IN THE SUPREME COURT OF FLORIDA

GABRIEL BRIAN NOCK,
Petitioner,

vs. Case number SC17-472

STATE OF FLORIDA,
Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review from the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner was Appellant and Respondent was Appellee in the Fourth District Court of Appeal and Petitioner was defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Court.

The symbol “T” will denote the Transcript on Appeal

The symbol "R" will denote the Record on Appeal.

The symbol “SR” will denote the Supplemental Record.

The symbol “SR2" will denote the Second Supplemental Record.

The symbol “ST” will denote the Supplemental Transcript.

STATEMENT OF THE FACTS

Larry Ellison

Larry Ellison was a 68 year old resided man who lived alone in Wilton Manors. T. 1062-4, 1076-1080, 1088-1091, 1098-1102, 1137. In the early afternoon on Tuesday, March 10, 2009, Ellison was at the Sebastian Street Beach in Fort Lauderdale. Ellison's friends, George Douglas and Raymond Wieder and Kevin DeWitt and James Hanna, encountered Ellison at the beach that day and saw him in the company of a young man, who appeared to be in his mid to late twenties. T. 1062–1070, 1076-1085, 1088-1097, 1098-1106. Ellison introduced this man to his friends as "Gabriel." T. 38, 1064-1070, 1080-1085, 1091-7, 1102-1106. Douglas and Wieder confirmed that Ellison would see them later that evening at Tropics Restaurant, in Wilton Manors. T. 1091-3. Gabriel mentioned he was from Delaware to DeWitt and Hanna, who owned a home there. T. 1093, 1103-5. Gabriel and Ellison left the beach, in Ellison's care, at about 1:30 or 2:00 p.m. T. 1067, 1076-7, 1105-6.

At 7:15 p.m., on March 10, 2009, Paul Guralchuk, a friend of Ellison, awaited his arrival at Tropics for their 7:30 dinner reservation. T. 1133-9. Guralchuk had the key to Ellison's home. T. 1136. For several years, Guralchuk worried about Ellison's health, as he was aware he had problems swallowing solid food. T. 1137-9. When Ellison was a no-show at 7:55, Guralchuk went to Ellison's home, and did not see Ellison's car in the driveway. T.

1139-1141. Guralchuk entered the residence and found Ellison lying face down on the kitchen floor. He phoned 911 and later learned that Ellison was dead. T. 1142-5.

Guralchuk described Ellison as gregarious; liked to be the center of attention; was physically attracted to younger men, with lean bodies; and engaged in risky sexual relationships with men he barely knew. T. 1148.

BSO Investigation

Broward Sheriff's Office Detective Luis Rivera began investigating Ellison's death on March 10, at about 9:30 p.m. T. 1298-1301. He detected a strong odor of bleach inside the residence and saw Ellison's body, face down on the kitchen floor. T. 1306, 1309-1311. Rivera was still at Ellison's home when Associate Broward Medical Examiner, Khalil Wardak, arrived at 4:15 a.m., on March 11. T. 1161-2, 1169-1171, 1213, 1312, 1215.

Medical Examiner's Autopsy and Opinions

Wardak first saw Ellison's body fully clothed, lying on the kitchen floor; bleach had discolored his clothing and areas of his skin; bodily fluids had expelled from his nose post-mortem; and there was a wound on the left side of his head caused by some sort of trauma, which was "[p]ossibly" consistent with a fall, although not consistent with blunt forced trauma. T. 1171-9, 1184-5, 1246. Petechia, which is redness in human tissue caused by broken blood vessels, was present in the corners of Ellison's eyes and likely

resulted from the rupture of small blood vessels when pressure was applied to a vein, blocking the return blood flow to the heart, to induce asphyxia. T. 1181-3, 1233.

The autopsy disclosed extensive deep muscle tissue injuries along the sides of Ellison's neck, near the sternum and clavicle, which were consistent with application of pressure to the neck. T. 1188, 1313-4. The hemorrhages were more extensive on the right side of the neck and less severe, with no visible contusions, on the left side. T. 1193-7, 1236. Hemorrhaging was present within the internal neck injuries, which meant that Ellison was alive when he bled and a spot on Ellison's face, a result of pooling blood, was caused by the pressure applied at that point. T. 1190-1191. Other marks on the surface of Ellison's face and neck were caused by bleach, post-mortem. T. 1192-3, 1232.

Wardak knew of a practice of volitional, non-lethal asphyxia for erotic pleasure, which he termed "horse-play." T. 1197-9, 1237-8. He acknowledged this sort of asphyxia was risky behavior and done to induce a "high" or lightheadedness, typically induced by physically depressing the arteries or veins on sides of the neck to slow the blood flow to the brain. T. 1238. Properly done, erotic asphyxia would not cause injuries to the front of the neck. T. 1238-9. A variety of ways existed to induce erotic asphyxiation; including placing one's arm around the recipient's neck, in a triangle configuration, with the elbow placed in front of, but

touching, the recipient's neck. T. 1239-1240. Such arm positioning was similar to a martial arts or law enforcement maneuver, known as a "choke hold." T. 1239-1241. When performed properly, with a rapid, forceful and strong application of even pressure, a choke hold will cause loss of consciousness within five to ten seconds. T. 1241-4. Conversely, erotic asphyxia used less force and prolonged pressure to induce pleasure. T. 1244. Loss of consciousness can occur during erotic asphyxia when pressure is applied too long. T. 1244. Wardak opined that if Ellison, who weighed 210 pounds, had been standing upright when receiving erotic asphyxia, he would have likely lost consciousness, not been able to manage his own weight and would have fallen or dropped. T. 1243-5.

Wardak believed that "horse-play" would not have caused Ellison's internal injuries because, with properly applied pressure, using a towel-wrapped ligature around the neck, there would not have been deep muscle tissue hemorrhages. T. 1197-9. He felt Ellison's injuries resulted from focused pressure, not from an arm, but from a thumb or finger pressing on the area above the injured muscles. T. 1199. Wardak, however, failed to note this injury in his autopsy report and mentioned it for the first time at trial. T. 1219-1220, 1229-1301.

Beside the deep neck muscle hemorrhages, there were no injuries or breaks to any of the cartilage or bony structures that supported and gave shape to Ellison's neck; such as the larynx and the hyoid

bone, which are typically damaged during a violent strangulation attack T. 1334-6. While acknowledging that any sort of asphyxiation is potentially fatal, Wardak conceded that the autopsy allowed for more than one conclusion concerning the manner and cause of Ellison's death. T. 1216-7. Also, there was no evidence of, as in typical, violent manual strangulation homicides, dime or quarter-sized contusions on the neck caused by the fingertip or hand pressure by the attacker; nor were there any scraps on the neck from the decedent's own fingernails, showing he resisted the attack. T. 1217-8, 1229.

