IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-506

ROBERT VELAZCO

Petitioner,

vs.

THE STATE OF FLORIDA

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL
LOWER TRIBUNAL NO. 3D15-165

ASHLEY MOODY
ATTORNEY GENERAL

MICHAEL W. MERVINE
Miami Bureau Chief—Criminal Appeals
Florida Bar No. 0692131

ASAD ALI
Assistant Attorney General
Florida Bar No. 111887
Office of the Attorney General
One SE Third Avenue, Suite 900
Miami, FL 33131
(305) 377-5441
CrimAppMia@myfloridalegal.com
Asad.Ali@myfloridalegal.com
Counsel for the State of Florida

TABLE OF CONTENTS

TABLE OF CITATIONS……ii

STATEMENT OF THE CASE AND FACTS……..……1

SUMMARY OF ARGUMENT……9

ARGUMENT…….....10

I. The Third District correctly determined that dual convictions for DUI serious bodily injury and DUI property damage as to the same victim were not barred by the Double Jeopardy Clause because the offenses were not degree-variants of each other. This Court should quash the Fourth District's decision in *Anguille v. State* that reached the opposite conclusion and approve the Third District's decision below………..…10

II. The Third District correctly determined that the trial court did not abuse its discretion in allowing the State to introduce the perpetuated testimony of a witness that was unavailable due to her ongoing severe health issues………17

CONCLUSION……..……24

CERTIFICATE OF SERVICE……...……..25

CERTIFICATE OF COMPLIANCE…….....25

TABLE OF CITATIONS

Cases

Anguille v. State,
243 So. 3d 410 (Fla. 4th DCA 2018) 8, 9, 10, 11, 24

Arnold v. State,
889 So. 2d 215 (Fla. 2d DCA 2004) 22

Battle v. State,
911 So. 2d 85 (Fla. 2005) 18

Blockburger v. United States,
284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) 7

Fisher v. Perez,
947 So. 2d 649 (Fla. 3d DCA 2007) 21

Hojan v. State,
3 So.3d 1204 (Fla. 2009) 22

Jackson v. State,
575 So. 2d 181 (Fla. 1991) 17

Muehleman v. State,
3 So. 3d 1149 (Fla. 2009) 17

Partin v. State,
82 So. 3d 31 (Fla. 2011) 20, 22

Ponton v. State,
73 So. 3d 70 (Fla. 2011) 18

Reichmann v. State,
966 So. 2d 298 (Fla. 2007) 17

Richardson v. State,
182 So. 3d 918 (Fla. 1st DCA 2016) 20, 21, 22

Shine v. State,
273 So. 3d 935 (Fla. 2019) 18

Sirmons v. State,
634 So.2d 153 (Fla.1994) 12

State v. Drawdy,
136 So. 3d 1209 (Fla. 2014) 10

State v. Florida,
894 So. 2d 941 (Fla. 2005) 11

State v. Maisonet-Maldonado,
308 So. 3d 63 (Fla. 2020) 11, 13

State v. Marsh,
308 So. 3d 59 (Fla. 2020) 13

State v. Paul,
934 So. 2d 1167 .....12, 14

State v. Roberts,
174 So. 3d 374 (Fla. 3d DCA 2014) 19

Valdes v. State,
3 So. 3d 1067 (Fla. 2009) 8, 11, 12, 13, 14, 15, 16

Velazco v. State,
305 So. 3d 72 (Fla. 3d DCA 2020) 7, 8, 9, 16, 18

Statutes

§ 775.021, Fla. Stat. (2020)..... 7,8,9,10,11,12,13,15

§ 90.804, Fla. Stat. (2014).....14, 19

§ 812.014, Fla. Stat. (2005).....12, 14

STATEMENT OF THE CASE AND FACTS

Following a severe hit and run crash that occurred in Miami-Dade County, the State of Florida filed an information charging Petitioner Robert Velazco with leaving the scene of an accident with serious bodily injury (count one), driving under the influence causing serious bodily injury (count two), and driving under the influence causing property damage (count three). (R. 31-34). Alexander Rodas was the sole victim named in each count of the information. Concerning the DUI property damage charged in count three, the information alleged that Petitioner caused or contributed to causing "damage to the motorcycle" of Rodas. (R. 34). The events precipitating the charges are described below.

