Electronically Filed 12/02/2013 01:39:41 PM ET

RECEIVED, 12/2/2013 13:43:42, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

LEON DAVIS, JR.,	:	
Appellant,	:	
vs.	:	Case No. SC11-1122
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

HOWARD L. “REX” DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER 0236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

Other Authorities

STATEMENT OF THE CASE

Leon Davis was charged with three counts of first degree murder (of Yvonne Bustamante, Juanita Luciano, and Michael Bustamante), attempted first degree murder (of Brandon Greisman), armed robbery, arson, and possession of a firearm by a convicted felon (2/73-78). The last count was severed (8/1251). Lengthy pretrial hearings were held on defense motions (renewed immediately before trial, and standing objections allowed, 79/2139-40) to exclude victim hearsay (dying declarations) (10/1565-68), and to exclude in-court identifications (10/1596-99; 19/3070-72); as well as a prosecution motion to exclude the testimony of Dr. John Brigham, the defense's expert on factors affecting the accuracy of eyewitness identification (19/2997-3001). The outcome of these hearings can be summarized for purposes of this appeal as follows: (1) The trial judge (Michael Hunter) ruled that testimonial statements made by Yvonne Bustamante in response to questioning by police lieutenant Joe Elrod (which were heard or overheard by several other witnesses as well) were admissible as dying declarations (which, Judge Hunter concluded, constituted an exception to the Confrontation Clause and to the standard announced in Crawford v. Washington, 541 U.S. 36 (2004)), but the statements made by Juanita Luciano to Lt. Elrod or other law enforcement personnel were not admissible as dying declarations, due to insufficient evidence that Ms. Luciano believed her death was imminent (19/3074-81). (2) The trial judge ruled that the photopacks shown by law enforcement officers to Brandon Greisman and Carlos Ortiz were not impermissibly suggestive, and therefore their pretrial

and in-court identifications were admissible (18/2828-39, 2950; 19/3043-46). (3) The judge, after an extensive Frye hearing, found that Dr. Brigham "is exceptionally well qualified as an expert to present opinion testimony on the subject of eyewitness identification" (41/6617), and he would be permitted to testify concerning five of the proffered factors (stress, weapon focus, forgetting curve, confidence, and cross-racial bias), but not the sixth (unconscious transference) (41/6603-18). In his order, Judge Hunter emphasized that the encounters between the perpetrator and the state's two key eyewitnesses (Greisman and Ortiz) were brief, highly stressful, and a weapon was involved; Greisman in fact was shot in the nose (41/6606).

The initial jury trial resulted in a mistrial partway through the state's case, occasioned by a gratuitous comment by emergency medical technician Ernest Froehlich (55/9169-96). A new jury was selected and a four-week trial took place in January and February 2011, resulting in verdicts of guilty as charged on each count (64/10697-10702; 97/5235-36). After the penalty phase the jury recommended death sentences by 12-0 vote (as to the two adult victims) and 8-4 vote (as to Luciano's infant son Michael Bustamante, whose premature birth was induced while his mother was in a coma) (64/10714-16; 100/5573-74). Judge Hunter overrode the death recommendation as to the child (imposing a sentence of life imprisonment on that count), but he imposed death sentences on the other two counts, finding seven aggravating factors, one statutory mitigating factor, and fifteen nonstatutory mitigators (66/10843-64).

STATEMENT OF FACTS

A. Overview

Due to page limitations, and since appellant is not challenging the legal sufficiency of the evidence, this Statement of Facts will focus on the evidence relating to the issues raised; i.e., the dying declarations and the eyewitness identifications. Facts relating to the autopsy photographs, and the "avoid arrest" aggravator (argued in the "forfeiture" section of the dying declarations issue), are set forth in the argument portion of the brief. The other evidence, circumstantial in nature, presented by the state, and the other evidence (including Davis' testimony) presented by the defense, will be discussed more thoroughly, if necessary, in the reply brief, in the event the state contends that the evidentiary rulings challenged herein constitute "harmless error".

This case arises from the robbery and arson of the Headley insurance agency in Lake Wales on December 13, 2007, during which the two female employees were doused with gasoline and set on fire. As the trial judge repeatedly recognized, there was no dispute as to how the women died or that the crime was horrible; the question to be resolved at trial was whether Leon Davis was correctly identified or misidentified as the perpetrator. (See, e.g. 72/1005; 73/1086-87; 94/4644,4652, and Issue III). Several people who lived in the neighborhood (including Greisman, Ortiz, Fran Murray, and Vicky Rivera), as well as an older woman who had driven to the insurance agency (Evelyn Anderson) and a young woman who had driven to the nearby Havana Nights restaurant (Ashley Smith) had somewhat more or somewhat less opportunity to observe

the perpetrator - - a tall, black male - - at some point during the aftermath of the fire. Fran Murray and Ashley Smith (the latter of whom was acquainted with Leon Davis) only saw the perpetrator from the back or the side and they were unable to make any identification (see Supp.Rec.1/5,13-17,25-29,37-38; 11/1664; 52/8659-60; 80/2245-47; 81/2473,2515-16,2519-20). Vicky Rivera could not identify the person (see 17/2797-2300). Evelyn Anderson, who actually spoke to the suspect when he exited the front door of the insurance agency, was also unable to make an identification (see 79/2215-16; 80/2244-45; 82/2599-2600,2610-11). Of the witnesses at the scene, only Brandon Greisman and Carlos Ortiz identified Leon Davis at trial (and Greisman, who had earlier claimed to be positive of his identification, had retreated by the end of cross-examination to "pretty certain" and "I feel in my heart that that's the man" (83/2902-03, 84/3010).[1]

The defense had also pointed to Brandon Greisman's mental health problems (including depression and bipolar disorder preceding the events of December 13, 2007, as well as post-traumatic stress resulting from the incident itself) as a factor affecting the reliability of his identification (see 8/1143-46; 9/1363-1411; Supp.Rec.1/63-81). [At trial, Judge Hunter said of Greisman, "This witness has a delicate psyche. I don't know how else to put

[1] Greisman, Ortiz, Murray and Anderson all testified in one or more of the pretrial hearings and at trial. Rivera testified only in the hearing on the admissibility of the dying declarations. Ashley Smith's taped statement and her deposition were offered by the prosecution and considered by the trial judge as evidence in the pretrial hearing (13/1988-94,2004,2035; 15/2392-95; 19/3074). She testified in the trial which resulted in a mistrial, but she was not called by either party in the subsequent trial.

it. He is squirrely, maybe that is a better way to put it" (84/2990; see, for example, 84/2942-43). In his deposition (which the state and the defense each requested the trial judge to consider in ruling on the defense's motions for a mental health examination of Greisman and for disclosure of records) (9/1406), Greisman stated "My memory has changed quite considerable. . . . Like I don't remember a lot of things. Like I forget about a lot of things now. I don't know if it's just because I'm so overloaded or just what I'm thinking about. I mean, I'm constantly thinking about what happened, why it happened, why am I still alive" (SR1/70). Greisman had blacked out after he was shot, and there was a gap in his memory of the incident; he described it as "a period I'm missing in the puzzle" (SR1/80). He was also having memory issues in his everyday life, and he was on about five different medications (SR1/72-73,78-81).

Regarding his neighbors, Greisman said that a week before the crimes which occurred at Headley, Carlos Ortiz' girlfriend had died of a drug overdose. Fran Murray, who had just gotten out of jail, was a friend of Ortiz' girlfriend who had been staying with them, and she remained there after the girlfriend's death. Greisman talked to Ortiz about why was he having this person stay with him, but it was really none of his business. Then, during a two-month period shortly after the events at Headley, while Greisman and his family were temporarily staying at Care Haven, Fran Murray broke into his house and stole a large quantity of food, as well as some city property [Greisman was a Lake Wales city employee] including a radio and a couple of cell phones. Vicky Rivera (who had some of the food in her house) admitted to

it and laughed about it. Greisman confronted Carlos Ortiz, who was drunk and kind of wanted to fight (SR1/86-90, see 64-65,70,121; 9/1365-68).

Throughout the trial, a number of security videotapes were introduced; these include tapes from Wal-Mart (State Exhibit 9034 and Defense Exhibit 9)(62/10361; 64/10608); Enterprise Car Rental (State Exhibit 9031 and Defense Exhibit 10)(62/10359; 64/1069); Beef O'Brady's (State Exhibit 9032)(62/10360); and Mid-Florida Credit Union (State Exhibit 9026 and Defense Exhibit 10)(62/10357; 64/1069). It was undisputed that Leon Davis is the person depicted in the Enterprise, Beef's and Mid-Florida videotapes, and that he was in those places on December 13, 2007 in the early morning, lunchtime, and late afternoon respectively. Conversely, the identity of the black male in the Wal-Mart video was very much in dispute. [The claimed relevancy of the Wal-Mart video and identifications is that the person bought various items - - including an orange cooler, a Bic lighter, a large-sized gray T-shirt, and gloves - - which are consistent with items which were or may have been connected to the crime or the crime scene (85/3222-28; 87/3467-97). Note, however, that there was no testimony that the perpetrator was wearing gloves, and there was a fingerprint (not linked to Davis)[2] on the underside of the piece of duct tape which covered the lens of the security camera inside Headley; a print

[2] Crime scene technician Kendrick testified that to the best of her knowledge the print on the camera lens was not linked to Davis (82/2579). Detective Navarro testified that none of the prints from the Headley crime scene were matched to Davis (92/4281). Some of those prints were of usable value and some were not (92/4281). Navarro did not specify whether or not the print on the camera lens was one of usable value.

which the prosecutor argued was placed there by the robber (see 80/2292,2301-03,2321,2334-35,2348,2359-62; 81/2574-5;82/2576-79; 92/4281; 99/5501,5505)].[3] As Judge Hunter observed (and took judicial notice) in a pretrial hearing, while there was a general resemblance, the quality of the Wal-Mart video was insufficient to discern the person's facial features to permit an identification of Davis from the videotape (20/3143-49). At trial, Wal-Mart employees Mark Gammons and Jennifer DeBarros identified (from memory, not from the videotape) Davis as having been in the store in the early morning of December 13, 2007 (85/3226-27; 86/3272-74). The defense contended that Gammons was mistaken in his identification, while DeBarros (who'd had a falling out with Davis' sister, and who did not come forward until two and a half years after the crimes) was confused about the date that Davis - - with whom she was acquainted - - had been in the store (see 85/3237-51; 86/3276-92). The defense also presented testimony of a video production and engineering expert, Richard Smith, who showed the jury the Wal-Mart video on a high resolution monitor, zooming in on the suspect's arms (extended with forearms up) as he is paying the cashier, with the camera overhead. Smith testified that if the person had a tattoo on his arm, he would have expected to see contrast (95/4935-39,4947-51). [Leon Davis has large tattoos on his forearms which were displayed to the jury; photos taken at the Sheriff's substation on the night of December 13, 2007 after he turned himself in depicted the tattoos; and Jennifer

[3] The Headley security camera was not operational, but - - as the prosecutor pointed out - - the perpetrator would not have known that (see 99/5501).

DeBarros acknowledged that, while she never paid any attention to his tattoos, she knew he had them on his arms (86/3292; 93/4542-43;State Exhibits 7081 and 7082; see argument at 80/2243-44; 96/5068-72,5102-03; 97/5162)].