Wardak concluded, due to focal injuries, Ellison died of asphyxiation by manual strangulation; in that he was choked manually and was unable to breath. T. 1200-1202-4, 1215-8. He ruled out accidental death, because the toxicology analysis showed no evidence of medication overdose; although Diltiazem, a calcium channel blocker, prescribed to persons with high blood pressure, was present T. 1202-3; 1247–8. He opined Ellison's death a homicide and the presence of bleach prevented him from concluding any other manner of death. T. 1202-4.

BSO Investigation Continued

After Rivera witnessed the autopsy on March 11, he learned that Ellison's wallet, credit cards, laptop computer and car were missing. T. 1315-6. On March 13, he learned that Ellison's credit card was used on March 10, after 4:00 p.m., at various retail locations in

Broward County; including stores at the Pembroke Pines Mall, and, in particular, the "Oro Gold" kiosk. T. 1284-1291, 1316-7, 1333-1340. Rivera and other BSO detectives went to this mall and obtained video surveillance recordings. T. 1317-8, 1322. Still photographs were made from these recordings depicting the person who used Ellison's credit card. T. 1318-1327. Sophia Jaborov, a clerk at the Oro Gold kiosk, told Rivera she had sold products to a man using Ellison's credit card, who called himself "Larry;" told her he was a police officer vacationing from New York; asked her out on a date; and gave her his telephone number. T. 1124-8, 1286-1290, 1327-9. Jaborov shared that phone number with Rivera and a controlled call to that number went unanswered. T. 1127-1132, 1329. On March 14, Rivera learned that Ellison's credit card was used at two stores in Miami Beach on March 11. T. 1357-8. BSO detectives went to these Miami Beach stores, obtained their video surveillance recordings and saw that Ellison's car was at these stores when his credit card was used. T. 1357-1374.

Petitioner's Arrest

On the morning of March 16, the BSO, using "real time" cellular telephone tracking technology,[1] learned that a cellular telephone using the telephone number obtained from Jaborov was emitting a

[1] See, e.g. Tracey v. State, 152 So. 3d 504 (Fla. 2014) (ST. 49-50, 57-9, 76. 1376; Vol. 4, pp. 23-28, 40-42, 50-61; ST. 3, 15, 17; R. 228-232).

signal in Miami Beach. T. 1127-1131, 1274, 1276-9, 1330-1331, 1357. Rivera and five other BSO detectives drove to Miami Beach and located a man matching the person depicted in video still from the Pembroke Pines Mall surveillance recordings. T. 1374-6. With the aid of two uniformed Miami Beach police officers, this person was arrested and subsequently identified as Petitioner, Gabriel Nock. T. 1283, 1376-7. At the time of his arrest, Petitioner possessed a tote bag, embossed with Ellison's initials. T. 1377. Inside the tote bag were items similar to the ones taken from Ellison's home. T. 1377-8. BSO seized the tote bag from Petitioner, as well as Ellison's credit card, business cards, car keys and a Delaware identification card. T. 1379. Petitioner asked Rivera if his arrest was "about the car." T. 1379, 1381. Rivera found Petitioner cooperative and before leaving Miami Beach, he directed detectives to a nearby lot where Ellison's car was parked. T. 1381-4, 1466. Detectives searched the car and found Petitioner's clothing inside. T. 1383-4. Rivera then took Petitioner to BSO headquarters and interrogated him T. 1382.

BSO Interrogation of Petitioner

At BSO headquarters, Rivera put Petitioner into an interrogation room, equipped with an audio and video recording device. T. 1385-6, 1466-9. All interrogations at BSO headquarters, including Petitioner's, were audio and video recorded and while Rivera took contemporaneous, handwritten notes of what Petitioner said, they were not verbatim and, subsequently, he relied on the video

to draft his investigation report and prepare for his trial testimony. T. 1471-3.

Rivera Mirandized Petitioner and, after he waived his rights, Rivera did not tell Petitioner that he was investigating a homicide or that Ellison was dead. He let Petitioner believe he was investigating his possession of items taken from Ellison's home. T. 1384-6, 1473-4. After Petitioner admitted the property he possessed was not his, Rivera questioned him about his activities in Fort Lauderdale and how he came to possess these items. T. 1387, 1392, 1473-4. Petitioner stated that he had not met Ellison before and, inter alia, that he bought the items from a friend he met on Fort Lauderdale Beach for three hundred dollars. T. 1392-8, 1474-8. Rivera disbelieved Petitioner's account and, an hour and a half after the interrogation commenced, confronted him with the facts that he had been seen on Fort Lauderdale Beach with Ellison; that he told people there that he was from Delaware; and that he had been seen with Ellison at Ellison's home. T. 1401, 1477-8. After denying that he knew Ellison, Rivera showed Petitioner the video stills from the Pembroke Pines Mall. T. 1402-4. Rivera then allowed Petitioner to use the toilet and, thereafter, Petitioner admitted knowing Ellison. T. 1405-8.

When Rivera asked him what he knew about Ellison, Petitioner shook his head and replied, "it wasn't suppose to happen, he stopped breathing." T. 1416, 1481, 1483, 1486. Petitioner related that while

he was at the beach with Ellison, Ellison offered him eighty dollars if he (Ellison) could perform fellatio on him. T. 1413, 1483-4. Ellison also offered to buy Petitioner a meal and invited him to be his house guest. T. 1483-4. They left the beach in Ellison's car, stopped at a Publix and arrived at Ellison's home. T. 1414-5, 1425.

Petitioner explained that Ellison wanted him to engage in certain sex acts and "wrestling" moves. T. 1413, 1416, 1484, 1493-5. He described how Ellison performed fellatio on him in the upstairs bedroom of the townhouse. T. 1413-4, 1484. In discussing what he characterized as "wrestling moves" which Ellison asked him to perform, Petitioner explained Ellison liked the squeezing sensation and the feeling of pressure; and that when he squeezed too much or applied too much pressure, Ellison "tapped out." T. 1416, 1418, 1484, 1493-5. He demonstrated how Ellison "tapped" his fingers and that the tapping was a signal meaning that the pressure he applied on Ellison was either overly or insufficiently forceful or that he wanted the pressure to stop. T. 1418, 1494-5. While in the bedroom, Ellison tapped for Petitioner to stop applying pressure, he thanked Petitioner for accommodating him and told him that he like what he had done. T. 1416-8, 1495.

After sex and wrestling, Petitioner took Ellison's wallet and credit cards before exiting the bedroom. T. 1417. Ellison was unaware that Petitioner had taken these items and never confronted Petitioner over the theft. T. 1516-7. They then ate ice cream and peanut butter

cookies on the back porch, adjacent to the downstairs kitchen, and Petitioner helped Ellison carry his garbage can and recycling bin to the front of his house. T. 1416, 1507-1510.

