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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2170

TAVARES DAVID CALLOWAY,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

REPLY BRIEF OF APPELLANT / ANSWER BRIEF OF CROSS-APPELLEE

SCOTT W. SAKIN, P.A.
Private Court Appointed Counsel for
Appellant / Cross-Appellee Calloway
1411 NW North River Drive
Miami, Florida 33125
sakinlaw@hotmail.com
(305) 545-0007

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." All other citations are as in the initial brief. Specific points raised in the initial brief but not addressed in the reply brief are not waived.

ARGUMENT

I

THE COURT ERRED IN LIMITING DEFENSE COUNSEL'S VOIR DIRE QUESTIONING OF PROSPECTIVE JURORS, WHERE COUNSEL'S QUESTIONS APPROPRIATELY PROBED POSSIBLE JUROR BIAS THAT COULD HAVE IMPACTED THE JUROR'S ABILITY TO FAIRLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

In our Initial Brief, we maintained that the defense was denied an adequate voir dire and an impartial jury because the trial judge improperly restricted defense counsel's ability to uncover possible pre-conceived notions and juror biases about certain aggravating circumstances and obtain assurances that the jurors would fairly weigh the aggravating and mitigating circumstances and consider both sentencing possibilities. (Initial Br. p. 44-49). In response, the State maintains that the trial court's limitation of voir dire was appropriate because defense counsel was endeavoring to pre-try the case in his questioning. (Answer Br. p. 64-65). The

State's contention is unsupported by the record and its proffered distinction of the authorities relied upon by the defense for its position is unavailing. (T. 3219, 3226, 3231-32).

First, it is important to remember the context in which the questioning of the jurors occurred in this case. Over strenuous defense objections, the trial judge severely limited defense counsel's voir dire when she held that defense counsel would not be permitted to ask the jurors about their reactions and attitudes concerning certain significant aggravating circumstances in Florida law, such as HAC and CCP.[1] (T. 3238, 3247, 3265, 3277). Inexplicably, the court later took a partial turn and adopted a slightly different position when it ruled that defense counsel could ask the jurors about their attitudes concerning the number of homicides that occurred in this case and the pecuniary gain aggravator. As a consequence of and in compliance with these rulings, the voir dire that followed was silent in the areas precluded by the trial court. Issue I in our brief is directed primarily at this significant limitation, as well as sporadic trial court rulings throughout voir dire that limited questioning relating to juror bias.

[1] This Court has recognized that HAC and CCP are significant aggravators in Florida's death penalty scheme because juries frequently accord them great weight. See *Zommer v. State*, 31 So. 3d 733, 751 (Fla. 2010) and *Morton v. State*, 995 So. 2d 233, 243 (Fla. 2008).

The State relies upon this Court's opinion in *Franqui v. State*, 699 So. 2d 1312 (Fla. 1997), in support of its position that the trial court correctly limited defense counsel's voir dire. In *Franqui*, this Court generally discussed the right of a criminal defendant to ferret out jurors' pre-conceived attitudes about legal doctrines and to inquire about how those attitudes might impact the jurors' ability to perform their duties. This Court noted that the defendant's right of inquiry does not extend to actually asking a juror how the juror would resolve an issue in the case based upon those attitudes. As a consequence, the *Franqui* court determined that defense counsel went too far when he asked: "Do you feel that the defendant's young age would be a factor you would take into effect, take into your mind in deciding whether or not to impose the death penalty?" The question was deemed improper because it sought an assurance from the juror that he *would* factor the defendant's age as a specific mitigating circumstance.

Defense counsel sought no such assurances from the jury in this case regarding any specific aggravating or mitigating circumstance. Defense counsel simply sought to ask the jurors whether their attitudes or thoughts relating to certain circumstances such as the charges, which involved five homicides, HAC or CCP were so strong that they would be unable to weigh the aggravators and mitigators in this case, consider both applicable penalties and make a decision. In other words, could the jurors follow the law notwithstanding their feelings about those

circumstances. That line of inquiry, precluded by the trial court's limitation, did not violate the precepts of *Franqui*.

The State also cites portions of the transcript where it claims that defense counsel sought to pre-try the case and therefore was properly limited by the trial court. For brevity's sake, we'll examine one such exchange cited by the State.