The series of surveillance videotapes also came into play regarding Greisman's and Ortiz' identifications of the perpetrator. Both of these eyewitnesses described the black male they saw as having an Afro but not a full Afro (Greisman), or "Afro hair, curly hair" (Ortiz) (84/2993; 85/3103-04). When shown a photograph of Leon Davis taken at the Sheriff's substation hours after the crimes occurred (State Exh. 7081), Greisman acknowledged that it could not be the same person he saw at the crime scene unless he cut his hair in the interim (84/2994, 3006-07). Ortiz, when asked if he had any explanation for the discrepancy, said "No. I don't, maybe he got a haircut" (85/3108-09). Defense counsel argued to the jury that - - while Greisman and Ortiz could not have known Davis' whereabouts earlier in the day, the Enterprise and Beef's videos showed that he had the same close-cropped hairstyle in the morning and at lunch that he still had that night when he turned himself in to police; "Your hair can't be short, then long, then short" (97/5126; see 80/2247-49; 86/3317-19; 96/5067,5090; 97/5161-62).

The state's direct evidence consisted of the crime scene identifications made by Greisman and Ortiz, and the dying declaration made by Yvonne Bustamante in response to Lt. Elrod's questioning. In considering the issue of Dr. Brigham's expert testimony, Judge Hunter recognized that "the most critical issue in this case is eyewitness identification", including the "dying

declaration of Mrs. Bustamante, who, in essence, is now considered an eyewitness" (21/3427), and including the testimony of Greisman and Ortiz (21/3428), all of which he was allowing in over defense objection. The judge later reiterated, "I consider the dying declaration eyewitness testimony through hearsay", "and then the significant eyewitness[es] in this case [are] Mr. Ortiz and Mr. Greisman" (28/4605).[4]

In closing argument, the prosecutor stated to the jury:

> Now, certainly, Yvonne Bustamante, in the shape she was in, when you see those pictures, didn't have any reason to identify any person in this world except the man who set her on fire. ...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, know 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)

During the penalty phase, Judge Hunter expressed the view that "[t]he most compelling evidence in this case is the dying declaration. I don't think anybody would dispute that" (98/5328). The judge further expressed his belief that that was one of the main factors which led to the jury's guilty verdicts (98/5328).

The remainder of the state's case was circumstantial, involving, inter alia, the conflicting interpretations of statements (which did not amount to confessions) made by Davis to his brother

[4] The judge also referred to the manager of Wal-Mart (Gammons) as an eyewitness, as well as "to some extent the black lady [Evelyn Anderson] that was there to pay her bill, although she doesn't identify the defendant" (28/4605).

Garrion and a family friend (and ex-police officer) named Barry Gaston; the financial difficulties the Davis family was experiencing (with the prosecution presenting evidence that the money problems were severe, and the defense presenting counter evidence that they were manageable); and ballistics evidence that several .38 caliber projectiles from gunshots fired inside Headley were all fired from the same gun (which could have been either a .38 or a .357 magnum caliber firearm), and were consistent with firearms made by 21 different manufacturers, one of which is Dan Wesson (90/4014-39). Leon Davis had bought a .357 magnum Dan Wesson revolver from his cousin Randy Black on December 7, 2013 (90/4049-81). Davis testified that soon afterwards he resold the weapon in a high-crime neighborhood in Winter Haven, after his mother reminded him of the risk of possessing a gun while on probation (93/4557-61; 94/4628-30). No firearm linked to the Headley crime scene was ever recovered, and therefore none was tested by the state's firearms analyst.

B. Evidence Pertaining to the Dying Declarations

Several of these witnesses testified at one or more motion hearings, the pretrial Arthur hearing, the trial which resulted in a mistrial, and the trial which resulted in guilty verdicts. Except where otherwise indicated, the testimony set forth herein is from the June 3 and 4, 2010 hearing on the motions to exclude victim hearsay.

The evidence in this record shows that Headley Insurance is located in the Nationwide building, which fronts on the north side of Central Avenue, which runs east and west through the business

district of Lake Wales. An antique shop and a restaurant (Havana Nights) are nearby. Stuart Avenue runs parallel to Central, one block to the north, so the back of Headley would face Stuart Avenue. Phillips Street runs north and south, perpendicular to (and intersecting) Central Avenue and Stuart Avenue, just to the east of Headley.

Fran Murray (then known as Fran Branch) in December 2007 was staying in a Stuart Avenue apartment with the boyfriend - - Carlos Ortiz - - of her best friend, who had just died of a drug overdose (11/1607-10; see 81/2493(trial)). Murray, who admitted to prior convictions on 10 counts of writing bad checks, had been incarcerated for DWLSR, and was released from jail about two months before the Headley incident occurred. [At, or just before, the time of the motion hearing she was back in jail]. (11/1635-37,1666).

On the afternoon of December 13, 2007, Murray was sitting on the porch with a neighbor, Vicky Rivera, when they saw smoke. They thought maybe the antique store was on fire. Murray, Rivera, and Brandon Greisman (another neighbor) went to investigate; the three of them came across the street at the same time. They heard “pop, pop, pop”, which sounded like chemicals on fire (11/1612-16). At that point, Vicky Rivera took off running down the alleyway back toward the apartments to get a phone (11/1616; see 52/8555-56(mistrial); 81/2503-05(trial)). Murray, who was coming around the side of the building, ducked down, and she saw Greisman hitting the ground. He had been shot in the face, and he went into a “gator crawl” (11/1616-17). Murray was in a little walkway near an electric pole at the rear of the insurance building, and:

> Right there is where I had run into Yvonne. I didn't run into Yvonne - - she was coming out. Let me tell you how it happened.
>
> I was standing behind the building, watching Brandon go down. Yvonne was on her way out. Yvonne had her hand up, when the pops went off. Her left hand had been shot. She had it like this.
>
> Brandon had been shot in the face. Brandon was on the ground.
>
> Yvonne came around, and there was a gentleman behind her. (11/1617-18)

[Murray did not know either of the women who were the victims in this case. She learned Yvonne's name later, when they were talking in front of the building; Murray had introduced herself as Fran, and the lady told her her name was Yvonne (11/1618-19,1637-40). Murray reiterated that the woman named Yvonne is the same woman who was coming out the back of the building, and she saw her later in front of the building leaning against an SUV (11/1627-28). At that point, Murray had not seen the second woman (who she later learned from the police officers was named Juanita); her only contact with Juanita happened later, when Murray went to the Havana Nights restaurant to get water for Yvonne (11/1618,1629-30,1634,1637)].

Yvonne was already outside when Murray first saw her. They were 10-15 feet apart, separated by a chainlink fence. Yvonne was burned all over, with her hands taped in front of her with silver duct tape, and she was screaming "I'm hot", "It hurts so bad", and that she needed something to drink. She was fumbling to walk, and as she was coming to the end of the chainlink fence, a man three or four steps behind her (whom Murray described from his side profile as a tall and husky black male)[5] had a gun raised "[a]nd

[5] Murray made it clear at the hearing and at trial that she could not identify Leon Davis as the shooter(11/1664; 81/2473,2519-20).

you heard pop, pop, pop". Yvonne "put her hand up to deflect it, like she knew she was going to be shot" (11/1620-24,1664). According to Murray, "I watched her get shot in the hand"; later, in front of the building, Murray asked her if she'd been hit in the hand and Yvonne said yes (11/1624,1659,1663). Brandon Greisman went to the ground at the same time Yvonne was shot (11/1624).

Asked where Yvonne went after the gunshots were fired, Murray said:

> She went to the front of the building.
>
> Q. Okay. Did you see how she got to the front?
>
> A. She walked.
>
> Q. Okay. She was still standing?
>
> A. She was stumbling, but she was walking, yeah.
> (11/1626, see 1618,1652-53)

The shooter stuck the gun into his lunch pail and walked north on Phillips Street (11/1618,1625). There was a car parked behind AA, and it was gone after the incident, but Murray didn't know if the man got into that car (11/1618,1625-26).

They got Brandon Greisman up off the ground; Murray walked him back to his house and sat him down in a chair in his driveway (11/1618,1626). "That's where Carlos Ortiz came in. He was there with the telephone, calling 911" (11/1626). Greisman's wife said she didn't have any towels, so Murray ripped off her t-shirt. Ortiz stayed and applied pressure to Greisman's nose, while Murray went to the front of the insurance building to be with Yvonne and see if she needed anything (11/1618,1627,1644).

Murray found Yvonne leaning against an SUV which was parked in front of the building (11/1627-28). [She later learned that

the SUV belonged to the lady (Evelyn Anderson) who'd come to make a payment (11/1614,1627)]. Yvonne was still screaming and in obvious pain; she said she needed something cold to drink. Murray asked her if she'd like her to get her a glass of water. Murray ran across the street to the Havana Nights restaurant, while the woman who was there to pay her bill stayed where she was. In the restaurant the young female behind the counter was calling 911. Murray told her she needed a glass of water quick, and the girl gave her one. That is when Murray first noticed a second burned woman who was sitting in a booth; she later learned that her name was Juanita (11/1626-30,1634).

Murray then returned to the SUV and held the cup for Yvonne as she drank a little bit of the water. She told Yvonne she needed to calm down because more stress adds to things; she introduced herself as Fran and said she'd stay until the ambulance arrived. Yvonne said she was in so much pain (11/1631).

Murray asked Yvonne, "Do you know who did this to you?" Yvonne answered that a black man had tied or taped her hands and doused her with gasoline, and he should be on camera (11/1631, 1647,1659,1664; see also 81/2486,2522-25(trial)). Yvonne did not mention a name, nor did she indicate that it was someone she knew; "[s]he just said that he should be on camera, and that was it" (11/1664; see 81/2524-25(trial)).

According to Murray, Yvonne then started talking about her kids, and saying over and over that her body hurt so bad. "She said, please keep me in your prayers. I'm not going to make it" (11/1631). Murray told her that God worked miracles, and that all she had to do was believe. Yvonne said she didn't do anything for

any of this, and she didn't know why it was happening to her. Murray told her she would keep her in her prayers, and she would come to see her if they'd let her. Yvonne said she would like that, but she didn't believe she was going to make it, and Murray told her just to keep faith (11/1632).

That was when the police arrived, and then the ambulance (11/1632,1654-55). There was only one paramedic assisting Yvonne, so Murray helped him load her onto the gurney and into the ambulance. Her pillow almost fell to the ground, so Murray grabbed it. All the while, until they closed the doors of the ambulance, Murray continued talking to Yvonne, telling her she would keep her in her prayers (11/1633,1655-59). The paramedic asked Yvonne what caused the fire, and she said it was gasoline that was poured on her; she also said she was badly burned, please get it to stop. Murray did not recall whether there was any conversation between Yvonne and the police officer (11/1657-58).

On cross-examination, Murray acknowledged that from the time she first saw the burned woman and saw Brandon Greisman get shot, everything became a total blur (11/1641-43). Asked to recapitulate the time frame of the events she described, Murray thought a couple of minutes to five minutes elapsed behind the building when she first saw Yvonne and when Greisman was shot; then it took a minute or two to walk Greisman back to his house; then two or three minutes attending to Greisman's injury; then she looked for Yvonne and found her at the front of the insurance building; then she spent some time with Yvonne before going to Havana Nights to get water (which took a couple of minutes); and then she spent

some more time talking to Yvonne before the police and then the ambulance arrived (11/1651-54).

Murray's trial testimony was generally consistent with her motion hearing testimony, with the following additional details: (1) Asked how long a time she spent with Yvonne near the SUV after she brought her the water and before the paramedics got there, Murray said, "It seemed like an eternity, ten or 15 minutes, seven to ten minutes, it could have been five minutes. It just seemed like forever" (81/2484). (2) Carlos Ortiz was never with Brandon Greisman at the time the black male came walking by. Murray was walking right with Greisman (maybe a foot or so behind him) when she was taking him back to his house after he was shot. At no point in time did she see Carlos Ortiz assisting Greisman across the street to his house (81/2509-11). (3) Murray never saw Brandon Greisman have any physical contact with the woman she identified as Yvonne Bustamante (81/2511-12); (4) The black car which the shooter was walking toward, and which was gone after the incident, was parked on the corner of the back street, facing east near a stop sign. In response to the trial judge's questions, Murray made it clear that the car was not in the driveway or beside the vacant house. It was a mid-size vehicle; she couldn't tell if it was a Chevy or a Ford, and it kind of resembled a Saturn (81/2479-80,2512-13).

