IN THE SUPREME COURT OF FLORIDA

No. SC16-1534

DOMINIQUE WRIGHT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

_____

On Discretionary Review from the District Court of Appeal,
Fourth District of Florida

_____

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Raphael Acker and James Howard, Jr., were shot while sitting in a car in March 2008. Petitioner and Fritz Murdock were charged with aggravated battery on Acker and attempted murder of Acker.

Acker was unable to identify the men, but testified they were both well over six feet tall. T8 536.

Petitioner is five feet seven inches tall. T9 705-06.

Acker said the shooting involved two masked men who got out of the driver and passenger seats of a car that stopped in front of Howard's car. T8 508.

Howard identified Petitioner in a photo lineup as the person who got out of the passenger side of the other car. T9 746.

Shell casings consistent with a 9 millimeter semi-automatic gun were found in the area of the shooting. T9 624, 714.

Howard had been charged six years before with shooting Petitioner's uncle, Dante Robinson, in an incident involving a chain. T9 764-65, 781.

Howard was killed before the trial in the present case. On October 17, 2011, he had testified at a hearing on a motion to suppress identification, at which he identified Petitioner and Fritz Murdock as the shooters. T9 744-47.[1]

[1] Murdock was also charged in the case. He was arrested about eight days after the shooting, and a revolver was found in

In his testimony he said he was certain of the identification. T9 789.

Howard testified that Dante Robinson wanted his necklace and would do anything to get his necklace. T9 782. He then said the shooting was not about the necklace; he did not know why it took place. T9 783.

This pretrial testimony, as well as his statements of identification, were presented to the jury by the state over defense objection.

Also over defense objection, the state put in evidence a Youtube video and a cell phone video. They show Petitioner singing or rapping. There was no evidence as to whether Petitioner wrote the songs.

Howard was not mentioned in the videos. T9 707-08. Nonetheless, the state contended that the videos concerned the shooting.

There was no evidence as to when the YouTube video was made.

The transcript shows that the YouTube was inaudible when played at trial. T9 669. In a discussion of the videos with the court, defense counsel said, apparently with reference to this video, that it showed the defendant saying he “got a letter from

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his presence. T9 644. Testing was inconclusive as to whether the revolver was used in the shooting. T8 603. Murdock was found not guilty at a separate trial.

Murdog," and said there was "'some unfinished business about somebody ratting on somebody' and he 'wants to stop that.'" T9 664.

The cell phone video showed a date stamp of October 20, 2011.[2] T9 792. The defense contended in final argument that the state did not prove that Petitioner was actually singing, and appeared to be merely lip-syncing. R11 891.

There was testimony that the cell phone video referred to the names Tay, Herb, Doe and Black, although they do not appear in the court reporter's transcription of the video; a detective opined that these persons were Dante Robinson, Deandre Black, Herbert Hamilton and a Mr. Bell. T9 720-721.

As played in final argument, it was transcribed as follows:

> Motha fuckers don't give a fuck, heard what's up, yo-yo what's up? Hey, what's up? Dog, what's up? Ya'll let those fuck niggas take my life for what? 25 years, can I stress it enough? And if we'll -- (cuts out) cuz, what it is? Cuz, what you do? Just chillin, man. You know just riding through your motha-fucking streets trying to get this little pimp you know, you all know it. Yeah, yeah, yeah, you know they still got a nigga on this shit, man. God damn, boy that shit still shaken like that? Shit, shit, nigga, it's so crazy right now, man. Man, listen cuz, remember what I told you my nigga -- these niggas better wake up and stop being asleep, I'm ready. You know shit that nigga I got some unfinished business, man. I'm finting to bending with some un-loyal niggas, man. I'm going to be on you in like 15, get on B. Okay, okay, you got that nigga, god dammit. Word. *(tape* cuts *out 10: 42:39*

[2] A cell phone was found at the scene of the shooting in 2008, but there was no evidence linking it to Petitioner. ST2 135-36.