> Mr. Smith [defense counsel]: Sorry for the interruption. Ms. Popham let me clarify some legal standards that we have to apply. You know there is five bodies in this case. Five homicides.
>
> Juror: Yes.
>
> Mr. Smith: Given that information standing alone, can you – given the fact that there are five people that have been killed, can you still fairly weigh the aggravators and the mitigators and come up with a recommendation of life or death or is your only consideration at that point death?
>
> Juror: No. Like I said, I think I would have to see the case and what happened. Whether it was just a simple death – I should say a death that was not – the victims didn't suffer versus death. If the person did suffer. If they did, I would lean much more towards the death penalty.
>
> Mr. Smith: If the victims did suffer and they were five people not this case – I'm talking to you –
>
> Ms. Dechovitz [the prosecutor]: Judge?
>
> The Court: Sustained.
>
> Mr. Smith: You would want to know more about the suffering?
>
> Juror: Right. It is was I would lean more towards the death penalty.
>
> Mr. Smith: The question is if there is five people involved, there is five victims, if that is all you know about the case, can you still fairly

> weigh the aggravators and mitigators and come up with a recommendation of life or death and consider life or death or –
>
> Ms. Dechovitz: Objection again, judge.
>
> The Court: Sustained.
>
> Mr. Smith: Or does there come a point where you cannot consider life in a five homicide case?
>
> Ms. Dechovitz: Objection. You sustained and he continued the question.
>
> The Court: Sustained. You may rephrase, Mr. Smith.

(T. 3662-63).

In this exchange, cited by the State as an example of "pre-trying" the case, defense counsel was simply asking whether there was anything about the charges in this case, five homicides, that would cause the juror to be unable to follow the sentencing procedures required by Florida law. Questioning about the juror's sensitivities concerning the charges likely occurs in every criminal prosecution in Florida that involves crimes which might inflame juror sentiment. The exchange quoted above did not seek to "pre-try" the case; defense counsel simply sought assurances from the juror that notwithstanding the charges in this case, the juror would still be able to follow Florida law. As such, the questioning was clearly proper and it was error for the trial court to sustain the State's objection and limit the inquiry. *Lavado v. State*, 492 So. 2d 1322 (Fla. 1986) and *Pait v. State*, 112 So. 2d 380 (Fla. 1959).

Lastly, with regard to the authorities relied upon by the defense in support of our claim that the trial court's limitation of voir dire was error, the State misrepresents the holdings in those cases or barely makes an effort to distinguish them.

The State claims that this Court's decision in *Geralds* v. *State*, 111 So. 3d 778 (Fla. 2013), merely stands for the proposition that defense counsel was not ineffective for failing to object to the prosecutor's listing of aggravators and mitigators in the case. In fact, the prosecutor in *Geralds* went further. The prosecutor commented on a number of aggravating circumstances, including HAC, CCP and pecuniary gain, discussed a number of mitigating circumstances and then asked jurors whether they could weigh the penalties in light of evidence of that nature. This Court found nothing impermissible about the procedure.

In this case, defense counsel wanted to do precisely the same thing that the prosecutor was permitted to do in *Geralds*, but was prevented from doing so by the trial court. The State's claim that defense counsel wanted "to ask the venire what recommendation they would return based on [the aggravators and mitigators]" is simply not borne out by the record.

With regard to the cases relied upon by the defense in our Initial Brief, *Campbell-Eley v. State*, 718 So. 2d 327 (Fla. 4th DCA 1998), *Moses v. State*, 535 So. 2d 350 (Fla. 4th DCA 1988) and *Johnson v. State*, 590 So. 2d 1110 (Fla. 2nd DCA

1991), the State dismisses their holdings because "the trial courts refused to permit the defendant to ask about whether the venire could be fair if they heard certain facts that were not legally relevant to whether the defendants were guilty." (Answer Br. p. 81). While we are not completely sure what the State is intending to say by this "distinction," it appears that it can be mostly aptly described as a distinction without a difference.

