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IN THE SUPREME COURT OF FLORIDA

LEON DAVIS, JR., :

Appellant/Cross-Appellee, :

vs. : Case No. SC11-1122

STATE OF FLORIDA, :

Appellee/Cross-Appellant. :

______________________________:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF AND CROSS-APPEAL ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE

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ISSUE I [DYING DECLARATIONS]

A. Dying Declarations are not exempt from the Right of Confrontation on "Historical Grounds"

The state has made it clear in its answer brief that it "does not contest the lower court's finding that [Yvonne] Bustamante's statements to Lt. Elrod were testimonial" (SB 83). The state further asserts that the trial court admitted Ms. Bustamante's statements "as a dying declaration and not under the forfeiture by wrongdoing doctrine" (SB 83, see 76,84). Therefore, the only possible basis for allowing the prosecution to introduce Ms. Bustamante's unconfrontable out-of-court statements would be on the assumption that dying declarations are an "historical exception" to the Sixth Amendment's Confrontation Clause.

The state inaccurately suggests that the United States Supreme Court has already resolved this constitutional question in Crawford v. Washington, 541 U.S. 36(2004) and Giles v. California, 554 U.S. 353(2008)(SB 81-82). Instead, the Court in Crawford, 541 U.S. at 56, n.6, expressly left the question open ("we need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations"). In Giles, 554 So.2d at 358, the Court recognized that two forms of testimonial statements (dying declarations and statements admitted under the forfeiture by wrongdoing doctrine) were admitted at common law even though they were unconfronted. It was the latter issue - - forfeiture - - which was before the Court in Giles; and the Court concluded that to the extent that the forfeiture theory accepted by the California Supreme Court was broader than the common law doctrine it could not provide a basis for the introduction of un-

confronted testimonial statements. Giles does not resolve the question of whether unconfrontable, testimonial dying declarations can be introduced as an "historical exception" to the accused's Sixth Amendment right of confrontation. Three years after Giles the Court made it clear that that constitutional question was still open. Michigan v. Bryant, 131 S.Ct. 1143,1151 n.1(2011) ("We noted in Crawford that we 'need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations' [citation omitted]. Because of the state's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here" (emphasis supplied).

See also Cobb v. State, 16 So.3d 207,209 (Fla. 5th DCA 2009)(rejecting the state's suggestion that any dicta in Crawford amounts to a holding that dying declarations are an exception to the Sixth Amendment, and noting that the Crawford Court had found it unnecessary to determine that question in that case).

Moreover, while the Fifth DCA has concluded (incorrectly, for the reasons discussed in Davis' initial brief and this reply brief) that dying declarations are an "historical exception" to the Confrontation Clause [Cobb, 16 So.2d at 210-12; White v. State, 17 So.2d 822 (Fla. 5th DCA 2009)], this Court - - like the U.S. Supreme Court - - has never had occasion to resolve the issue. See Hayward v. State, 24 So.3d 17,33 n.8 (Fla. 2009)("We have determined that Destefano's statement did not constitute a dying declaration. Therefore, we need not address whether a dying declaration might be an exception to the Confrontation Clause requirements set forth in Crawford")(emphasis supplied).

The issue, therefore, is one of first impression for this Court. Numerous appellate courts in other states (as well as the Fifth DCA in Florida) - - following the lead of the California Supreme Court in People v. Monterroso, 101 P.3d 956 (Cal. 2004) - - have ruled in favor of the state's position that testimonial dying declarations are admissible as an "historical exception" (see appellant's initial brief, p.81, n.14), while two federal district courts have found, for reasons similar to those explained in Polelle, The Death of Dying Declarations in a Post-Crawford World, 71 Mo.L.Rev. 285 (2006), that dying declarations are not an exception to the Confrontation Clause, under the internal logic of Crawford itself. United States v. Jordan, 66 Fed.R.Evid.Serv. (Callahan) 790 (D. Colo. 2005)[2005 WL 513501]; United States v. Mayhew, 380 F.Supp.961,964-65 (E.D. Ohio 2005). If numbers - - as opposed to reasoning and analysis - - were dispositive, Davis would lose on this point. However, the caselaw finding dying declarations to be an exception contains remarkably little historical analysis. The California Supreme Court simply found that a dying declaration exception existed at common law, and the other states (citing Monterroso and eventually each other) fell like dominoes.

Monterroso, 101 P.3d at 972, states:

> Dying declarations were admissible at common law in felony cases, even when the defendant was not present at the time the statement was taken. (T. Peake, Evidence (3d ed. 1808) p. 64.) In particular, the common law allowed "'the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed,'" provided that "'the deceased at the time of making such declarations was conscious of his danger.'" (King v. Reason (K.B.1722) 16 How. St. Tr. 1, 24-25.). To exclude such evidence as violative of the right to confrontation "would not only be contrary to all the precedents in England and here,

> acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished." (State v. Houser (Mo.1858) 26 Mo. 431,438; accord, Mattox v. United States (1895) 156 U.S. 237,243-244, 15 S.Ct. 337,39 L.Ed. 409 ["from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility"].) Thus, if, as Crawford teaches, the confrontation clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding" (Crawford, supra, 124 S.Ct. at p. 1365, citing Houser, supra, 26 Mo. at pp. 433-435), it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment. We therefore conclude the admission of Patel's dying declaration was not error. [footnote omitted].

All that shows is that there existed a dying declaration exception at common law. Nobody disputes that. But there also existed a forfeiture by wrongdoing exception. The problem in Giles v. California was that the forfeiture doctrine as applied in California in 2008 was not the same as the forfeiture doctrine as it was understood at common law. That is more than equally true of the dying declaration exception. As more thoroughly discussed in Davis' initial brief, p. 72-78, the original religious rationale for the dying declaration exception at common law - - the assumption that no Christian (or no believer in an afterlife of reward or punishment) would be willing to meet his Maker with a lie upon his lips - - has been abrogated by statutes, caselaw, and state and federal constitutional provisions. The dying declaration exception as it exists in 2014 in Florida and other states is very different - - in its rationale, its prerequisites for admissibility, and its boundaries for impeachment - - from the common

law exception which existed at the time of the founding.

In his majority opinion in Crawford, "[t]o determine what kind of statements violate the Confrontation Clause, Justice Scalia centered on 1791, the year in which the Sixth Amendment was adopted, as the focal point of his historical analysis." Polelle, supra, 71 Mo.L.Rev. at 289 and n.23, citing Crawford, 541 U.S. at 46, 54-55. Giles v. California stands for the proposition that any "historical exception" to the Sixth Amendment right of confrontation must be "co-extensive with the contours of that exception" as it existed at the time of the founding of the nation and the ratification of the Sixth Amendment. See State v. Beauchamp, 796 N.W. 2d 780,792 (Wis.2011). See also Chavez v. State, 25 So. 3d 49,53 (Fla. 1st DCA 2010)(emphasis supplied)("Specifically, in Giles, the Supreme Court examined the roots and application of the common law doctrine. . ."); People v. Clay, 88 A.D.3d 14,28, 926 N.Y.S.2d 598,609, n.2(2011)("We recognize that the Supreme Court did not provide any guidance in Crawford or any subsequent decision as to the definition of "dying declaration" that will satisfy federal constitutional standards, though it might reasonably be assumed that any such formalization would be faithful to the exception as it existed 'at the time of the founding'").

"The classic justification" for the dying declaration exception at common law was explained in 1789 - - two years before the adoption of the Sixth Amendment - - in King v. Woodcock, 168 Engl.Rep. 352, 1 Leach 500 (1789)(cited in both Crawford and Giles regarding the common law roots of the exception) "whose premise was that the fear of divine judgment for lying provided religious assurance that the dying person would speak the truth". Polelle,

71 Mo.L.Rev. at 300. At common law, the absence of a belief in God and a future state of rewards and punishments rendered a witness incompetent, and also rendered his or her dying declaration inadmissible in evidence. In the United States, throughout the 19th century and well into the 20th, the religious rationale continued to prevail and to impact the way the dying declaration exception was applied. The requirement for admissibility that the declarant have been a believer in God and an afterlife of reward and punishment eventually began to erode, but any declarant's lack of such belief became fair game for impeachment of his or her dying declaration. See Davis' initial brief, p. 72-77, and the caselaw discussed therein.[1]

Around the beginning of the 20th century, while some American courts were still allowing the opponent of a dying declaration to introduce impeachment evidence that the declarant was (at the time of the statement or at any point in his life) an "infidel" [Gambrell v. State, 46 So.138 (Miss.1908)("it was for the jury to say . . . whether or not deceased had reformed or been converted to the faith)], other courts were starting to recognize that the common law doctrine regarding dying declarations might be incompatible with constitutional and statutory provisions guaranteeing freedom of religion and prohibiting government establishment of

[1] Carver v. United States, 164 U.S. 694,697(1897); Idaho v. Wright, 497 U.S. 805,820(1990), quoting Queen v. Osman, 15 Cox.Crim.Cas. 1,3(Eng.N.Wales Cir.1881)(Lush, L.J.); State v. Weir, 569 So.2d 897,901(Fla. 4th DCA 1990),opinion (as to dying declarations) adopted by Weir v. State, 591 So.2d 593,594(Fla. 1991); State v. Satterfield, 457 S.E.2d 440,447 (W.Va.1995); Garza v. Delta Tau Delta Fraternity National, 948 So.2d 84,91, n.13(La.2006); McClendon v. State, 36 Okla.Crim.11, 251 P. 515-516(1926); Donnelly v. State, 26 N.J.L. 507(1857); State v. Hood, 59 S.E.971(W.Va.1907); Gambrell v. State, 46 So. 138(Miss.1908).

religion. See State v. Hood, 59 S.E. 971(W.Va.1907)(recognizing that the common law rule had been abrogated by the Virginia and (later) West Virginia Bill of Rights, and was "entirely against the spirit and letter of American constitutional law"); see also State v. Weir, 569 So.2d 897,901 (Fla. 4th DCA), opinion (as to dying declarations) adopted by Weir v. State, 591 So.2d 593,594 (Fla. 1991)(religious justification, which formed the underpinnings of the early use of dying declarations, has long lost judicial recognition). As explained by Polelle, the early English (i.e., common law) precedent has in more recent years been rejected by American courts, which "have typically discounted a lack of belief in God or . . . an afterlife of rewards and punishments as a basis for excluding dying declarations" because of our constitutional guarantees pertaining to religion. This, according to Polelle, "guts the original religious rationale for the rule". 71 Mo.L.Rev. at 300-01.