Vicky Rivera (who testified in the motion hearing but did not testify at trial) was sitting alone on her front porch, when Fran Murray came over, said "Where there's smoke there's fire", and pointed across the street to the antique store. Upon investiga-tion, Rivera realized the smoke was coming from the insurance

company. Behind the building, Rivera noticed a woman leaning against the dumpster. The woman was burned from head to toe, and she had tape around her neck and over her head (11/1671-78). [Rivera did not know her, but she learned after the fact, through news media reports, that her name was Yvonne (11/1676-77,1683-86)]. Rivera asked her what happened and she said to call 911 (11/1678-79).

On direct examination, Rivera testified that when the burned woman said to call 911, she [Rivera] ran down Phillips Street back to her house on Stewart Avenue to make the phone call. The prosecutor asked her, once she began to run in that direction, when did she next see the woman? Rivera answered "In front of Headley, in the parking lot" (11/1679-80). On cross, she added that just before she ran, somebody came out of the building behind Yvonne and "shot at her, I believe, in the hand" (11/1689-93).[6]

Rivera did not see Brandon Greisman get shot. Greisman was on Phillips Street - - and not near the back of the building - - and "[h]e was nowhere near Yvonne" when Yvonne got shot in the hand (11/1693,1696).

When Rivera next saw Yvonne, she was in front of Headley in the parking lot, leaning against an SUV. She was screaming for water and appeared to be in pain (11/1680-82). Fran Murray went to get Yvonne some water, and by the time Fran came back with the water, uniformed personnel were already there (11/1682-83,1697-

[6] In the motion hearing, Rivera refers to this person as "Leon" (11/1690-95). However, Leon Davis was a name she learned via the news media (11/1686). As the prosecutor acknowledged, Rivera never saw the person at the scene well enough to identify him (17/2797-2800).

1704). [Rivera was not certain whether it was police officers or paramedics or - - at the prosecutor's suggestion - - possibly a firefighter; but once that person came up to treat or deal with the woman who had been burned, Rivera left and went back to where Brandon Greisman was (11/1702-04)].

Evelyn Anderson, accompanied by her teenage granddaughter and infant grandson, had driven to Headley to make a payment. She parked her Tahoe in front of the building, exited the vehicle, and approached the front door. When she twisted the knob, she found that the door was locked (11/1706-08,1713,1727). She thought to herself that they shouldn't be closed at this hour, and then she heard three popping sounds (11/1708,1711). Then a young black man came out the front door which she had just tried to open. Anderson described him as tall, well built, nice looking and nicely dressed. He had something in his hands (it looked like it was brown and she wasn't sure whether it was a bag) which he put under his arm as he came out the door. Anderson asked him what was going on, and he said there's a fire in there (11/1708-10). That was when she saw smoke coming out of the side of the building. The man headed west, toward the Havana Nights café across the street, and then north on Phillips (11/1712).

By the time the man made it to the corner, a lady ran out of the same (front) door which Anderson had found locked, and from which the black male had just exited (11/1712-13,1725-26). The woman (whose name, Anderson later learned, was Yvonne) was "naked as a jay bird" except for burning strings which were hanging on her; when Anderson tried to knock them off they burned her hand (11/1713-14,1717,1724-27). The woman was screaming for help and

saying that her sister-in-law had been shot (11/1714-15,1727-28,1732-33). Meanwhile, Anderson's granddaughter had run out of the truck and left the passenger door open; Yvonne got in the truck. Anderson told her to get out of the truck because the paramedics were coming, so Yvonne got out and leaned on the hood of the truck (11/1713-15,1726; see 82/2596(trial)). "And that's where she stayed until the paramedics got there" a short time later (11/1726, see 1715).

Anderson testified that during the entire time from when she came out the front door until the paramedics arrived, Yvonne was in front of the building near the Tahoe (11/1726-27). At no point in time did Yvonne go behind the building (11/1727). Anderson was right there with Yvonne until the paramedics got there (11/1731-32). Asked on cross "Now, during the time period that you were with this person named Yvonne who had been burned, did you ever see anybody give her any water?", Anderson answered "No, sir" (11/1729). Anderson testified that when she saw Fran Murray and Vicky Rivera at the pretrial hearing she did not recognize either one of them; "in fact, I had never seen them until we started coming to this hearing" (11/1729-30). Anderson could not absolutely exclude the possibility that either of those women could have come up and gotten close to Yvonne or given her some water, only because she wasn't concerned about who else was there; her attention was focused on Yvonne (11/1730-31, see 1715).

On direct, Anderson stated that two paramedics came and put Yvonne on a stretcher. One of them asked her who did it and she said Leon Davis (11/1716-18,1722,1733-38). On cross, she acknowl-

edged that it could have been a police officer who asked Yvonne who did it (11/1722-23,1732). On redirect, she reiterated that it was one of the paramedics (11/1737-38; see 82/2597-98,2619 (trial)).

The prosecutor asked Judge Hunter to consider the taped statement and the deposition of Ashley Smith (who had just given birth and was unable to travel) as evidence in the motion hearing, and the judge expressly considered them as such in his written ruling (13/1988-94,2004,2035; 15/2392-95; 19/3074). [Smith later testified as a state witness in the trial which resulted in a mistrial (52/8604-61), but she was not called by either party in the trial which resulted in guilty verdicts]. Smith is a casual acquaintance of Leon Davis; she sometimes tends bar at a club owned by Leon's uncle (Supp.Rec.1/13-17). On December 13, 2007 she was driving down Central Avenue getting ready to turn into the Havana Nights restaurant when a pregnant lady who had been burned came running toward her car and bumped into the window. Smith helped her inside the restaurant. The lady kept saying "He burned my friend", without mentioning any names (SR1/18-21). [The evidence in this case establishes that the pregnant woman - - and the one who was later seen by numerous witnesses inside Havana Nights - - was Juanita Luciano]. Smith then walked outside the restaurant, trying to call 911 on her cell phone, when she heard three pops that sounded like gunshots (SR1/3; see 52/8626-28, 8647(mistrial)). An older lady (who, Smith later learned, was Evelyn Anderson) was about to open the door to the insurance agency when a black male came out, walking really fast. He headed down the alley on the side of the building (SR1/3,5,24-29,35-37).

Smith never saw the man's face, but he was tall, wearing jeans, and carrying something like a lunchbox. Smith described his hairstyle as a "low fade" (like an Afro, but shorter on the sides and with more hair on top)(SR1/26-29,31-32,37-38).

Meanwhile, Smith saw a second burned woman, whom she knew as Yvonne Bustamante[7], come out. Evelyn Anderson was patting her down, trying to get some charred stuff off her, and Yvonne ran to the truck and jumped in (SR1/20-24). She was screaming; Smith was trying to calm her down while at the same time talking to dispatch (SR1/22-23).

About three to five minutes after she saw the black male running from the insurance business - - and while she was still dealing with Yvonne - - Smith heard several more gunshots coming from somewhere behind her, "and that's when everybody pretty much got on the ground" (SR1/24,29,34).

Smith stated that she saw a car which was dark-colored [deposition] or black [taped statement] and looked like a Nissan Altima. It had rims rather than traditional hubcaps. The car was parked on the street, right in front of the stop sign at the corner of Phillips and "whichever road that is right behind Havana Nights", and it was visible from the insurance parking lot (SR1/2,4,30-31,34-35). In her deposition, Smith said she did not see the Altima drive off, or who may have gotten into it, but at some point after the incident it was gone (SR1/38-39). In her

[7] Smith knew the woman who came out the door in front of the insurance building, by sight and by name, as Yvonne, and she knew her as Michael Bustamante's sister. Smith also knew that the pregnant woman in Havana Nights [Juanita] was dating Michael Bustamante (SR1/33; see 52/8618-19).

taped statement, on the other hand, Smith said she saw the same guy who came out the front door get in the car (SR1/3,5).

The medical examiner, Dr. Stephen Nelson, testified that the pain a person would feel from burns begins almost immediately, but as the burn advances and the nerve endings are destroyed, the pain may subside. This can occur in a relatively short time (11/1749-51,1760-65). Moreover, even in the earlier stage, adrenaline would kick in and the person would be able to walk, run, and speak (11/1750,1756,1762-63). Dr. Nelson would not expect a burned person to become unconscious until medical intervention (in the form of pain medication) induced sleep (11/1754-55).

According to Dr. Nelson, the probability of survival of burn injuries is roughly inversely proportional to the percentage of body surface which is burned; so - - for example - - if the burns are to 85% of the body, there is about a 15% chance of survival (11/1753), factoring in the person's general constitution and state of health (11/1771-72). Even with the best of care at a burn treatment center, there is a great risk of fluid loss and bacterial infection; when people die as a result of thermal burns the specific cause of death is usually pneumonia or (as in Yvonne Bustamante's case) renal failure (11/1754,1767-68). Even without medical intervention, death would not be immediate, and treatment in a burn unit - - even if the person ends up dying - - would prolong it further (11/1767-69).

Although Dr. Nelson, because of his expertise 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).

Dr. Nelson testified that Yvonne Bustamante, who died five days after being burned at Headley Insurance, had second and third degree burns over 80%-90% of her body surface (11/1744-53). She had also sustained a gunshot wound to her left wrist (11/1745-47). Juanita Luciano died three weeks after the events at Headley. Although her death occurred later than Yvonne’s, according to Dr. Nelson Juanita’s burn injuries were at least as severe as Yvonne’s if not more so; she had third degree and possibly even some areas of fourth degree burns over 90% of her body surface (11/1757-60). Unlike Yvonne, Juanita did not have any gunshot wounds (11/1761). Juanita’s baby had been delivered by Caesarian section (11/1761), and died three days later as a result of extreme prematurity (88/3707-09) (trial); see 91/4134-42).

Lt. Joe Elrod of the Lake Wales Police Department had received a radio transmission regarding a fire at the insurance agency on Central in the late afternoon of December 13, 2007. En route he learned that somebody was hurt; then that a person had been shot and a suspect was heading north on Phillips. When he arrived at the scene he encountered a city employee whom he recognized (Brandon Greisman), who had been shot sideways across the bridge of his nose (12/1779-83). Elrod quickly determined that Greisman’s injury was not life-threatening. Greisman told Elrod that he’d seen a woman who was on fire, running and screaming, and a black male who looked like he was throwing stuff on her. When he [Greisman] ran to try to help the woman, the black male shot him (12/1783-84). Elrod then realized that the shooting

and the fire were part of the same incident, and he went to find the injured woman. He located her in front of the insurance building where a Tahoe was parked. Two ambulance personnel from the Polk County EMS were already there, and they had the patient on a gurney (12/1785-89,1811). Elrod immediately approached her without speaking with the paramedics (12/1788-89).