In *Campbell-Eley, Moses* and *Johnson*, the defendants' convictions were reversed because the trial courts in their respective cases refused to allow defense counsel to question jurors about their attitudes and biases concerning issues that were likely to be elicited in the evidence, such as the uncharged death of a fetus or the defendant's prior record. Although those factual issues did not strictly involve elements of the crimes charged, the courts issuing the decisions in those cases determined that the limitation of voir dire on those significant issues demonstrably prejudiced the defendant's ability to select a fair and impartial jury.

The prejudice to the defendant in this case is more profound. Defense counsel also sought to question the jurors about their attitudes and biases about issues that did not involve elements of the crimes charged, such as HAC and CCP, but were nevertheless highly relevant in assessing whether each juror possessed the ability to follow the law on a much more important matter - the process in which it is determined whether the defendant lives or dies. The court's improper restriction of

counsel's voir dire deprived the defendant of his right to a fair and impartial jury, which, under the authority of *Lavado*, *Campbell-Eley*, *Moses*, and *Johnson*, compels reversal.

II

THE TRIAL COURT ERRED IN LIMITING THE TESTIMONY OF THE DEFENDANT'S EXPERT, DR. RICHARD OFSHE, WHERE OFSHE WAS PREVENTED FROM TESTIFYING ABOUT THE FACTS HE REVIEWED AND RELIED UPON AS PART OF HIS METHODOLOGY IN EVALUATING AND DESCRIBING THE HALLMARKS OF A FALSE CONFESSION.

In our Initial Brief, we argued that the trial court erred in severely restricting the testimony of the defense's expert on false confessions, Dr. Richard Ofshe. (Initial Br. p. 51-58).[2] The trial court had refused to permit Dr. Ofshe to discuss the facts he relied upon to formulate his opinions, including the testimony of witnesses he reviewed or had observed, and refused to allow Dr. Ofshe to describe his analysis/comparison of the details of the defendant's confession with objectively known facts developed in the police investigation. That comparison, in Dr. Ofshe's view, was essential to helping the jury to develop and understand significant factors for consideration in deciding whether the confession was true or false. (T. 10400-17). Given that the defendant's confession was the heart of the State's case against

[2] This denied the Defendant's right to meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986).

the defendant, the court's restriction of Dr. Ofshe's testimony was particularly harmful. In response, the State mis-characterizes the defendant's argument and falsely claims that the trial court merely precluded Dr. Ofshe from offering his opinion as to whether the defendant's confession was true. (Answer Br. p. 69). In fact, the defense never sought to have Dr. Ofshe give his opinion about the truth or falsity of the defendant's confession. After generally outlining the hallmarks of a false confession, Dr. Ofshe then simply wished to highlight for the jury the evidence he believed was significant for the jury to consider when it engaged in its analysis of the defendant's confession. (T. 10400-17). The trial court, however, would not permit Dr. Ofshe to discuss any of the evidence that he considered relevant to that analysis. Instead, the court considered the "facts" to be for the jury to determine and not for discussion by an expert. (T. 10400, 10404, 10411, 10417). That ruling was error. It is clearly within the expert's purview to assess the facts in a case, apply the knowledge gleaned from his expertise and provide the jury with an opinion that would aid the jury in its analysis of the case. The jury is free to reject the expert's opinion if it disagrees with the expert's view of the facts. But, the expert is nevertheless free to discuss the facts. That was not the case in the trial below.

The State also contends that the trial court was correct in limiting Dr. Ofshe's testimony because the defense sought to have Dr. Ofshe serve "as a conduit of inadmissible evidence." (Answer Br. p. 70). Again, the State's charge is false.

Dr. Ofshe sought to contrast portions of the defendant's confession with other facts that were developed by the police in their investigation. The confession and the fruits of the police investigation were largely heard by the jury.[3] Even if some of the information relied upon by Dr. Ofshe was not actually admitted in evidence, that would not legally prevent Dr. Ofshe from describing for the jury the information he relied upon to formulate his opinions. Section 90.704, Florida Statutes expressly permits an expert to rely upon facts or data gleaned by the expert prior to trial.

