Filing # 21202487 Electronically Filed 12/03/2014 04:15:31 PM

RECEIVED, 12/3/2014 16:18:41, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2170

TAVARES DAVID CALLOWAY,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

REPLY BRIEF OF CROSS-APPELLANT

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@myfloridalegal.com

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF CASE AND FACTS..... 1

SUMMARY OF THE ARGUMENT..... 7

ARGUMENT..... 8

XII. THE TRIAL COURT ERRED IN ADMITTING ERRED IN ADMITTING DR. OFSHE'S TESTIMONY WITHOUT A *FRYE* HEARING. 8

CONCLUSION..... 19

CERTIFICATE OF SERVICE..... 19

CERTIFICATE OF COMPLIANCE..... 20

TABLE OF AUTHORITIES

Boyer v. State,
825 So. 2d 418 (Fla. 1st DCA 2002) 16

Brim v. State,
695 So. 2d 268 (Fla. 1997) 10

Frye v. United States,
293 F. 1013 (D.C. Cir. 1923) 8

Haddon v. State,
690 So. 2d 573 (Fla. 1997) 16

Hayes v. State,
660 So. 2d 257 (Fla. 1995) 9

King v. State,
89 So. 3d 209 (Fla. 2012) 10

Lemour v. State,
802 So. 2d 402 (Fla. 3d DCA 2001) 10

Magaletti v. State,
847 So. 2d 523 (Fla. 2d DCA 2003) 10

Ramirez v. State,
810 So. 2d 836 (Fla. 2001) 10, 11, 15

United States v. Hall,
93 F.3d 1337 (7th Cir. 1996) 16, 17

Williamson v. State,
994 So. 2d 1000 (Fla. 2008) 8

STATEMENT OF CASE AND FACTS

The State relies on the statement of case and fact presented in it amended answer brief of appellant/initial brief of cross-appellant, with the following additions:

Dr. Ofshe testified that he had conducted research on the area of decision making throughout his career. (R192/10188-93) He began by looking at the area of micro economics, then moved to decision making in cults and finally started looking at decision making in police interrogations. *Id.* He had published articles and described an article published in a law review as his most important publication regarding the result of his research on police interrogations. (R192/10205-08) He subsequently admitted that the articles in which he had published his work on police interrogations were not published in scientific journals and that the articles published in law reviews were not subject to peer review. (R196/10737-38, 10740-48)

He stated that some studies, such as the one from the Cardozo Law School and the one from the Northwestern Law School, established that false confessions existed and determined a number of cases in which a person had allegedly confessed falsely but did not consider what allegedly produced the false confessions. (R192/10271, 10294-97, R194/10440-45) Moreover,

there is no reliable information on the rate at which false confessions occur. (R193/10304, R194/10431-32) Dr. Ofshe admitted that he had not examined the information used to determine the number of allegedly false confessions in these studies and that the definition used in determining the number of false confessions did not comport with his definition of false confession. (R199/11138-49) He also did not know if the allegedly false confessions had been given by individuals who had mental illnesses, were young or were retarded. (R199/11149-50) He admitted that such vulernabilities made people more likely to give false confessions. (R199/11150) However, he considered the fact a person had a vulnerability a minor factor. (R199/11152) He averred that the study conducted by Dr. Leo only looked at technics used in interrogations and had not considered whether the confessions produced by the interrogations were false. (R200/11337-39)

Dr. Ofshe averred that all police interrogations were conducted using the same basic method, which involved placing a suspect in a setting where he lacked assistance, causing the suspect to believe that his situation was hopeless and motivating the suspect to confess. (R193/10315-32) He stated that some actions designed to motivate a suspect to confess, such as promising leniency, were what he called psychologically

coercive and produced false confessions. (R193/10326-32) However, a promise of leniency is a powerful motivator whether the suspect is guilty or not. (R194/10493)