Davis and the state agree that there is a split of authority as to whether testimonial dying declarations are an historical exception to the right of confrontation under the principles of Crawford (SB82). The state's position, as articulated in its answer brief, "is that the majority of jurisdictions agree that excluding dying declarations as violative of the right of confrontation 'would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught.' Monterroso, 101 P.3d at 972" (SB 82-83).

Davis agrees that the majority of jurisdictions have followed Monterroso's lead and concluded that dying declarations are indeed an historical exception to the right of confrontation. That doesn't necessarily mean they are right, and Davis' submits that after an analysis of the pertinent history (which the state has not even attempted, see SB 77-85), and in light of the internal logic of Justice Scalia's Crawford opinion, this Court will see that Monterroso and its progeny are not right. The abrogation of the dying declaration exception as it existed at common law is perhaps most compellingly illustrated by the sequence of opinions of the Alabama Court of Appeals in Wright v. State, 24 Ala.App. 378, 135 So.636(1931)(a decision which undersigned counsel had not found at the time he wrote Davis' initial brief).

In Wright, the defendant had unsuccessfully moved to exclude a dying declaration "after it had been proven by undisputed testimony that deceased did not believe in God, did not believe in a Supreme Being, [and] did not believe there was a place to reward the faithful or punish the wicked". 135 So. at 636. On appeal, the original panel decision reversed Wright's conviction, finding that the trial court's rulings regarding the dying declaration were in error. The panel opinion stated that dying declarations should only be admitted and weighed with great care. The dying declaration:

> is not . . . the testimony of a witness under oath, but the recital of a statement made under solemn force of impending death by and through which, according to the belief of nearly, if not quite all of the people of the world, the immortal part of man is separated from the mortal and the immortal goes to stand face to face with a Judge whose decrees are based upon full knowledge and perfect justice. A belief in God-a Supreme Being, a Just and an All Wise Judge-whose decrees are final and eternal and who rewards the truth and punishes the un-

> true, would render a dying statement of much value as evidence, but coming from one whose mind is filled with resentment against a recent adversary and who believes that the grave ends it all and that when he sleeps it will be with the rock and the clod, there is nothing to take the place of an oath and personal examination . .

135 So. at 636.

The panel opinion posed the question, "Is a witness competent to testify who does not believe in an Omniscient Supreme Being exercising the power to reward truth and punish falsehood?" 135 So. at 636. By common law, such a belief was required (although no particular form of religious belief was insisted upon), and "While this rule has been abrogated in many states, the common-law rule still obtains in Alabama". 135 So. at 636. The common law rule, according to the panel opinion, was not in conflict with the "no religious test" provisions of the Alabama Constitution of 1901, because

> The whole fabric of this nation from its inception to the present time is founded on a belief in a Supreme Being whose guiding hand is recognized and invoked in our most solemn governmental pronouncements. Beginning with our Declaration of Independence, which is the foundation of our liberties, the framers evidenced this belief in the following phrases: "The separate and equal station to which the laws of nature and of nature's God entitle them;" and "that all men are created equal; that they are endowed by their Creator with certain unalienable rights," and ending this remarkable document with a full faith in God as follows: "And, for the support of this declaration with a firm reliance on the protection of Divine Providence." Coming to our own state, every Constitution ever adopted by the people of Alabama was framed and adopted with a full recognition of the powers of a Supreme Being with powers to control and direct the destinies of men. This recognition is given voice in the Preamble to the Constitution of 1901 in the following language: "Invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution." Every statute ever passed by the Legislature of this state relating to the introduction of evidence in courts of justice has been enacted in full recognition of a faith in a Supreme Being and there is no place in our whole governmental structure for a belief which ties men to the

> rocks and clods and places him on a level with the beasts of the field. Without belief in a Supreme Being there can be no legal oath; without a legal oath a witness is not competent to testify in our courts.

135 So. at 636-37.

Because the rulings of the trial court regarding the dying declaration "were not in accord with the above", Wright's conviction was reversed and remanded.

The opposite result was reached on rehearing. Wright, 135 So. at 637-39. As explained by Justice Rice:

> I do not subscribe to the view that "there is no place in our whole governmental structure for a belief which ties men to the rocks and clods and places him on a level with the beasts of the field," asserted by my brother SAMFORD.
>
> It is, rather, my opinion that ours is "the land of the free, and the home of the brave"; and that though to say "there is no God," both in Scripture and in common knowledge, proves one a fool, and may, for all I know, tie him "to the rocks and clods," yet it does not, and should not, deprive that one of his heritage as a citizen, nor of his standing as one of the "free" and one of the "brave".

135 So. at 637-38.

Section 3 of the 1901 Alabama Constitution provided "That no religious test shall be required as a qualification to any office or public trust under this state"; and that "the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles." Justice Rice concluded that this provision "completely abrogates the common-law rule", and therefore it was not error in the case before the court to admit the dying declaration of a nonbeliever. 135 So. at 638. Setting aside the judgment of reversal, granting the state's motion for rehearing, and affirming Wright's conviction, Justice Rice reiterated, "[T]he common-law rule which would have rendered

incompetent the dying declaration admitted in evidence in this case has been abrogated by the provisions . . . of our Constitution of 1901 . . ." 135 So. at 639.

Justice Bricken concurred in the granting of rehearing on the ground that section 3 of the 1901 Constitution "is conclusive of the point involved". 135 So. at 639.

Justice Samford, who wrote the original panel opinion, adhered to and amplified his previously expressed views:

> Section 3 of the Constitution presupposes a religious belief, and every reference for guaranty under that section relates to "religion," which is defined by Webster's Dictionary as: "1. The outward act or form by which men indicate their recognition of the existence of a God or of gods having power over their destiny, to whom obedience, service, and honor are due; the feeling or expression of human love, fear, or awe of some superhuman and overruling power, whether by profession of belief, by observance of rites and ceremonies, or by the conduct of life; a system of faith and worship; a manifestation of piety; as, ethical religions; monotheistic religions; natural religion; revealed religion; the religion of idol worshippers. 2. Specif., conformity in faith and life to the precepts inculcated in the Bible, respecting conduct of life and duty toward God and man; the Christian faith and practice. 3. A monastic or religious order subject to a regulated mode of life; more broadly, the religious state." I fail to find any guaranty in the section for an Atheist who does not believe in a God and has no religious beliefs. With the Constitution as it is and the statute as it is Simpson, J., wrote in Parker v. State, 165 Ala. 1-8, 51 So. 260, 262: "Dying declarations are admitted upon the theory that the consciousness of approaching death dispels from the mind all motive for making a false statement, in view of the fact that the party recognized the fact _that he shall soon appear in the presence of his Maker_." (Italics mine.) Somerville, J. (the elder), quoted Greenleaf with approval in Kennedy v. State, 85 Ala. 327, 5 So. 300, 302, where he says: "A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." Rice, J., in McHugh v. State, 31 Ala. 317, speaking of a dying declaration: "The law deems [dying declarations] equivalent to a sworn obligation." And Mr. Greenleaf, whom all judges in this state hold in high esteem, says: "Without this belief (In a Supreme Being) the person cannot be subject to that sanction, which the law deems

an indispensable test of truth."

135 So. at 639-40 (emphasis in opinion).

Justice Samford acknowledged that the common-law rule had been modified in some states either by statute or constitutional construction, but he believed that for the most part it still prevailed in Alabama. 135 So. at 640. Quoting Greenleaf on Evidence € 370, "It should here be observed that defect of religious belief is never presumed. On the contrary, the law presumes that every man brought up in a Christian land, where God is generally acknowledged does believe in Him, and fear Him." 135 So. at 641. The law, according to Greenleaf and Justice Samford, presumes a person "to be what he professes himself to be, whether atheist or Christian"; therefore the state of his religious belief when he is offered as a witness (or, as in the Wright case, when his dying declaration is offered in evidence) is "presumed to be the common faith of the country, unless the objector can prove that it is not." 135 So. at 641.

In the more than two centuries since the ratification of the Sixth Amendment, and in the eight decades since Wright, America has become more secular, and also more polarized on religious matters. There are undoubtedly some who still believe there is, or should be, a "common faith of the country", but article I, section 2 of the Florida Constitution guarantees that no person shall be deprived of any right because (inter alia) of his or her religion, and article I, section 3 prohibits the state from establishing religion or penalizing the free exercise thereof.

The sequence of opinions in Wright trace the history of the dying declaration exception, and - - especially when considered in

light of this Court's decision in Weir v. State, 591 So.2d 593,594 (Fla. 1991), adopting the opinion (as to dying declarations) in State v. Weir, 569 So.2d 897,901 (Fla. 4th DCA 1990) - - compellingly demonstrate that the common law regarding dying declarations has been abrogated. In Weir, the defendant asserted that Florida's dying declaration exception amounted to judicial establishment of religion contrary to the state and federal constitutions. The Fourth DCA and this Court rejected Weir's claim, sayng "This analysis does not reflect the present state of the law. The basic philosophies of morality and ethics, premised at least in part on prevailing religious values, may have formed the underpinnings of the early use of dying declarations centuries ago. However, religious justification for the exception has long lost judicial recognition. Indeed, as early as 1897, the United State Supreme Court in Carver v. United States, 164 U.S. 694, 17 S.Ct.228, 41 L.Ed. 602(1897) held that disbelief in a 'future state of rewards and penalties' does not warrant exclusion of dying declarations." 569 So.2d at 901.