In truth, it was the State who used its cross examination of Dr. Ofshe to present inadmissible information to the jury. On at least two occasions, the State questioned Dr. Ofshe concerning his knowledge of representations by the attorney for co-defendant Clark, made as part of a proffer by the attorney to the police regarding Clark's involvement in the offense. Although plainly double hearsay, the State was permitted by the court to question Dr. Ofshe about the representations and to ask Dr. Ofshe about their impact upon his opinion. (T. 10888-900), (Initial Br. p. 74-79).

The trial court's crippling limitation of Dr. Ofshe's testimony was contrary to Florida and federal constitutional law and dealt a particularly damaging blow to the

[3] In its brief, the State spends considerable effort discussing a demonstrative exhibit that the trial court refused to allow the defense to use. (Answer Br. p. 69-71). That exhibit is irrelevant to resolution of this issue. The defense is not challenging the propriety of the court's ruling regarding the demonstrative exhibit, but instead the significant limitation of Dr. Ofshe's testimony, which went well beyond his discussion of the evidence he considered in his analysis.

defendant's defense at trial, given the fact that the defendant's confession was central to the State's case against the defendant. A new trial for the defendant is required.

IX

IN PRECLUDING DEFENSE COUNSEL FROM ARGUING THAT THE STATE HAD FAILED TO PROVE THE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, THE COURT IMPROPERLY RESTRICTED DEFENSE COUNSEL'S CLOSING ARGUMENT AND DENIED THE DEFENDANT A FULL AND FAIR SENTENCING HEARING.

In our Initial Brief, we maintained that the defendant was denied a fair sentencing hearing pursuant to Florida and federal constitutional law when the trial judge refused to allow defense counsel to argue that the evidence introduced at trial was insufficient to prove certain aggravating circumstances beyond a reasonable doubt. (Initial Br. p. 91-94). For example, defense counsel was precluded from arguing to the jury that the evidence was insufficient to establish the HAC and CCP aggravating circumstances beyond a reasonable doubt. Defense counsel's argument was, in part, based upon his view that the facts primarily relied upon by the State to support those aggravators came from the defendant's confession, which was

uncorroborated on those points.[4] (T. 14194, 14201, 14206). In response, the State argues that the trial court correctly limited defense counsel because the proffered closing was nothing more than a "lingering doubt" argument that was inconsistent with the evidence. (Answer Br. p. 91). The State is wrong on both counts.

The State's reliance upon *Franqui v. State*, 965 So. 2d 22 (Fla. 2007) is misplaced. In *Franqui*, the defendant claimed that his trial lawyer had been ineffective for failing to relitigate the suppression of his confession during his resentencing (penalty phase) trial. This Court found that trial counsel was not ineffective for failing to raise the issue again. Noting that the proffered evidence would presumably have been used only to cast doubt about the admissibility of the defendant's confession to establish guilt, this Court found the challenge not to be relevant to sentencing issues.

Unlike the situation in *Franqui*, defense counsel did not seek to relitigate the admissibility of the defendant's confession nor imply that a death sentence was inappropriate due to "lingering" questions or doubt about the defendant's guilt. Instead, defense counsel simply sought to argue that the evidence introduced at trial was insufficient to establish beyond a reasonable doubt the aggravating circumstances proffered by the State to support a death recommendation. Such an

[4] Specifically, defense counsel referred to the length of time the defendant was in the apartment and the order in which the fatal shots were fired.

argument is clearly within the defense function in a capital sentencing proceeding and is absolutely relevant and germane to the function the jury is asked to undertake during their penalty deliberations. *Braddy v. State,* 111 So. 3d 810, 854 (Fla. 2012) and *Way v. State*, 760 So. 2d 903 (Fla. 2000).

Per the court's instructions, the jury is asked to find whether aggravating circumstances have been proven beyond a reasonable doubt, whether mitigating circumstances have been established by the greater weight of the evidence, and whether, after weighing the established aggravating and mitigating circumstances, a death or life recommendation is appropriate.[5]

Here, defense counsel's remarks were directed at the jury's first function - ascertaining the sufficiency of evidence to sustain statutory aggravating circumstances. The circumstances that were the focus of the argument, HAC and CCP, had not been previously resolved by the jury when the defendant was found guilty of first degree murder. Defense counsel was therefore not trying to relitigate or have the jury re-think its decision regarding the defendant's guilt of the crime charged. He was simply urging the jury to conclude that the State had not met its burden of proving beyond a reasonable doubt certain separate and distinct aggravating circumstances. It was plainly error for the trial court to have restricted defense counsel's argument in this essential area.