When the State inquired if Dr. Ofshe would consider conflicts with known facts in assessing the reliability of the statements Defendant made to Dr. Ofshe during their interview, Dr. Ofshe insisted that doing so was inappropriate because any conflict could be attributed to mistaken memory or a misunderstanding. (R197/10886)

Dr. Welner stated that the issue of what actually caused false confessions had not been been adequately studied and that instead of studying the issue scientifically, much of the work on the area was based on theorical inferences. (R202/11609-11) Moreover, the studies that had been done included cases in which the defendants had not confessed at all, cases in which the defendant had made an incriminatory statement but not admitted responsibility and cases in which the confessions had not been shown to be false. (R202/11684-87) As a result of these inclusions and the fact that the same cases were relied upon in multiple studies, the rate of false confessions was grossly overstated. (R202/11682-89) Further, some of the studies were based on second hand accounts of what occurred in the case written by people with biases or limitations and not a review of

the actual case materials. (R202/11691-92, 11707-09)

Moreover, the research that did exist suggested that false confessions result from the interplay of three factors: (1) the vulnerability of the defendant; (2) the interrogator's use of that vulnerability; and (3) the context of the interrogation. (R202/11720-22) The vulnerabilities that matter are those that make a person suggestible or compliant and included mental retardation, mental illness and being naive. (R202/11731-33) In fact, the majority of cases in which false confessions have been shown to exist concerned mentally retarded and actively psychotic individuals. (R204/11792-95) The context of the interrogation included circumstances affecting the interrogator's desire to close a case, circumstances affecting the mental state of the defendant during questioning and the experience of the defendant in dealing with the police. (R202/11727-28) Experience with the police also affects a person's vulnerability and suggestibility. (T204/11942-43) However, how the factors interacted was unknown. (R204/11845-4)

The factors that contribute to a defendant's decision to provide a confession include the defendant's perception of proof against them, external pressure and internal pressure. (R202/11734-39) Because what matters is the defendant's perception of the proof against them, it does not matter if a

statement made to him regarding the proof that is actually against him is true or false. (R202/11739) There are some circumstances that are so adverse that a defendant may confess to get out of the circumstances. (R202/11747-49) While this indicates that the confession is coerced, it does not necessarily mean that the confession is false. (R202/11749) Moreover, the type of circumstances at issue is not related to the type of physical environment in which the confession is taken, the number of officers involved or the length of the interrogation. (R202/11748, R203/11780, R204/11822-33) Minimizing the seriousness of the offense, such as by suggesting that it might have been an accident or an act of self defense, had been shown to cause false confessions. (R206/12136-42) However, how the factors interact to overcome a person's desire not to confess and the point at which the factors become coercive to a particular individual has also not been adequately studied. (R204/11845-47)

In this case, Dr. Ofshe made no attempt to identify any vulnerability of Defendant. (R202/11725) He also did not present any indication that Defendant was suggestible. (R204/11961) Dr. Welner saw nothing that indicated that Defendant was either compliant or suggestible. (R203/11763-67) Moreover, he heard nothing that indicated that Defendant had

confessed simply to make to interrogation stop. (R203/11782)

Dr. Welner noted that Dr. Ofshe had used the terms coercion and psychologically coercive in manners that had not been studied and were not accepted in the scientific community. (R204/11833-37) He included in this usage Dr. Ofshe's statement that certain actions by the police during an interrogation were coercive. *Id.*

Dr. Welner stated that Dr. Ofshe's claim that a confession had to be false if it was not consistent with all the other evidence in the case had not be studied. (R204/11839-40) Moreover, there were numerous reasons why a confession might contain some inconsistencies, including fault memory, a desire to lessen one's culpability or a desire to shield another person. (R204/11840-43)

SUMMARY OF THE ARGUMENT

The trial court erred in failing to hold a *Frye* hearing before admitting Dr. Ofshe's testimony.