Elrod, who has some emergency medical training and some experience with burn victims in other contexts, observed a badly burned female [Yvonne Bustamante]; he estimated that 80% of her body had been burned (12/1789,1801). She was awake, calm, and quiet, and she did not appear to be in acute pain, or else she was in shock (12/1810,1814). [At trial, Elrod explained "[I]f you know much about burns and stuff . . . she was not feeling any pain, I don't think at that time" (82/2638, see 2672-74)]. Based on his experience, Elrod concluded that the woman was dying; "I knew she wasn't going to survive the injuries" (12/1791,1807). [Elrod acknowledged on cross that he is not a medical doctor; if the medical examiner Dr. Nelson said that the survival rate is roughly the equivalent of the percentage of body surface which is not burned, then "[t]hat's his opinion" (12/1808; see 11/1753)].

The prosecutor asked Lt. Elrod if his conclusion that the woman wasn't going to survive "affect[ed] the way that you then began to handle your responsibilities as the first Lake Wales officer to have contact with her?" Elrod answered:

> Yes, sir.
>
> Q. What - - what did you do? Why did you do it?
>
> A. I wanted to get her statement before it wouldn't ever be gotten.

(12/1791-92)(emphasis supplied)(see also 82/2637(trial))

Normally, Lt. Elrod explained, if he thought the injured person was going to survive and be in the hospital he would have just let the medical personnel try to take care of them, but in this case, he went ahead and began to ask the woman on the gurney very pointed questions (12/1792).

Elrod asked her if she knew who did this to her and she answered yes, it was Leon Davis. Asked how she knew him, she replied that he was a client of theirs at the insurance place. Elrod continued asking more questions. "She replied that her and the other lady - - she said her name now, but I don't remember what her name was. Said that they were working, and Leon Davis came in and demanded money from them, was trying to rob them. And when they didn't give him the money he wanted, he threw gasoline on them and set them on fire" (12/1793-94). She asked Elrod how the other lady was, but Elrod did not know at that time who she was talking about, and he didn't respond (12/1795-96).

According to Lt. Elrod, this conversation occurred while he and the ambulance guys were rolling the gurney to the ambulance and loading her in. He continued to speak with her as they were putting her in the back of the ambulance, but he didn't get into the ambulance with her (12/1796-98).

Right then, somebody told Elrod that someone else was burned real bad and [she] was in the Havana Nights restaurant. Elrod went there and saw a woman who was obviously pregnant [Juanita Luciano] sitting upright in a chair, "[a]nd she was burned worse than the lady on the gurney" (12/1799, see 1799-1805). He estimated a burn percentage of 90% (12/1802). Elrod went back to the

ambulance to try to get at least one of the two paramedics who were attending to Yvonne to come to the restaurant to assist Juanita. The paramedics told Elrod they couldn't do that (which made Elrod a little upset at the time) but that another ambulance was on the way (12/1800-02). Elrod ran back to the restaurant, where he asked Juanita if she knew who had done that to her. Before answering, Juanita asked Elrod how the other lady [whom she mentioned by name] was:

> And at that point, I was hesitant, but I told her, I said she's burned just like you are.
> And I said, do you know who did this to you?
> And she said, did the other lady tell me who it was?
> And I said yes.
> And she said, did she say it was Leon?
> And I said yes.
> And then she said it was Leon Davis.
> And then I asked her how she knew him. (12/1803)

She answered that he was a client of theirs, and also they personally knew him. Elrod testified that it had something to do with someone in her family - - maybe her boyfriend - - possibly knowing him from high school (12/1803,1816-18). [Elrod had commented in the Arthur hearing that he had thought it was a little strange that, before answering his question if she knew who did it, she asked him what the other lady had told him (8/1105)].

Elrod asked her what happened. "She said that Leon Davis came in and demanded money from them, tried to rob them. When they didn't give him what he wanted, he threw gasoline on them and set them on fire" (12/1803). He continued throwing fire on them as they were trying to run out (12/1803-04).

The first responders at the scene were paramedic Chip Johnson and EMT Ernest Froehlich (who initially assisted Yvonne Bustaman-

te), while the second team to respond were paramedic George Bailey and EMT Joshua Thompson (who went to Havana Nights to assist Juanita Luciano). [Chip Johnson, doing triage, went back and forth to both victims, while his partner Froehlich remained with Yvonne]. Trial testimony established that the silent alarm inside Headley was activated by either Yvonne or Juanita at 3:35 p.m. (80/2403; see 79/2179,2195), and Johnson and Froehlich arrived at 3:45 p.m. (82/2683,2698).

Johnson testified that he and his partner Froehlich responded to the fire and encountered a burned patient [Yvonne] who was leaning against a Tahoe. As a police officer approached, Johnson heard her say something to the effect that Davis did this. She also might have said a first name, but if so, Johnson did not catch it (12/1823-25,1843). The prosecutor then refreshed Johnson's memory with his statement to Officer Metz a few weeks after the incident occurred (12/1825-26,1846). Johnson now acknowledged that he had told Officer Metz that the woman's statement that Davis did it was made, while they were assisting her onto a stretcher, in response to a Lake Wales police officer's questioning (12/1826-27). However, Johnson believed his recollection was better at the time of the motion hearing than it was at the time he gave the statement, and he now thought - - and "I realize this is awkward" - - that (1) the woman's statement was volunteered, and (2) he didn't know if the police officer even asked her (12/1827).

At some point during what he described as "an awful chaotic situation", Johnson briefly went to the Havana Nights café where

the second burn victim was, leaving the woman by the Tahoe with his partner Froehlich (12/1828-29,1840,1843). In his taped statement to Officer Metz, Johnson had said that it was after he got back from the café that an officer asked the first woman if she knew who did it, and he [Johnson] just remembered hearing Davis. On cross in the motion hearing, Johnson reaffirmed that he believed the woman's statement was made after he'd returned from the café (12/1844-46):

> MR. NORGARD [defense counsel]: But do you see the very end of that sentence [in the taped statement] where it says she didn't hesitate when the officer asked her?
>
> JOHNSON: Yes
>
> Q: You said - - right before that, you said: I mean, it was obvious she knew who it was.
>
> A: Yeah. I said – -
>
> Q: She didn't hesitate when the officer asked her. So I'll ask you one more time: Was the name Davis said in response to the officer asking her questions?
>
> A: As - - the way I remember it now, no, sir.

(12/1845-46)

However, when defense counsel raised the question of whether it was reasonable to believe that Johnson's earlier statements might be more accurate recollections than his later ones, and he might very well be remembering it wrong now, Johnson acknowledged, "I would say that probably the first way I said it, it would stand to reason" (12/1846-47).

[In his Arthur hearing testimony on February 9, 2010 - - more than two years after the events at Headley and his statements to Officer Metz, and only four months before the victim hearsay motion hearing - - Johnson specified three times, on direct and

cross, that the woman's statement was made in response to the police officer's questioning:

> She - - what I remember principally was that this Lake Wales police officer came over and was asking her like, you know, who, who did this, and she shouted, shouted, and like I said, whatever first name or whatever she said, I don't recall that, I didn't understand that, I just remember Davis.

(7/1022; see 1018-19,1029)

At trial, on the other hand, Johnson no longer recalled the officer saying anything to prompt Yvonne Bustamante's statement (83/2790, see 2769)].

Johnson testified that when he initially encountered the woman who was leaning on the Tahoe [Yvonne], she was able to stand and speak, and she had airway control and circulation. "So she was not in obvious danger of - - mortal danger at that moment" (12/1828). For that reason, he left her with his partner Froehlich, and he went over to the café where he encountered a second severely burned woman [Juanita]. She had some charred material, which appeared to be black tape, around her neck and wrists. She was in obvious pain; she said it was still burning underneath the tape on her wrists, so Johnson applied some sterile water (12/1829-35).

Johnson estimated that each of the two women had burns to 80-85% of their body surface. It appeared to him that both of them had breathed flame (12/1831,1836-37). It was his opinion, based on his approximately 15 years experience as a paramedic, that neither of the women was going to survive, but he did not communicate this to them (12/1836-37). [In the Arthur hearing, Johnson stated that neither Yvonne nor Juanita said anything to him which

would indicate that she believed she was dying (7/1026-31)].

[At trial, Johnson testified that at no point did it happen that a police officer asked him to come to the restaurant to attend to the injured woman there and he said he couldn't do so because he had to stay with Ms. Bustamante. That would be absolutely contrary to his training as a paramedic; his job is to do triage on any injured person as quickly as possible (83/2794-95). See also 83/2749-50 (Ernest Froehlich trial testimony)].

Emergency medical technician Ernest Froehlich testified that his partner told him to get the lady [Yvonne] on a stretcher, while he [Johnson] went to assess the other patient in the café. [Doing triage, Froehlich explained, means "[y]ou determine who is the worst off, and that's who you take care of first"] Johnson left and came back, helped Froehlich get Yvonne into the ambulance, and then said he needed to go back to the restaurant (12/1848-54,1864-66). Unlike Johnson, Froehlich never went to the Havana Nights café and never saw Juanita Luciano (12/1852). Instead, Froehlich was right there with Yvonne Bustamante for the entire time from his arrival until she was placed in the helicopter to leave (12/1854). Froehlich testified that he did not recall anything about a police officer approaching Yvonne and her calling out or volunteering the name Davis (12/1865).

Instead, when Froehlich got Yvonne into the ambulance a male law enforcement officer in a dark-colored uniform - - from either the Lake Wales PD or the Polk County Sheriff's office - - stepped up to the back door and asked her "Do you know who did this to you?" (12/1855-56,1867-68). She raised up and very clearly and distinctly hollered Leon Davis (12/1855-59,1870-71). [Froehlich

didn’t recall whether the officer asked her more questions or whether she gave the officer any more information; “I was mostly focused in on her care” (12/1856-57,see 1866,1872)]. Froehlich told her she was safe here, it was all over with, and he asked her about her kids (12/1858-61,1873). He told her she was injured very seriously and she needed to be airlifted to the hospital in Orlando for treatment (12/1861-62,1872). He never told her she was going to die (12/1873). Asked whether Yvonne made any statements in reference to her physical condition, Froehlich replied “She said she was shot in the hand” (12/1861). [In his Arthur hearing testimony, Froehlich stated that when he asked her about pain or whether she was having trouble breathing, Yvonne’s main complaint was that she had been shot in the hand (7/1048; see 82/2702(trial)). She never made any statements that she thought she was dying, and Froehlich never would have said anything like that to her, because he didn’t know whether she would survive or not (7/1049-50). He wouldn’t have told her everything was going to be all right; instead he would try to reassure her by telling her “we’re going to do the best we can to help you” and “we’re going to get you to . . . the best place for your care” (7/1050-51).

Paramedic George Bailey and EMT Joshua Thompson were the second unit on the scene, and they treated Juanita Luciano in the Havana Nights café (12/1877-1905,1931-45). Once they got her in the ambulance, Bailey began to question her - - from a medical standpoint - - about what caused her injuries (12/1885-86,1897-1903,1939). Bailey did not ask her the name of the person who did

it, and she did not volunteer a name, but she indicated that she knew who he was (12/1886-87,1898-1900,1939-40,1944-45). According to Thompson, because the patient appeared to be pregnant, Bailey asked whether it was the baby's father or something, and she answered no (12/1939,see 1894-95). Thompson couldn't tell whether she knew him personally, or whether she even knew his name (12/1945). [Neither Bailey nor Thompson testified that she indicated that it was a client or customer].

Both Bailey and Thompson testified that Juanita told them that the man had poured gasoline on them and set them on fire. According to Bailey, she said this occurred in the midst of a robbery; but he kind of stopped her from talking about the robbery because it wasn't relevant to her medical treatment (12/1887-88,1939).

When asked about pain, Juanita said she was in some pain but not a lot of pain. According to Bailey, this is common with full-thickness burns (12/1888-89,1896). Bailey, based on his experience treating burn victims, did not think she was going to live; while Thompson - - who had no experience involving severe burns - - did not form an opinion about whether or not she was likely to survive (12/1904-05,1937).