[5] Fla. Std. Jury Instr. (Crim.) 7.11

Lastly, the State claims that the trial court correctly limited defense counsel's argument because the evidence was inconsistent with defense counsel's argument. For support, the State cites the fact that the defendant's confession was corroborated by the discovery of Clark's fingerprints at the scene.[6] In making this argument, the State falls into the same trap that it attributes to the defendant. The discovery of Clark's fingerprints at the apartment was certainly relevant to the defendant's *guilt of the crimes charged*, to the extent that it corroborated the defendant's confession, but it did nothing to undermine the defendant's argument that as to the facts supporting the HAC and CCP aggravating circumstances, the defendant's confession was essentially uncorroborated.[7]

The trial court's limitation of defense counsel's closing argument was particularly harmful in this case. The jury recommended death in this case by a vote of only 7-5.[8] Given the great weight that is generally accorded the HAC and CCP

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[6] In his confession, the defendant stated that the charged crimes were committed with Clark. (T. 6160-81).

[7] The State also cites Strachan's testimony for its claim that the defendant's confession was corroborated by other evidence. With regard to the evidence supporting the HAC and CCP aggravators, Strachan only provided imprecise testimony regarding the time that elapsed between his first observation of men going into the apartment/crime scene, and their departure. (T. 6685). He provided no other testimony regarding the other matters raised by defense counsel in his proffered argument.

[8] The court implied that if the jury returned a life recommendation, the court would have imposed a life sentence. (T. 13291).

aggravators,[9] defense counsel should have been given a full and fair opportunity to present defense arguments that pertained to those two significant aggravators. That did not happen. Defendant was denied due process under Florida and federal constitutional law. As a consequence, the defendant's death sentence must be reversed.

X

THE TRIAL COURT IMPROPERLY LIMITED THE DEFENDANT'S ADMISSION OF MITIGATION EVIDENCE IN THE PENALTY PHASE WHEN IT REFUSED TO ADMIT THE DEFENDANT'S FATHER'S MEDICAL RECORDS, WHICH DEMONSTRATED THAT THE FATHER HAD BEEN DIAGNOSED WITH SCHIZOPHRENIA AND POST-TRAUMATIC STRESS DISORDER, DIAGNOSES THAT WERE RELEVANT TO THE JURY'S FULL UNDERSTANDING OF THE DEFENDANT'S ABUSIVE CHILDHOOD, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In its response to our claim raised in Issue X, the State misrepresents the defendant's position. In its brief, the State argues that our position is that "the Eighth Amendment precludes the exclusion of any evidence a defendant wants to present in mitigation." (Answer Br. p. 95). In fact, that has never been our position. Instead, we correctly maintained that the Eighth Amendment forbids exclusion of any

[9] See *Zommer v. State*, 31 So. 3d 733, 751 (Fla. 2010) and *Morton v. State*, 995 So. 2d 233, 243 (Fla. 2008).

mitigating factor from consideration by the jury in the capital sentencing scheme. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Consistent with that principle, we argued that it was error for the trial court to have excluded the medical records of the defendant's father, Solomon Calloway, which contained information indicating that the father had been diagnosed with schizophrenia and post-traumatic stress disorder (PTSD) by the Veteran's Administration. The latter diagnosis resulted from the father's service in Vietnam. (T. 13565-77).

The State maintains that the records were correctly excluded from consideration by the trial court because they were relevant to the father's character and not the defendant's. That position is patently absurd.