ARGUMENT

XII. THE TRIAL COURT ERRED IN ADMITTING ERRED IN ADMITTING DR. OFSHE'S TESTIMONY WITHOUT A *FRYE* HEARING.

Defendant insists that it was proper for the trial court to admit Dr. Ofshe's testimony with conducting a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). He insists that the fact that this Court had required a *Frye* hearing on Dr. Ofshe's testimony about influences that allegedly cause a person to make a false statement is irrelevant and that Dr. Ofshe's opinion regarding what causes false confessions and how to determine if a confession was false was generally accepted because the experts agreed that false confessions exist. However, none of these assertions show that the trial court did not err in admitting Dr. Ofshe's testimony.

While Defendant attempts to distinguish this Court's decision in *Williamson v. State*, 994 So. 2d 1000 (Fla. 2008), by claiming that Dr. Ofshe testified about a syndrome in that case and did not do so in this case, the record belies the distinction. In *Williamson*, Dr. Ofshe was qualified as an expert in influence and control and testified that he believed that the witness's actions were consistent with someone who had been treatened. *Id.* at 1009. In this case, Dr. Ofshe admitted that his work on police interrogations was merely a

specialization of work on influence and control. (R192/10188-93) Moreover, the gravamen of his testimony was that Defendant must have agreed to have the statement to Det. Law as part of a deal for a false statement because he found Defendant's actions consistent with someone who believed that his life and that of his loved ones was threatened. Since these are the same areas in which this Court found that Dr. Ofshe's testimony had to be subjected to *Frye* testing, Defendant's attempt to distinguish *Williamson* are unavailing. The trial court erred in not conducting a *Frye* hearing.

Moreover, Defendant's insistence that the fact that Dr. Welner agreed that false confessions do exist means that Dr. Ofshe's testimony satisfied *Frye* is complete contrary to this Court's precedent regarding the circumstances in which a *Frye* hearing is required. No one can seriously doubt that DNA exists. In fact, in *Hayes v. State*, 660 So. 2d 257, 264 (Fla. 1995), this Court took judicial notice that "DNA test results are generally accepted as reliable in the scientific community." Yet, this Court still reversed because the trial court had failed to conduct a proper *Frye* hearing on whether the methodology used in conduct the DNA testing of some evidence was generally accepted and because one of the methods used to analyze other DNA evidence was not generally accepted. *Id.* at

262-65. It later required a full *Frye* hearing before evidence could be presented regarding the calculation of the statistical evidence related to the DNA match. *Brim v. State*, 695 So. 2d 268, 271-75 (Fla. 1997). *Frye* hearings were also required when the STR DNA testing methodology was first presented even though this Court had already found that the RFPL DNA testing methodology met *Frye*. *Lemour v. State*, 802 So. 2d 402, 404-08 (Fla. 3d DCA 2001). The same was true before mitochondrial DNA testing was admitted. *Magaletti v. State*, 847 So. 2d 523, 525-28 (Fla. 2d DCA 2003).

Similarly, the existence of tool marks cannot be questioned. In fact, this Court has held that expert testimony regarding tool marks, including marks made by knives, is generally accepted and that the application of tool marks to ballistic evidence is not new and novel and has been relied upon by courts since at least 1937. *King v. State*, 89 So. 3d 209, 228-29 (Fla. 2012); *Ramirez v. State*, 810 So. 2d 836, 845 (Fla. 2001). Yet, this Court found that testimony regarding a tool mark made by a knife in human tissue was not generally accepted. *Ramirez*, 810 So. 2d at 845-52.

Given this body of law, Defendant's assertion that the fact that the experts agreed that false confession exist shows that Dr. Ofshe's testimony regarding what causes false confessions

and how to determine if a confession is false met *Frye* is simply specious. It does not show that the trial court was correct to find a *Frye* hearing unnecessary.