a.m., music starts playing at 10:42:41 a.m.) Yo, yo, yo, man niggas, motha-fucker dead. Shit, that nigga, I got some unfinished business, some un-loyal niggas, some unfinished business *(indiscernible 10:42:58-02)* you tripping, since when a nigga treat a nigga like a *(indiscernible 10:43:04-05)* some unfinished business with some un-loyal niggas *(indiscernible 10:43:08-18)* damn, they don't make them like they used to, nah, this shit crazy because this ain't what I'm used to. I'm used to real ass niggers who are really bust, I'm talking real ass niggas I can really trust. These are the same mother-fuckers watch me growing up, and these the same mother-tuckers who don't give a fuck, you heard what's up? Dombo, what's up? Tate, what's up? Dog, what's up. Ya'll gonna let them fuck niggas take my life? For what? 25 years. Can I stress it enough? And if *(indiscernible 10:43:47-49)* and that's my unfinished business with some un-loyal niggers *(indiscernible 10:43 : 52- 57)* I got some niggers right down *(indiscernible 10:43:58-01)* and that's a god damn shame, my own kin-folk done switched up the game. Fuck, I got some unfinished business, some un-loyal niggers who I *(indiscernible 10: 44:08-12)* looking at you different, you niggas really tripping, since when a nigga treat a nigga like a misfit. Unfinished business with some un-loyal niggas who are *(indiscernible 10:44:21)* I'm looking at you different, you niggas really tripping, since when a nigga treat a nigga like a misfit. I got a letter from Murdog yesterday, and today he say he cool, where you at my nigga, what's the play? He say he glad that I'm real because them niggers ain't *(indiscernible 10 : 44 :38-43)* dollar signs, what you *(indiscernible 10:44:45)* you will always be my nigger when you smoke with me, smoke a nigger smoke with me, the nigger even jokes with me, now they got my nigger *(indiscernible 10:44:51-53)* with me. Going to business on the person Attempted Murder, and they trying to do some shit that I ain't never heard of. They say the best thing *(indiscernible 10:45:01-03)* you got me fucked up, cracker, let me *(indiscernible 10: 45:05-08)* 5 blacks, 6 whites, 1 Puerto Rican *(indiscernible 10:45:11-12)* do shit, shit. When you on trial for a Murder case, bitch. Hear my people saying bitch, shit. I got some unfinished business with some un-loyal niggers *(indiscernible 10 : 45:21-22)* I'm looking at you differently, you niggers really tripping, since when a nigga treat a nigga

> like a misfit. I got some unfinished business with some un-loyal niggas. *(indiscernible 10:45:34-35)* I'm looking at you different, niggas really tripping, since when a nigga treat a nigga like a misfit? I got some unfinished business with some un-loyal niggas *(indiscernible 10:45:44- 48)* I'm looking at you different, you niggas really tripping, since when does a nigga treat a nigga like a misfit? I got some unfinished business with some un-loyal niggas who I thought was *(10:45:46-58)* I'm looking at you different, you niggas really tripping, since when does a nigga treat a nigga like a misfit?

T11 870-73.

Over defense objection, the state gave its interpretation of parts of the video in questioning the detective:

> Q Did you hear those lyrics that I just stated "if you in a position about to go to prison because a nigga be snitching, but you people can kill him, I'm that same nigga who in that position could be going to prison because my people ain't kill him?"
>
> A Yes, sir.

T9 720.

> Q In the unfinished business video, the first video that we saw —
>
> A Yes, sir.
>
> Q -- did you hear him talking about "being on trial for Attempted First Degree Murder?"
>
> A Yes, sir.

T9 723-24.

The detective said that the cellphone video said, "if you in a position about to go to prison because a nigga be snitching, but you people can kill him, I'm that same nigga who in

that position could be going to prison because my people ain't kill him." T9 720.

The detective also said that this video talked about "being on trial for Attempted First Degree Murder." T9 723-24. Apparently this was the detective's interpretation of this statement in the video: "Going to business on the person Attempted Murder, and they trying to do some shit that I ain't never heard of." T11 872.

Petitioner was convicted as charged of attempted murder of Howard and aggravated battery on Acker. On direct appeal, the Fourth District affirmed the conviction. It also held on the state's cross-appeal that the trial court erred by not imposing consecutive sentences under the 10-20-Life Act. *Wright v. State*, 143 So. 3d 995 (Fla. 4th DCA 2014) (*Wright I*).