The records and diagnostic information contained therein were highly relevant to the jury's understanding of the abusive conditions in which the defendant was raised. The defendant's mother, Shirley Hill, provided harrowing testimony regarding the defendant's home life, including a detailed description of Solomon's violent behavior, which frequently occurred in the defendant's presence when the defendant was very young. (T. 13871-77, 13880-81, 13894-95). Standing alone, the jury may have had reason to question Hill's account of the abuse suffered at the hands of Solomon Calloway, given Hill's significant drug habit and total disregard of her children's welfare when the defendant was a child. However, Solomon Calloway's VA records, containing the dual diagnosis of schizophrenia and post-

traumatic stress disorder, corroborated Hill's account and shed descriptive light on Solomon's violent conduct in the home which was witnessed by the defendant. Given that evidence of the defendant's abusive childhood clearly constitutes compelling mitigation, the VA records, which tended to prove circumstances of clear mitigating value, were relevant to mitigation and should have been admitted. *Tennard v. Dretke*, 124 S. Ct. 2562 (2004); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990).

The State nevertheless argues that the records were properly excluded because there was no connection established between Solomon Calloway's diagnosed illness and the defendant's abusive childhood. (Answer Br. p. 95). As noted earlier, Solomon Calloway served in Vietnam. The defendant witnessed Solomon's abusive behavior during his formative years, which occurred just a few years after Solomon's return from combat. Although Solomon was not diagnosed with PTSD until 2002, that did not mean that the illness and its debilitating effects and consequences were not present during the defendant's childhood, particularly when the trauma that likely contributed to the illness had occurred a few years prior to the defendant's birth. Given the significant media attention given to PTSD-stricken veterans returning from conflicts around the world, juror awareness regarding the illness and

its consequences has been elevated.[10] Under those circumstances, the jury should have been given the opportunity to weigh the value of the VA records and accorded them the mitigating value it saw fit. The trial court's exclusion of the records improperly removed mitigating evidence from the jury's consideration. In this case, where the jury recommended death by the slimmest of margins, 7-5, the unconstitutional restriction of mitigating evidence constituted harmful error compelling a reversal of the defendant's death sentence.

XII

THE TRIAL COURT CORRECTLY ADMITTED DR. OFSHE'S TESTIMONY WITHOUT A FRYE HEARING.

The State contends that the trial court erred in admitting Dr. Ofshe's testimony regarding false confessions without first holding a *Frye* hearing for two reasons: 1) this Court has categorically held that Dr. Ofshe's testimony on influences that cause false confessions may not be admitted without a *Frye* hearing, and 2) had the *Frye* hearing been held, the court would have realized that this case did not present an issue that required expert testimony. The State is wrong on both accounts.

In support of its first point the State chiefly relies upon *Williamson v. State*, 994 So. 2d 1000 (Fla. 2008), for the proposition that this Court has categorically

[10] At present, PTSD affects over 7 million American adults. National Institute of Mental Health (2014).

held that a *Frye* hearing must be held before testimony offered by Dr. Ofshe may be admitted. In *Williamson*, the State called Dr. Ofshe to testify that a cooperating witness was displaying a pattern of behavior that was consistent with the actions of someone who had been threatened or terrorized.[11] The defendant contended that his lawyer was ineffective for failing to request a *Frye* hearing before Dr. Ofshe's testimony was admitted. The trial court denied the defendant's claim without an evidentiary hearing. This Court remanded the case to the trial court for an evidentiary hearing regarding counsel's effectiveness on the admissibility of Dr. Ofshe's testimony. This Court noted that Dr. Ofshe's testimony regarding the witness' behavior was syndrome testimony that should have been tested regarding whether it was generally accepted by authorities in the field.

Unlike the *Williamson* case, Dr. Ofshe was not called by the defendant to provide syndrome testimony. Instead, he was called as an expert to provide testimony on the phenomenon of false confessions, which included information on how to recognize it and the factors the jury should consider in deciding whether the confession in this case was true or false. (T. 10263, 10290, 10296-97, 10304, 10308, 10311-13, 10316, 10319-21, 10323, 10326-31, 11342-43). Dr. Ofshe was not alone in his expert opinion regarding the notion that existence of false confessions is generally accepted in the scientific community. The State's expert on this issue, Dr.

[11] The State's position was that the defendant had threatened the cooperating witness.

Michael Welner, agreed with Dr. Ofshe that false confessions do occur and are generally proven when the defendant is subsequently exonerated.[12] (T. 11639-40, 11720, 12058).