Facts of the Case

On June 4th, 2014, Petitioner ran through a red light, struck Alexander Rodas, and fled the scene. Events leading up to this accident began with a traffic stop of the victim's nephew, Miguel Castro. Miguel was pulled over and cited for driving a scooter with no headlights and having no valid driver's license. (T. 113). Rather than have the scooter towed, Miguel called his uncle, Alexander Rodas to pick him up and drive the scooter home. (T. 128-29). Rodas, the victim in this case, drove his car to meet Miguel. (T. 128-29).

The victim's wife was going to drive Miguel home in the car while the victim drove the scooter home. (T. 128-29).

Once the victim and his wife arrived to pick up Miguel, the victim mounted the scooter and Miguel entered the car. The victim drove in front of his wife. (T. 130). Their lane had the green light. (T. 140). As the victim lawfully proceeded through the intersection, Petitioner ran a red light and struck the victim. (T. 205). The victim flew through the intersection and landed on the ground. (T. 206). Petitioner did not stop to render aid, instead he fled the scene.

The victim was severely injured. He had blood "pouring from his mouth, his eyes, his ears his nose and…abrasions all over his body." (T. 207). His leg was broken and "turned in the opposite direction, that it shouldn't be turned." (T. 131, 207). He had to have a surgery on his leg because his femur was broken, detached, and separated. (T. 141). He had a rod permanently implanted in his leg. (T. 141). He also had reconstructive surgeries to his face. (T. 142). During his testimony, he referenced missing bones in his face. (T. 142). The victim lost teeth, his sense of smell and sense of taste. (T. 143-44). He experienced continuing back pain due to two lumbar discs in his back being injured. (T. 144). He was hospitalized for approximately one month. (T. 219).

The State presented evidence of the damage to the motorcycle through photos and eyewitness testimony. (T. 122, 197). Officer Diaz testified that he had stopped Miguel but once he left the intersection, he heard a "huge bang, which indicated…that it was an accident." (T. 115). He looked at the intersection and saw dense fog. (T. 115). Pictures of the scooter lying on the ground were introduced. (R. 121-22). There was testimony referring to 'pieces of the scooter" after the accident. (T. 122). Another officer observed "a moped just on the floor crashed and parts everywhere." (T. 197).

Officer Jerry Dodie testified that he responded to the accident scene. (T. 222). As he responded, Leticia Suri flagged him down. (T. 223). Suri was a passenger in Petitioner's car when he struck the victim. (T. 223). Suri gave Officer Dodie Petitioner's home address. (T. 224). Officer Dodie drove her to the address she provided. She positively identified Petitioner as the driver of the truck that struck the victim and fled the scene. (T. 225-26).

Petitioner's white pickup truck was parked at the house. (T. 226). The truck had visible damage to the front passenger corner. (T. 226). In the front passenger area, the glass was shattered. (T. 226). At trial, the State presented a certified vehicle registration that indicated Petitioner was the

owner of the damaged white pick-up truck on the date of the crime. (T. 237-39).

Petitioner was uninjured but exhibited signs of impairment. (T. 227, 236). He had slurred speech, bloodshot eyes, and an odor of alcohol on his breath (T. 236). Officer Richard Closius made contact with Petitioner. Officer Closius explained to Petitioner that he was investigating the reported crash and Petitioner's possible intoxication. Petitioner responded, "[W]hat fucking crash[?] The fucker hit me." (T. 252).

Officer Closius began his driving under the influence ("DUI") investigation and administered field sobriety exercises. (T. 254). The remainder of the DUI investigation took place at the police station. (T. 260). While Petitioner waited at the station he stated, "[F]uck that fucker, the fucker hit me. He deserved to get crushed. He doesn't know who he is messing with. I was an animal back in the day." (T. 262).

Petitioner submitted to a breathalyzer test and provided a urine sample. His first breathalyzer result indicated a .143 blood alcohol level content, and his second result indicated a .134 blood alcohol level content. (T. 296). Additionally, Petitioner's urine sample tested positive for cocaine. (T. 302). At a court hearing the following morning, Petitioner stated, "I made a mistake...[I] blacked out…I don't remember anything." (T. 265).