Former counsel for Petitioner sought discretionary review in this Court, raising the sentencing issue, but raising no issue as to the convictions. This Court quashed the Fourth District's decision based on *Williams v. State*, 186 So. 3d 989 (Fla. 2016) (holding that court is not required to give consecutive 10-20-Life sentences). *Wright v. State*, 41 Fla. L. Weekly S304 (Fla. May 5, 2016) (*Wright II*) (summary opinion).

On remand, the Fourth District entered a new decision. As to the sentencing issue, it rejected the state's argument and affirmed the concurrent sentences imposed by the trial court. It

again affirmed the convictions in language identical to the language in its original opinion:

> We find no error in the trial court's ruling that the defense had sufficient opportunity to cross-examine the victim at the hearing on the motion to suppress. *See Thompson v. State,* 995 So. 2d 532 (Fla. 2d DCA 2008) (finding murdered witness's prior testimony admissible where defendant was present, motivated to probe witness's recollection and credibility, and had an opportunity to cross-examine witness at first hearing). We also find no error in the trial court's ruling not to allow the use of certain portions of victim one's deposition as inconsistent statements. *See* § 90.614(2), Fla. Stat. (2011) ("Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement … ."); *see also Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (finding the court properly excluded alleged inconsistent statement as the defendant could not lay a proper foundation).
>
> And last, we find no error in the trial court's admission of the rap videos created by the defendant as they were relevant to the commission of the crime. *See Faust v. State,* 95 So. 3d 421 (Fla. 4th DCA 2012) (finding audio recordings suggesting the defendant was using code words to direct others to get rid of a weapon were relevant). We therefore affirm the defendant's conviction.

Wright v. State, 199 So. 3d 1019, 1021 (Fla. 4th DCA 2016) (*Wright III*); App. A, page 2.

Petitioner then sought discretionary review in this Court on the ground that the Fourth District's decision expressly and direct conflicted with decisions of this Court on the issue of impeachment of hearsay evidence. This Court granted review on December 9, 2016.

SUMMARY OF THE ARGUMENT

I. The Fourth District erred in ruling that the defense may not impeach a hearsay testimony of an unavailable witness with a prior inconsistent statement. This ruling is erroneous and contrary to this Court's decisions in *Reaves v. State*, 639 So. 2d 1 (Fla. 1994) and *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005). In the state's own words, the hearsay testimony of Howard was the "crux" of the state's case, so that the proposed impeachment "affects our entire case dramatically because obviously our case rests solely on his testimony" and afforded the defense "the avenue to argue that somehow he was not being truthful with [the jury] and that's the crux of our case." A new trial should be ordered.

II. As the defense did not have a similar motive in the cross-examination at the suppression hearing as at trial, it developed at the suppression hearing evidence that would be affirmatively prejudicial at trial. Because of the dissimilarity in the defense motive, it was error to allow the suppression hearing testimony into evidence.

III. The court erred in allowing into evidence irrelevant and prejudicial videos of Petitioner singing or rapping. The state made extensive use of them at trial. The convictions should be reversed.

ARGUMENT

I. THE FOURTH DISTRICT ERRED IN RULING THAT ONE MAY NOT IMPEACH HEARSAY TESTIMONY OF AN UNAVAILABLE WITNESS WITH A PRIOR INCONSISTENT STATEMENT.

The state's case rested on Howard's testimony at the suppression hearing. It was put in evidence by the state under the hearsay exception for prior testimony in section 90.804(2)(a), Florida Statutes, because Howard's death made him unavailable as a witness.

At trial, the defense sought to impeach this testimony with Howard's deposition. After a proffer and argument, the judge noted that "if Mr. Howard were present in court today which he's not, of course the Defense would cross examine him regarding that and there would be no question the cross examination would be permissible." T9 810.

Nonetheless, the court granted the state's objection to this impeachment, basing its ruling on *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), and *Leighty v. State*, 981 So. 2d 484 (Fla. 4th DCA 2008):

> THE COURT: Just for the record, I'm just going to cite 2 cases which are not directly on point but deal generally with the issue of introducing -- introducing deposition testimony in a criminal case. And being introduced not pursuant to the rule where testimony is perpetuated. The cases are the Supreme Court of Florida, 609 So. 2d 493, Rodriguez vs. State. And 4th District Court of Appeal case Rendall vs. Leighty. 1-e-i-g-h-t-y. 981 So. 2d 484. Which basically stand for the proposition that what the Defense is seeking to do is not authorized by the rules. I will concede that