Flight nurse Hewitt Tarver and paramedic Christopher Cate transported Yvonne Bustamante by aircraft to the hospital, while paramedic Shane Hall (and his flight nurse partner who didn't testify) transported Juanita Luciano. Both women were awake and in pain until medication administered prior to the flight rendered them unconscious (12/1946-13/1988). Based on their experience with burn patients, each flight medic concluded that the patient's

survival was impossible or extremely unlikely, but they did not communicate this to the patient (13/1959-61,1973-74,1985).

C. Evidence Pertaining to the Eyewitness Identifications

The following evidence, unless otherwise indicated, was presented in the June 7-8, 2010 hearing on the defense's motions to exclude the identifications made by Brandon Greisman and Carlos Ortiz:[8]

Detective Lynette Townsel interviewed Brandon Greisman on December 14, 2007, and Carlos Ortiz on December 17 (15/2361-78,2447-53; 16/2487-2501; 17/2757-61,2803-15). [Detective Yoxall was also present during the Greisman interview (15/2361; 16/2496)]. She showed each of them a six-person black-and-white photopack, and each identified the photograph of Leon Davis. [Copies of the two photopacks are in the record at 15/2367 and 2378; the only difference between them is that Davis' photo and book-in number are in the number 1 position in the Greisman photopack, while they are in the number 2 position in the Ortiz

[8] The record on appeal in this case contains ten transcripts of sworn testimony by the two eyewitnesses at the scene who identified Davis: Brandon Greisman and Carlos Ortiz. Each testified in the Arthur probable cause hearing (5/683-708; 6/910-7/939); the pretrial hearing on the motions to exclude their identifications (15/2436-67; 17/2738-95); the trial which resulted in a mistrial (52/8685-8722; 53/8857-54/8876; 54/8912-87; 54/9007-55/9145); and the trial which resulted in guilty verdicts (83/2852-84/3010; 84/3017-3149). Additionally, Greisman testified in the hearing on the motion to compel mental health examination and records (9/1363-89), and his deposition - - at the request of both the defense and prosecution - - was considered by the trial court in that proceeding (SR1/52-147; 9/1363,1406-07). However, due to the length of this brief, only their testimony in the hearing on the motions to exclude their identifications and their trial testimony are summarized in detail herein.

photopack]. [9]

In his interview, Greisman described the suspect as wearing a dark colored shirt, “like maybe gray or black” (15/2363).

Lake Wales police officer Townsel, who was in the detective division at the time, was informed that Leon Davis had been arrested, and she was provided with the photopacks. She did not know who put them together. Since the police department didn’t assemble their own photopacks at the time, they usually got them from the Sheriff’s office (which uses book-in photos), and sometimes they got them from the FDLE (which uses driver’s license photos)(16/2481-85). Townsel explained that you can tell the driver’s license photos because they have a blue background, “and a lot of times we would photocopy them and make them black and white”; while you can tell the Sheriff’s office’s book-in photos because “We know that’s what they use. And there is book-in numbers” (16/2484-85).

Townsel testified that when they receive a photopack, they make sure that the six individuals “look relatively similar so that nothing specific stands out”; they should all be of the same race, appear to be about the same age, and have similar hairstyles, for example (16/2485-86). Townsel examined the photopacks before she showed them to Greisman and Ortiz, and concluded that they met that test (16/2487; 17/2809-10). She acknowledged that there are book-in numbers clearly visible on the photopack, and the number corresponding to Leon Davis’ photo begins with 2007 (which was the current year), while the numbers corresponding to

[9] The original photopacks have been provided to this Court pursuant to its August 6, 2013 order granting appellant’s motion to supplement the record.

the other five photos begin with 93 or 94 (16/2515-17,2520-21). [The two rows of numbers are directly below the two rows of photos; each number is not underneath each photo, but the numbers are obviously positioned in such a way that each number corresponds to a particular photo. Also the photos are numbered 1 through 6, and the book-in numbers are also numbered 1 through 6 (15/2367)(Greisman photopack); 15/2378(Ortiz photopack)]. Townsel explained, “And you have your numbers underneath, but those numbers are more for us”; the police use them in case the witness points to an unknown suspect, so they can then call the sheriff’s office and identify who it is (16/2518). [Now the police department has a program which enables them to do it themselves (16/2518)].

When Townsel showed the photopack to Greisman, he immediately pointed to number 1 [Davis] (16/2499). She didn’t notice whether he looked at the other pictures, but she assumed that he did (16/2521-22). The prosecutor asked, “Did Mr. Greisman say anything at all about these numbers that he saw - -”, and Townsel answered “No”; the prosecutor then rephrased it “ - - or that would be visible along the bottom here”, and again Townsel answered “No” (16/2516).

On cross-examination, Townsel acknowledged that only two of the six men in the photopack were wearing gray shirts, while the other four had on white shirts (17/2817-18;see 15/2363).

Townsel instructed Greisman to initial the photograph that he chose, and he did so (16/2499; 15/2367). Someone also put a circle around the numeral 1 in the lower left corner of the photo; Townsel said it must have been Greisman because “[w]e don’t touch

the photopack", while Greisman didn't believe he circled it but couldn't remember for sure (see 15/2367,2463; 16/2499).

Instead of placing it in Property and Evidence, Townsel took the original Greisman photopack home with her, misplaced it, and didn't find it again until a few days before the hearing, in a box in her shed (16/2501-14; 2522-34,2548-49; see 9/1398-99; 10/1486-87; 13/2036-39; 15/2419-20,2426-27,2433-34; 17/2819-20; see also 92/4324-32(trial)). This mishandling of evidence, she admitted, is "a big deal" and a violation of departmental policy; a complaint had been filed and she anticipated being disciplined - - potentially even suspended - - for it (16/2530-31).

Three days after Greisman's photopack identification, Townsel showed a photopack containing the same six individuals (with Davis now in the number 2 position) and the same six book-in numbers (with the number beginning with 2007 also now in the number 2 position) to Carlos Ortiz (16/2535-46; 17/2802-16; see 15/2378). Because the case had been all over the news by then, Townsel asked Ortiz if he had seen the suspect's face on the news. Ortiz replied that he had not; "you know I am going through a lot, so I'm not really into what is going on out there" (17/2811-12; 15/2372). [Townsel testified that if a witness answered that he did see the suspect's picture on the news, "[t]hen I wouldn't show them the photopack" (17/2812)].

When she showed him the photopack, Ortiz picked out photo number 2 [Davis] without hesitation (16/2544; 17/2812-14). It did not appear to Townsel that he looked at the book-in numbers, and he didn't mention them (17/2813). At her direction, he initialed,

dated, and circled the photograph he chose (17/2814; 15/2378).

Townsel didn't tell Ortiz that the suspect's photo would definitely be in the photopack, and she didn't recall telling him there was a suspect in custody, though "I'm sure he knew it" (17/2813). Asked whether, after the tape was turned off, she told Ortiz he'd identified the right guy, she replied, "I don't remember if I did or not" (17/2814).

Brandon Greisman testified that when he went to investigate what he thought was a dumpster fire, he bumped into the burned lady (coming into physical contact with her) and got a burn mark on his skin because he wasn't wearing a shirt (15/2439,2442,2465). [In contrast to the testimony of Fran Murray and Vicky Rivera in the victim hearsay motion hearing (and Murray's trial testimony), in which they identified the burned woman in back of Headley whom Greisman tried to help as Yvonne Bustamonte (and where Murray claimed to have seen Yvonne get shot in the hand), Greisman testified that the burned woman in back of Headley was the pregnant one, Jane [Juanita Luciano] (15/2459). See also Judge Hunter's findings of fact in his sentencing order at 66/10875-76,10880 (stating that Greisman was trying to help Juanita Luciano when the perpetrator came up behind her and shot Greisman across the tip of his nose)].

There was a man walking toward Greisman and the burned woman, and Greisman thought he was coming to help (15/2439-42). Asked if he concentrated on the man's face, Greisman said "It happened so fast, but I did get a look at his face" (15/2441). The man pulled a gun out of a red or orange lunch bag, raised the weapon to shoulder level and pointed it at Greisman, who tried to turn his

body to run. Greisman had a ringing in his ears, he might have blacked out, and he didn't realize he'd been shot until he saw blood on his chest. At first he thought the blood was from bumping into the lady, until he saw that it was dripping from his face and "I didn't have a nose" (15/2444-46). Meanwhile, the man "was walking away like nothing had ever happened" (15/2446). At that point, Greisman could only see him from quite a distance away and from behind (legs and back); he never saw the man's face after the shooting occurred (15/2446).

After spending the night in the hospital, where he underwent surgery (and did not watch any television), Greisman went the next morning to the police department where Officers Townsel and Yoxall showed him a photopack (15/2447-51). His recollection was that the photos were in color, but he could be wrong about that (15/2451). Greisman didn't know whether anyone had been arrested for this incident, and the officers didn't tell him. The only thing they said to him was "If you don't identify this person, it's okay" (15/2450-51). Greisman quickly looked at all the pictures, and then pointed to picture number 1 [Davis] and initialed it (15/2451-52,2367). While he had never seen the man who shot him prior to the incident, Greisman testified that he identified him because he remembered his face, and he was 100% certain of his identification (15/2452,2455). [At trial, on cross, Greisman acknowledged that Davis' photo was the only one with a 2007 number, which represented the date he turned himself in, but Greisman asserted that he didn't know what it meant at the time of the photopack procedure (84/2999-3001)].

Carlos Ortiz, a convicted felon (he admitted in the pretrial hearing to two, three, maybe four priors; at trial he said it was four, and he was on probation at the time of the events at Headley), testified that he, Brandon Greisman, Fran Murray, and Vicky Rivera went to investigate the smoke coming from the building across the street (17/2740-42,2765; 84/3070,3074). The two girls went down the side of the building, Greisman went down the side street, and he [Ortiz] was coming up behind Greisman. Ortiz temporarily lost sight of Greisman. When Ortiz next saw him Greisman was coming back toward him, holding his face. Greisman said to Ortiz, "I been shot in the face. That guy shot me in the face" (17/2742-43). Greisman pointed, and Ortiz saw a tall black man walking away. The man crossed the street and headed northbound on Phillips (17/2743-48). The man was carrying an orange-ish red cooler type bag, and Ortiz saw what looked to be a firearm in his hand; he put his hand into the bag, and then Ortiz didn't see the gun anymore (17/2745-46).

Ortiz said he was watching "the whole person" as the man walked away; "I had a view from top to bottom". He was watching the man's hand, but "[a]t one point we kind of locked eyes for a second, and he just kept walking". According to Ortiz, the man was looking at him and Greisman "just as we were looking at him" (17/2747,2779).

Nevertheless, Ortiz was unable to describe the man's clothing at all; not as to color, or whether he was wearing long or short sleeves or long or short pants (17/2780-81,2818). [At the hearing he attributed this to the fact that it had happened almost two years ago, but in his interview with Detective Townsel four days

after the events Ortiz told her he remembered nothing about the suspect's clothing (15/2375,17/2780)]. Ortiz did notice the person's hair, which he described as a small Afro; short, but "[j]ust a little bushier than mine" (17/2782-83).

Ortiz watched the man walk away until he turned the corner at 118 Stuart (the house across the street from Brandon Greisman's house). Because that house had always been vacant, Ortiz had never seen any cars parked there before. Now, however, when he saw the black male walk to the back of the house, a car was parked in the back. Ortiz could see the entire car; it was a black Nissan Maxima (17/2748-49). [Ortiz testified that he was certain that the car he saw was a Maxima (17/2787)]. It did not have custom rims, and nothing about the wheels stood out in his mind (17/2787). Ortiz did not actually see the man get into the car, but he saw the car drive away, coming out on Phillips and heading northbound (17/2749-50). Ortiz was unable to see the driver (or passengers if any)(17/2750).