With regard to how Ellison died, Petitioner explained that after they had eaten, Ellison asked Petitioner to allow him to fellate him again. T. 1413-9, 1483-6, 1507-1510. As Ellison performed oral sex on him in the kitchen, he told Petitioner that he wanted to feel the pressure of his tightening biceps again. T. 1416, 1495-6. When he placed Ellison in a "headlock," Ellison admired Petitioner's arm muscles and told him that he enjoyed what he was doing to him. T. 1418. While demonstrating the headlock-type wrestling move on a mannequin, Petitioner explained that, unlike events in the bedroom, Ellison did not "tap out" in the kitchen. T. 1418, 1497, 1500-1501. Instead, Petitioner explained, after applying pressure for a minute or two, during which Ellison appeared to be fine, Ellison's weight suddenly came down on his arm, causing his arm, which had been holding Ellison, to give way and Ellison collapsed on to the floor like a dead weight. T. 1416-9, 1497, 1500-1501, 1503.

When Ellison hit the floor, he landed face down and made a noise as if he was struggling for air; Petitioner told Rivera that Ellison had "quit breathing on me." T. 1416, 1418, 1487-8. Petitioner did not call 911; instead, he tried to awake Ellison, but he did not respond and Petitioner did not know what to do. T. 1418-9. Petitioner told Rivera that he never intentionally hurt anyone and

he had not intended to hurt Ellison. T. 1486-8. Not knowing CPR, Petitioner checked for a pulse and found Ellison did not have one; whereupon he panicked and became scared. T. 1419-1420, 1503-4. Rivera asked why, if Petitioner thought Ellison fell accidentally, he did not call 911; Petitioner did not articulate "why." T. 1420-1422. He told Rivera that when Ellison failed to awaken, he put a cell phone charging cord around Ellison's neck to make it appear that he was a victim of a robbery, but then, feeling remorseful, he removed it because he felt doing so was wrong. T. 1420-1422, 1516. Petitioner then put his head down, saying, "I should of [sic] known better." T. 1420.

Panicking and not knowing what to do, Petitioner found a bottle of bleach in the house and poured it on the kitchen floor, in order to cover up his presence. T. 1420. He did this because he feared no one would believe him. T. 1422. After pouring the bleach, he spoke to Ellison for about thirty minutes and then contemplated committing suicide, because Ellison had died on him. T. 1503-4. Rivera asked Petitioner if he was trying to get his mind right; Petitioner replied, "you never get your mind right" and that what happened was still not right. T. 1505. He then told Rivera that he had wanted to get as far away from Ellison's house as possible and, before leaving, he grabbed whatever items he could. T. 1420. The items taken after Ellison's death and after he poured bleach on the floor included Ellison's laptop computer, car keys and sundry

objects; other than Ellison's wallet and credit cards. T. 1417, 1420-1422, 1490-1491, 1501. While these items were not important to Petitioner, he took them after Ellison was dead to make it appear that Ellison had been robbed. T. 1417, 1420-1422, 1490-1491, 1501.

Petitioner left Ellison's home, taking the various items and the empty bleach bottle. T. 1422-3. He drove Ellison's car around for a few minutes, parked and reflected on just what occurred. T. 1422-4. He next drove to a 7-11, then to the mall and then to Target before he stopped at a strip club. Leaving the strip club, he drove to a parking garage, discarded some of his clothing and the bleach bottle. T. 1423.

Sometime after Petitioner admitted using Ellison's credit card, Rivera demanded he provide more details of events. T. 1424. Petitioner then told Rivera that he felt ill, as he had become nervous and had taken Xanax pills immediately before being arrested earlier that day in Miami Beach. T. 1424. Rivera told Petitioner that Xanax became effective within an hour of its ingestion. T. 1425. Petitioner then said he took Xanax when he used the toilet, although Rivera had searched him earlier, found no Xanax in his possession and watched him use the toilet. T. 1425. Rivera called for paramedics, who took Petitioner to the hospital. T. 1424, 1426-8. Petitioner was treated; cleared; and Rivera returned him to the interrogation room, around 8:45 p.m., and resumed questioning, during which he reviewed what they had discussed before the hospital visit and

Petitioner explained events the same way. T. 1428-9, 1515-6. Toward the end of the interrogation, Rivera questioned Petitioner on how he met Ellison and asked whether he targeted a gay man on the beach. T. 1409. While Petitioner replied he had targeted gay men, because they were easy targets, he said that Ellison was a "real good guy," and made no disparaging remarks about gay men. T. 1409, 1613-6.

Petitioner's Case-In-Chief

Petitioner elicited testimony from John Marranuccini, a forensic pathologist and former Florida state medical examiner. T. 1636-7. Marranuccini reviewed the entire medical examiner's file, including the complete autopsy report and the medical examiner's photographs; police reports; crime scene photos; toxicology reports; and Petitioner's interrogation statement. T. 1641-2. He agreed with Wardak that the manner of death was a homicide and its cause was asphyxia. T. 1642. He testified that asphyxia death can result from consensual activity for personal entertainment, such as sexual or erotic asphyxia, and such occurs when one puts pressure on the neck or face of another during sex to induce partial asphyxia or lowering of oxygen levels, which, reportedly, increases sexual excitement and intensity. T. 1663-4.

Marranuccini compared Petitioner's interrogation statement to Wardak's scientific findings and concluded that he could not rule out the conclusion that Ellison's death was consistent with voluntary, erotic asphyxiation activities, during which

Petitioner's arm was positioned around the decedent's neck, in an arm-bar or carotid sleeper type maneuver, to induce asphyxia. T. 1642, 1644, 1653-4, 1667. He explained that a carotid sleeper hold compresses blood vessels on the side of the neck, without compressing the air tube. T. 1655. The pressure on these blood vessels depletes brain oxygen and causes unconsciousness within ten seconds. T. 1655-6. The police arm-bar choke hold, similar to the carotid sleeper, can cause instantaneous death when applied incorrectly or if the subject moves and pressure application shifts from the carotid artery to the trachea. T. 1656-7. Erotic asphyxia is suppose to induce pleasure, not unconsciousness, by inducing a twilight type of consciousness. T. 1656-7. To avoid too much oxygen deprivation, erotic asphyxia participants use signals to prevent strangulation; although, since erotic asphyxia causes some oxygen deprivation, prolonged sessions can affect the recipient's brain communication function. T. 1659, 1738. Ellison died as a result of Petitioner's poor or inadequate technique in applying erotic asphyxia. T. 1665.