> there is a dissent rather well-written in one of these cases which Mr. Hanrahan would love. But it is the dissent.
>
> The thrust of the cases seems to be that as one of our Prosecutors has suggested and I think it was Ms. Caracuzzo. Basically the case law articulates the argument Ms. Caracuzzo made that the problem with allowing in the proposed portion of the deposition is that in essence is -- and I think Ms. Caracuzzo characterized it this way is -- that not knowing the deposition would be used at trial, the State did not develop certain areas in testimony which they would have developed had they known the deposition transcript would have been used at trial.
>
> There is some discussion in the cases that some consideration be given to considering the basic concept of a fair trial versus just the technical Rules of Criminal Procedure. But it would appear to me that both the Supreme Court of Florida and the 4th District Court of Appeals suggests otherwise. So I will follow precedent, and rely on these 2 cases.

T11 846-47 (underlining in original).

The Fourth District affirmed Petitioner's convictions, holding that the defense could not use the deposition as impeachment:

> We find no error in the trial court's ruling that the defense had sufficient opportunity to cross-examine the victim at the hearing on the motion to suppress. *See Thompson v. State,* 995 So. 2d 532 (Fla. 2d DCA 2008) (finding murdered witness's prior testimony admissible where defendant was present, motivated to probe witness's recollection and credibility, and had an opportunity to cross-examine witness at first hearing). We also find no error in the trial court's ruling not to allow the use of certain portions of victim one's deposition as inconsistent statements. *See* § 90.614(2), Fla. Stat. (2011) ("Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement … ."); *see also Mattox v. United States,* 156 U.S. 237, 15 S.Ct.

> 337, 39 L.Ed. 409 (1895) (finding the court properly excluded alleged inconsistent statement as the defendant could not lay a proper foundation).

Wright III, 199 So. 3d at 1021; App. A, page 2.

> A. *The Fourth District's ruling is contrary to rulings of this court and section 90.806(1), Florida Statutes.*

The Fourth District's decision is contrary to this Court's rulings in *Reaves v. State*, 639 So. 2d 1 (Fla. 1994) and *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005).

In *Reaves*, as at bar, the state presented the prior testimony of an unavailable witness (Hinton). As at bar, the defense was not allowed to impeach his testimony with prior inconsistent statements because he had not been confronted with them.

This Court ruled that the defense had the right to impeach the hearsay testimony under section 90.806(1), Florida Statutes, although it found the error harmless under the facts of the case (the defendant had confessed to a deputy):

> Reaves argues to this Court that several statements made by Hinton, under oath, prior to his 1987 trial testimony, were inconsistent with his 1987 trial testimony and should have been admitted pursuant to section 90.806, Florida Statutes (1991).[5] We agree that Hinton's prior inconsistent testimony should have been admitted, but we find that the trial court's exclusion of the testimony was harmless error. Hinton's inconsistent statements pertained to details and did not repudiate the significant aspects of his testimony. Section 90.806, Florida Statutes (1991), provides:
>
> [5] (1) When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes

> if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.
>
> (2) If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Reaves, 639 So. 2d at 3-4 (emphasis added; one footnote omitted).

Fitzpatrick was a murder case. When the victim was found, she said someone other than the defendant had attacked her. These statements were put in evidence by the defense. Over objection, the state then impeached this statement with statements she made at a hospital before she died. This Court wrote that the state's impeachment was proper under section 90.806(1), under which it is not necessary to confront the hearsay declarant with the prior inconsistent statements. 900 So. 2d at 515.

As in *Reaves*, this Court cited the provision of section 90.806(1) allowing use of an inconsistent statement to impeach the hearsay of an unavailable declarant "regardless of whether or not the declarant has been afforded an opportunity to deny or explain it." *Fitzpatrick*, 900 So. 2d at 515.

In affirming Petitioner's conviction at bar, the Fourth District cited section 90.614, Florida Statutes, and *Mattox v. United States,* 156 U.S. 237 (1895), but they offer no support for the court's ruling. Section 90.614 simply sets out the

procedure for confronting a testifying witness with an inconsistent statement. It does not address the issue covered by section 90.806(1) – impeachment of hearsay with an inconsistent statement. *Mattox* is based on the common-law rule requiring confrontation of a witness with inconsistent statements and does not address our statutory rule that allows such impeachment of a hearsay declarant.