Later, after Brandon Greisman and the two women were loaded onto ambulances, Ortiz spotted David Black, a police officer he knew from the investigation of Ortiz' girlfriend's overdose death a week earlier. When Ortiz approached him, Black said he was busy, but he would get back to him. Ortiz said he'd wait at his house. Black did not come by, either that night or afterwards, and Ortiz made no further effort to contact him, or to speak with any other law enforcement officers, because they were busy too, and because he doesn't trust the police (17/2751-54,2765-66).

A female officer (Townsel) came to Ortiz' apartment on the

17th, and took his taped statement (17/2754-56; 15/2370-77). During the four-day interval between the events at Headley and his interview with Townsel, there were reporters and camera crews from newspaper and TV "[e]verywhere you turned around". Ortiz "was just trying to avoid the whole thing"; they were sticking cameras in people's faces and he didn't want any part of it. He testified on direct that he never let them in his house and never gave them an interview (17/2756-57). [On cross, Ortiz acknowledged that he did give an interview to a girl from a newspaper who showed up at his house; the article in the December 17 Ledger quotes Ortiz as saying the robber "walked like someone who didn't have a care in the world", and - - after the robber hesitated for a moment at his car parked in a grassy area behind a vacant house at 118 Stuart Ave. and then got in and left - - "He didn't speed off, didn't burn no rubber. He drove off slowly like a person with no care in the world" (17/2766-68; SR3/514). Ortiz acknowledged in the motion hearing that that sounded like the interview he gave (17/2767-68)].

Ortiz had stated in a deposition that he might have learned Leon Davis' name in the newspaper; "It was in the paper, I believe, the next day" (17/2768-69). His neighbors had brought over the newspaper (17/2769). In the motion hearing, Ortiz acknowledged that he'd said that in the deposition, but now claimed that defense counsel had "kind of confused me a little bit" (17/2769):

> But actually that gave me a good chance to think hard about what I did see, and that's why I was able to say - -
>
> DEFENSE COUNSEL: Yeah. You thought - -
>
> ORTIZ: - - the exact date on the date today.

> DEFENSE COUNSEL: You thought hard about it when later on in the deposition, after you'd already told me that you saw it in the newspaper the next day, I said, well, then why did you tell the police you hadn't seen the news, right? That's when you changed the date you saw- the newspaper, right?
>
> ORTIZ: Correct. (17/2770).

[A large photograph of Davis in jail garb and handcuffs, showing his face and torso, appeared on the front page of the December 15, 2007 Ledger (SR3/508)].

Similarly, Ortiz was confronted with the following question and answer from his deposition:

> DEFENSE COUNSEL: Yeah. Did you watch any of the news coverage on the TV with them [his neighbors] or your- self?
>
> ORTIZ: The next day I caught the report on the morning news, but I was - - I didn't need to watch it on the news. I had the news right outside the door. (17/2770).

Next, in the depo, defense counsel asked, "[W]hen you say you caught it on the morning news the next day, do you remember what channel you might have been watching?" Ortiz had replied that he usually watches the news on channel 13 (17/2771-72).

In his motion hearing testimony, Ortiz once again explained that he had been confused, and the way defense counsel was phras- ing the questions had him a little bit off balance (17/2771). Ortiz again acknowledged that it wasn't until defense counsel confronted him (during the depo) with the fact that he had told the police in the December 17 interview and photopack procedure that he hadn't seen the news, that he then changed his story as to when he saw it on the news (17/2771, see also Ortiz' statements in the later portion of the depo as elicited by the prosecutor on redirect, 17/2790-94). Ortiz ultimately adhered to the position,

in the motion hearing and at trial, that at the time the police officers showed him the photopack on December 17 he had not seen any news accounts that had the face of the suspect (17/2761,2795; see 85/3116-24,3142-44(trial)).

In any event, when the female detective was at his house on the 17th she showed him a photopack, and he identified photo number 2 [Davis] right away (17/2757-60; 15/2378). Ortiz testified that he was 100% certain of his photo identification (17/2761). Asked how he was able to pick him out, Ortiz said "Well, as I watched him walk away, I thought to myself he looked familiar. He looked like the guy I've seen at - - at the gate I work, and that's how I was able to recognize him . . ." (17/2760, see 2761-63). Asked by the prosecutor about this person he'd seen when he worked at Florida Natural, Ortiz had no idea how many times he'd seen him, and had never spoken to him nor had any personal contact with him. "[W]hen you're getting off work, the people from the following shift are coming in, and you cross each other at the gate. The place is huge, so there's hundreds of people working in there. You just see people walking in and out of the gate. Some you know, some you don't" (17/2762-63). On cross, he described Florida Natural as "like a little city in itself" (17/2788). It was brought out on cross that Ortiz was a seasonal worker. He thought there were three gates at Florida Natural but there could be as many as five. Depending on where a person worked in the plant, that would determine which gate they would probably use. Ortiz worked in fruit receiving; he never saw the person whom he said was the same man he saw at the crime scene work in fruit receiving (17/2773-79). Ortiz acknowledged that

when he is going through his designated gate “I just see the people in passing”, and he doesn’t really pay attention to them as they walk in or out of the gate (17/2778-79). Asked if he ever saw the person without a hat, Ortiz replied “Everybody at Florida Natural wears a hat” (17/2782).

[At trial, Ortiz testified on direct that he was never actually employed by Florida Natural; he worked for a couple of temp agencies, Spartan Staffing and Labor Solutions, which placed him part-time at two juice plants, Florida Natural and CitroSuCo (85/3025-29). Subsequently three defense witnesses - - the human resources manager at Florida Natural; the operations manager at Spartan Staffing who was based at Florida Natural; and a staffing specialist at Spartan Staffing - - for the purpose of showing that due to the nature of their respective jobs - - Davis (who was a permanent employee of Florida Natural at the time) and Ortiz would never have used the same gate (92/4368-4428)].

At trial, over the defense’s renewed objection (79/2139-40), Greisman and Ortiz identified Leon Davis as the tall black male who was walking toward the burned woman and shot Greisman in the nose [Greisman’s ID], and then walked north on Phillips toward a black Maxima parked behind the vacant house [Ortiz’ ID].[10] (83/2899-2903; 84/3061-66). Ortiz stated that he was “positive”

[10] Much of Greisman’s and Ortiz’ trial testimony overlaps with their testimony at the motion hearing, so - - in an effort to conserve pages, and because Davis’ appellate issues concern the admissibility of evidence (and he is not contesting the legal sufficiency of the evidence) - - undersigned counsel will present here only those portions of Greisman’s and Ortiz’ trial testimony which significantly add to or explain what they said in the earlier hearing.

of his identification (85/3149), and so did Greisman (83/2902-03) (although by the end of his cross-examination and redirect Greisman had retreated from claiming absolute certainty (see 84/3010)).

Greisman acknowledged on cross that after the burned lady bumped into him and he saw her injuries, everything got scrambled; "[e]verything happened so quick that it just happened right away, everything was just - - it happened. It just" (83/2914-15). There was more than one significant thing going on at once that he was trying to pay attention to (83/2915). The black male appeared all of a sudden. At the same time, there were other people - - including some other black people - - standing around, and as Greisman was glancing up and noticing the person who was coming toward him and the lady, he was also noticing other people in the area (84/2918-19,2923). As far as he could remember, Greisman was focusing on trying to help the injured woman, then he glanced up and noticed the black male that he thought was coming to help, and then he directed his attention back to the injured woman (84/2923, 3009). Almost immediately, the black male pulled a gun out of his lunch bag or possibly out of his back pocket (83/2880-81; 84/2924-26,2932-33). At that point, Greisman was focusing on the weapon (84/2926,2928-29,2981-82,2995). As soon as he saw the gun, Greisman turned his head to try to run, and as he turned (although he didn't realize it right away) he was shot in the nose (83/2882-84; 84/2934). Greisman remembered that somebody told him he fell to the ground, but he didn't remember who told him that, and he didn't remember falling (84/2942-45, 2954-55). Asked whether he might have blacked out, Greisman said "Maybe, I don't know" (84/2945).

Although in his June 2010 motion hearing testimony Greisman had described the suspect, after the shooting, as "walking away like nothing had ever happened", and said he could see the man's legs and back (although not his face) as he walked away (15/2446), by the time of the trial seven months later Greisman no longer remembered seeing the man leave (84/2955-58). When he was shown three prior statements he made to police officers, they failed to refresh his recollection as to what he saw; as Greisman put it "I'm pretty much trying to forget what I saw" (84/2957, see 2956-58).

Greisman did remember walking back to his house and seeing blood on himself (83/2884; 84/2958-59). "It is just like a puzzle that's missing pieces" (84/2959).

Greisman stated on cross that he never saw Fran Murray anywhere near the black male or the burned woman at the time or place of the shooting (83/2913-15; 84/2916,2959-60):

> DEFENSE COUNSEL: You don't recall going down Phillips, when you got here, Vicky Rivera and Fran Murray popping out the other side?
>
> GREISMAN: No, I don't remember that because that's not what happened.
>
> DEFENSE COUNSEL: Did you ever see Fran Murray down there when you got shot?
>
> GREISMAN: No.

(83/2913-14)(emphasis supplied)

Greisman testified that he did not see Fran Murray until he made his way back to his house after the shooting (84/2913). Murray and Carlos Ortiz were there trying to help him, and Murray took off her shirt to stop the bleeding (83/2886).

While Greisman, at the time of the photopack procedure, had told Detective Townsel that he thought the person he saw was wearing a dark colored (gray or black) shirt, by the time of trial he no longer remembered the color of his shirt, or whether it had long or short sleeves (84/2980-81; see 15/2363). Greisman said to defense counsel, "Sir, if somebody was pointing a gun at you, would you be looking at what they were wearing?" (84/2981-82).

Greisman agreed that the whole thing happened so fast that he didn't notice whether the man had facial hair or not. If he had a beard, Greisman thought he would have remembered that; while if he had a mustache it would have been something fairly light (84/2984-86):

> Yeah. I'm not positive whether he might have had a little 12:00 shadow. I don't know. I have no idea. Again I wasn't, you know, I was just trying to get out of the way.

(84/2986)(emphasis supplied)

The one thing Greisman did notice about the suspect was his hair, which he had described as an Afro but not a full Afro (84/2994-95):

> DEFENSE COUNSEL: And, frankly, the only thing that you remembered about the person was their length of hair, right?
>
> GREISMAN: Yeah.
>
> DEFENSE COUNSEL: Everything else you didn't - - I don't remember, I don't remember, right?
>
> GREISMAN: Yep. I don't remember too much.

(84/2995)

When defense counsel showed him a photograph (State Exhibit 7081)(61/10117-18) taken of Leon Davis at the Sheriff's substation a few hours after the events at Headley, Greisman three times in

quick succession parried counsel's question with a question: "Could he have gotten a haircut before he came in?" "You don't think he could have gotten clippers and cut his hair before he came in?" "But don't you think it is possible he cut his hair before he came in" (84/2994). Asked whether he was saying that the only way the person in the photo could be the person he saw at Headley would be if he cut his hair, Greisman initially said "No, I'm not saying that. I could be wrong"; but immediately thereafter defense counsel asked him to "[l]isten to my question carefully":

> DEFENSE COUNSEL: That can't be the person you saw because that person's hair is not an inch long, unless that person cut his hair before this picture, correct?
>
> GREISMAN: Yeah.