Marranuccini disagreed with Wardak and ruled out manual strangulation, concluding there was no evidence of hand or finger imprints on the front of the neck; there was a lack of intense abrasions on the side of the neck; no abrasions on the front of the neck, caused by the decedent's own fingernails while trying thwart a strangulation attack; no damage to the Adam's apple, thyroid cartilage, or other cartilage or bony structures within the neck;

and, based on the crime scene photo, there was no sign of a struggle or that Ellison thrashed against an attacker, which typically occurs during a manual strangulation. T. 1644-1650, 1660-1661, 1667, 1732. He maintained Ellison's injuries were consistent with Petitioner's use of an arm-bar hold to asphyxiate Ellison for erotic pleasure, evinced by more extensive internal hemorrhages in the large muscles on one side of the his neck than the other. T. 1661-4. The placement of Ellison's body and the contusion on the right side of his head were consistent with Petitioner's explanation that the decedent suddenly became dead weight, slipped out of his hold and fell to the floor. T. 1663, 1666-7.

STATEMENT OF THE CASE

Petitioner was indicted by the grand jury of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. R. 3-5. It charged Petitioner the with first degree, premeditated murder of Ellison by asphyxiation, strangulation or choking while in the commission of a robbery (Count I) and tampering with physical evidence (Count II). R. 3-5.

Motion In Limine Re Rule of Completeness

Prior to trial, Petitioner learned the prosecutor intended to elicit Petitioner's statement through Rivera's trial testimony and not by introducing audio/video recording of the interrogation. R. 426-9. Petitioner was concerned that the prosecutor, through his direct-examination of Rivera, would selectively edit portions of his

statement in which he admitted causing Ellison's death and the resulting testimony would be out-of-context and affirmatively mislead the jury about its actual circumstances. He sought an order, under section 90.108(1), Florida Statutes (2014), compelling the State to admit the complete context of his statements and not be bound or charged with their elicitation for purposes of section 90.806, Florida Statutes (2014), prior conviction impeachment. R. 430-435; T. 558-560, 644-650, 652-3, 1003-6. The trial court denied the motion, ruling that it would not compel the State to elicit Petitioner's "self-serving" statements and, if Petitioner elicited them when cross-examining Rivera, his credibility could be impeached by his prior felony convictions. T. 1006-9. Petitioner renewed his Rule of Completeness objection during the State's direct-exam of Rivera. R. 1420-1421, 1431-1437. He argued that compelling the State to elicit his complete, in-context interrogation statements did not make admissible his prior felony convictions to impeach his credibility; rather, to be impeached he would have to elicit exculpatory statements, non-germane to Rivera's misleading testimony. T. 1432. The trial court did not change its prior ruling and suggested Petitioner not cross-examine Rivera about his statement to avoid the impeachment. T. 1435-7.

Cross-examination of Rivera

During his cross-examination of Rivera, Petitioner elicited, pursuant to the Rule of Completeness, the portions of his

interrogation statement which the State omitted when it elicited Rivera's direct-examination testimony:

Direct-examination:

Rivera testified that Petitioner described how Ellison died in the kitchen. T. 1416-8.

Cross-examination:

Rivera conceded that Petitioner explained Ellison's death was accidental. T. 1440-1441, 1516.

Direct-examination:

Rivera testified that Petitioner said Ellison "wasn't suppose to die, it wasn't suppose to happen that way." T. 1416.

Cross-examination:

Rivera admitted that the complete statement was, "it wasn't suppose to happen, he stopped breathing." T. 1481, 1483, 1486. Rivera also admitted that Petitioner directly addressed Ellison's death after the first hour and a half of the interrogation and took full responsibility for it. T. 1517-9.

Direct-Examination:

Rivera testified that Petitioner said Ellison offered to pay him eighty dollars to give him fellatio. T. 1416-8.

Cross-examination:

Rivera further divulged that Petitioner told him that Ellison made his offer at the beach, along with offers to get Petitioner a meal and for him to be his house guest. T. 1483-4.

Direct-examination:

Rivera testified that Petitioner told him that Ellison had a biceps and wrestling "fetish." T. 1413, 1416.

Cross-examination:

Rivera clarified that "fetish" was his (Rivera's) own interpretation of what Petitioner told him and that Petitioner never used the word "fetish." T. 1484.

Direct-Examination:

Rivera testified Petitioner stated, with regard to Ellison having stopped breathing while in a wrestling hold, that he tried to awaken Ellison after he dropped to the kitchen floor, Ellison did not respond and he did not know what to do. T. 1418-9.

Cross-examination:

Rivera conceded that Petitioner actually said that he never intentionally hurt anybody and that he had not intended to hurt Ellison. T. 1486-8. Rivera admitted that Petitioner told him that Ellison "quit breathing on me;" and he clarified that, contrary to his direct-examination testimony, Petitioner did not state that Ellison passed out or loss consciousness. T. 1416, 1487-8.

Direct-examination:

Rivera testified that Petitioner told him that he grabbed Ellison's laptop computer, car keys and other items, other than the wallet and credit cards, after he poured bleach onto the floor. T. 1417, 1420-1422.

Cross-examination:

Rivera admitted that, within the same context, Petitioner also noted that he took these items because Ellison was dead; that he wanted to make the scene appear as though the items were taken in a robbery; and that these items were not important to him. T. 1417, 1420-1422, 1490-1491, 1501. Petitioner told Rivera that he removed the cord from Ellison's neck because he felt it had been wrong to put it there in the first place. T. 1421-2, 1516. In the same context, Rivera remarked to Petitioner that he used Ellison's belongings and credit card "like crazy," and Petitioner replied that he was desperate and foolish and that his mind was elsewhere at the time. T. 1501.

Direct-examination:

Rivera testified that Petitioner stated he and Ellison engaged in oral sex and consensual wrestling moves in the bedroom. T. 1413-9. Rivera then testified that while they were in the kitchen, after having ice cream, Petitioner put Ellison into a headlock, using his arm, and, after a few minutes, Ellison collapsed, Petitioner let go of him and Ellison dropped like a dead weight. T. 1418-9.

Cross-examination:

Rivera conceded that Petitioner, within the same context, actually said that he let Ellison give him oral sex in the kitchen, after they ate ice cream. T. 1493-6. Petitioner also told Rivera that, as Ellison performed fellatio on him in the kitchen, Ellison

wanted to again feel pressure from Petitioner's tightening biceps; and that Petitioner never used the word "choke" to describe the physical pressure he applied to Ellison T. 1493-6.

Direct-examination:

Rivera testified that Petitioner stated Ellison "would tap out," with regard to wrestling; in that Ellison used his fingers to indicate the pressure he applied was overly or insufficiently forceful. T. 1418.