Trial Proceedings

In April 2017, the State moved to depose witness Leticia Suri and perpetuate her testimony under Florida Rule of Criminal Procedure 3.190(i). (R. 70-71). The State claimed that Suri was an essential witness to its case but had ongoing medical issues. (R. 70). Suri was undergoing dialysis three times per week and had been hospitalized twice in the previous month. (R. 70). Because of Suri's various health issues, the State was concerned about her availability for trial. (R. 70). The trial court granted the State's motion, and the record indicates that Suri's testimony was videotaped. (R. 70; T. 11-12).

Petitioner proceeded to trial in October 2017. Before the proceedings commenced, the State requested that the trial court allow Suri's videotaped testimony to be admitted into evidence based on her unavailability. (T. 8). The State provided the court with information on Suri's medical history, ongoing health issues, and her status as of that morning:

> [State]: [O]n October 10, [Suri] was at Kendall Regional. And she did have a surgery, and there [were] some complications with the surgery that she had. Okay. And, she had to undergo other treatment. On [October 17], she was again hospitalized, this time at Hialeah hospital. On [October 23], she was still at the hospital, but this time, at University of Miami hospital. On [October 24], we contacted the University of Miami, and we were told she had been released, and we have since spoken to her, including this morning, and she indicated that she had been sick since she was released, on [October 24]. And she said, . . . on [November 9],

> she has a . . . follow-up surgery, because of the swelling on her arm. And so, she's been having some complications with regards to that surgery. And I tried to get some more detail from her, but she's on medication, and she's on steroids, because of heavy swelling as of this morning. She goes to dialysis, three times a week, because of her kidney problems and I also have a record indicating that she's also had hospitalizations prior to that, in August, as well as complications and hospitalizations in September, because of her ongoing issues at this time.

(T. 8-9).

The trial court found that Suri was unavailable based on her ongoing medical issues and granted the State's request to admit her videotaped testimony:

> [Court]: I'm very familiar with the victim, this witness's unavailability to be here throughout the preparation of the case. She was set for deposition a number of times. Okay. And they tried to do it, on Tuesday or Thursday, because she had dialysis Monday, Wednesday or Friday. And I granted the motion to perpetuate her testimony, because the condition is ongoing, and she has been in an out of the hospital, every time this case is up for trial. And, I don't know which hospital, but I know she's in the hospital every time the case comes up and her condition is confirmed all of these previous times. I don't think there is a violation of the confrontation clause, which allows for the testimony to be perpetuated, and it was, at which time Mr. Chambrot had an opportunity to cross examine her.
> . . . .
> So the videotape will be played, and the cross-examination that's there will be available for the jury to see and hear. So, at this time, based on all the foregoing, and she has been in the hospital, as recently a week ago. And, she is looking at an additional surgery next week, she goes to dialysis three times a week, and is on steroids also, I'm going to find that she's unavailable and allow the video testimony to be submitted as

> evidence during the trial, and played for the jury, after you lay a predicate. So, that's granted over the defense objection.

(T. 11-12).

A jury found Petitioner guilty as charged. (R. 243). The trial court imposed a consecutive sentence of fifteen years' imprisonment for leaving the scene of an accident with serious bodily injury and five years' imprisonment for DUI serious bodily injury, and a one-year probation term for DUI property damage. (R. 249-55; 264-67).

Appeal to the Third District Court of Appeal

Petitioner appealed his judgment and sentence to the Third District Court of Appeal. *Velazco v. State*, 305 So. 3d 72 (Fla. 3d DCA 2020). He argued that his convictions for DUI serious bodily injury and DUI property damage as to the same victim violated the proscription against double jeopardy, and that the trial court reversibly erred in admitting Suri's perpetuated testimony. *Id.* at 75.