(84/2994)

[Greisman also acknowledged that he had never seen any videos of how Leon Davis' hair had looked "right before all this happened, in fact at lunch time that day" (84/2995)].

At the very end of cross, defense counsel further clarified the hair style question with Greisman:

> Q. And the one last thing that I want to make absolutely sure with you is that is not - - I'm showing you State Exhibit 7081, that hair style is different than the person you saw, isn't it?
>
> A. I think so.
>
> Q. And, if Mr. Davis had that hair style at lunchtime, immediately before this incident - -
>
> A. If you are trying to say he wasn't the man that did it, you are wrong. I'm sticking by that.
>
> Q. Can you explain why the person had a different hair style?

A. I can't explain that.

Q. You can't explain why the person has a different hair style than what you saw and clearly remember, can you explain that?

A. Um-hmm.

Q. That is a no?

A. That is a no.

(84/3006-07).

At the conclusion of redirect, the prosecutor asked Greisman essentially the same question he'd asked near the end of direct: "How certain are you that the person you identified, Leon Davis, is actually the person that shot you?" (84/3010). On direct, Greisman had answered "I am positive it is" (83/2902-03). Now he was considerably less unequivocal:

> I'm pretty certain. I feel in my heart that that's the man. I'm sorry. I mean, that's what I feel. I was there. Nobody here was there other than him. So, I mean, for somebody to tell me that's not him, I have to say, no, that's - - he is.

(84/3010)

Carlos Ortiz testified at trial that when Brandon Greisman told him "That guy shot me", he [Ortiz] saw a tall (6'3 or 6'4), heavily-built (200 pounds plus), black male walking on Phillips Street from an initial distance of about 25 feet (and closing at one point to a distance of maybe 10 feet on an angle behind Greisman before the distance began to increase again)(84/3041-42,3048-49; 85/3086-87). Ortiz had grabbed Greisman and was physically assisting him in making his way back to his house, while at the same time watching the black male as he [the suspect] walked northbound on Phillips and crossed Stuart Avenue (84/3040-45,3084-85; 85/3086-91,3140-41,3148-49). As the man was crossing

the street, Ortiz saw parts of a pistol. The man put his hand in his lunch bag, and after that Ortiz didn't see the gun anymore (84/3049-50,85/3091-94). Ortiz was watching him to make sure he didn't turn around and come toward them, or shoot at them (84/3043-44). According to Ortiz, he made eye contact with the suspect and got a clear view of his face (84/3044; 85/3095, 3142,3147,3149).

On cross, Ortiz agreed that the amount of time he was able to see the black male was roughly the amount of time it would take the man to cross the street (85/3087-89):

> DEFENSE COUNSEL: But it wasn't just that everything was happening fast, including you trying to get Brandon to his house. There were all kinds of distractions, people screaming, running around, right?
>
> ORTIZ: Correct.
>
> DEFENSE COUNSEL: And as far as your opportunity to see the person, you did not see the front of the person the entire time. What happened is in that brief space of time it took the person to cross the width of the road, you saw a person from the front, then the side, and then their back, right?
>
> ORTIZ: Correct.
>
> DEFENSE COUNSEL: So as the person is crossing the road you see a glimpse of the person from the front, then [the] side, then the back, and you lose sight of him, correct?
>
> ORTIZ: Correct. (85/3090)

Ortiz acknowledged that the situation was very stressful, but he believed (at the time of the trial) that stress makes him think more clearly (85/3098-3101).

Ortiz agreed that he had described the black male he saw walking up Phillips Street as having "Afro hair, curly hair". (85/3103-04). Defense counsel showed Ortiz two photographs (State

Exhibits 7081 and 7083)[11] of Leon Davis taken at the Sheriff's office substation a few hours after the events at Headley. Counsel said, "That person doesn't have an Afro, do they?", and Ortiz said "No" (85/3103-04; see 61/10117-18,10121-22). Asked whether the person he saw walking down the street had different hair than the person in the photographs, Ortiz initially said "I couldn't tell you" (85/3104), but then he testified as follows:

> DEFENSE COUNSEL: All right. But you described that the person had a small fro and your answer was correct, right?
>
> ORTIZ: Correct.
>
> DEFENSE COUNSEL: And you were then asked if this hair [in the photo] was a small fro and you said it was not, right?
>
> ORTIZ: Correct.
>
> DEFENSE COUNSEL: So, using your own words if the person you saw had a small fro, what you described as a small fro, but this person doesn't, the hair is different, isn't it?
>
> ORTIZ: Yes, it is.
>
> DEFENSE COUNSEL: Can you come up with any explanation as to why this picture was taken the evening of December 13th, do you have any experience as to why Mr. Davis does not have a small fro, but the person you saw did?
>
> ORTIZ: No. I don't, maybe he got a haircut.

(85/3108-09)(emphasis supplied)

Counsel asked Ortiz if - - hypothetically - - there is a video of Leon Davis eating lunch at Beef O'Brady's with the same

[11] This section of transcript contains correct references to State Exhibits 7081 and 7083, as well as references to 7018 and 7038 (85/3102-03). The latter two are clearly typos (with the last two numbers transposed), since 7081 and 7083 are photos of Davis at PCSO (61/10117-18,10121-22), while 7018 and 7038 are photos of the burned bathroom area inside the insurance agency (60/10035-36; 61/10075-76).

hairstyle, then “he didn’t get a haircut, did he?” Ortiz replied, “I wouldn’t know” (85/3109).

Ortiz also acknowledged that he might have described the person he saw as having a goatee with a little mustache (85/3101-03). Defense counsel showed him State Exhibit 7083 (a large head shot photo of Davis at the Sheriff’s substation), and asked “Does that person have a goatee?” Ortiz answered, “No, that person looks shaven” (85/3102).

> DEFENSE COUNSEL: You are telling the Jury the person you saw had a goatee, but the person I showed you does not?
>
> ORTIZ: The person I saw was that man right there.
>
> DEFENSE COUNSEL: That is not my question. The person in this picture does not have a goatee, do they?
>
> ORTIZ: No.
>
> DEFENSE COUNSEL: And who is the person in that picture.
>
> ORTIZ: That man right there.
>
> DEFENSE COUNSEL: So, the person you saw that night had a goatee - - or pardon me. <u>The person you saw that afternoon had a goatee, yet Mr. Davis does not, right?</u>
>
> ORTIZ: <u>Correct.</u>

(85/3102-03)(emphasis supplied)

As he had in the pretrial motion hearing, Ortiz testified at trial that the suspect walked toward the driveway behind the vacant house at 118 West Stuart. Ortiz noticed a black Nissan parked in that driveway (where he had never seen any vehicle parked before). While he didn’t see the man actually get into the car, because his view was blocked at that point, Ortiz did see the same car a few moments later driving away, heading north on Phillips (84/3046-47,3051; 85/3010-12).

On cross-examination, Ortiz gave the following testimony about the black car:

Q. You told the prosecutor it was a Nissan, correct?

A. Correct.

Q. But, what you didn't tell him on direct examination was that it was a Maxima, correct?

A. Correct.

Q. And there is no question in your mind that the car you saw was a Maxima, is there?

A. Correct.

Q. And you also noticed that the car did not have custom rims, correct?

A. I couldn't tell custom rims, I couldn't tell.

Q. Now, if Mr. Davis, his motor vehicle was a Nissan Altima, then that wasn't his car behind there, was it?

A. I don't know.

Q. You just told us the car you saw was a Nissan Maxima?

A. Correct.

Q. So if Mr. Davis' car is a Nissan - -

MR. AGUERO (PROSECUTOR): Objection. This is argument.

THE COURT: Sustained.

Q. All right. No doubt in your mind that the car you saw was a Nissan Maxima, right?

A. Correct.

(85/3111-12)(emphasis supplied)

During the defense's case at trial, expert testimony from three witnesses - - William Gaut, Dr. Richard Marshall, and Dr. John Brigham - - was presented which pertains to the crime scene

eyewitness identifications.[12]

William Gaut became a law enforcement officer in 1968, and -- through a series of promotions - - advanced through the ranks to become a homicide specialist for 16-17 years, and eventually retired from the Birmingham, Alabama Police Department as Captain of Detectives (commanding 125-130 detectives). Gaut has obtained bachelors and masters degrees, and has completed all of the course work and is partway through the dissertation process for his Ph.D. He has received training from numerous state and federal law enforcement agencies; and he has taught at the Birmingham Police Academy, lectured at the University of Alabama-Birmingham and Samford University, and served as a full-time adjunct professor of criminal justice at Jefferson State Community College. Gaut has testified as an expert witness in the area of police practices and procedures (as well as private and proprietary security) in 28 states and numerous federal jurisdictions (94/4742-53).

In administering photopacks, Gaut explained, a double-blind procedure is a standard accepted by the International Association of Chiefs of Police and by various law enforcement agencies, in which the officer who shows the photopack to the witness is not involved in the case and does not know which of the six photographs is the suspect, or whether the suspect is even in the photo array. This procedure eliminates the possibility that the officer who is doing the showing will inadvertently do something - - whether it be verbal cues, physical cues, even “something as

[12] A fourth such witness, Richard Smith (an expert in video production and engineering), gave testimony pertaining to the Walmart identifications and video.

innocent as a glance of the eyes toward a particular picture" - - to influence or assist the witness in picking the suspect (94/4756-58).

Gaut testified that ideally any photopack identification should be videotaped. "There is not any real reason not to. You are [n]ot trying to hide anything. You are trying to document an identification. And as you say video equipment is $29.95, so to speak, it is readily affordable" (94/4766). Also, there is no good reason for using black-and-white photographs (as was done with the Greisman and Ortiz photopacks); "[c]olor has been around for decades now." Color photographs are preferable to black-and-white for many reasons, including the elimination of shadows which can be misinterpreted (94/4763-64). A witness' exposure to media accounts containing photographs of the suspect brings into question the reliability of any subsequent photopack identification (94/4776). Regarding the misplacing of the original Brandon Greisman photopack (which was found just before the pretrial hearing commenced), Gaut testified, "That is the kind of mistake that should not happen. The detective should not take original evidence home, or anywhere else." (94/4774).

The photopacks which were shown by Detective Townsel to Brandon Greisman and Carlos Ortiz, according to Gaut, contain some information that shouldn't be there; specifically the rows of numbers below the rows of photos (94/4765,4767).

> Q. With respect to those numbers at the bottom, what if any of those individuals have a number that would give an indication of the year 2007?
>
> A. There is only one, in this case what I now know to be the suspect. His is 2007, all of the others have beginning numbers of 93, 94, which tells me those

> photographs are 13 or 14 years old. His is the only one with a 2007 designation.
>
> Q. And that can be seen on the photo pack, right?
>
> A. It can be, it shouldn't be, but it can be, yes, sir.

(94/4767)(emphasis supplied)

Gaut testified that the appropriate standard requires that the photographs "be as similar as possible, height, age, weight, clothing, attire, scars, marks, haircuts. You want to put a fair photo spread together to determine . . . whether or not the individual is making an accurate, a real identification, or that they are just using a process of elimination" (94/4770-71).

Gaut had reviewed Brandon Greisman's statement in which he had described the person who shot him as wearing a gray or black shirt. Four of the men in the photopack are wearing white shirts, while only two [Leon Davis and number 5] are wearing gray shirts (94/4771-72; see 15/2367,2378; State Exhibits 4467,9015). That, according to Gaut, is a violation of the standard, in that "your attention immediately goes to the two that have the gray shirts" (94/4772). Given the witness statement that the suspect had no facial hair, was about 28-30 years old, and was wearing a gray shirt, Gaut believed that he - - or an average person - - could pick the individual out by process of elimination, and "that's the kind of thing that tends to taint the photo spread" (94/4772).