Cross-examination:

Rivera stated he asked Petitioner about "the biceps thing," and other bedroom activities. T. 1494. Petitioner replied that Ellison liked the squeezing and the feeling of pressure and that when he squeezed too much or applied too much pressure Ellison "tapped out." T. 1494. Rivera also acknowledged that Petitioner demonstrated how Ellison tapped and that tapping was a signal meaning the pressure applied was too little, too much or that he wanted it to stop. In the bedroom, Ellison tapped for Petitioner to stop the pressure and he then thanked him, saying he liked it. T. 1416-8, 1495. Rivera admitted that when Petitioner demonstrated the wrestling move, he explained that, unlike in the bedroom, Ellison did not "tap out" in the kitchen; instead he got heavy in his arms and fell to the floor after a minute or two of pressure, during which he had believed Ellison was fine. T. 1418, 1497, 1500-1501.

Direct-examination:

Rivera stated Petitioner told him that when he let go of Ellison he hit the floor; landed face down; and made a noise, as if he was struggling for air. T. 1418-9.

Cross-examination:

Rivera agreed that Petitioner said, in response to his questions concerning how Ellison's head got hit, that while he held Ellison, his weight suddenly came down on his arm and caused his arm to give way. T. 1503.

Direct-examination:

Rivera testified Petitioner told him that he poured bleach on the kitchen floor to cover up his presence in Ellison's home. T. 1420.

Cross-examination:

Rivera admitted, in the same context, Petitioner also said that before he did, he panicked, because he did not know CPR and that he checked, but found Ellison did not have a pulse. T. 1503-4. Petitioner also told Rivera that, after pouring bleach, he talked to Ellison for thirty minutes, knowing he was dead, and then contemplated suicide, because Ellison died on him. T. 1503-5. He also acknowledged that he had asked Petitioner whether he was just trying to get his mind right and that Petitioner replied, "you never get your mind right" and that, during the interrogation, his mind was still not right. T. 1505.

Direct-examination:

Rivera testified Petitioner told him about the places he went to after leaving Ellison's home on March 10, including a 7-11 store, where he bought a gift card, and to a strip club. T. 1422-3.

Cross-examination:

Rivera agreed he had not known about the strip club until Petitioner told him about it and that he used the gift card to pay for things at the club. T. 1505-6.

Direct-examination:

Rivera testified that for the first hour and a half of the interrogation Petitioner told him a story that did not jive with information received from other witnesses. T. 1401.

Cross-examination:

Rivera acknowledged that, later in the interrogation, he questioned Petitioner again about events at the beach and Petitioner admitted that he had initially lied to him and said that everyone he met at the beach were nice people. T. 1506-7. Petitioner also told Rivera that Ellison was a "real good guy," he made no disparaging remarks about Ellison, and he made no disparaging remarks about gay men; although he understood that Petitioner "targeted" gay men, because they were easy targets. T. 1613-6. Petitioner further told Rivera that he knew Ellison had a dinner date scheduled on March 10; that Ellison stopped at a Publix on the way home from the beach with Petitioner; that Petitioner smoked Marlboro cigarettes; that

Petitioner and Ellison ate peanut butter cookies with their ice cream; that Ellison had told him that he had been a part-time zookeeper in Chicago; and that the time during which Rivera assumed Petitioner used Ellison's credit card was wrong: all of which Rivera had not known before Petitioner provided him this information. T. 1507-1510.

Direct-examination:

Rivera testified that, at 4:30 p.m., while he pressed Petitioner for more details, Petitioner told him he was not feeling well and that he had taken Xanax pills when Miami Beach police officers approached him. T. 1424.

Cross-examination:

Rivera acknowledged that he had taken a break from the interrogation at 3:33 p.m. and left the room. T. 1511. After questioning resumed, a point came when Petitioner, after he had already told Rivera he took Xanax tablets, began dozing off. T. 1512. Rivera acknowledged that Petitioner eventually appeared so sleepy he called for paramedics, who took him to the hospital, where he was treated with intervenes fluids. T. 1512. Rivera and Petitioner returned to the interrogation room at around 8:45 p.m., reviewed what they discussed before the hospital visit and Petitioner explained events the same way. T. 1515-6. Before the interrogation ended, Nicholson questioned Petitioner more aggressively, asking if Ellison could have discovered his theft of the wallet and credit cards and

confronted him over it. T. 1516-7. Petitioner maintained that no such confrontation occurred and that Ellison did not know he had taken these items. T. 1517.

Jury Charge Conference and Closing Argument

Under the Rule of Completeness grounds, Petitioner objected to the inclusion of the weighing the evidence instruction concerning a witness's prior felony convictions affecting testimonial credibility. T. 1568-1570. The trial court overruled his objection; admitted evidence, upon the parties' stipulation, that Petitioner had nine prior felony convictions; and gave a limiting instruction that the convictions were not evidence of guilt, but should only be considered with regard to a "declarant's" credibility. T. 1569, 1626-7, 1835.

During the State's closing argument, Petitioner objected and moved for mistrial when the prosecutor told the jury that it should consider Petitioner's prior felony convictions when it weighed the credibility of evidence, elicited by Petitioner during his cross-examination of Rivera, regarding portions of the interrogation statement which were omitted by the State when it elicited Rivera's direct-examination testimony. T. 1855-7, 1866-7, 1912, 1918, 1926, 1927, 1937-9. The trial court overruled the objections and denied a mistrial. T. 1866, 1912, 1918, 1926, 1927, 1941.

Verdict and Sentencing

The jury found Petitioner guilty as charged of first degree

murder and tampering with physical evidence. R. SR2; T. 1946. Upon the parties stipulation that Petitioner's prior felony convictions and the relationship of the dates of their commission to the date of the crimes at bar, the trial court could find that Petitioner qualified for habitual felony offender sanctions. T. 1957-1961. The trial court found that Petitioner qualified for habitual felony offender sanctions as to Count II. T. 1965. It adjudicated Petitioner guilty as per the jury's verdict and sentenced him to life imprisonment, as to Count I, and, as to Count II, a concurrent term of 120 months imprisonment. R. 483-9, 519-522; T. 1966.

Notice of Appeal was timely filed. R. 531-3.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in holding that the principles of section 90.108(1), Florida Statute, known as the Rule of Completeness, applied solely to written or recorded statements. It also erred in holding that a party's reliance on the Rule of Completeness opens the door to impeachment under section 90.806, Florida Statutes.

ARGUMENT

THE FOURTH DISTRICT ERRED BY HOLDING THAT: (1) THE PRINCIPLES OF § 90.108(1) ARE INAPPLICABLE TO CORRECT MISLEADING TESTIMONY OF ORAL, OUT-OF-COURT ADMISSIONS BY A DEFENDANT; AND (2) THAT A DEFENDANT IS SUBJECT TO § 90.806 IMPEACHMENT WHEN, IN FAIRNESS, HE OR SHE ELICITS EXCULPATORY EVIDENCE THAT IS NECESSARY TO CORRECTS SUCH MISLEADING TESTIMONY.