B. *The trial court's ruling is contrary to law.*

In granting the state's objection, the trial court relied on two cases: *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), and *Leighty v. State*, 981 So. 2d 484 (Fla. 4th DCA 2008).

But those cases address a separate question: whether testimony at a discovery deposition may be admitted as <u>substantive evidence</u> under section 90.804(2)(a). At bar, the defense did not seek to introduce the deposition testimony as substantive evidence. Instead, it sought to use it as impeachment – which is proper under *Reaves* and *Fitzpatrick*.

C. *The error was not harmless beyond a reasonable doubt*.

As already noted, the state's case depended on Howard's hearsay testimony.

For this reason, the state vigorously objected to the use of the deposition because its case "comes down to the credibili-

ty of a witness" (Howard) who was "the crux of our case." T10 815.

It said the use of the deposition to discredit his testimony "affects our case dramatically because obviously our case rests solely on his testimony." T10 816.

The state said the impeachment would give the defense "the avenue to argue that somehow he was not being truthful with them and that's the crux of our case." T10 816.

The state's worry about the effect of impeaching its witness is understandable. It shows the error in denying the impeachment was not harmless beyond a reasonable doubt.

In his testimony, Howard said that Petitioner's uncle, Dante Robinson, wanted his necklace and would do anything to get his necklace. T9 782. He then said this incident was not about the necklace; he did not know why the incident took place. T9 783.

He said at deposition, however, that the shooting was all about the chain. T9 804-05.

The state was very concerned that this contradiction of its star witness would affect the outcome of the trial. It cannot rule out the reasonable possibility that jurors might have lowered their estimation of his credibility such that the result of the trial would have been different.

As beneficiary of the error, the state has the burden "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

Some jurors might think the impeachment was trivial, others might think that it affected the state's case dramatically. The state cannot rule out the possibility that the error affected the verdict.

The Fourth District's decision is directly and expressly contrary to decisions of this Court on the same question of law. Petitioner was denied his right to impeach the witness under Florida law, the decisions of this Court, and the Confrontation and Due Process Clauses of the state and federal constitutions. Art. I, §§ 9, 16, Fla. Const.; Amends. VI, XIV, U.S. Const.

The decision below should be reversed. A new trial should be ordered.

II. THE DEFENSE DID NOT HAVE A SIMILAR MOTIVE IN QUESTIONING HOWARD ON THE MOTION HEARING AS AT TRIAL, SO THAT HIS TESTIMONY AT THE HEARING WAS INADMISSIBLE.

Section 90.804(2), Florida Statutes governs the admissibility of statements of an unavailable witness. Under the rule, former testimony is admissible against a party who had an opportunity and similar motive to question the witness:

> (a) *Former testimony.*—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered … had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

§ 90.804(2)(a), Fla. Stat.

A. *Trial counsel did not have a similar motive at the suppression hearing as at trial*.

At the suppression hearing, defense counsel brought out on cross-examination testimony that he would not have brought out at trial – evidence that was affirmatively harmful to the defense and which the state used in final argument to establish a motive.

At the hearing, Howard was questioned by counsel for co-defendant Murdock and testified about the incident involving Dante Robinson, who he said was someone he knew from the gym. T9 762-65. Murdock's lawyer later explained that he was trying to establish that someone other than Murdock was involved in the murder. T3 101-05. (As already noted, Murdock was tried separately from Petitioner.)

Petitioner's counsel then addressed the matters raised by Murdock's lawyer. He brought out that Robinson was Petitioner's uncle. T9 780-81. He also brought out that Robinson wanted his necklace and would do anything to get it. T9 782. The cross-examination addressed matters brought out by counsel for the co-defendant rather than by the state.