In determining whether Petitioner's convictions for DUI serious bodily injury and DUI property damage involving the same victim violated double jeopardy, the Third District applied the *Blockburger*[1] test codified in section 775.021(4)(a), Florida Statutes (2020). *Id.* at 78. The majority observed that

[1] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

the two offenses each contained an element the other did not and were thus considered separate offenses under the *Blockburger* test. It also determined that the two offenses did not fall under any of the three exceptions barring convictions for separate offenses outlined in section 775.021(4)(b)1.-3.[2]

Regarding the degree-variant exception set forth in section 775.021(4)(b)2., the majority noted that the exception was to apply narrowly, and that the only offenses that fell under the exception were "those that constitute different degrees of the same offense, as explicitly set forth in the relevant statutory sections." *Velazco*, 305 So. 3d at 79 (quoting *Valdes v. State*, 3 So. 3d 1067, 1076 (Fla. 2009)). The majority concluded that DUI serious bodily injury and DUI property damage were not degree-variants of the same offense because their "resultant injuries are entirely distinguishable and do not overlap, 'neither offense is an aggravated form of the other,' and the crimes do not constitute degree-variants." *Id.* at 81 (quoting *Valdes*, 3 So. 3d at 1077).

The Third District certified conflict with *Anguille v. State*, 243 So. 3d 410 (Fla. 4th DCA 2018), a decision from the Fourth District that held

[2] In his dissenting opinion, Judge Emas concluded that convictions for both DUI serious bodily injury and DUI property were barred by double jeopardy as the offenses fell under the degree-variant exception in section 775.021(4)(b)2. *Velazco*, 305 So. 3d at 82.

convictions for DUI serious bodily injury and DUI property damage were barred by double jeopardy because the offenses were degree-variants. *Velazco*, 305 So. 3d at 75. As for the perpetuation of Suri's testimony, the Third District determined that the trial court did not abuse its discretion in admitting the testimony into evidence. *Id.* at 81-82.

SUMMARY OF ARGUMENT

I. The Third District correctly determined that dual convictions for DUI serious bodily injury and DUI property damage as to the same victim did not violate the Double Jeopardy Clause because the offenses were not degree-variants of one another. The two offenses were not classified by degree in the DUI statute, and the plain language of the degree-variant exception in section 775.021(4)(b)2. indicates that the exception applies to offenses that are expressly designated by degrees within their respective statute. Additionally, because DUI serious bodily injury and DUI property damage result in wholly distinct injuries that do not overlap, neither offense can be considered an aggravated form of the other. Accordingly, this Court should approve the Third District's decision below and quash the Fourth District's decision in *Anguille v. State*, 243 So. 3d 410 (Fla. 4th DCA 2018).

II. The Third District correctly determined that the trial court did not abuse its discretion in allowing the State to admit Suri's perpetuated videotaped

testimony. Before the testimony was admitted, the State provided the court with Suri's medical history, ongoing medical issues, and current condition. (T. 8-9). The court properly exercised its discretion in finding Suri unavailable and permitting the State to introduce her testimony into evidence at trial.

ARGUMENT

I. The Third District correctly determined that dual convictions for DUI serious bodily injury and DUI property damage as to the same victim were not barred by the Double Jeopardy Clause because the offenses were not degree-variants of each other. This Court should quash the Fourth District's decision in *Anguille v. State* that reached the opposite conclusion and approve the Third District's decision below.

Standard of Review

Determining whether a double jeopardy violation occurred based on undisputed facts is a legal question that is reviewed de novo. *State v. Drawdy*, 136 So. 3d 1209, 1213 (Fla. 2014).

Merits

Petitioner contends that his convictions for DUI serious bodily injury and DUI property damage violate the Double Jeopardy Clause because they are two degrees of the same offense, and thus fall under the degree-variant exception barring convictions under section 775.021(4)(b)(2). The State does not agree. Because section 775.021(4)(b)(2)'s plain meaning makes clear that the degree-variant exception applies to offenses that are expressly

designated by degrees within their respective statutes, and because DUI serious bodily injury and DUI property damage are not aggravated forms of one another, the two offenses cannot be considered degree-variants. As such, this Court should approve the Third District's decision below reaching the same conclusion and quash the Fourth District's decision in *Anguille v. State*, 243 So. 3d 410 (Fla. 4th DCA 2018).