Per *Frye*, a hearing is required when it is necessary to determine if expert testimony is deduced from a scientific principle that has gained general acceptance in the field.[13] According to the two experts who testified in this case on behalf of the parties to this cause, and the significant scientific study upon which they relied,[14] there is little disagreement that the phenomenon of false confessions exists and is accepted by authorities in the field in which it belongs. The trial court was therefore well within her discretion to admit the testimony of Dr. Ofshe without the necessity of first conducting a *Frye* hearing. See *United States v. Hall*, 93 F. 3d 1337 (7th Cir. 1996) and *Boyer v. State*, 825 So. 2d 418 (Fla. 1st DCA 2002).

[12] The National Registry of Exonerations summarized 873 exonerations in the United States over a 23-year period and found that false confessions occurred in 15% of those cases. Gross & Shaffer, National Registry of Exonerations, Exonerations in the United States, 1989-2012 (June 2012).

[13] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

[14] Many of the studies and authorities cited by and relied upon by Drs. Ofshe and Welner are discussed in a new law review article: Cutler, Brian L. and Findley, Keith A. and Loney, Danielle, Expert Testimony on Interrogation and False Confession (May 13, 2014). UMKC Law Review, Vol. 82, No. 3, 2014; Univ. of Wisconsin Legal Studies Research Paper No. 1256.

Regarding its second point, the State argues that had a Frye hearing been held, the court would have realized that expert testimony was not necessary because Dr. Ofshe testified that the police tactics were not the cause of the confession in this case; the defendant's deal with Sgt. Law was. (Answer Brief p. 99).

The State's argument must fail. First, it has little to do with *Frye*. *Frye* deals with whether an expert's opinion testimony is deduced from scientific principles that are generally accepted by the scientific community of which the expert is a part. Instead, the State essentially contends that Dr. Ofshe's expert testimony regarding police tactics that may lead to false confessions was not relevant because those tactics did not lead to the defendant's confession in this case. The State's argument grossly misrepresents Dr. Ofshe's testimony.

Dr. Ofshe testified that evidence ploys, such as a false claim by police regarding the existence of incriminating evidence, and the police use of psychologically coercive motivators are important ingredients in the production of a false confession. (T. 10319-31). Per Dr. Ofshe, both of those tactics existed in this case. Regarding an evidence ploy, there is little question that the police lied to the defendant when they told him that his fingerprints were found at the scene. (T. 10448-49). Dr. Ofshe also testified that the police, through Detective Law, utilized a very powerful coercive motivator; the threat that death or harm would come to the defendant's family and girlfriend if he did not confess. (T. 10450-52, 10685, 11354-

55). Ofshe found it significant that the defendant agreed to confess minutes after Law utilized the powerful motivator when he was alone with the defendant. (T. 10474-75, 10687-89).

Contrary to the State's argument, the record clearly demonstrates that Dr. Ofshe's expert testimony concerned a scientific principle that is generally accepted by authorities in the field and that the evidence at trial amply demonstrated that his testimony was germane and helpful to resolution by the jury of significant issues in this case. The trial court therefore properly exercised her discretion in permitting Dr. Ofshe to provide expert testimony without first testing that testimony under the *Frye* standard.

CONCLUSION

For the foregoing reasons, the defendant's convictions must be reversed and the case remanded for a new trial. Alternatively, the defendant's sentence of death must be vacated and the case remanded for new sentencing proceeding before a jury.

Respectfully Submitted,
SCOTT W. SAKIN, P.A.
Private Court Appointed Counsel for
Appellant / Cross-Appellee Calloway
1411 NW North River Drive
Miami, Florida 33125
sakinlaw@hotmail.com
(305) 545-0007

BY: __/S SCOTT W. SAKIN_____
SCOTT W. SAKIN
Florida Bar No. 349089

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief and Cross-Appellee's Answer Brief was forwarded by e-mail to Sandra S. Jaggard, Esq., the Attorney General's Office, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, capapp@myfloridalegal.com, sandra.jaggard@myfloridalegal.com, this 29th day of October, 2014.

BY: __/S SCOTT W. SAKIN_____
SCOTT W. SAKIN
Florida Bar No. 349089

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is composed in 14 point Times New Roman type.

BY: __/S SCOTT W. SAKIN_____
SCOTT W. SAKIN
Florida Bar No. 349089