This evidence brought out on cross was harmful to the defense – the prosecutor used it to argue to the jury that Petitioner's connection to Robinson established his motive to attack Howard:

> Defense would like you to believe that this whole incident with Dante Robinson that James Howard Junior picking out Dominique Wright is just to get back at Dante Robinson. He must have done it because he' s related to Dante Robinson. Well, let's just say he did it. That's absurd. Dante Robinson is the Defendant's uncle.
>
> Now, let's talk about that relationship for a second. Because you know what that does? It gives him motive for the shooting. It gives him a reason to go shoot at James Howard Junior because Dante Robinson and James Howard Junior had an ongoing feud. You heard about it. But what does that do? It gives Dominique Wright right there and Fritz Murdock a reason to go and shoot and find James Howard Junior, to go pay back to what he had done to Dante Robinson for what they thought he had done to Dante Robinson.
>
> And all those videos what you see the theme of it all is is about being loyal, being loyal to your friends, being loyal to your family, doing the right thing. And when he talks about it on the video which is even more crazy about it all he says you know he's "about to go to prison," and he says "my people ain't kill him yet." He's talking about having his people kill James Howard Junior. Just like in Dante Robinson, him and

> Fritz Murdock are trying to kill James Howard Junior. It's about being loyal to your family, about taking care of the other person. It gives him motive. It gives a reason for why this whole case happened. That's why Dante Robinson is important; that's why the Defense brought up Dante Robinson in that former hearing. That's why they talked about Dante Robinson over and over again. About paying it back, but really there's a motive there. There's a connection there, and that's important.

T11 911-12 (emphasis added).

B. *The error was prejudicial*.

The prior testimony of Harvey identifying Petitioner was the main evidence against the defendant. In fact, the state told the jury in final argument that it "the single most important piece of evidence" in the case:

> MR. KELLER: Yes, Judge. Thank you, Judge. May it please the Court; opposing counsel.
>
> *(Photograph on overhead projector)*
>
> What's the single most important fact, the single most important piece of evidence, the single most important thing you heard from the former testimony? Think about it. What is it? What's the most important thing? "I'm certain." "I'm certain."
>
> I asked James Howard Junior "is there any doubt in your mind that you picked out the person who was in the passenger in the car that shot you?" James Howard Junior's response "I'm sure." I went on to say "are you certain?" Are you certain? He says "I'm certain." 3 1/2 to 4 years after he was shot by Dominique Wright on March 26th, 2008. 3 1/2 to 4 years later in the former hearing he's been consistent all along he told you.
>
> … .
>
> But that's not the only thing we have. It's not all that we presented. It's just the most important part.

> Because he told you “I’m certain. Without a doubt in my mind, I’m certain.” He didn’t hesitate, he didn’t take a second to think about it, he says “no, I’m certain.” As I sit here 3 1/2 to 4 years later, I’m certain. I’m still certain, and I’ve always been certain that he’s the one that did it. Right there it is. He told the police and he’s told all of you.

T11 902-03 (emphasis added).

The evidence was admitted in error and Petitioner was deprived of his trial right the right to confront his accuser. Art. I, §§ 9, 16, Fla. Const.; Amends. VI, XIV, U.S. Const. The error was prejudicial – not harmless beyond a reasonable doubt.

A new trial should be ordered.

III. THE COURT ERRED IN ALLOWING INTO EVIDENCE IRRELEVANT AND PREJUDICIAL VIDEOS OF PETITIONER SINGING OR RAPPING.

"Relevant evidence is 'evidence tending to prove or disprove a material fact.' § 90.401, Fla. Stat. (1995)." *Mendoza v. State*, 964 So. 2d 121, 130 (Fla. 2007). Evidence is not relevant if the claimed relevance "require[s] stacking one inference upon another." *Id*. *See also Merck v. State,* 664 So. 2d 939, 942 (Fla. 1995) (defendant could not demonstrate evidence was material or exculpatory without impermissibly stacking inferences).

"Even after determining that evidence is relevant, a trial court in every case must also consider section 90.403." *Sexton v. State*, 697 So. 2d 833, 837 (Fla. 1997). *Accord Floyd v. State*, 913 So. 2d 564, 572–73 (Fla. 2005) ("'[e]ven after determining the evidence is relevant, a trial court in every case must also consider section 90.403,' which prohibits the admission of relevant evidence when the danger of unfair prejudice substantially exceeds the evidence's probative value."; quoting and following *Sexton*); *Poole v. State*, 151 So. 3d 402, 414 (Fla. 2014).

