond a reasonable doubt.

Now, does the State intend to play these videos in their entirety? No. The way we intend to present it is to have the witness testify that these are the videos and what exactly they show. Because, again, the intimacy of the act in which is recorded and the presence of it is there, gives the weight that we need to argue for possession.

And so we intend to have the witness testify that this is the act engaged on in these GoPro videos. That they are on the State's evidence that we are introducing into evidence, but we intend to show the still shots, which is what I've already told counsel. He's seen the still shots we intend to use from the videos. And the witness will testify these are still shots from the videos. They only particularly show this Defendant's face.

Granted, we are putting in sexual battery of a child and it wouldn't be as prejudicial to show an adult female's vagina, but we do not intend to do so or to show the actual acts on that video.

But I do think it's relevant and I think the value to the State outweighs any prejudicial value, given the nature of what we're here today about, the child sexual abuse material.

So I have the case law and if the Court needs anything more, but I would need time to just find those points in that case. And I think I have two cases related to this very issue of showing this because it often comes up.

THE COURT: All right. So to make sure I'm clear. There's a video. You don't plan on playing the video. You do plan on asking Ms. Britt about the video and about what the video contains, the two of them having sex. And then publishing still photographs from that video, those photographs being of the Defendant's face.

MS. BARGE: Yes, Judge. But I intend to ask the detectives about that. And there's more than one video. So those are the two corrections I wanted to

make to the Court.

THE COURT: So asking the detectives about the video, but only showing still photographs of the Defendant's face.

MS. BARGE: That is correct.

THE COURT: Mr. Stone?

MR. STONE: Again, I still don't see the relevance of suggesting that the video – I mean, obviously, if there's a video and it contains Mr. Ternovsky's face, the purpose of that, from what I gather, is to demonstrate that this is a video of him that was created and placed on this thumb drive and so it would, from my observation of the evidence, link Mr. Ternovsky to the thumb drive that contains the child pornography. I think that's the point.

Whether or not he's on vacation and buying an ice cream cone and he's on the video, or whether he's engaging in sexual activity with an adult girlfriend, is of no value or consequence and would, again, I think be overly prejudicial and also embarrassing to the witness. It's just not a necessity to say: And by the way, here's a video of you and Mr. Ternovsky having sex. You remember

> that? Was that something that was created – I mean, it's suggestive that there's some other bad act. There's no other bad act. It's not a Williams Rule because it's not a similar fact. It's simply a reference to tie Mr. Ternovsky to the flash drive.
>
> And so to get into the nature of the video or to even discuss what is going on in the video, I think is irrelevant and prejudicial and should be excluded.

(A-38-43). The trial court, however, overruled the objection:

> All right. I do think it's – the way it's been presented by the State, it's a probative material fact of dispute that is whether or not Mr. Ternovsky is in possession of child pornography. That child pornography being found on a thumb drive that also contained this video of an intimate nature, I don't think it's overly prejudicial, especially in the light of the fact that the State is not going to play the video. They're just gonna discuss its contents and show a photograph of the Defendant's face.
>
> So I'm going to overrule the defense's objection and allow that evidence to come in as it has been

described to me this morning.

(A-43).[3] As argued below, the Petitioner submits that his constitutional due process right to a fair trial was violated when the trial court allowed the State to inform the jury that the thumb drives contained videos of the Petitioner and Ms. Britt having sex.

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[3] During the trial, defense counsel renewed his objection:

> I think the nature of the first three pictures – two pictures, I'm sorry, are reflected that there's some sexual engagement going on and I would object on the basis that that's the prejudicial effect outweighs any probative value. The probative value is to identify that this is identified to Rodney Ternovsky and this was on the same flash drive that we discovered child porn, and that's fair game. But having four screenshots, number one is overkill; and number two, is – especially the photographs that are suggestive that sexual activity is occurring in them, is unnecessary and irrelevant and prejudicial. 403 and Rule 404 – 90.403 and 90.404 I would object.

(A-27).