Section 775.021(4)(b)1.-3. has been described as setting forth exceptions to the *Blockburger* same-elements test, "because even if offenses are separate under that test, dual convictions are barred if the offenses meet the criteria in one of the exceptions." *State v. Maisonet-Maldonado*, 308 So. 3d 63, 67 (Fla. 2020) (quoting *State v. Florida*, 894 So. 2d 941, 945 n.2 (Fla. 2005), receded from on other grounds by *Valdes*, 3 So. 3d at 1077).

The degree-variant exception provided in section 775.021(4)(b)2. states that convictions for offenses are barred for "[o]ffenses which are degrees of the same offense as provided by statute." The plain language of this exception—as evinced by the terms "degree," and "as provided by statute"—indicates that the exception applies to those offenses that are designated by degree in their respective statutes (i.e., first-degree murder, second-degree grand theft, etc.). As this Court noted in *Valdes*:

> The statute itself creates an exception for crimes that "are degrees of the same offense as provided by statute." § 775.021(4)(b)(2), Fla. Stat. (1999) (emphasis added). By its very language, this exception is intended to apply narrowly. It prohibits separate punishments only when a criminal statute provides for variations in degree of the same offense, so that the defendant would be punished for violating two or more degrees of a single offense. *See Sirmons v. State*, 634 So.2d 153, 156 (Fla.1994) (Grimes, J., dissenting) (highlighting the phrase "as provided by statute" and concluding that the "Court's obligation is to apply the statute as it is written"). One example is the theft statute, which expressly identifies three degrees of grand theft and two degrees of petit theft. *See* § 812.014, Fla. Stat. (2005). Another is the homicide statute, which expressly identifies three degrees of murder, as well as multiple forms of manslaughter. *See id*. §§ 782.04, 782.07. Yet another is arson, which has two degrees. *See id.* § 806.01. It is in such cases, and only such cases, that the exception was intended to apply.

Valdes, 3 So. 3d at 1076 (quoting *State v. Paul*, 934 So. 2d 1167, 1177-78) (Cantero, J., specially concurring). Thus, the only offenses that fall under the degree-variant exception are those that constitute degrees of the same offenses "as explicitly set forth in the relevant statutory sections." *Id.* at 1077.

Applying that interpretation of section 775.021(4)(b)2. here, it is apparent that DUI serious bodily injury and DUI property damage are not degree-variants of one another. Neither of the two offenses are categorized by degree "*as explicitly set forth* in the relevant statutory sections." *Valdes*, 3 So. 3d at 1077 (emphasis added). *See* §§ 316.193(3)(c)(2) (defining DUI serious bodily injury) and 316.193(3)(c)(1) (defining DUI property damage), Fla. Stat. (2014).

Although the plain meaning of section 775.021(4)(b)2., as well as the overarching analysis in *Valdes*, indicate that the degree-variant exception should apply only to offenses expressly designated by degree, this Court has said in dicta that it is not necessary for the Legislature to use the word "degree" in defining the offense in order for the exception to apply. *Valdes*, 3 So. 3d at 1076. Instead, it has suggested, "[t]here are other statutory designations that can evince a relationship of degree—for example, when a crime may have aggravated forms of the basic offense." *Id.*

To the State's knowledge, however, this Court has never relied on that language to identify degree-variants not expressly provided by statute. In *State v. Marsh*, this Court held that convictions for DUI serious bodily injury and DWLS serious bodily injury did not fall under the degree-variant exception because the exception "only applies when a criminal statute itself provides for an offense with multiple degrees, which may be evidenced by the location within Florida Statutes and whether the offenses are aggravated forms of one another or are explicitly designated as degree variants." *State v. Marsh*, 308 So. 3d 59, 62 (Fla. 2020) (citing *Valdes*, 3 So. 3d at 1075-77). The Court found the same with vehicular manslaughter and fleeing or eluding causing serious injury or death in *State v. Maisonet-Maldonado*. 308 So. 3d at 70-71. This Court's language leaving open the prospect that section

775.021(4)(b)2. might be triggered by a statutory scheme that *implicitly* sets out differing degrees of an offense is therefore dicta.