Evidence of specific collateral bad acts or bad character is normally irrelevant. Such evidence is "presumed harmful" because the jury might consider the bad character thus demonstrated as evidence of guilt of the crime charged. *Gore v. State*, 719 So. 2d 1197, 1199 (Fla. 1998). "Appellate courts have

consistently held that a defendant's comments concerning unrelated crimes do not prove material facts and constitute harmful error. *See, e.g., Zuniga v. State,* 121 So. 3d 640 (Fla. 4th DCA 2013)." *Walker v. State*, 180 So. 3d 1154, 1157 (Fla. 4th DCA 2015).

Ambiguous statements of the accused have little probative value. *Fiske v. State*, 366 So. 2d 423, 424 (Fla. 1978) ("The state points to evidence of scienter in the record. The statement made by appellant when confronted by law enforcement agents is ambiguous and susceptible of innocent explanation as well as being indicative of criminal knowledge. Ambiguities in criminal proceedings are resolved in favor of the accused."). *Accord A.B. v. State*, 141 So. 3d 647, 649 (Fla. 4th DCA 2014) (quoting and following *Fiske*).

Evidence of possession of a firearm is irrelevant unless tied to the crime charged. *See Metayer v. State*, 89 So. 3d 1003, 1004 (Fla. 4th DCA 2012) ("We hold that the trial court abused its discretion in admitting evidence of a firearm and ammunition found in appellant's mother's house six months after the shooting incident, because there was no evidence linking these items to the crime.").

Over defense objection at bar, the state introduced two videos of the defendant rapping racial expletives and mentioning "murdog" and "unfinished business" about persons who were

unloyal, and saying that he was facing 25 years in prison. In the cellphone video, he seems to have a semi-automatic weapon in his waistband. The videos did not name Howard or Akers. They do not claim that Petitioner took part in the shooting. The state did not contend that the videos were made around the time of the 2008 shooting, and the cellphone video seems to have been made in October 2011.

In final argument, the prosecutor gave the jury her own personal interpretation as to what the rapping and might mean.

> Dominique Wright has the street name of Dombo. We know that from the video. Right? The first name that comes up Dombo. We know that's him.
>
> MR. HANRAHAN: Judge, I'm going to object to her arguing facts not in evidence.
>
> THE COURT : Again ladies and gentlemen, if your recollection differs from the recollection of either lawyer please rely upon your own recollection.
>
> MS. CARACUZZO: Okay. And we'll see the video; we'll show you what I'm talking about, okay? The videos. Why are these important? Why is the unfinished business important from Dominique Wright? Well, it's important for a number of reasons.
>
> He's rapping in this video about some "un-loyal niggas." This video was made after his arrest for this Attempted First Degree Murder. And how do we know that?
>
> MR. HANRAHAN: Objection; arguing facts not in evidence.
>
> THE COURT: Same ruling, folks. Rely on your own recollection.
>
> MS. CARACUZZO: How do we know that? And by the way, you're going to get an instruction the Judge is going

> to tell you and it's in there, you can see it, you're to use your common sense when deciding this. You're going to look to the evidence. And if we can make a reasonable argument from what that evidence means, that's what we're here for.
>
> You're going to see how do we know that it was made after? Because he tells you that. He tells you in the lyrics of it. He talks about his opened Attempted First Degree Murder.
>
> When talking about that, he then talks about "un-loyal niggers" and what he "wants done with them." And he may not say the words, but he shows you them. As he's rapping about this, what does he do? He does the hand sliding across his neck. *(indicating)* Okay? Common sense, we all know what that means. He wants him dead.
>
> And why is that important? Because that's a consciousness of guilt. If you didn't do it, if you weren't guilty, why would you want the witness dead?
>
> MR. HANRAHAN: Objection; again arguing facts not in evidence.
>
> THE COURT: Folks, from the evidence it's up to you to determine whatever inferences you should draw from the evidence. Counsel may continue.
>
> MS. CARACUZZO: Thank you. Also in the video when he talks about the Attempted First Degree Murder charge, he talks about "getting a letter from his boy Murdog who's on trial with him." Fritz Murdock. He talks about "how Fritz is loyal." Fritz isn't testifying against him; Fritz is loyal. He then goes further and says "I have some unfinished business with some un-loyal niggas." We know what that indicates. We know he's putting a threat out there that he doesn't want this witness to testify.

T11 868-70.