To recapitulate, in 1791 when the Sixth Amendment was adopted the common law dying declaration exception was (1) based on the prevailing Christian religious doctrines, (2) the declarations of nonbelievers in an afterlife of reward or punishment were inadmissible, and (3) the declarant's religious beliefs (or lack thereof) were fair game for impeachment. By 1897, the requirements for adissibility and impeachment had at least begun to change. The abrogation of the common law rule was recognized - - for example - - in West Virginia in 1907 (Hood) and in Alabama in 1931 (Wright), and in 1990 and 1991 the Florida courts emphasized that the orig-

inal religious justification for the exception had long lost judicial recognition (Weir). Therefore, there can be no historical exemption of dying declarations from the accused's Sixth Amendment right of confrontation under Crawford. Simply put, Cobb v. State, 16 So.3d 207,209 (Fla. 5th DCA 2009), People v. Monterroso, 101 P.3d 956 (Cal. 2004), and the admittedly numerous decisions in various states which follow Monterroso, are wrongly decided because they fail to analyze the relevant history, and fail to recognize the fundamental differences between the ecclesiastical common-law dying declaration exception as understood and applied in and before 1791, and the secular statutory dying declaration exception - - based on considerations of (supposed) reliability and necessity - - which exists today. And, as Justice Scalia's majority opinion in Crawford makes clear, reliability and/or necessity (even if shown)[2] cannot trump the accused's constitutionally guaranteed right of confrontation. See Polelle, supra, 71 Mo.L.Rev. at 300-07 and 313; see also United States v. Jordan, supra ("Whether driven by reliability or necessity or both, admission of a testimonial dying declaration after Crawford goes against the sweeping prohibitions set forth in that case"). Considerations of reliability and necessity were the focus of the Ohio v. Roberts[3] test which was abandoned in Crawford in favor of Justice Scalia's view (shared by six other Justices) that the Confrontation Clause means exactly what it says. "Where testimo-

[2] The supposed reliability of dying declarations has frequently been called into question, especially where (as here) the contention is not that the declarant was lying but that she was mistaken. See Davis' initial brief, p.79-80.

[3] 448 U.S. 56 (1980).

nial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation". 541 U.S. at 68-69.

In light of the foregoing, consider the state's argument, which it summarized as follows: "The State's position is that the majority of jurisdictions agree that excluding dying declarations as violative of the right of confrontation 'would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitable set at naught'. Monterroso, 101 P. 3d at 972" (SB 82-83). As has been shown, the common law precedents in England and pre-1791 America have been abrogated; the dying declaration exception has been separated from its religious roots, and the admissibility and impeachment rules are entirely different. See Chavez v. State, 25 So.3d 49,53 (Fla. 1st DCA 2009) (noting that in Giles v. California, the Supreme Court "examined the roots and application of the common law [forfeiture] doctrine", and determined that the scope of California's forfeiture rule differed from that of the common law doctrine). As for generalized considerations of a "sense of justice" or "regard for individual security and public safety", these considerations might pass muster for nontestimonial dying declarations under state law, but where, as here (and as the trial court ruled and the state does not contest, SB 83), the out-of-court statements are testimonial - - made in direct response to police questioning whose

primary purpose is to create a substitute for live testimony[4] - - the Sixth Amendment guarantees the right of confrontation. Crawford.

B. Yvonne Bustamante's Statements to Lt. Elrod were also Inadmissible Under Florida's Evidence Code

Davis will rely on his initial brief, p. 97-106, for this alternative argument.

C. Harmful Error

The state claims that if Ms. Bustamante's dying declaration was erroneously introduced, such error "cannot be said to have affected the verdict" (and was therefore harmless) because the prosecution presented "substantial evidence of Defendant's guilt" (SB 84-85). While citing by rote to State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the state ignores that case's holding, which is:

> The [harmless error] test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the er-

[4] The prosecutor asked Lt. Elrod if his conclusion that Ms. Bustamante was not going to survive affected how he handled his responsibilities, and Elrod said yes. Asked by the prosecutor, "[W]hat did you do? Why did you do it?, Elrod answered, I wanted to get her statements before it wouldn't ever be gotten" (12/1791-92). Elrod explained that he would not have started asking questions at that time if he had thought Ms. Bustamante was going to survive and be in the hospital; he would have let the medical people try to take care of her. But because he believed otherwise, he began to ask Ms. Bustamante very pointed questions (12/1792).

> ror did not affect the verdict, then the error is by definition harmful.

491 So.2d at 1139.

The importance of proper application of the DiGuilio test has been repeatedly emphasized by this Court. See State v. Lee, 531 So.2d 133 (Fla. 1988); Goodwin v. State, 751 So.2d 537, 540-42 (Fla. 1999); Ventura v. State, 29 So.3d 1086,1089-91 (Fla. 2010); Cooper v. State, 43 So. 3d 42 (Fla. 2010); Jackson v. State, 107 So.3d 328, 342-44(Fla. 2012). While Davis by no means concedes that the evidence in his trial was "overwhelming" (especially in light of the extensive impeachment of the eyewitness identifications made by Brandon Greisman and Carlos Ortiz[5], including the fact that both witnesses clearly stated that the "small Afro" hairstyle they saw on the perpetrator as he left the crime scene in the late afternoon was different than Leon Davis' hair in the photo taken at the Sheriff's substation a few hours later, where the video evidence from Enterprise and Beef's presented by the state showed that Davis' close-cropped hair was the same earlier that morning and at lunchtime as it was in the photo taken at the time of his arrest), and while the state does not even assert that its evidence was overwhelming but merely "substantial", it is also true that under the DiGuilio test even "[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached . . ." State v. Lee, 531 So.2d at 137; see Ventura, 29 So.3d at 1091; Cooper, 43 So.2d at 43;

[5] Assuming without conceding that those identifications were even admissible, see Issue II in Davis' initial brief.

Jackson, 107 So.2d at 342. While the DiGuilio test may include an examination of the permissible evidence on which the jury could have legitimately relied, it requires "an even closer examination of the impermissible evidence which might possibly have influenced the jury verdict." 491 So.2d at 1135. Unless the reviewing court can determine beyond a reasonable doubt that the error could not have contributed to the conviction, the error is harmful and reversal for a new trial is required. DiGuilio; see Ventura, 29 So.2d at 1091.

Could the testimonial dying declaration of Yvonne Bustamante, introduced in violation of Crawford and the Sixth Amendment's Confrontation Clause, have contributed to this jury's verdict? While the state on appeal fails to address this question, instead merely cataloging (with dubious accuracy) its other evidence, the prosecutor at trial obviously thought it could and should "contribute"; in fact he strongly suggested to the jury, near the beginning of his closing argument, that it was virtually dispositive:

> Lieutenant Elrod is the person who actually asks Yvonne. He is a cop. And he testified. He was the guy that kind of got upset. He didn't think she was going to survive even at the scene. He didn't think she was going to make it out of there alive. He asked her: Who did this to you? And she told him: Leon Davis did it, knew him as a customer that's what Yvonne Bustamante said. Now, the State could have put on the evidence that first week and stopped right there. I don't think any defendant can get around this.

(96/4983)(emphasis supplied).

See, e.g. Stoll v. State, 762 So.2d 870,878 (Fla. 2000)(prejudice Stoll suffered as a result of inflammatory hearsay statements being improperly admitted "was exacerbated by the State's reliance on this evidence during closing arguments"); Robinson v.

State, 982 So.2d 1260, 1262-63(Fla. 1st DCA 2008)(prosecutor's emphasis on the erroneously admitted evidence bespeaks a reasonable possibility that the error affected the verdict).

Moreover, the trial judge in this case, Judge Hunter, who had the superior vantage point of seeing and hearing all of the evidence (including not only the prosecution's testimony which is recited - - and, with regard to use of the word "confession", egregiously mischaracterized[6] - - in the state's answer brief (SB 84-85, 101-102, 112,124-25), but also the testimony presented during the defense's case, and the defense's extensive cross-examination and impeachment of the state's witnesses) observed during the penalty phase charge conference:

> The most compelling evidence in this case is the dying declaration. I don't think anybody would dispute that. And I have to assume that with them, the trier of fact, that was one of the main factors that led to their verdict.

(98/5328)(emphasis supplied).

The state's harmless error argument stands the DiGuilio standard on its head; ignoring the impact of the impermissible evidence, and focusing only on its own remaining evidence which it characterizes as "substantial", without regard to the fact that most of that evidence was vigorously challenged by the defense. For purposes of the state's argument in its Issue V (SB 111-114) that the evidence was legally sufficient to sustain Davis' convictions, its recitation of the prosecution's evidence may be appropriate (apart from its mischaracterization of Davis' statements to his brother Garrion and to Barry Gaston as confessions to the charged crimes, SB 112), because in determining a sufficiency

[6] See Part D, infra.

issue the evidence is taken in the light most favorable to the state. The standard for determining whether an evidentiary error (or, as in the instant case, an evidentiary error amounting to a violation of a constitutional right) is "harmless" is entirely different. The state, as beneficiary of the error, must show beyond a reasonable doubt that the improperly admitted evidence could not have played a role in the jury's deliberations nor could it have contributed to their verdict. DiGuilio. The state cannot satisfy this standard merely by listing its other evidence and ignoring the fact that, due to strong cross-examination and impeachment [in particular, Brandon Greisman, Carlos Ortiz, and Garrion Davis were heavily impeached by criminal convictions (Ortiz) and inconsistent statements (all three)] the jury may not have rested its verdict on the permissible evidence. The primary focus must be on the potential impact of the impermissible evidence, and the prosecutor's argument to the jury and the trial judge's observations amply demonstrate that the impact of Yvonne Bustamante's dying declaration was enormous. The introduction of that evidence, in violation of Davis' Sixth Amendment right of confrontation, was patently harmful. DiGuilio; Lee; Stoll; Ventura; Cooper; Jackson.

D. The State's Misleading Assertions that Davis Confessed to the Robbery

Four times the state - - in its "harmless error" arguments on the dying declaration and eyewitness identification issues, in its sufficiency of the evidence issue, and in its cross-appeal issue regarding Dr. Brigham - - asserts that Davis "confessed that he

had committed the robbery" (SB 124; see 84,101,112). That assertion is simply wrong. According to the trial testimony of Garrion Davis (Leon's brother), if believed by the jury, Davis made a general statement that he robbed somebody; no further details were mentioned (89/3835). Garrion's testimony was impeached with prior inconsistent statements (89/3839-57), and the prosecutor introduced a prior consistent statement (which Garrion did not recall making) in an effort to rehabilitate the witness (89/3876-78). According to family friend and former law enforcement officer Barry Gaston, if believed by the jury, while he (accompanied by Davis' mother and sister) was driving Davis to the sheriff's substation to turn himself in, Davis (in the backseat with his mother) was crying and sobbing out of control and having trouble catching his breath. Gaston heard words to the effect of "I hurt somebody". Gaston didn't know for sure if he said anything else, and "if you listen to a small child cry as they speak, you can't explain exactly what they are saying. I can't tell you what was in his mind, or which direction he was going." When Gaston asked him what he did, Davis said he didn't know (87/3580-84,3590-94, see 97/5160).