Indeed, the only degree-variants this Court has identified are those contained in statutes that explicitly delineate—by the use of the word "degree" itself—various degrees of the offense. As noted above, *Valdes* pointed to three such categories of offenses: theft, homicide, and arson. *Valdes*, 3 So. 3d at 1076 (quoting *Paul*, 934 So. 2d at 1177–78 (Cantero, J., specially concurring)). Each of the statutes governing those categories expressly employs the term "degree." The theft statute, for instance, provides:

- "the offender commits *grand theft in the first degree*" where various circumstances are present, § 812.014(2)(a), Fla. Stat. (emphasis added);
- "the offender commits *grand theft in the second degree*" where other circumstances are present, *id.* § 812.014(2)(b) (emphasis added); and
- "[i]t is *grand theft of the third degree*" in the remaining circumstances, *id.* § 812.014(2)(b) (emphasis added).

The arson statute follows a similar pattern. It sets out the separate offenses of "arson in the first degree," *id.* § 806.01(1), and "arson in the

second degree," *id.* § 806.01(2). And the homicide statute likewise provides for "murder in the first degree," *id.* § 782.04(1)(a), "murder in the second degree," *id.* § 782.04(2), and "murder in the third degree," *id.* § 782.04(3). "It is in such cases, and only such cases, that the exception was intended to apply." *Valdes*, 3 So. 3d at 1076.

And it makes sense that section 775.021(4)(b)2. be limited in precisely this way. That law bars separate convictions for "[o]ffenses which are degrees of the same offense as *provided by statute*." § 775.021(4)(b)2., Fla. Stat. (emphasis added). The phrase "provided by statute" would have been an odd choice had the Legislature meant to bar separate convictions simply where multiple offenses were *listed* or *created* in the same statute, without resort to the explicit label "degree." And in 1988 when the Legislature adopted Section 775.021(4)(b)2., the theft, murder, and arson statutes were structured in the same way they are now—a fact the Legislature was aware of when it required that the "degrees" be "provided by statute." That makes it far more likely that the Legislature used the word "degrees" as a term of art mirroring its use of the identical term in those criminal statutes. That comports with the rule that Section 775.021(4)(b)2. is an "exception [that] is intended to apply narrowly." *Valdes*, 3 So. 3d at 1076.

In other words, a statute "provide[s]" for "degrees" of the same offense when it lists offenses delineated as "X of the first degree" and "X of the second degree." Under this "faithful textualist approach," *Velazco*, 305 So. 3d at 79, Petitioner's separate convictions were proper because Section 316.193 does not purport to create various "degrees" of DUI.

But even if this Court were to ask whether section 316.193 *implicitly* "provided" that DUI with serious bodily injury and DUI with property damage are degrees of each other, Petitioner still cannot prevail. Although DUI serious bodily injury and DUI property damage are located in the same, general DUI statute, the two offenses are not explicitly designated as degree variants, as noted above, and the offenses are not aggravated forms of one another. The two offenses each result in "separate, distinct, non-overlapping harms." *Velazco*, 305 So. 3d at 80. DUI property damage causes harm to property belonging to another, whereas DUI serious bodily injury causes harm to the person of another. "As the resultant injuries are entirety distinguishable and do not overlap, 'neither offense is an aggravated form of the other, and the crimes do not constitute degree-variants.'" *Id.* at 81 (quoting *Valdes*, 3 So. 3d at 1077).

The Third District correctly concluded that convictions for DUI serious bodily injury and DUI property damage as to the same victim do not fall under

the degree-variant exception of section 775.021(4)(b)2. and therefore do not violate double jeopardy principles. The offenses do not constitute degree-variants of one another because they are not expressly designated by degree by statute, and they are not aggravated forms of each other because they each result in wholly distinct injuries and do not overlap with each other. Accordingly, this Court should quash the decision of the Fourth District in *Anguille v. State* and approve the decision of the Third District below.

II. The Third District correctly determined that the trial court did not abuse its discretion in allowing the State to introduce the perpetuated testimony of a witness that was unavailable due to serious ongoing medical issues.

Standard of Review

A trial court's ruling on a motion to perpetuate testimony is reviewed under an abuse of discretion of discretion standard. *Reichmann v. State*, 966 So. 2d 298 310 (Fla. 2007); *Jackson v. State*, 575 So. 2d 181, 187 (Fla. 1991). And a court's "decision to admit prior testimony is reviewed for an abuse of discretion." *Muehleman v. State*, 3 So. 3d 1149, 1162 (Fla. 2009).