The Fourth District Court of Appeal erred in affirming the trial court's rulings at bar. First, it erred in holding that the trial court did not abuse its discretion in ruling that the principles of the Rule of Completeness, § 90.108(1), Fla. Stat. (2014), do not apply to testimony concerning an oral, out-of-court statements or admissions by a party opponent, when direct-examination testimony concerning the admission is misleading. Second, the Fourth District erred in holding that the trial court did not abuse its discretion in ruling that a criminal defendant's credibility can be impeached by means of prior felony convictions, § 90.806, Fla. Stat. (2014), when the defendant, on cross-examination, elicits relevant, in-context, exculpatory evidence to correct the misleading testimony concerning the oral, out-of-court admission.

During the State's direct-examination of Rivera, the prosecutor elicited testimony about the detective's interrogation of Petitioner. In so doing, it failed to elicit the entire context of various statements made by Petitioner. As a result of these omissions, the jury was not provided with the entirety of the statements; rather, they were given a misleading impression of what

Petitioner actually stated. These portions, purposely omitted by the prosecutor, concerned Petitioner's involvement in Ellison's death. In particular, Rivera's direct examination testimony omitted the portions of Petitioner's interrogation statement in which Ellison asked Petitioner to allow him to fellate him again in the kitchen, as he had done in the bedroom, and that Ellison asked Petitioner to apply pressure to his neck in the kitchen, as he had done in the bedroom (T. 1413-9, 1493-6). Additionally, Rivera's direct-examination omitted Petitioner's demonstration of the wrestling move which Ellison asked him to perform in both the bedroom and the kitchen and that as Petitioner applied the wrestling move in the kitchen, Ellison failed to tap-out; instead, he became heavy on his arm and fell to the floor (T. 1416-8, 1494-7, 1500-1501).

These omissions in Rivera's direct-examination concerning Petitioner's interrogation statement were hardly the result of happenstance. Prior to trial, Petitioner moved in limine, pursuant to section 90.108(1), Florida Statutes, to have the trial court compel the State to elicit all relevant, in-context statements he made during his interrogation, in light of his concern that the State would selectively edit his statement to intentionally mislead the jury concerning the circumstances of Ellison's death (R. 426-435; T. 558-560, 644-650, 1003-9). After the trial court denied his pretrial motion, concluding that any omissions within Rivera's testimony about the interrogation would concern self serving hearsay

(T. 1006-9), Petitioner renewed it during and immediately after the prosecutor elicited Rivera's misleading direct-examination testimony concerning the moments leading up to Ellison's death; this testimony omitted the content showing Ellison asked Petitioner to again engage him in sex and sexual asphyxia in the kitchen and that, unlike earlier in the bedroom, Ellison did not signal him to stop, but stopped breathing and died in his arms (T. 1420-1421, 1431-1437).

The net effect of these omissions and mischaracterizations was to make it appear that Petitioner confessed to choking Ellison to death in an effort to rob him of his belongings, so the State could make a prima facie showing of felony murder (R. 3-5). This intentionally misleading narrative would have gone unchallenged had not Petitioner cross-examined Rivera to elicit those relevant, in-context portions which explained how Ellison's death was unintended and not committed during the course of a felony. However, the prosecutor's less-than-candid trial tactic came with the contingent benefit of exposing Petitioner's felony conviction record when Petitioner cross-examined Rivera to fix the misleading direct-examination testimony, by eliciting relevant, in-context and, albeit exculpatory, portions that were omitted.

The "Rule of Completeness" is codified under section 90.108(1), Florida Statutes (2014). It states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing

> or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

Had the principles of the rule of completeness been applied to Rivera's testimony at trial, the misleading nature of his testimony concerning the interrogation statement would have been resolved, Petitioner would not have been bound or held responsible for eliciting the omitted portions of his statement and there would have been no section 90.806 impeachment. § 90.108(1), Fla. Stat. In other words, the State would have not been rewarded for its gaming[2] and "gotcha"[3] trial tactic.

Other out-of-court statements by Petitioner were admitted as impeachment of Rivera's lack of recollection or to correct testimony that was factually inconsistent with the actual, recorded content of the interrogation statement, such as Petitioner never having used the word "choke" to describe his act of putting pressure on Ellison's neck (T. 1416-8, 1494-5, 1497, 1500-1501); that Petitioner never used the word "fetish" to describe Ellison's desire to wrestle (T. 1413, 1416, 1484); and that Petitioner stated that Ellison stopped breathing, not that he passed out or lost consciousness (T. 1416, 1487-8). Gudmestad v. State, 209 So. 3d 602, 605-6 (Fla. 2d DCA 2016);

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[2] See, generally, Chambers v. State, 880 So. 2d 696, 701 (Fla. 2d DCA 2004).

[3] See, generally, State v. Belien, 379 So. 2d 446 (Fla. 3d DCA 1980).

see § 90.608(5), Fla. Stat. 2014). Still other statements introduced during cross-examination were informative, such as conversations between Petitioner and Ellison, to show what transpired while the two men spent time together; they were neither inculpating nor exculpating with regard to the crimes charged, such as Petitioner never having made disparaging remarks about gay men; that Ellison told him of his dinner plans; that they ate peanut butter cookies with their ice cream; and that Ellison had been a part-time zookeeper (T. 1507-1510, 513-6). Id.

Of the State-omitted interrogation statements that could be deemed exculpating, under section 90.108(1), their introduction by Petitioner did not warrant section 90.806 prior conviction credibility impeachment. The focus of the rule of completeness is fairness to the adverse party when the proponent of a written or recorded statement "opens the door" and introduces only part of the statement, the relevant, in-context remainder which relate to the crimes charged and would give the introduced statement an entirely different meaning. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988); Metz v. State, 59 So. 3d 1225, 1226-7 (Fla. 4th DCA 2011); see also Sanders v. State, 237 Miss 772, 115 So. 2d 145 (1959). Where the proponent omits in-context portions of that statement, which cause the admitted portions to be misleading, the proponent "open[s] the door" to the introduction of the omitted portion by the party opponent to correct the misleading nature of what was initially

admitted. Callaway v. State, 210 So. 3d 1160, 1183-4 (Fla. 2017); Reese v. State, 694 So. 2d 678, 683 (Fla. 1997), citing Christopher v. State, 583 So. 2d 642, 645-6 (Fla. 1991)("Although that rule is defined at section 90.108, Florida Statutes (1995), to include only written or recorded statements," the supreme court has "allowed the policy to apply to oral testimony as well") see Larzelere v. State, 676 So. 2d 394, 401-2 (Fla. 1996); Foster v. State, 182 So. 3d 3 (Fla. 2d DCA 2015); see Dessett v. State, 951 So. 2d 46, 48 (Fla. 4th DCA 2007); Whitfield v. State, 933 So. 2d 1245, 1248-9 (Fla. 1st DCA 2006); see Bozeman v. State, 698 So. 2d 629, 630-631 (Fla. 4th DCA 1997); Sweet v. State, 693 So. 2d 644, 645 (Fla. 1997); Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989).