The state juxtaposes these two vague statements, and misleading asserts that Davis "confess[ed] that he had committed <u>the</u> robbery and hurt somebody" (SB 84,101,124, see 112). First of all, the words attributed to Davis are not confessions; they are at most circumstantially incriminating remarks. <u>Kocaker v. State</u>, 119 So.3d 1214, 1225 (Fla. 2013). The prosecutor was free to argue that, in light of the other evidence, the jury should <u>infer</u> that Davis must have been referring to the crimes at Headley

Insurance, but nothing in the statements themselves suggests that. A confession is "[a] voluntary statement made by a person charged with the commission of a crime . . . wherein he acknowledges himself to be guilty of the offense charged. Burks v. State, 589 So.2d 355,357 (Fla. 5th DCA 1991), quoting Black's Law Dictionary (5th Ed.)(emphasis in opinion); see also State v. Brown, 940 P.2d 546,554 n.2(Wash. 1997), as well as People v. Houseton, 490 N.E.2d 1354,1360 (Ill.App.1986)(defendant's admissions were usable against him as such, but they were "not a confession since they did not constitute a direct acknowledgement of guilt of the specific crimes charged").

For purposes of harmless error analysis there is a world of difference between a confession to the charged crimes (as the state would have it) and vague circumstantial admissions. Therefore, even apart from the fact that the state's recitation of its own other evidence - - without addressing the impact of the dying declarations (which the trial prosecutor argued as being practically dispositive of guilt and which the judge characterized as the most compelling evidence in the trial) - - is insufficient to satisfy the DiGuilio standard, the state's repeated suggestion that its other evidence includes a confession by Davis is misleading and wrong.

ISSUE II [EYEWITNESS IDENTIFICATION]

Two specific points need to be made here. [Otherwise, as to the merits, Davis will rely on the arguments in his initial brief, P. 107-124. As to the state's "harmless error" contention (SB

101-02), Davis will rely on his argument regarding the impact on juries of eyewitness testimony (initial brief, p. 123-24), and his discussion of the DiGuilio standard set forth at p. 16-20 of this reply brief].

First, the state asserts that Adkins v. Commonwealth, 647 S.W.2d 502,504-05 (Ky.App.1982) is inapplicable because it "did not even involve the inclusion of any numbers on the photopack" (SB 97). However, the appellate court in Adkins made the following observation;

> The admission of testimony that a witness has previously identified a defendant in a photographic lineup denies that defendant due process only if the photographic identification procedure is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), Beecham v. Commonwealth, Ky.App., 594 S.W.2d 898 (1979). The Kentucky cases in which this standard has been applied indicate that a photograph identification procedure is impermissibly suggestive only when elements in the photographs other than minor variations in the physical features of the individuals pictured mislead witnesses in making their identifications, e.g. where the witness describes a criminal as wearing a hat, and the defendant is the only one wearing a hat, or where dates are written on the photographs, and the defendant's photograph is the only one with a date close to the time when the crime of which he is accused occurred. Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978), Jones v. Commonwealth, Ky.App., 556 S.W.2d 918 (1977).

(emphasis supplied)

Secondly, the state says, "the [trial] court found nothing suggestive about the book-in numbers under the pictures (18/2833). The trial court based its determination on the fact that when he looked at the photopack, he paid little attention to the numbers but instead focused on the pictures (18/2833). The trial judge explained that he did not realize that these numbers represented a year until the defense counsel pointed that out to him (18/2833-

34)" (SB 93-94).

However, as defense counsel also pointed out (and as the judge obligingly took judicial notice), Judge Hunter has never been booked into a jail, unlike the (four-time) convicted felon Carlos Ortiz (18/2835). Moreover, any question of whether the witnesses Ortiz and Greisman were actually influenced by the inclusion of the book-in numbers in the photopack (assuming arguendo that that could be accurately determined) would go to the second (reliability) prong of the due process test; not the first (unnecessary suggestiveness) prong. See State v. Davis, 504 A.2d 1372,1374-75(Conn. 1986). Whether a pretrial identification procedure is unnecessarily suggestive refers to the circumstances which are arranged by - - or are within the control of - - law enforcement officers. See Perry v. New Hampshire, 132 S.Ct.716 (2012). The eyewitnesses themselves are not "apt to be alert for conditions prejudicial to the suspect", nor are they "likely to be schooled in the detection of suggestive influences". United States v. Wade, 388 U.S. 218,230(1967). As recognized by the New Jersey Supreme Court in State v. Henderson, 27 A.3d 872,896-97(N.J. 2011), even subtle cues can influence a witness' behavior, "[y]et the witness is often unaware that any cues have been given".

In the instant case, both the evasive convicted felon Ortiz and the squirrely (as described by the trial judge) Greisman were heavily invested in the identifications they'd made, and they displayed obvious hostility on the stand not only to Davis but to his attorney.[7] If their identifications were aided by the numbers on the photopack, neither would have been likely to admit it (even

[7] See Davis' initial brief, p. 113-14.

assuming they were consciously aware of it). The crucial question of whether the photopack itself was impermissibly and unnecessarily suggestive turns solely on the "system variables"; i.e., the circumstances of the identification procedure which were within the control of law enforcement. See State v. Lawson, 291 P.3d 673,685 and 697 (Or.2012); State v. Almaraz, 301 P.3d 242, 251-53(Idaho 2013). If the police use an unnecessarily suggestive procedure, then the trial and reviewing courts go to the second prong of the test to determine whether (considering the various "estimator variables", including, inter alia, the witness' opportunity to observe, his or her degree of attention, and the accuracy of the witness' prior description of the suspect) the identification is sufficiently reliable to support a finding that it is solely the product of the witness' independent recollection, untainted by the suggestive procedures employed by law enforcement. Almaraz, 301 P.3d at 252-53. [Conversely, absent an initial showing of "state action" - - i.e., that the suggestive circumstances were created by law enforcement - - there can be no due process violation and hence no basis to proceed to the "reliability" prong. Perry v. New Hampshire, supra].

Here, it was the Sheriff's department's choice to put the book-in numbers (which began with 2007 for Davis' picture and 93 or 94 for all the others) on the front of the photopack; it was Detective Townsel's choice not to crop or cover the numbers before showing the photopacks to Greisman and Ortiz. See People v. Velarde, 541 P.3d 107,109 (Colo.App.1975)(photographic arrays are a permissible part of investigative procedure if conducted within certain guidelines, including "(3) all numbers or other indica-

tions that pictures are mug shots must be covered"); Sims v. State, 469 N.E. 2d 554, 556(Ohio App. 1984)(victim picked defendant's picture from a display of mugshots "with all the police numbers and arrest dates covered"); Kiser v. State, 2002 WL 31322776(Tex. App. -Beaumont 2002)(not designated for publication)(identification procedure was not impermissibly suggestive where, inter alia, "[t]he photos are similar 'book-in' style photos, with the dates blocked out").

The photopacks shown to Greisman and Ortiz were unnecessarily suggestive due to the inclusion of book-in numbers, only one of which (Davis') began with 2007. The suggestiveness was exacerbated by the fact that only two of the six individuals in the photospread were wearing a gray shirt (consistent with Brandon Greisman's prior description of the suspect); the other four were wearing white shirts (inconsistent with Greisman's description). The defense's police practices expert, William Gaut, believed that he - - or an average person - - could pick the person out by process of elimination (94/4772).

Proceeding to the second prong of the test, the following factors compellingly demonstrate the unreliability of Greisman's and Ortiz' identifications - - time and opportunity to observe; degree of attention; stress; weapon focus; the cross-racial nature of the identifications; vagueness of the descriptions; and the inaccuracy of the only aspect of the description (the suspect's hairstyle, which both eyewitnesses clearly stated was different than Davis') which wasn't vague. See Davis' initial brief, p. 114-123. These circumstances, coupled with the unnecessarily suggestive photopack, gave rise to a very substantial likelihood

of irreparable misidentification, in violation of the Due Process clause of the Fourteenth Amendment. Davis' convictions and sentences must be reversed for a new trial.

ISSUE III [PHOTOGRAPHS]

Everything the state mentions in support of its claim that the 43 gruesome morgue and hospital photographs were "relevant" goes to the matters which were not in dispute (SB 104-108). Since this Court has made it clear that in order to be relevant (and therefore in order to be admissible) "a photo of a deceased victim must be probative of an issue that is in dispute", the state's relevancy argument is circular and meritless. See Almeida v. State, 748 So.2d 922,929(Fla. 1999)(emphasis in opinion); Jennings v. State, 123 So.3d 1101,1126 (Fla. 2013); Seibert v. State, 64 So.3d 67,88 (Fla. 2011); Smith v. State, 28 So.3d 838,861 (Fla. 2010).

Therefore, the easy question in this case is whether the photographs were admissible. They clearly were not, in light of the fact that (as the trial judge repeatedly made clear) nobody was disputing how these two women and the unborn child died; the only contested issue in this trial was the identity of the perpetrator. The much more difficult question is whether the photographs were so horrendous as to undermine the fairness of the trial, and therefore their introduction amounted to fundamental error.

On the latter question, the state again resorts to a circular formulation: "Here, Defendant cannot demonstrate fundamental error because no error occurred related to the admission of the

subject photographs" (SB 103-04). The state purports to distinguish Shootes v. State, 20 So.3d 434 (Fla. 1st DCA 2009) and Stephenson v. State, 31 So.3d 847(Fla. 3d DCA 2010) - - cases which found fundamental error where the fairness of the trial was compromised by the presence of a large number of identifiable law enforcement personnel in the courtroom (Shootes) and by the prosecutor's comments that the defendant, charged with aggravated manslaughter by neglect of her 13 month old daughter, had during her pregnancy contemplated aborting the child (Stephenson) - - on the basis that they don't involve gruesome photographs (SB 108). The analysis, however, should be the same. The photographs of the two women burn victims and the unborn child were inadmissible because they were wholly irrelevant to the only disputed issue, identity [Almeida]; they were horrendous - - so much so that the trial judge worried about their effect on the jurors' mental health; there were 43 of them; and they were shown to the jury twice (during the testimony of the crime scene technicians, and again during the testimony of Dr. Nelson), projected on a large TV screen, as well as being sent back to the jury room for deliberations. See Davis' initial brief, p. 125-27.