Instead, this Court has held that a *Frye* hearing is necessary to determine "the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand." *Ramirez*, 810 So. 2d at 844. Further, the proponent of the evidence carries the burden of showing by a preponderance of the general acceptance of both the principle and the procedures. *Id.* Applying this standard does not involve accepting a "nose count" of experts. *Id.* at 844. Instead, it involves a determination of whether the principle and methodology have the "indicia" or "hallmarks" of acceptability. *Id.* In making that determination, a court looks at whether the methodology has been properly tested, whether it has been subject to meaningful peer review, whether the method is based on objective standards and the ability to quantify an error rate for the method. *Id.* at 849-52.

The mere fact that both experts agreed that false confession do exist in no way showed that Dr. Ofshe's claim that certain factors cause false confessions is generally accepted, that his method of evaluating whether those factors were present

in this case or caused Defendant to confess was generally accepted or that his method of evaluating whether confession is false is generally accepted. Thus, it does not show that the trial court was correct to admit this testimony without even conducting a *Frye* hearing.

Further, a review of the information in the record relevant to the actual inquiry merely shows that a *Frye* determination was required. While Dr. Ofshe cited to several studies during his testimony, he acknowledged that these studies had either looked at whether allegedly false confessions were present or whether technics were used in an interrogation; not whether Dr. Ofshe's methodology for determining whether the technics produced a false confession was reliable. (R192/10271, 10294-97, R194/10440-45, R200/11337-39) While he claimed to have done his own studies of his methodology, he admitted that his studies had been published in law reviews, which were not scientific journals and were not subject to peer review. (R192/10205-08, R196/10737-38, 10740-48) Dr. Welner stated that the methodology for determining what causes false confessions had not been adequately studied, and that the studies that had been published were flawed because the included cases in which no confession had been made and analyzed cases based on second hand accounts. (R202/11691-92, 11707-09)

Dr. Ofshe admitted that vulernabilities, such as retardation and mental illness, made one more likely to give a false confession but made no attempt to account for these vulnerabilities in his studies or his methodology. (R199/11149-50) Dr. Welner stated that the majority of cases in which false confessions had been shown to exist involved these vulnerabilities. (R204/11792-95) Given these circumstances, it cannot be said that Defendant carried his burden of showing that Dr. Ofshe's methodology had been adequately tested or adequately subjected to peer review.

Moreover, the evidence in the record refutes any notion that Dr. Ofshe's method of evaluation was objective or that the error rate in the application of his standard is known. In fact, it shows that Dr. Ofshe was openly biased in his evaluation in this case. According to Dr. Ofshe, his method of evaluating whether a person had given a false confession involved interview the person and determining whether the confession included information that was not publically available or provided by the police. (R193/10308-13)

In his confession in this case, Defendant has detailed several trips codefendant Clark had made from the apartment during the crime to purchase duct tape to restrain the victims and to consult with Frank about how many of the victims should

be killed. (R160/6114) The information about the trips was not publically available but had been included in Clark's statement. During Dr. Ofshe's interview with Defendant, Defendant clearly and repeatedly told Dr. Ofshe that he had invented the portion of the confession about the trips. (R39/6793-96) Dr. Ofshe responded to Defendant providing this information first by asking lead questions, suggesting that the police had provided him with Clark's statement and pointing out that the information was in Clark's statement. (R39/6794-96) Dr. Ofshe did so despite the fact that he had testified that the use of leading questions and the provision of information caused false statements. (R193/10308-13) When Defendant failed to take these hints, Dr. Ofshe finally resorted to tell Defendant that his story had to change:

> [W]hat I am trying to get at is if you think you made up the stuff about the duct tape. Then It's weird that Clark also talked to them about the duct tape. Now either what he said gets changed because of what you said or they told you what he said and that influenced your story. Otherwise there is no way to reconcile how those two things came out so that is why I raise it with you because I want to hear if there is a way to make that come out right.

(R39/6796) Thus, far from using an objective method of analyzing whether the factors that he believed were important in determinating whether a confession was false, Dr. Ofshe actually sought to manipulate the information he was being provided to

suit the opinion he wanted to give.