At bar, the State intentionally omitted Petitioner's statement that Ellison stopped or quit breathing, that his death was accidental and that he did not intent to hurt Ellison and had never intentionally hurt anyone (T. 1416, 1418-9, 1481, 1483, 1486-8); that after their sex in the bedroom, Petitioner and Ellison had consensual sex in the kitchen, where Ellison wanted him to apply the same wrestling move as he did in the bedroom; that while Ellison gave a "tapping" signal when "wrestling" in the bedroom, he never did so in the kitchen, leading Petitioner to believe he wanted the pressure, and, thereafter, he felt the weight of Ellison's body on his arm and let go of him (T. 1416-8, 1494-5, 1497, 1500-1501); and that Ellison was not aware he took his wallet and credit cards and never confronted

him about it afterward (T. 1516-7).

The State's exclusion of the in-context, exculpating, portions was designed to mislead the jury with regard to Petitioner's intent when he caused Ellison to be asphyxiated in the kitchen. It was done to create an illusion that the State's evidence showed Petitioner committed felony murder by using force against Ellison before, during or after the taking of the wallet; and that the force was unrelated to consensual asphyxiation, but rather, it was to rob him (T. 1762, 1767-8, 1827, 1854, 1887-8, 1922-3).

To prevent the proponent of a recorded statement from intentionally misleading a jury regarding the statement's actual meaning, section 90.108(1) requires that the omitted portions be contemporaneously included when the initially admitted portion are introduced and prohibits the adverse party from being bound for causing the introductions of the omitted portions. This did not occur at bar. The trial court's refusal to compel the State to introduce the omitted portions of Petitioner's statement contemporaneously with the elicited portions was erroneous. It was also error for the trial court to bind or charge Petitioner for introducing the omissions during its cross-examination of Rivera, thus allowing the State to impeach Petitioner's credibility, as a non-testifying witness, with his nine prior felony convictions, causing the initial error not to be harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Foster v.

State, 182 So.3d (Fla. 2nd DCA, 2015).

The Fourth District's reliance on Kaczmar v. State, infra, was misplaced. In Kaczmar, the State omitted a portion of the defendant's secretly recorded statement to an undercover detective investigating the defendant for attempting to frame his friend for the murder with which he was charged. The portion omitted was the defendant's statement that he was framing his friend because he was innocent. Id, 104 So. 3d 990, 997, 1000-1001 (Fla. 2012). This Court held that when the defendant elicited the hearsay statement in which he claimed his innocence, the State was free to impeach it under section 90.806. Id at 1000-1001. However, in Kaczmar, the evidence of the defendant's statement to the undercover detective was not alleged to have been misleading or taken out of the context in which it was actually made; only that it was incomplete for not including the defendant's insistence that he sought to frame his friend for a murder because he, himself, was innocent of that murder. Id. Such evidence was not protected by the Rule of Completeness, as it was merely exculpatory; the jury was not mislead by the edited recording of his solicitation of the undercover detective to frame his friend; and, under these circumstances, principles of fairness did not necessitate admission of the complete statement. Hence, the Kaczmar defendant was not entitled to the protection afforded by section 90.108(1), not to be charged with admitting the completed hearsay statement, and the section 90.806 impeachment was proper. Id.

The Fourth District's reliance on its own decision in Kelly v. State, 857 So. 2d 949 (Fla. 4th DCA 2003), which cites Llanos v. State, 770 So. 2d 725 (Fla. 4th DCA (2000), was equally misguided. The opinion in Kelly appears to hold that where a defendant elicits any exculpatory parts of his or her out-of-court statements, whether or not to cure a misleading impression created by the State by means of omitting relevant and in-context portions, the defendant can be impeached under section 90.806. However, the Kelly opinion is devoid of underlying facts and fails to discuss the context or nature of the defendant's statement introduced by the State; nor is there a discussion on the context or nature of the omitted portions introduced by the defendant, giving rise to 90.806 impeachment.

In Llanos, 90.806 impeachment evidence was admitted when, after the prosecutor elicited part of the defendant's recorded statement, in which he told an investigator that he did not want the victim to call police in a prosecution concerning charges for kidnapping, burglary and battery, the defendant elicited the in-context remaining portions in which he explained that he did not want the victim to call police because he was remorseful, he loved her and wanted to resume their relationship. Id at 726. However, the omitted portions, that the defendant was sorry and that he loved the victim, did not concern evidence necessary for the State to prove the accused's crimes; nor did the omitted portion provide evidence to prove a valid defense to the crimes charged. Such statements were

superfluous to any element of proof; there was nothing misleading concerning the State's evidence supporting the elements of proof; and 90.806 impeachment was proper. Christopher v. State, supra at 646; c.f. Foster v. State, supra; c.f. Metz v. State, supra at 1226-7. In fact, the trial court, in Llanos, could have properly excluded the defendant's exculpatory statements, since the evidence added to the testimony that the defendant prevented the victim from calling police, i.e., because he loved the victim, wanted their relationship to continue and was remorseful, was irrelevant to any material issue of fact and trial courts maintain discretion to exclude such evidence. Larzelere v. State, supra at 402; Christopher at 646; Pulcini v. State, 41 So. 3d 338, 348 (Fla. 4th DCA 2010); Dessett v. State, 951 So. 2 46, 48 (Fla. 4th DCA 2007); Mulford v. State, 416 So. 2d 1199, 1201 (Fla. 4th DCA 1982).

While the Fourth District rejected the Second District's authority, the procedural facts at bar are much akin to those of Foster, supra. In Foster, the State, in a burglary and theft prosecution, elicited police testimony that the defendant, who possessed a wallet taken from a burgled vehicle, told the officer that he found the wallet; implying that he obtained it when he burgled the car. On cross-examination, the officer testified that the defendant's complete statement was that he "found the wallet inside of a garbage can and that he was going to turn it in to police as found property." Id at 3-4. The Second District held that the trial

court erred in admitting 90.806 impeachment against the defendant, because the remainder of the statement, elicited by the defendant, was relevant evidence and the prosecutor, by eliciting only a portion of the admission, "'opened the door'" to the entire statement, which, in fairness, and pursuant to the truth-seeking function of a trial, should have been admitted in its entirety. Id at 4-5.