The state cites Arbelaez v. State, 898 So.2d 25,44 (Fla. 2005) and Henderson v. State, 463 So.2d 196,200 (Fla. 1986) for the proposition that "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments" (SB 104). The same sentiment was conveyed in Calloway v. State, 189 So.2d 617,620 (Fla. 1966)(defendant cannot complain of the shocking nature of photographs on ground of gruesomeness "inasmuch as the scene was one he created"); see also

Jones v. State, 257 So.2d 296 (Fla. 3d DCA 1972). However, this gut reaction does not trump the relevancy standard of Almeida, Jennings, Seibert, and Smith that photographs, to be admissible, must be relevant to an issue that is in dispute. Even more importantly, the "work product" and "scene was one he created" cases illustrate just how prejudicial gruesome photos can be in a case like this one, where the only disputed issue is identity. The "work product" concept assumes the defendant's guilt, and is flagrantly inconsistent with the presumption of innocence. The parade of horrendous photographs almost inevitably create feelings of anger, revulsion, and pity, and a desire to punish the person responsible for causing such suffering. And the defendant is the only person on trial. Whatever the validity of the "work product" rationale in a case where the defense is, for example, insanity, self-defense, or lack of premeditation, it is clearly an improper basis for the introduction of gruesome photographs when the sole defense is that the accused was not the person who committed the crime. If the photographs are shown to be relevant to a disputed issue (which would often be true in a case where the defendant claims self-defense, accident, or lack of premeditation, because the nature of the victim's injuries would shed light on what occurred), then they would be admissible under the relevancy standard, even apart from the "work product" theory. In the instant case, in contrast, as the trial judge repeatedly acknowledged, "there's no disputing what happened to these women and how they died and how the child died. What is in dispute is who did

it" (73/1087).[8] The photographs - - 43 of them - - were as graphic as Judge Hunter had ever seen (73/1086). The state's claim that these photos were properly admitted and therefore "it is obvious that no error occurred" (SB 105, see 104,108) is unsupported and unsupportable. To the contrary, the extremely horrifying and gruesome nature of these photos, their sheer number, and the manner in which they were presented to the jury, shows that the fairness of the trial was irreparably compromised and fundamental error occurred.

SUMMARY OF ARGUMENT [AS TO CROSS-APPEAL]

[Issue VI] Juanita Luciano's testimonial dying declarations made to Lt. Elrod were inadmissible because (1) dying declarations are not an "historical exception" to the accused's Sixth Amendment right of confrontation, and (2) the prosecution failed to meet the foundational requirement under state law of showing that Ms. Luciano knew she was dying and that her death was imminent.

[Issue VII] The issue presented by the state - - claiming that the trial court erred in finding that Dr. Brigham's expert testimony concerning the factors which can impair the accuracy of eyewitness identifications met the Frye standard - - is moot. In the event of a retrial, any challenge to Dr. Brigham's testimony will be governed by the more lenient (and discretionary) Daubert test, not Frye. In any event, all of the trial court's findings in support of his ruling were strongly supported by the evidence

[8] See also the numerous record citations at p. 126, n.29 in Davis' initial brief.

adduced at the hearing below.

CROSS-APPEAL ISSUE VI [DYING DECLARATION OF JUANITA LUCIANO]

As did the state (SB 114-15), Davis incorporates his arguments in Issue I (of his initial brief and this reply brief) asserting (1) that testimonial dying declarations are not an "historical exception" to the Confrontation Clause of the Sixth Amendment or to the requirements of Crawford v. Washington, 541 U.S. 36(2004); and (2) that the state also failed to establish a sufficient predicate for the introduction of the dying declarations under state law.

In this cross-appeal issue, the state contends that the trial judge erred in excluding the dying declaration of the second victim, Juanita Luciano. However, in order for an out-of-court statement to be admissible as a dying declaration under Florida law, the proponent of the evidence must show that the declarant understood his or her "condition as being that of an approach to certain and immediate death." Hayward v. State, 24 So.3d 17, 30 (Fla. 2009); Teffeteller v. State, 439 So.2d 840,843(Fla. 1983). The "[a]bsence of all hope of recovery" and "appreciation by the declarant of his [or her] speedy and inevitable death" are foundational requirements for admissibility. Hayward, at 31; see, e.g., Williams v. State, 967 So.2d 735,749 (Fla. 2007); Lester v. State, 76 So.3d 952,954 (Fla. 4th DCA 2011); Cardenas v. State, 49 So.3d 322,325 (Fla. 1st DCA 2010); Jones v. State, 36 So.3d 903,908 (Fla. 4th DCA 2010). Fear or even belief that death may be the ultimate result of one's injuries is an insufficient predicate for

admissibility; there must be "a settled hopeless expectation" that death is near at hand. Shepard v. United States, 290 U.S. 96,100 (1933), quoted in State v. Saucier, 926 A.2d 633,646 n.14 (Conn. 2007); State v. Buggs, 581 N.W. 2d 329, 335 (Minn.1998); and Hewitt v. State, 514 P.2d 6,8 (Ak. 1973). As was explained in Hewitt, "Even though [the declarant] may have thought that death would be the progressive result of his injuries, we have no way of knowing when, in his mind, he believed that death would actually ensue. The foundation evidence fails to establish the necessary imminence of death and the abandonment of hope which would render the declaration admissible." 514 P.2d at 8.

In the instant case, there is insufficient basis to conclude that Yvonne Bustamante knew that her death was certain and imminent at the time she made her statements to Lieutenant Elrod [see Davis' initial brief, p. 97-106], and even less basis to conclude that Juanita Luciano knew that she was facing certain and imminent death or that she had abandoned all hope of recovery.

Judge Hunter determined that any statements made by Ms. Luciano to Lt. Elrod or other law enforcement personnel in response to their questions were inadmissible as dying declarations; "[a]lthough the Court thinks that Ms. Luciano would have been aware that her injuries were extremely serious, the Court does not find that there is sufficient evidence to demonstrate that [she] reasonably believed her death from her injuries was imminent" (19/3081). In arguing that this ruling was an abuse of discretion, the state relies on the testimony that (1) Lt. Elrod and various medical personnel concluded, based on looking at Ms. Luciano, that they knew she wasn't going to survive; (2) the

medical examiner, Dr. Nelson, subsequently determined that her chances of survival were minimal; and (3) Ms. Luciano said to Lt. Elrod, "Look what he did to me" (SB 115-16,118).

First of all - - as the Mississippi Supreme Court, construing that state's dying declaration exception, pointed out - - "the question . . . is not what other people thought concerning whether or not the deceased would die, but whether the deceased himself thought he was going to die." Kidd v. State, 258 So.2d 423,427 (Miss. 1972). As Dr. Nelson explained, a burn victim's probability of survival is (roughly) inversely proportional to the percentage of body surface burned (a formulation which would have given Ms. Luciano a 10% chance of survival). Even with the best of care, there is a great risk of fluid loss or bacterial infection. When people die as a result of burns, the specific cause of death is usually from medical complications such as pneumonia or renal failure. Even without medical intervention, death would not be immediate. (11/1753-54,1767-72). Although Dr. Nelson, because of his experience and training, is familiar with the survival rate for somebody who suffers severe burns, when asked if the average individual would have that knowledge, he replied, "No. I would suggest they probably don't" (11/1766).

Similarly, while most (though not all) of the medical first responders who treated Ms. Luciano and/or Ms. Bustamante concluded - - based on their own experience with burn victims - - that survival was impossible or extremely unlikely - - none of the medical personnel communicated that opinion or prognosis to the patient. Moreover, as Dr. Nelson (and even Lt. Elrod) testified, the pain a person feels from burns may subside in a relatively short time

once the nerve endings are destroyed.

Therefore, there is a complete lack of evidence that Ms. Luciano knew or even believed that her death was certain and imminent. The state, grasping at straws, points to Lt. Elrod's testimony that she said, "Look what he did to me." That statement, however, is consistent with any disfiguring or even visible injury; it in no way conveys the declarant's awareness that her death is certain and immediate.[9] Therefore, even apart from the fact that Ms. Luciano's testimonial dying declaration was inadmissible under the Confrontation Clause and Crawford, it was also inadmissible under Florida evidentiary law.

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[9] Published and unpublished decisions in which people who were not mortally injured, or even close to that condition, said "Look what he did to me" include United States v. Tootick, 952 F.2d 1078,1084(9th Cir.1991); Smithwick v. Walker, 758 F.Supp.178,182 (S.D.N.Y.1991); State v. Bautista, 227 N.W.2d 835,837(Neb.1975); People v. Martinez, 2011 WL 5169341 (N.Y.City Crim.Ct.2011); State v. Lee, 2010 WL 5549042 (Ohio App. 4 Dist.2010); Martin v. Ornoski, 2009 WL 537075 (N.D.Cal.2009); State v. Florez, 2002 WL 31813993 (Wash.App.Div.1,2002); Chew v. State, 2000 WL 264350 (Ark.App.2000). Similar cases where the declarant said "Look what he did" are State v. Smith, 2011 WL 3860572 (Ohio App.8 Dist.2011) and Milligan v.State, 2006 WL 357880 (Tex.App.-Austin 2006).

CROSS-APPEAL ISSUE VII [EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION]

A. Mootness and Standard of Review

The state frames its second cross-appeal issue as follows: "THE TRIAL COURT ERRED IN FINDING THAT THE EXPERT TESTIMONY CONCERNING THE FACTORS THAT COULD IMPAIR THE ACCURACY OF EYEWITNESS IDENTIFICATIONS MET THE FRYE STANDARD" (SB 119; see SB 31-32,77,119-20 and n.3,125,128). The state further claims (correctly) that the standard of review of a Frye[10] ruling is de novo (SB 119). See Brim v. State, 695 So.2d 268,274 (Fla.1997); Hadden v. State, 690 So.2d 573,579(Fla. 1997); Gosciminski v. State, 132 So.3d 678,702(Fla. 2013). The key question in a Frye inquiry is whether the scientific principles and procedures are generally accepted in the relevant scientific community, and "[w]hen undertaking such a review, the appellate court should consider the issue of general acceptance at the time of the appeal rather than at the time of trial." Gosciminski, 132 So.3d at 702-03. Conversely, for rulings allowing or disallowing expert testimony under the Daubert[11] test, the standard of review is whether the trial court abused its discretion. General Electric Co. v. Joiner, 522 U.S. 136,141-43(1997); see also Berry v. CSX Transportation, Inc., 709 So.2d 552,557 and n.5 (Fla.1st DCA 1998)(contrasting Frye de novo standard with Daubert abuse of discretion standard).