Discussing the videos, the state opined that the defendant wrote the lyrics and that they were "clearly" about an intent to kill Howard to prevent him from testifying at trial:

… . That’s clearly what the videos are talking about.

He wants James Howard Junior dead. Defense tells you “well” -- *(rap music starts playing loudly)* he tells you in these videos it’s about this case. He tells you in this video that’s about James Howard Junior. He tells you in the unfinished business video that he’s on trial with a co- defendant for Attempted First Degree Murder. What else is he talking about? That’s why we’re here today. This is why we’re all here. Because there’s an Attempted First Degree Murder that he’s charged with and he tells you in the video. There’s only one person he can be talking about, and that’s the victim in this case James Howard Junior.

And then the other video, the one that we’re going to watch in just a second, he talks about- I hope we’re going to watch -- he talks about he’s “about to go to prison, because a nigga be snitching.” Well, he’s seated here, we’re at trial, you’re all here for a reason, to determine whether he’s guilty or whether he is not guilty. That’s it. He’s in that position and he’s talking about it in that video. He can only be talking about one person, and that’s James Howard Junior. Because James Howard Junior is the only person who puts him here. James Howard Junior is the only person that puts him at the scene of the crime. James Howard Junior is the only person who identifies him at the scene of the crime. And without James Howard Junior, where do we stand? “I want him whacked. I want his face on a shirt.” Those aren’t my words. Those aren’t Ms. Caracuzzo’s words. Those are his words. *(pointing* to *Defendant)* Nobody else. It’s not about an art form, it’s about him in what he said in those videos to you.

It’s crystal clear what he wants. He wants to evade prosecution. He wants James Howard Junior dead so he can’t testify against him. And what does that prove? It proves his guilty conscious. That’s exactly what it proves. It proves that he knows that he committed these crimes, and the only way he goes down for it is if James Howard Junior sits at this stand and tells you guys about it. Unfortunately, James Howard J unior was unavailable to do so. He’s unavailable to beyond circumstances that he couldn’t control of no fault of his own to be here to tell you that. But you did get t o hear the former testimony. You did get to see the

> lineup. You did get to hear all the evidence, thankfully.
>
> ….
>
> MR. KELLER: I didn't write these lyrics. The State did not create these lyrics. He wrote those lyrics. He did —
>
> MR. HANRAHAN : Objection; facts not in evidence.
>
> THE COURT : Overruled. Same instructions to the jury.
>
> MR. KELLER: So the picture is clear. We know who did this. We know who committed this crime. We know who shot James Howard Junior. He's right there. *(pointing to Defendant)*
>
> And now we're going to ask that you go find him accountable for his actions on the crimes that he committed back on March 26th, 2008. Thank you.

T11 913-16.

Shell casings at the scene suggest that a semi-automatic weapon was used in the 2008 shooting, T9 624, 714, but there was no evidence that Petitioner ever had that particular weapon. Nonetheless, the state suggested that the weapon that Petitioner apparently had in the 2011 cellphone video – <u>three years after the shooting</u> - was linked to the crime:

> We know that that person had a semi-automatic due to the casings being found. We know subsequent to this that we have rap videos that the Defendant made. And in the second one the cell phone video where he talks about how he's "about to go to prison, and that because his people ain't kill him" that one, you'll notice that he has a firearm in his waistband. And what is it? A semi-automatic. What a coincidence.
>
> It's not a coincidence. This is all proof beyond a reasonable doubt. Everything adds up.

T11 867.

On these facts, the video was irrelevant and highly prejudicial. The state's claim of relevance amounted to nothing more than stacking inference upon inference. Any possible relevance was grossly outweighed by their prejudicial effect, as they were used by the prosecution to fuel its speculations about the case and to suggest that the defendant had something to do with the death of Howard.

The trial court erred in allowing the videos into evidence. The Fourth District erred in affirming that ruling. A new trial should be ordered.

CONCLUSION

The decision of the Fourth District should be reversed. A new trial should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 29 December 2016 a copy hereof has been electronically filed with this Court and furnished to Melynda L. Melear, Esq., Assistant Attorney General, Counsel for Respondent, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, by email to CrimAppWPB@MyFloridaLegal.com.

/s/ Gary Lee Caldwell
Attorney for Petitioner

CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

/s/ Gary Lee Caldwell
Attorney for Petitioner