While the Foster court did not use the term "rule of completeness," its holding is in total accord with the rule as it would and should be applied to testimony of oral statements of a party opponent. The basic premise of the section 90.108(1), as recognized by this Court, is that when a proponent of testimony "opens the door" by introducing only a portion of an oral admission of a party opponent and, by doing so, misleads the fact finder as to the true meaning or correct context of how that statement ought to be understood, principles of fairness, or due process, entitles the party opponent to compel the disclosure of the entire context of the statement. Larzelere v. State, supra at 401-2; Foster v. State, supra at 4-5; see Newton v. State, 160 So. 3d 524, 526 (Fla. 5th DCA 2015); Barone v. State, 841 So. 2d 653, 655 n.2 (Fla. 3d DCA 2003). Moreover, federal courts recognize that while Federal Rules of Evidence 106, which is the statutory equivalent of section 90.108(1), Fla. Stat., applied, by its terms, only to written or recorded statements, the principles of the same rule applied to oral testimony concerning out-of-court statements or admissions of party-opponent. United

States v. Pacquette, 557 Fed. Appx. 933, 935-6 (11th Cir. 2014), citing United States v. Baker, 432 F. 3d 1189, 1223 (11th Cir. 2005), abrogated on other grounds Davis v. Washington, 547 U.S. 813, 821 (2006)).

The Foster court went on to hold that the 90.806 impeachment of the defendant's credibility was harmful error, because it could not be concluded that the admission of a non-testifying defendant's prior felony convictions, in light of his defense that he had merely found the wallet, did not affect the jury's verdict beyond a reasonable doubt. Id at 5, citing State v. DiGuilio, supra. This holding is consistent with the principle of the Rule of Completeness that, "[a] adverse party is not bound by evidence introduced under" section 90.108(1). Foster recognized that that the party opponent to misleading testimony about an out-of-court admission cannot be bound, or impeached, by exercising his or her entitlement to complete the statement in the interest of due process or fairness. Id at 5.

Not being subject to prior conviction impeachment must be what "not bound by evidence under this section" necessarily means. See § 90.108(1), Fla. Stat. Where a party opponent identifies misleading or out-of-context testimony concerning the content of an out-of-court admission, it would be profoundly unfair to allow for section 90.806 impeachment of the statement's declarant when the proponent of such testimony omits relevant, in-context content. To conclude otherwise would reward a party for misleading the jury.

Moreover, in Florida, all trial witnesses are required to take an oath, swearing or affirming that testimony they will give will be the truth, the whole truth and nothing but the truth. See In re Standard Jury Instructions--Contract and Business Cases, 116 So. 3d 284, 290-291 (Fla. 2013); § 90.605(1), Fla. Stat. (2014); § 90.605(1), Fla. Stat (2014). State law also provides that a party calling a witness to testify on its behalf vouches for the witness's testimonial credibility. See Pomeranz v. State, 702 So. 2d 465, 468-9 (Fla. 1997); see Phelps v. State, 154 So. 3d 1232, 1233 (Fla. 1st DCA 2015). In light of these basic principles of trial procedure, it is quite disconcerting to think that, under the Fourth District's reasoning, a police witness can be lead by a prosecutor to testify half-truthfully, to mislead a jury, concerning admissions made by a criminal defendant; and then, when the defendant succeeds in correcting such misleading half-truths, he or she is punished for doing so. Nock v. State, 211 So. 3d 321, 324-5 (Fla. 4th DCA 2017).

It is even more disturbing to consider that the Fourth District's opinion at bar appears to be a potential weapon for prosecutors to engage in Giglio violations with impunity. Giglio v. United States, 405 U.S. 150 (1972). Giglio holds that a prosecutor cannot knowingly present false testimony against a defendant. Id at 153-4. It provides that to establish such a violation, a defendant must show that the prosecutor presented false testimony; the prosecutor knew the testimony was false; and the false

evidence was material. Id. Under the facts in Foster, supra, a Giglio violation would lie where the prosecutor was aware of the entirety of the officer's police report, in which he memorialized the defendant's explanation that he found the wallet in the trash and intended to turn it in to police as found property; elicited only the portion in which the defendant said that he found the wallet, leaving an inference that the defendant found it while burgling the car; and the misleading half-truth was material, because it undercut the defendant's legitimate defense that his possession of the wallet was free of criminal intent.

The facts at bar, juxtaposed with the Giglio factors, would also show a violation. The prosecutor was wholly cognizant of the entire content of Petitioner's statement; he lead Rivera to provide misleading direct-examination testimony, by means of half-truth, regarding the context of what Petitioner actually told him about the circumstances immediately preceding Ellison's death; and the misleading, half-truthful testimony was material with regard to Petitioner's lawful defense that Ellison's death was accidental and not a result of any felonious criminal agency.

The Fourth District's Nock opinion provides a "heads I win, tails you lose"[4] scenario. The State gets to mislead the jury as to

[4] See, e.g., Swafford v. State, 828 So. 2d 966, 979 (Fla. 2002), ANSTEAD, J., dissenting; see, e.g., Williams v. State, 163 So. 3d 694, 698-9 (Fla. 4th DCA 2015).

the actual content of a defendants' admission and, if the defendant corrects the misleading nature of the testimony, his or her credibility is impeached with admission of prior felony convictions despite the fact that he or she does not testify at trial.

At bar, Petitioner's defense was that Ellison's death was an accident that occurred during an episode of consensual erotic asphyxiation. The medical evidence did not refute this claim (T. 1197-9, 1202-3, 1216-1220, 1229-1301, 1247-8, 1642-4, 1653-4, 1663-4, 1667). Ironically, the State's sole source of direct evidence to prove that Ellison's homicide death was a murder and that Petitioner committed it was Petitioner's interrogation statement. C.f. Kaczmar, supra. Consequently, the omitted, exculpatory portions of Petitioner's interrogation statement were relevant to the State's burden of proof regarding the element of intent and Petitioner's legal defense that the homicide was excusable. Under section 90.108(1), the trial court abused its discretion and erred by not compelling the State to admit the portions contemporaneously during Rivera's direct-examination testimony and erred in allowing the State to impeach Petitioner's credibility under section 90.806. Because Petitioner's credibility was impeached by his nine prior felony convictions, it cannot be said that the errors, below, in rejecting the application of the Rule of Completion principles to Rivera's testimony concerning the interrogation statement, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d

1129 (Fla. 1986): Foster v. State, supra at 5. This Court should reverse Petitioner's conviction and remand for a new trial with directions that if the State seeks to admit Petitioner's interrogation statement, all relevant, exculpating portions must be admitted contemporaneously with the inculpating portions and, if not, that Petitioner can elicit such portions on cross-examination, not be bound or responsible for the admission of such evidence, and not be subject to section 90.806 impeachment.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal, and the rulings of the trial court, and remand this cause with proper directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Asst. Attorney General Don Rogers crimappwpb@myfloridalegal.com, 1515 N. Flagler Dr., West Palm Beach, FL 33401, this 5th day of September, 2017.

S/ Ian Seldin
Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 12 point Courier New.

S/ Ian Seldin
Of Counsel