The state's contention in this cross-appeal that Judge

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

[11] Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579(1993).

Hunter's ruling (allowing the defense expert, Dr. Brigham, to testify regarding five of the six proffered factors which can affect the accuracy of an eyewitness identification) was error under the Frye standard is meritless in light of the evidence presented at the evidentiary hearing, but this Court need not even get to that because the state's contention is also moot. The purpose of a cross-appeal is to address legal questions which may recur on retrial; not to issue advisory opinions. Walker v. State, 459 So.2d 333,335(Fla.3d DCA 1984). If this case is reversed for a new trial based in whole or in part on the erroneous introduction of Brandon Greisman's and Carlos Ortiz' pretrial and in-court identifications, then those identifications will be inadmissible in the retrial, and there will be no occasion for the defense to call Dr. Brigham as a witness. If, on the other hand, this case is reversed for a new trial based solely on the dying declaration and/or gruesome photographs issue, then Greisman, Ortiz, and Dr. Brigham would likely be called by their respective parties, but the admissibility of Dr. Brigham's expert testimony (assuming the state objected again) would be governed not by the Frye standard but by the broader and more discretionary Daubert standard. See Conley v. State, 129 So.3d 1120(Fla.1st DCA 2013). Effective July 1, 2013, the Florida legislature replaced Frye with Daubert, and instead of "general acceptance" the focus of the inquiry is on sufficiency of the underlying facts or data, and the reliability of the principles and methods (in general and as applied). Fla.Stat.§90.702. Since this statutory change is procedural and relates solely to the method of determining the admissibility of evidence, and because it does not define or

aggravate a crime or punishment, the Daubert standard applies to trial court proceedings taking place after July 1, 2013, regardless of when the charged crime occurred. Because changes in the law regarding admission of evidence do not implicate the ex post facto clauses of the state and federal constitutions, such changes are applied prospectively. See, generally, Windom v. State, 656 So.2d 432,439(Fla. 1995); Glendening v. State, 536 So.2d 212,214-15(Fla. 1988); State v. Dionne, 814 So.2d 1087,1092-95(Fla. 5th DCA 2002); Mortimer v. State, 100 So.3d 99,103 (Fla. 4th DCA 2012); see also State v. Coon, 974 P.2d 386,391-92(Ak.1999) (discussing these principles in the context of Daubert and Frye tests).

The Daubert test has been described as "more lenient" than the Frye test [Brewington v. State, 98 So.3d 628,630 (Fla.2d DCA 2012)]; in any event - - in the exercise of his or her "gatekeeping" function - - a trial judge applying the Daubert test has greater discretion "to admit a somewhat broader range of scientific testimony" then would have been admissible under the "austere" Frye standard. General Electric Co. v. Joyner, 522 U.S. at 141-42; see also Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137,141 (1999). "Under Daubert, the Frye test of general acceptance in the scientific community is only one factor among several in assessing the admissibility of scientific evidence." Brewington, 98 So.2d at 630.

If the state's Frye argument which it made below and on appeal is moot, the state cannot contend (and has not contended) that this Court should review the trial court's order as if it were a Daubert ruling, especially in light of the prosecutor's

argument below that the trial court should not use the Daubert test:

> Well, Your Honor, first of all, certainly in the Federal courts, it's very clear that they apply a completely different standard. They use Daubert, and so you can't compare Daubert with Frye. It is a totally different analysis.

(28/4628).

The judge pointed out that Daubert "has a Frye component to it", but the judge and the prosecutor agreed that the Daubert standard is broader (28/4628). Therefore, according to the prosecutor, it was not relevant whether Drs. Brigham or Fisher or Loftus had been permitted to testify in states which use the Daubert approach; "the more important factor, we believe, is looking at Florida" (28/4628, see 4629). The prosecutor, defense counsel, and the judge all agreed that there is no reported Florida caselaw that has addressed the specific issue of whether expert testimony concerning the factors affecting the accuracy of eyewitness identification meets the Frye test (28/4519-21,4612-13).

And that Frye issue (the sole aspect of the trial judge's ruling which would have been subject to de novo review) is now moot. As to every other aspect of Judge Hunter's ruling allowing Dr. Brigham to testify regarding five of the six proffered factors, the proper standard of review is for abuse of discretion.

B. The Trial Court did not Abuse his Discretion in Allowing Dr. Brigham to Testify Regarding Five of the Six Proffered Factors Affecting the Reliability of Eyewitness Identifications

A trial court's determinations under the Daubert test are discretionary [General Electric Co. v. Joiner; Berry v. CSX

Transportation, Inc.]; the question of whether the expert testimony would assist the jury is discretionary [McMullen v. State, 714 So.2d 368,373(Fla. 1998); see, generally, Angrand v. Key, 657 So.2d 1146,1148-49(Fla.1995); Barfield v. State, 880 So.2d 768,770(Fla.2d DCA 2004)]; and the determination of the witness' qualifications to express an expert opinion is discretionary [Ramirez v. State, 542 So.2d 352,355(Fla. 1989); Smith v. State, 28 So.3d 838,855 (Fla. 2010); Banmah v. State, 87 So.3d 101, 103(Fla.3d DCA 2012]. As this Court recognized in McMullen, "The trial court was in a far superior position to that of an appellate court to consider whether the [eyewitness expert's] testimony would have aided the jury in reaching its decision." If great deference was accorded to the trial court's decision to exclude the testimony in McMullen, then similar deference should be accorded to Judge Hunter's decision to admit the testimony (or most of it) in the instant case. That, of course, is not to suggest that a trial court's decision can never be so manifestly wrong as to amount to an abuse of discretion, but the bar is set high for the complaining party to establish this. See, e.g., Frances v. State, 970 So.2d 806,813(Fla. 2007)(discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable). In the instant case there was an abundance of competent evidence before the trial court, in the evidentiary hearing testimony of Drs. Loftus, Fisher, and Brigham, as well as the Kassin Survey 2001(41/6619-30), to support each of the findings in his order (41/6603-18). The state - - no surprise - - prefers the contrary testimony of its own experts, Drs. Elliott and Ebbesen (SB 122-23,127-28), but that provides no basis to

overturn the trial court's findings where he, unlike the reviewing court, had the opportunity to see and hear all five of the competing experts, and even to question them individually on points of interest (see 25/4012-21(Dr. Brigham); 26/4142-49(Dr. Fisher); 26/4283-85; 27/4286-91 (Dr. Loftus); 27/4404-08 (Dr. Elliott); 27/4453-60; 28/4461-62,4509-15 (Dr. Ebbesen)).

The six factors about which the defense sought to have Dr. Brigham testify are summarized in the trial judge's order as follows:

> Stress - Very high levels of stress impair the accuracy of eyewitness testimony.
>
> Weapon focus - The presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face.
>
> Forgetting Curve - - The rate of memory for an event is greatest right after the event and then levels off over time.
>
> Accuracy - Confidence - An eyewitness's confidence is not a good predictor of his or her identification accuracy.
>
> Unconscious Transference - Eyewitnesses sometimes identify as a culprit someone they have seen in another situation or context.
>
> Cross-Race bias - Eyewitnesses are more accurate when identifying members of their own race than members of other races.

(41/6613)

Dr. Brigham testified that meta-analysis is a statistical technique developed within the last thirty years or so, in which the empirical results of the various individual studies in a given scientific area are combined, using the original data, in order to determine "the overall pattern of findings" (24/3894). In response to Judge Hunter's question whether each of the proffered factors had been subject to meta-analysis, Dr. Brigham answered

yes as to five of the factors (25/4013-14; see 24/3894-95(stress); 3902(weapon focus); 3904-06(cross-race); 3908(confidence level); 3910(forgetting curve); see also the various studies introduced as defense exhibits, 25/4052-60; 29/4697-4805; 30/4806-36). [As to the sixth factor, unconscious transference (i.e., "source monitoring" confusion where the witness thinks he saw the person at the crime scene when in fact he saw him somewhere else), that too had been the subject of peer-reviewed studies, but Dr. Brigham wasn't sure whether meta-analysis had been done (24/3902-04; 25/4013-14)].

Dr. Brigham further testified that studies and surveys show that most jurors are not aware of how these factors can affect the accuracy of eyewitness identifications, and they can even be counterintuitive; for example, "a significant amount of jurors believe that stress imprints something on your mind such that you'll never forget it. So they believe just the opposite of what the research shows" (24/3997-98).

Much of the testimony of the four other experts - - Fisher and Loftus for the defense, Elliott and Ebbesen for the state - - was couched in terms of "general acceptance", because that was the main issue before the Court under the Frye test.

Dr. Fisher testified that the six concepts affecting the accuracy of eyewitness identification are each generally accepted in the relevant scientific community (25/4038-40,4044,4061). Regarding meta-analytic studies, Dr. Fisher echoed Dr. Brigham, describing it as "a way to compile the data from several different studies to see whether or not . . . there's a general principle that holds" (25/4052). Because meta-analysis is a systematic

compilation, it is not dependent on any single expert; "if you get the same phenomenon being observed across researchers, across time, across laboratories, across contexts, then that supports the generalized reliability of the phenomenon" (25/4061). With the sole exception of "unconscious transference", the general acceptance of each of the other five concepts - - high stress, weapon focus, cross-race, confidence level, and forgetting curve - - was supported by one or more meta-analytic studies (25/4052-63).

Dr. Loftus similarly testified that each of the six factors was generally accepted in the relevant scientific community (26/4179-83). She further expressed the view that an ordinary juror would not be aware that such factors could impair the accuracy of an eyewitness' identification; many people "have misconceptions about the workings of memory, and . . . they believe things to be true that are either unsupported or even contradicted by the scientific evidence" (26/4260-61).