Evidence must be relevant in order to be admissible. *See* § 90.402, Fla. Stat. Relevant evidence is defined as evidence "tending to prove or disprove a material fact." § 90.401, Fla. Stat. "In determining relevance, we look to the elements of the crime charged and whether the evidence tends to prove or disprove a material fact." *Opsincs v. State*, 185 So. 3d 654, 658 (Fla. 4th DCA 2016) (citation omitted). "When evidence is offered to prove a fact which is not a matter in issue, it is said to be immaterial." *Id.* (quoting Charles W. Ehrhardt, *Florida Evidence* § 401.1 (2001 ed.)). Even if evidence is relevant, it is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. "The unfair prejudice that section 90.403 attempts to eliminate

relates to evidence that inflames the jury or appeals improperly to the jury's emotions." *State v. Gerry*, 855 So. 2d 157, 159 (Fla. 5th DCA 2003) (citations omitted).

In the instant case, evidence that the Petitioner made videos of himself having consensual sex with his adult girlfriend was irrelevant and immaterial. It was not unlawful for the Petitioner to record his sexual activity with Ms. Britt. The evidence and testimony regarding the Petitioner's videos of his sexual activity with Ms. Britt – *in no way* – tended to prove that the Petitioner possessed child pornography. As conceded by defense counsel, it would have been proper for the State to introduce a screenshot of the Petitioner from a video found on the thumb drives. But it was totally irrelevant and overly prejudicial to inform the jury that the videos on the thumb drives involved the Petitioner filming himself having sex with Ms. Britt. *See Frizzle*

v. State, 982 So. 2d 1292, 1293 (Fla. 4th DCA 2008) ("The presence of pornography and Vaseline in appellant's bedroom had no relevance to any fact in issue in this case. Furthermore, we hold that the scant probative value of the testimony about the presence of the pornographic tapes and Vaseline was outweighed by the undue prejudice to appellant."); *Perez v. State*, 595 So. 2d 1096, 1097 (Fla. 3d DCA 1992) ("It was also error for the state to introduce evidence that Perez possessed magazines (characterized by the state as pornographic yet described as 'lawful' by the trial court) on the day after the incident. The magazines were not relevant to the issues at trial and, therefore, should not have been admitted.").

Moreover, informing the jury that the Petitioner liked to film himself having sex with his girlfriend was extremely inflammatory and prejudicial. It is certainly

possible that one or more of the jurors believed that the Petitioner was an immoral person after hearing that he recorded himself having sex with Ms. Britt. In *Michelson v. United States*, 335 U.S. 469, 475-476 (1948), the Court stated:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular

> charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(Footnotes omitted) (citation omitted). Additionally, in *Brinegar v. United States*, 338 U.S. 160, 173-174 (1949), the Court said:

> Thus, in this case, the trial court properly excluded from the record at the trial, *cf. Michelson v. United States*, 335 U.S. 469, Malsed's testimony that he had arrested Brinegar several months earlier for illegal transportation of liquor and that the resulting indictment was pending in another court at the time of the trial of this case. This certainly was not done on the basis that the testimony concerning arrest, or perhaps even the indictment, was surmise or hearsay or that it was without probative value. Yet the same court admitted the testimony at the hearing on the motion to suppress the evidence seized in the search, where the issue was not guilt but probable cause and was determined by the court without a jury.
>
> The court's rulings, one admitting,

> the other excluding the identical testimony, were neither inconsistent nor improper. They illustrate the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt. Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, *to some extent embodied in the Constitution*, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

(Emphasis added) (footnote omitted). The Court has also established a general principle that evidence that "is so extremely unfair that its admission violates fundamental conceptions of justice" may violate due process. *Dowling v. United States*, 493 U.S. 342, 352 (1990). In the instant case, allowing the State to inform the jury that the thumb drives contained videos

of the Petitioner and Ms. Britt having sex – testimony that clearly amounts to "evil character" evidence – denied the Petitioner a fundamentally fair trial.[4]

By granting this petition, the Court will have the opportunity to address the important question presented in this case. Accordingly, for the reasons set forth above, the Petitioner prays the Court to grant his petition for writ of certiorari.

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[4] *See also Duvall v. Reynolds*, 139 F.3d 768, 787 (10th Cir. 1998) (stating that the erroneous admission of evidence that renders a trial fundamentally unfair violates due process); *Dobbs v. Kemp*, 790 F.2d 1499, 1503 (11th Cir. 1986) (stating that evidentiary errors are grounds for granting a writ of habeas corpus when the trial is rendered fundamentally unfair).

I. CONCLUSION

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

Respectfully Submitted,

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