Merits

Petitioner contends that the Third District incorrectly concluded that the trial court did not abuse its discretion when it allowed the State to introduce the perpetuated videotaped testimony of a witness, Leticia Suri, at trial. He

claims that the State failed to establish Suri's unavailability before the court allowed the admission of her videotaped testimony.

As a threshold matter, this Court should decline to reach the perpetuation issue. In reviewing cases presenting certified or express and direct conflict, the Court has often exercised its discretion to decline to address non-conflict issues raised by the petitioner. *See, e.g.*, *Shine v. State*, 273 So. 3d 935, 935 n.1 (Fla. 2019) ("elect[ing] not to address" the non-conflict issue in the case); *Ponton v. State*, 73 So. 3d 70, 73 n.4 (Fla. 2011) ("As this issue was not a basis for exercising our conflict jurisdiction, we decline to address it."); *Battle v. State*, 911 So. 2d 85, 87 n.1 (Fla. 2005) ("We decline to address these claims as they are beyond the scope of the conflict issue."). Here, Petitioner has not alleged that the perpetuation issue is the subject of any conflict between the district courts—indeed, that issue did not even divide the panel below. *See Velazco, 305 So. 3d at 82* (Emas, C.J., dissenting) ("I concur with that portion of the majority opinion holding that the trial court committed no error in admitting at trial the perpetuated testimony of an unavailable witness."). Nor has Petitioner shown that the case involves any important legal question. Rather, he asks the Court to engage in sheer error correction of the district court's fact-bound application of settled law. And that issue is particularly unworthy of the Court's review

given that, as explained below, any purported error was harmless beyond a reasonable doubt.

Should this Court nevertheless reach the perpetuation issue, it should approve the Third District's decision. Before the trial court permitted the State to introduce Suri's testimony, the State provided a detailed overview of her medical history, ongoing health issues, and her condition on the day of trial. The court was familiar with Suri's medical history and aware of her ongoing health issues. As such, the court was well within its discretion in finding Suri unavailable for trial and allowing the State to introduce her testimony at trial.

Former testimony of a witness is admissible in a criminal trial as an exception to hearsay if the witness is unavailable and the defendant had an "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." § 90.804(2)(a), Fla. Stat. (2014); *State v. Roberts*, 174 So. 3d 374, 376 (Fla. 3d DCA 2014). One circumstance in which a witness is considered unavailable is when the witness is "unable to be present or to testify at the hearing . . . because of then-existing physical or mental illness or infirmity . . . ." § 90.804(1)(d), Fla. Stat.

Determining whether an illness or infirmity exists to render a witness unavailable "is a question of preliminary fact for the trial court, proven by a preponderance of the evidence." *Partin v. State*, 82 So. 3d 31, 43 (Fla. 2011).

However, a trial court may rely on a party's factual assertions in making its determination if the assertions are not in dispute. *See Richardson v. State*, 182 So. 3d 918, 920 (Fla. 1st DCA 2016) ("The trial court was entitled to rely on the prosecutor's assertions to make its determination as to witness unavailability, particularly given the absence of objection or refutation by the defense."); *see also* Charles W. Ehrhardt*, Florida Evidence* § 804.1 (2021 ed.) ("When there is a dispute as to whether the declarant is able to be present or testify at trial, the trial judge must make a preliminary factual finding pursuant to section 90.105(1) to determine whether necessary illness or infirmity exists.").

Courts have made determinations of witness unavailability based on medical conditions that were less severe (and less detailed) than the witness's health issues in this case.

In *Partin*, this Court found that the trial court did not abuse its discretion in finding a pregnant witness who lived in California unavailable for trial because the witness was advised by her obstetrician not to travel by airplane. *Id.* at 43. This Court noted that "though there was no specific evidence of complications attending [the witness's] pregnancy, the trial court relied on advice from her obstetrician and determined that the limitation on her travel was attributable to the pregnancy." *Id.*; *see also Fisher v. Perez*, 947 So. 2d

649-50 (Fla. 3d DCA 2007) (in denying defense counsel's motion for continuance, trial court accepted counsel's representation that witness was unavailable to testify due to pain and complications from recent surgery and also being medicated); *Richardson*; 182 So. 3d at 920 (witness who recently gave birth visited doctor on day of trial and was experiencing unspecified pain).