[Numerous appellate opinions over the last decade have recognized that the factors which can affect the accuracy of eyewitness identification are likely to be unknown to jurors, and are often counterintuitive. See, e.g. Simmons v. State, 934 So.2d 1100,1124-26(Fla. 2006)(Pariente, C.J., joined by Anstead and Cantero, J.J., specially concurring); State v. Lawson, 291 P.3d 673,696(Or.2012); State v. Guilbert, 49 A.3d 705,723-25 and n.22(Conn.2012); Tillman v. State, 354 S.W.3d 425,442-43(Tex.Crim. App.2011); Young v. Conway, 698 F.3d 69,79(2nd Cir.2012); United States v. Brownlee, 454 F.3d 131,142(3rd Cir.2006); Minor v. United States, 57 A3d 406,414-16 and n.5 (D.C.App.2012); Commonwealth v. Walker, 2014 WL 2208139, p.18-19(Pa., May 28,2014)].

Dr. Elliott, the state's first expert in support of its contention that the eyewitness research findings should be excluded under the Frye test, when asked whether there are a number of published articles which are contrary to his position, volunteered "I would say most articles are contrary to my position." (27/4380). Later, when Judge Hunter asked him whether he believed his views on the six proffered factors "are in the minority as it relates to the general scientific community that studies eyewitness identification", Dr. Elliott forthrightly answered, "Yes, I'm afraid they are" (27/4407). Dr. Elliott expressed that he was unsure how to define the term "general acceptance" (27/4350), but he agreed with the statement that eyewitnesses are more accurate when identifying members of their own race, as opposed to members of other races, and he acknowledged that the cross-race effect is generally accepted by the relevant scientific community (27/4397-98, see 41/6615). Additionally, although he had reservations about the usefulness of the concepts, Dr. Elliott thought weapon focus and the forgetting curve were generally accepted in the scientific community (27/4398-99; see 41/6615). If the question were phrased "[v]ery high levels of stress can impair the ability of [an] eyewitness to accurately identify the perpetrator" it too would be generally accepted by the scientific community; while if the question were phrased "does impair" Dr. Elliott thought it would not be accepted (27/4398). Finally, the concept of unconscious transference is, in Dr. Elliott's opinion, "incoherent" (27/4353).

The state's second expert, Dr. Ebbe Ebbesen, has testified in approximately 185 court cases, always for the prosecution (28/

4481-82,4505; 41/6608). [See People v. Williams, 14 Misc.3d 571,573-76, 830 N.Y.S.2d 452, 455-57(Sup.Ct.Kings County 2006), in which the trial court - - accepting the "thoughtful" and "balanced" views of the defense's expert Dr. Kovera - - found that the proffered eyewitness expert testimony was admissible because (1) it was outside the ken of ordinary jurors, and (2) it satisfied the Frye general acceptance test. At the request of the Williams trial judge, Dr. Kovera addressed the contrary views of Dr. Ebbesen, who is known as a vocal critic of meta-analysis and of the Kassin surveys. Dr. Kovera testified that "only a small number of people espouse Dr. Ebbesen's views." 830 N.Y.S. 2d at 456. She also noted that Dr. Ebbesen faulted the 2001 Kassin survey for having less than a 50% participation rate; but that percentage, according to Dr. Kovera:

> should . . . be considered high for experts because it is likely many opted out based on their self assessments that they were not sufficiently qualified as experts in that specialized field. Dr. Kovera testified that one of the criteria for participation in the more recent survey was scholarly publication on eyewitness identification within the previous 10 years of the survey. She noted that the responders were among the most widely published in the field, a fact which in her view added to the prominence of the survey. Dr. Kovera was a participant. As for Dr. Ebbesen's criticism that the survey field of witness identification experts was too small and should have been expanded to all researchers in human memory, apparently to include himself, Dr. Kovera strongly disagreed, predicting that such expansion would in all likelihood reduce the reply rate to 5%. She pointed out that memory is a huge field and most researchers within that broad spectrum do not stay current with the much more specialized applied studies in eyewitness identification.

830 N.Y.S.2d at 457 (footnotes omitted).

The state, in its cross-appeal brief, indicates that Dr. Ebbesen testified that the stress and cross-race concepts are "generally accepted by people who tend to testify in court because

they generally testify for the defense" (SB 128)(as contrasted with Dr. Ebbesen, who always testifies for the prosecution). Moreover, the Kassin study itself (appended to the trial court's order, 41/6619-30) notes that 44% of the experts who responded never testified in court (41/6628). Moreover, statistical analysis showed no significant difference between the responses of the 28 experts who never testified as compared to the 35 experts who had testified at least once (41/6629)].

In the Frye hearing in the instant case, Dr. Ebbesen acknowledged that his views were in the minority as compared to the people in the Kassin study (28/4480,4505; see 41/6616). Compared to all psychologists who study human memory, he didn't know because "in my opinion, the relevant community hasn't been surveyed" (28/4480; see 41/6616). Asked by the prosecutor whether there was general acceptance of the cross-racial effect "within the relevant scientific community in which it belongs", Dr. Ebbesen replied, "[F]or face memory research, yes, but for actual eyewitness, I don't know" (27/4452-53). On cross he acknowledged his deposition testimony - - when asked whether cross-race effect is generally accepted in the scientific community - - "It could be or it could not be" (28/4507-08). He had given similar answers with regard to weapon focus and high levels of stress (28/4508-09).

Plainly, there is an abundance of competent evidence supporting each aspect of the trial court's discretionary ruling. To the extent that there were credibility issues to resolve, those were for the trial court, who saw, heard, and questioned the five expert witnesses. See McMullen, 714 So.2d at 368. The trial

court found that Dr. Brigham "is exceptionally well qualified as an expert to present opinion testimony on the subject of eyewitness identification" (41/6617) [see Ramirez; Smith; Banmah]. The trial court noted that Leon Davis is black, while the eyewitnesses Greisman and Ortiz are, respectively, white and Hispanic (41/6606). The court further noted that Greisman's encounter with the suspect was brief and highly stressful and a weapon was involved; a shot was fired striking Greisman in the nose (41/6606). The same three factors were present in Ortiz' encounter with the suspect, although Ortiz was not shot (41/6606). The trial court - - recognizing that research has shown that an average person would not have a full understanding of how the various factors relate to eyewitness identification (41/6611) - - found that expert testimony concerning five of the six factors (the exception being unconscious transference) "would be helpful in assisting the trier of fact" (41/6612) [see McMullen; Angrand v. Key; Barfield]. As to the Frye issue of general acceptance, the trial court - - citing People v. Williams, supra, - - found that "the appropriate scientific community are those surveyed in the Kassin survey 2001" (41/6616-17), and further found that "the expert eyewitness identification testimony sought in this case is generally accepted within the relevant scientific community" (41/6617). [The exception was unconscious transference, the only one of the six factors which had not been the subject of meta-analysis. The trial judge exercised his discretion to exclude it; finding that its probative value was outweighed by its potential to confuse the jury, due to the absence of scientifically valid measurements as to the occurrence of this phenomenon (41/6618)].

The trial judge noted that "eyewitness identification of the Defendant will have a significant role" in the trial (41/6606), and that the national trend is to allow eyewitness expert testimony in such cases (41/6605).

The national trend referred to by Judge Hunter was recognized by Justice Pariente (joined by Justices Anstead and Cantero), specially concurring in Simmons v. State, supra, 934 So.2d at 1123-26, and in the eight years since Simmons that trend has accelerated. See, e.g., State v. Copeland, 226 S.W. 3d 287,298-304 (Tenn.2007); State v. Clopten, 223 P.3d 1103,1105-18(Utah 2009); Tillman v. State, 354 S.W. 3d 425,435-443(Tex.Crim.App. 2011); State v. Guilbert, 49 A.3d 705,715-738(Conn.2012); Minor v. United States, 57 A.3d 406,413-422(D.C.App.2012). Just five days ago, in Commonwealth v. Walker, 2014 WL 2208139, p.13-15,22 (Pa., May 28, 2014), the Supreme Court of Pennsylvania - - noting that courts in 44 states, the District of Columbia, and ten federal circuits have permitted the introduction of eyewitness expert testimony at the discretion of the trial judge - - became the most recent appellate court to adopt this approach (leaving Kansas, Louisiana, and possibly the Eleventh Circuit as the sole outliers). Appellate courts around the country have recognized the reliability and general acceptance of the specific areas of research about which Dr. Brigham testified:

> HIGH STRESS - see State v. Guilbert, 49 A.3d 705,720-22(and cases cited at n.14)(Conn.2012); see also State v. Henderson,27 A.3d 872,904(N.J.2011); State v. Lawson, 291 P.3d 673,700-01(Or.2012). State v. Almaraz, 301 P.3d 242,252(Idaho 2013); Young v. Conway, 698 F.3d 69,78-79 and 81(2nd Cir.2012).
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> WEAPON FOCUS - see Guilbert, 49 A.3d at 720-22(and cases cited at n.13); see also Henderson, 27 A.3d at 904-05; Lawson, 291 P.3d at 701-02; Almaraz, 301 P.3d at

252 and n.6; Young v. Conway, 698 F.3d at 78-81; People v. Williams, supra 830 N.Y.S.2d at 458-59.

CROSS-RACE EFFECT - see Guilbert, 49 A.3d at 720-22(and cases cited at n.15); see also Henderson, 27 A.3d at 907; Lawson, 291 P.3d at 703-04; Almaraz, 301 P.3d at 252 and n.8; Young v. Conway, 698 F.3d at 78-79 and 81; Williams, 830 N.Y.S.2d at 457-58.

CONFIDENCE LEVEL - see Guilbert, 49 A.3d at 720-22(and cases cited at n.12); see also Lawson, 291 P.3d at 704-05; Young v. Conway, 698 F.3d at 88-89; State v. Clopten, 223 P.3d 1103,1108(Utah 2009).

FORGETTING CURVE - see Guilbert, 49 A.3d at 720-22(and cases cited at n.16); see also Henderson, 27 A.3d at 907; Lawson, 291 P.3d at 705.