Moreover, he refused to apply his own methodology to the statement Defendant had given him during questioning. (R197/10886) Instead, he insisted that the numerous inconsistencies in Defendant's own statements must have been attributable to memory errors or misunderstandings. *Id.* Thus, Dr. Ofshe's own testimony showed that his methodology was not based on objective criteria but on subjective determinations.

Further, Dr. Ofshe's own testimony showed that there was no ability to quantify an error rate from his methodology. Dr. Ofshe repeatedly claimed that there was no way to determine the rate at which false confessions occurred. (R193/10304, R194/10431) However, he insisted that all confessions taken by all officers everywhere involved the same methods. (R193/10315-32) Yet, he made no attempt to claim that all confessions were false and admitted that the promises of leniency that he claimed were powerful motivators of confessions affected even in the guilty. (R194/10493)

In fact, Dr. Ofshe's testimony regarding this case showed that his work produced errors. While Dr. Ofshe claimed that the length of the interrogation and false statements about the evidence against a defendant cause a defendant to become hopeless and force him to provide a false confession, he

admitted that the length of the interrogation and the statements about fingerprints did not cause Defendant to confess in this case. Since the record in this case does not support the assertion that any of the indicia of acceptability are present in Dr. Ofshe's methodology in this case, the trial court erred in admitting testimony about that methodology without even holding a *Frye* hearing.

The cases Defendant relies upon do not compel a different result. In *Boyer v. State*, 825 So. 2d 418, 419-20 (Fla. 1st DCA 2002), the court only analyzed whether the trial court had correctly determined that Dr. Ofshe's opinion would not assist the jury. While it mentioned that the trial court had found *Frye* satisfied, it made no attempt to analyze whether the trial court was correct to find that Dr. Ofshe's opinion had indicia of acceptability. *Id.* at 419. However, as this Court had held, whether *Frye* is satisfy in to be conducted de novo. *Haddon v. State*, 690 So. 2d 573, 579 (Fla. 1997). As such, the mere fact that the First District mentioned *Frye* in *Boyer* does not show that it found *Frye* was satisfied.

Similarly, the Seventh Circuit did not find that Dr. Ofshe's testimony satisfied the standard for admissibility of novel scientific evidence in *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996). Instead, it found that the trial court had

erred in failing to determine whether his testimony was admissible as accepted scientific evidence. *Id.* at 1342, 1345. Moreover, as the Seventh Circuit stated, the prosecution in that case did not even challenge the scientific basis of the testimony so it assumed that testimony was scientifically valid. *Id.* at 1344-45. Thus, *Hall* also does not address whether Dr. Ofshe's testimony met the standard for admissibility of scientific evidence.

Moreover, it should be noted that *Hall* was based on a misunderstanding of Dr. Ofshe's creditials. The Seventh Circuit characterized Dr. Ofshe was a person with a psychology doctorate who worked as a psychologist. *Hall*, 93 F.3d at 1341. Based on its mistake about Dr. Ofshe's background, the Seventh Circuit proceed to analyze the admissibility of Dr. Ofshe's testimony as if it was testimony regarding psychology or psychiatry about a mental condition that the jury might not understand on its own. *Hall*, 93 F.3d at 1343-44. In fact, the court distinguished situations in which expert testimony did not concern an abnormal mental condition or situations in which the expert was exceeding the scope of his area. *Id.* However, as Dr. Ofshe admitted below, he is a sociologist and all of his training is in sociology. (R195/10697-10713) Moreover, he expressly stated that he did not consider anything about Defendant's mental

state. Given these circumstances, it is not even clear that the Seventh Circuit would have found Dr. Ofshe's testimony admissible on this record.

Given these circumstances, neither *Boyer* nor *Hall* supports Defendant's position. The trial court erred in admitting Dr. Ofshe's testimony without conducting a *Frye* hearing.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@
myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** was furnished by email to **Scott Sakin**, sakinlaw@hotmail.com, 1411 N.W. North River Drive, Miami, Florida 33125, this 3d day of December 2014.

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General