In this case, the State provided the trial court with much more detail as to the witness's physical infirmity than what was provided in *Partin*. The State outlined Suri's medical history and ongoing health complications to the trial court. The State informed the court about her recent hospitalizations resulting from complications associated with a surgery and that she underwent dialysis three times per week. The State explained that they had spoken to Suri on the day of trial, and that she said she had been feeling sick since her most recent discharge from the hospital. Additionally, Suri was medicated and taking steroids because of heavy swelling on her arm on the day of trial. The State told the court that a follow up surgery was scheduled to address her swollen arm. And the court also indicated that it was intimately familiar with Suri's medical history and ongoing health issues.

The information provided by the State was sufficient to establish Suri's unavailability for trial. Petitioner, citing *Arnold v. State*, 889 So. 2d 215, 216

(Fla. 2d DCA 2004), suggests that the State's representations about Suri's status on the morning of trial were insufficient to establish her unavailability because they were unsworn. (IB. 18). However, there was no evidence or information about Suri's status offered by Petitioner that contradicted or refuted the State's assertions. Instead, Petitioner appeared to rely on the State's assertions when he informed the trial court that Suri is "feeling better now, and her next appointment is early November . . . ." (T. 12). Absent any dispute by Petitioner regarding Suri's status, the trial court was entitled to rely on the State's factual assertions. *See Richardson*, 182 So. 3d at 920. The trial court did not abuse its discretion in finding her unavailable and allowing the State to introduce her perpetuated testimony.

Even if the trial court erred in finding Suri's unavailable, any error was harmless beyond a reasonable doubt. *See Partin*, 82 So. 3d at 43 (if trial court erred in finding witness unavailable, any error was harmless beyond a reasonable doubt since witness's testimony was cumulative); *Hojan v. State*, 3 So.3d 1204, 1210 (Fla. 2009) ("[W]here the evidence introduced in error was not the only evidence on the issue to which the improper evidence related, the introduction can be harmless.").

Here, Suri's testimony was relevant for establishing Petitioner as the driver of the truck that struck the victim and left the scene, as well as his

intoxication. However, Petitioner made multiple statements that amounted to admissions to driving the vehicle ("The fucker hit me."; "[F]uck that fucker, he deserved to get crushed."; I made a mistake . . . [I] blacked out . . . I don't remember anything." (T. 252; 262; 265)). And police observed a recently crashed vehicle registered in Petitioner's name parked in his driveway (T. 237-39). Additionally, any observations of intoxication by Suri were cumulative to the observations of impairment by multiple law enforcement officers. Petitioner exhibited slurred speech, bloodshot eyes, and an odor of alcohol. (T. 227; 236). Finally, Petitioner's high blood alcohol content was reflected by the results of his breathalyzer tests: .143 and .134. (T. 296). In light of the additional evidence presented concerning Petitioner's operation of the vehicle that struck the victim as well as his intoxicated state, any error in admitting Suri's testimony was harmless beyond a reasonable doubt.

CONCLUSION

This Court should approve the decision of the Third District below and quash the Fourth District's decision in *Anguille v. State*, 243 So. 3d 410 (Fla. 4th DCA 2018).

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

MICHAEL W. MERVINE
Criminal Appeals Bureau Chief—Miami
Florida Bar No. 0692131

/s/ Asad Ali
ASAD ALI
Assistant Attorney General
Florida Bar No. 111887
Office of the Attorney General
One SE Third Avenue, Suite 900
Miami, FL 33131
(305) 377-5441
CrimAppMia@myfloridalegal.com
Asad.Ali@myfloridalegal.com
Counsel for the State of Florida

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing answer brief has been furnished by email to counsel for Petitioner, Michael Mirer, at Michael@MirerLaw.com, on December 27, 2021.

/s/ Asad Ali
ASAD ALI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I certify that this answer brief complies with the font and word limit requirements set forth in Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B). This answer brief was prepared in Arial 14-point font and contains less than 13,000 words.

/s/ Asad Ali
ASAD ALI
Assistant Attorney General