Many of the courts which have approved the introduction of expert testimony on these factors have emphasized that eyewitness misidentification has been shown to be the single most important factor leading to wrongful convictions. See Guilbert, 49 A.3d at n.30; Henderson, 27 A.3d at 885; Lawson, 291 P.3d at 690 n.5; Almaraz, 301 P.3d at 251; Clopten, 223 P.3d at 1108; Copeland, 226 S.W.3d at 299; Minor, 57 A.3d at 414; Walker, 2014 WL 2208139, P.10-11. See also Justice Pariente's specially concurring opinion in Simmons, 934 So.2d at 1124 and 1126. As stated in United States v. Brownlee, 454 F.3d 131,141(3rd Cir.2006):

> It is widely accepted by courts, psychologists and commentators that "[t]he identification of strangers is proverbially untrustworthy." Felix Franfurter The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen 30 (Universal Library ed., Grosset & Dunlap 1962)(1927)("What is the worth of identification testimony even when uncontradicted? ... The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent-not due to the brutalities of ancient criminal procedure."); see also United States v. Wade, 388 U.S. 218,228,87 S.Ct.1926,18 L.Ed.2d 1149(1967)(stating that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"); C. Ronald Huff, et.al, Guilty Until Proven Innocent: Wrongful Conviction and Public Policy, 32 Crime & Delinq. 518,524(1986)("the single most im-

> portant factor leading to wrongful conviction in the United States ... is eyewitness misidentification"). The recent availability of post-conviction DNA tests demonstrate that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications. In 209 out of 328 cases (64%) of wrongful convictions identified by a recent exonerations study, at least one eyewitness misidentified the defendant. Samuel R. Gross et al., Exonerations in the United States: 1989-2003 95 J.Crim.L. & Criminology 523,542(2004). In fact, "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." A. Daniel Yarmey, Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts? , 42 Canadian Psychology 92,93(May 2001). "[E]eyewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence." Id.

(emphasis in Brownlee opinion)

This Court has stated that "[a]ny doubt as to admissibility under Frye should be resolved in a manner that minimizes the chance of a wrongful conviction, especially in a capital case" [Ramirez v. State, 810 So.2d 836,853(Fla.2001); see also Harrison v. State, 33 So.3d 727,732(Fla. 1st DCA 2010); Brewington v. State, 98 So.3d 628,630 (Fla. 2d DCA 2012)], and there is no reason why that principle shouldn't be equally applicable under Daubert.

Each of the cases (decided from 1981-2006) relied on by the state in its effort on cross-appeal to overturn Judge Hunter's ruling is actually an affirmance of a trial court determination. It is a far different matter to conclude - - as in Johnson v. State, 393 So.2d 1069,1072(Fla.1981); Johnson v. State, 438 So.2d 774,777(Fla. 1983); Lewis v. State, 572 So.2d 908,911(Fla. 1991); McMullen v. State, 714 So.2d 368,372-73(Fla.1998); and Simmons v. State, 934 So.2d 1100,1117(Fla.2006) - - that a trial judge did not abuse his discretion by excluding eyewitness expert testimony

(see SB 120-21) than to conclude that a trial judge did abuse his discretion by allowing such testimony, especially where, as here, the trial judge's decision is supported by compelling evidence and well thought-out findings. This Court in McMullen, after discussing the three differing views as to the admissibility of expert eyewitness testimony (as of 1998), expressly reaffirmed its adherence to the majority "discretionary" view, as opposed to "prohibitory" or "limited admissibility" views [714 So.2d at 370-73], and emphasized that "[t]he trial court was in a far superior position to that of an appellate court to consider whether the testimony would have aided the jury in reaching its decision." 714 So.2d at 373.

The state suggests (1) that Dr. Brigham's testimony amounted to a comment on the credibility of the state's witnesses, Greisman and Ortiz (SB 121); (2) that "there are other means that can provide a jury with sufficient information to evaluate the reliability of eyewitness identification such as, cross-examination, jury instructions and closing arguments" (SB 123); and (3) that the prosecution's case was not based "solely" on the eyewitness identifications (SB 123).

As to the first point, Dr. Brigham explained in the evidentiary hearing that in all the court cases in which he has testified he has never been asked to evaluate whether a particular witness is reliable in his or her identification; that "would be invading the province of the jury" (25/3994-95). Rather, he sees his role as giving the jurors "a frame of reference based on science, not based on their own spotty knowledge or stereotypes or whatever, as to what we know about memory" (25/3993). The trial

judge's ruling that Dr. Brigham would be allowed to testify was made with the specific caveat that he "would not be able to render an opinion as it relates to any specific witness" (41/6605). Accordingly, Dr. Brigham's trial testimony, on direct examination by defense counsel, contains no mention of Brandon Greisman or Carlos Ortiz, much less any opinion as to the reliability, or lack thereof, of their identifications. Instead, his testimony was confined to brief explanations of what scientific research has learned regarding high stress, weapon focus, cross-race bias, confidence level, and the forgetting curve (95/4841-67).

It was on cross-examination that the prosecutor asked Dr. Brigham, "Now, in this particular case, did you have any opinion as to whether or not the individuals who were shown the photo line ups are accurate or not accurate in their . . ." (95/4902). This question arguably violated the judge's pre-trial order, and might have opened the door to Dr. Brigham answering what was asked, but defense counsel timely objected. By agreement, the prosecutor was allowed to re-phrase his question, and Dr. Brigham answered that he did not form an opinion as to whether the witnesses involved in this case were accurate or inaccurate; "I see my role as to provide general information about eyewitness memory, and not to comment on any particular witness or . . . situation" (95/4908-09, see 4902-07). The judge, again with the agreement of both parties, immediately instructed the jurors that they are the exclusive trier of fact, with the sole duty of determining the believability and credibility of witnesses (95/4909).

See State v. Guilbert, 49 A.3d at 729 and 731 (expert testimony on the factors adversely affecting the reliability of eyewit-

ness identification does not invade the province of the jury); State v. Clopten, 223 P.3d at 1109(expert "will not offer an opinion on whether the specific eyewitness identification is accurate or not", but "[i]nstead the relevant research is discussed in more general terms, thus allowing the jury to apply the information to whatever degree it sees fit"); Commonwealth v. Walker, 2014 WL 2208139, at p.16 (rejecting commonwealth's claim that expert testimony on factors concerning eyewitness identification would constitute an impermissible invasion of jury's province in determining credibility; such testimony "would not speak specifically to the legitimacy of the . . . identification, or pass directly on the veracity of a particular witness, but would provide a background against which the jury could assess various factors concerning eyewitness identification at issue in the case").

It is also worth noting that the state was in no way precluded from contesting Dr. Brigham's scientific opinions. The prosecutor had his own expert, Dr. Rogers Elliott, waiting in the wings, and ultimately chose not to call him, or to present any rebuttal case at all (95/4920; 96/4957).

The state's second point was cogently addressed by the Connecticut Supreme Court in Guilbert:

> As a result of this strong scientific consensus, federal and state courts around the country have recognized that the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications - cross-examination, closing argument and generalized jury instructions on the subject - frequently are not adequate to inform them of the factors affecting the reliability of such identifications.

49 A.3d at 725.

As to cross-examination, the Guilbert opinion notes that it

is not as effective as expert testimony because cross-examination is "far better at exposing lies that at countering sincere but mistaken beliefs." 49 A.3d at 725-26. While skillful cross-examination may succeed in exposing obvious inconsistencies in an eyewitness' account, it cannot effectively educate jurors about the import of the various factors which can affect the accuracy of an eyewitness identification. 49 A.3d at 726. The court emphasized that "[n]othing is obvious about the psychology of identification and most people's intuitions on the subject . . . are wrong." 49 A.3d at 726. See also Commonwealth v. Walker, 2014 WL 2208139, p.16-17.

Defense counsel's closing argument to the jury urging them to find that an eyewitness' identification is unreliable is, if anything, an even more "inadequate substitute for expert testimony." Guilbert, 49 A.3d at 726; see also Walker, p.16-17. In the absence of the evidentiary support provided by the scientific research presented by an expert:

> such an argument is likely to be viewed as little more than partisan rhetoric. See, e.g., Ferensic v. Birkett, 501 F.3d 469,482(6th Cir.2007)("The significance of [the proffered expert] testimony cannot be overstated. Without it, the jury ha[s] no basis beyond defense counsel's word to suspect the inherent unreliability of the [eyewitness'] identifications"). This is especially true if the argument relates to a factor that is counterintuitive.

49 A.3d at 726 (emphasis supplied).

Finally, the court in Guilbert explained that research has revealed that generalized jury instructions are less effective than expert testimony in apprising jurors of the potential unreliability of eyewitness identifications. Jury instructions do not explain the complexities of perception and memory, nor convey the

results of scientific research, and they do not serve as an effective safeguard against mistaken identification. 49 A.3d at 727.

See State v. Clopten, 223 P.3d at 1108-11("In the absence of expert testimony, a defendant is left with two tools - cross-examination and cautionary instructions - with which to convey the possibility of mistaken identification to the jury. Both of these tools suffer from serious shortcomings when it comes to addressing the merits of eyewitness identifications, [footnote omitted]. Additionally, the admission of eyewitness expert testimony is gaining support in courts throughout the country"); see also State v. Lawson, 291 P.3d at 695; State v. Copeland, 226 S.W. 3d at 300.

As to the third point, while it is true that the prosecution had other evidence suggesting guilt (although it did not - - as the state repeatedly and misleadingly asserts - - have a confession), it is equally true that the defense vigorously challenged the state's evidence, and presented its own testimony suggesting that Davis was not the perpetrator. Moreover, the trial judge specifically found in his order allowing Dr. Brigham's testimony that the eyewitness identifications "will have a significant role in the prosecution of the Defendant in this matter" (41/6606). See Guilbert, 49 A.3d at 738.

The trial court, in allowing Dr. Brigham to testify concerning five of the six proffered factors, did not abuse his discretion.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court (1) reverse his convictions and death sentences and remand for a new trial, and (2) affirm (or do not address on grounds of mootness) the trial court's rulings regarding Juanita Luciano's dying declarations and Dr. John Brigham's expert testimony.

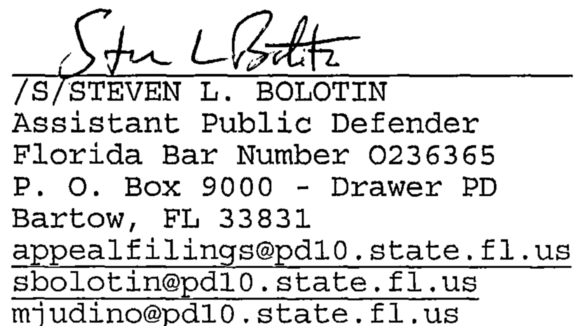
CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General at Capapp@myfloridalegal.com, and to Timothy Freeland at Timothy.Freeland@myfloridalegal.com, on this 2nd day of June, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,



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