Neuropsychologist Dr. Richard Marshall explained how the brain processes what the eyes see (95/4812-31). "A memory is a reconstructive process, not a recording" (95/4830). The more similar things are - - whether people, cars, trees, or anything

else - - the harder they can be to differentiate and the more likely an error may occur (95/4828).

Dr. John Brigham is a social psychologist whose specialty involves the study of factors which affect the accuracy of eyewitness memory (95/4843, see 4841-52). This has been the hottest area in forensic psychology over the last 35 years, with numerous books and published articles (many of them authored by Dr. Brigham) on the subject (94/4848-50). An overview of the thousands of studies can be accomplished by means of a methodology known as meta-analysis, in which data is combined and a consensus is developed, resulting in an overall viewpoint on how strong the findings are (95/4852-54).

Dr. Brigham summarized the conclusions reached through scientific research and meta-analysis with regard to five factors; stress, weapon focus, forgetting curve, confidence, and cross-racial identification.[13] (1) Very high levels of stress tend to impair the accuracy of an eyewitness' identification (95/4855); (2) the presence of a weapon - - which has the double effect of drawing attention away from the person's face, and raising stress level even higher - - impairs a witness' ability to accurately identify a perpetrator (95/4857-59); (3) memory loss is very rapid in the first few minutes after an event, then levels off over time (95/4860-61); (4) people are significantly better at identifying persons of their own race than those of another race, and despite their best efforts people are more likely to make errors when the

[13] Dr. Brigham's testimony concerning a sixth factor, unconscious transference, was excluded by the trial judge (41/6617-18).

identification is cross-racial (95/4862-65); and (5) an eyewitness' degree of confidence is not a strong predictor of accuracy (although there is a slight positive correlation); "[p]eople who are certain, their certainty may derive not from the actual quality of the memory but from other factors that are going on" (95/4866-67).

Summary of Argument. Harmful and reversible error was committed, in violation of federal constitutional standards and Florida evidentiary law, when the trial court allowed the state to introduce (1) out-of-court testimonial statements made by Yvonne Bustamante implicating Leon Davis, and (2) eyewitness testimony of Brandon Greisman and Carlos Ortiz purporting to identify Davis. The introduction of Ms. Bustamante's statements violated the Confrontation Clause of the Sixth Amendment, and in any event they were inadmissible as dying declarations under state law. Greisman's and Ortiz' cross-racial identifications were tainted by a gratuitously suggestive photopack, and - - in light of factors such as opportunity to observe (very fleeting), degree of attention (chaos and distraction, stress, and weapon-focus), and accuracy of their descriptions (extremely vague, and in the one area where there was any specificity - - the suspect's hairstyle - - it didn't match Davis) - - the identifications were far too unreliable to be admissible under the second prong of the constitutional test. Finally, the introduction of 43 gruesome morgue and hospital photos which were irrelevant to any disputed issue created an unacceptable risk of impermissible factors influencing the jury's decision, and amounted to fundamental error.

[ISSUE I] THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE AS A DYING DECLARATION YVONNE BUSTAMANTE'S STATEMENT TO LIEUTENANT ELROD IDENTIFYING LEON DAVIS AND DESCRIBING THE EVENTS OF THE CRIME.

A. Introduction

Leon Davis' sole defense was misidentification (see, e.g., 96/4644,4652). To this end, the purported eyewitness identifications made by Brandon Greisman and Carlos Ortiz were thoroughly impeached on cross-examination, by bringing out prior inconsistent statements, internal inconsistencies, their very limited opportunity to observe the suspect, and their descriptions of the suspect's hairstyle which did not match Davis' hair (as shown by photographs just before and just after the crime). However, the trial court - - over strenuous defense objection - - allowed the state to introduce the unconfronted testimonial statements made by one of the deceased victims, Yvonne Bustamante, to Lieutenant Elrod (portions of which were overheard by paramedics Froehlich and Johnson and insurance customer Evelyn Anderson) identifying Leon Davis and recounting the events of the crime. The prosecutor - - near the beginning of his closing argument to the jury - - made it clear how devastating these statements were to the defense of misidentification:

> Now, certainly, Yvonne Bustamante, in the shape she was in, when you see those pictures, didn't have any reason to identify any person in this world except the man who set her on fire. ...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, know 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)

The trial judge understood the same thing, expressing (during the penalty phase) the view that "[t]he most compelling evidence in this case is the dying declaration. I don't think anybody would dispute that"; and that that was one of the main factors which led to the jury's guilty verdicts (98/5328).

It is Davis' main contention in this point on appeal that the introduction of those statements violated his Sixth Amendment right of confrontation. This is because (1) Yvonne Bustamante's statements in response to Lt. Elrod's questioning were testimonial; and (2) dying declarations cannot be grandfathered in as an historical exception to the right of confrontation because the rationale for and application of the dying declaration exception under the pre-ratification English common law was fundamentally dissimilar to how dying declarations are viewed and applied today. (3) The common law doctrine of forfeiture by wrongdoing could not justify the introduction of Ms. Bustamante's statements, because (a) if applied under the circumstances of this case it would violate the constitutionally required presumption of innocence; (b) forfeiture was not an authorized basis for admissibility at the time of Davis' trial; (c) the judge did not make the predicate findings which would be required under Fla. Stat. §90.804(2)(F) (which became effective more than a year after Davis' trial) and Giles v. California, 554 U.S. 353 (2008); and (d) in any event, the evidence did not establish that Ms. Bustamante's murder was specifically motivated by a desire to prevent her testimony.

Alternatively - - even if this Court were to conclude that

Ms. Bustamante's statements to Lt. Elrod were nontestimonial, or that unconfronted testimonial dying declarations can be introduced as an historically-based exception, or that the forfeiture doctrine can be applied - - Davis contends (4) that Ms. Bustamante's statements were inadmissible as dying declarations under Florida evidentiary law, due to insufficient evidence that she believed her death was imminent. [The trial judge correctly excluded the statements made by the other victim Juanita Luciano (whose burn injuries were even more severe than Ms. Bustamante's) on precisely that basis. His only rationale for allowing Bustamante's dying declarations while excluding Luciano's was the testimony of Fran Murray to the effect that Ms. Bustamante had said to her (purportedly before Lt. Elrod and the paramedics even arrived on the scene), "[p]lease keep me in your prayers. I'm not going to make it" and "I don't believe I'm going to make it" (11/1631-32; 13/2017-18; 15/2405-06; 19/3080-81)]. For reasons which will be shown in Part H of this Point on Appeal, Fran Murray's testimony does not provide a reliable predicate for the introduction of the dying declaration, nor does it establish that at the time of her answers to Lt. Elrod's questions (when she no longer appeared to be in severe pain and was receiving medical attention) Ms. Bustamante knew that her death was certain and imminent, with no hope of recovery.

B. Preservation

After the evidentiary portion of the pretrial motion hearing, defense counsel made extensive legal argument, both on federal constitutional grounds and state law grounds, objecting to the

introduction of Ms. Bustamante's dying declarations. The trial court ruled those statements admissible, orally explained the bases for his ruling, and issued a written order (13/1995-2035; 15/2391-2411; 19/3074-81). See McWatters v. State, 36 So.3d 613, 627(Fla.2010) and Fla. Stat. §90.104(1)(pretrial ruling on admissibility of evidence preserves objection for appellate review). In addition, at the beginning of the trial, defense counsel renewed his pretrial motions (specifically including "the victim hearsay related to Miss Bustamante"), and asked for "a standing objection rather than objecting every time it comes up", to which the trial judge replied "Absolutely" (79/2139-40).

C. Yvonne Bustamante's Statements to Lieutenant Elrod

Defense counsel made it clear that he was not particularly concerned about any nontestimonial statements made by Ms. Bustamante or Ms. Luciano to various witnesses before the police came on the scene (13/2014-16). Rather, "[t]he ones that are really at issue are the statements . . . that Lieutenant Elrod testifies to and says he was privy to" (13/2016).

The state's evidence presented in the motion hearing, taken as a whole, shows convincingly that Yvonne Bustamante only identified Leon Davis on one occasion, and that was in response to Lt. Elrod's questioning. The two paramedics - - Ernest Froehlich and Chip Johnson - - and the insurance customer Evelyn Anderson each overheard the name Leon Davis (or, in Johnson's case, just Davis) at that time.

Elrod is a Lake Wales police officer. When he arrived the paramedics already had Yvonne on a gurney. Elrod immediately approached her, and (because of his conclusion that she was not

going to survive her burn injuries) began asking her questions; "I wanted to get her statement before it wouldn't ever be gotten" (11/1791-92). Elrod asked her if she knew who did this to her, and she said yes, it was Leon Davis (12/1793). He then continued to question her about the events of the crime.

From the time the paramedics arrived, Ernest Froehlich was right there with Yvonne Bustamante until she was placed in the helicopter, while his partner Johnson went back and forth between there and the Havana Nights café (where Juanita Luciano was). When Froehlich got Yvonne into the ambulance a male law enforcement officer in a dark colored uniform (Froehlich wasn't sure if it was a Lake Wales or a Polk County officer, but in context it had to be Lt. Elrod) stepped up to the back door and asked her "Do you know who did this to you?" Yvonne raised up and hollered Leon Davis (12/1855-59,1867-71). Froehlich did not pay any attention to whether the officer asked her any more questions or whether she gave any more information, because he was focusing on her medical care. [Froehlich also testified that he did not recall anything about a police officer approaching Yvonne and her calling out or volunteering the name Davis (12/1865)].

The other paramedic, Johnson, stated at the hearing that as a police officer approached he heard her say something to the effect that Davis did this; she also might have said a first name but if so, Johnson didn't catch it. The prosecutor then refreshed Johnson's memory with his statement to Officer Metz a few weeks after the incident occurred, in which he had said that Yvonne's statement that Davis did it was made, while they were assisting

her onto a stretcher, in response to the Lake Wales officer's questioning. Johnson now (at the hearing) gave the self-contradictory explanation ("and I realize this is awkward") that (1) Yvonne's statement was volunteered, and (2) he didn't know if the police officer even asked her (12/1823-27,1843,1846). On cross, Johnson acknowledged that he'd told Metz in his taped statement shortly after the events occurred that Yvonne didn't hesitate when the officer [Lt. Elrod] asked her. While he no longer remembered that the name Davis was said in response to the officer's questions, Johnson agreed that he might very well be remembering it wrong now; "I would say that probably the first way I said it, it would stand to reason" (12/1845-47). [Note also that in his Arthur hearing testimony in February 2010 - - more than two years after the events at Headley and his taped statement to Officer Metz, and only four months before the victim hearsay motion hearing - - Johnson specified three times, on direct as well as on cross, that Yvonne's statement was made in response to the Lake Wales police officer's questioning; "[W]hat I remember principally was that this Lake Wales police officer came over and was asking her like, you know, who, who did this, and she shouted, shouted, and like I said, whatever first name or whatever she said, I don't recall that, I didn't understand that, I just remember Davis" (7/1022, see 1018-19,1029)].

Evelyn Anderson stated that two paramedics came and put Yvonne on a stretcher; one of them asked her who did it and she said Leon Davis (11/1716-18,1722,1733-38). On cross she acknowledged that it could have been a police officer who asked Yvonne who did it (11/1722-23,1732), while on redirect she reiterated

that it was one of the paramedics (11/1737-38). [Note that neither of the two paramedics who were attending to Yvonne - - Froehlich and Johnson - - indicated that they asked Yvonne any questions relating to the crime or the perpetrator].

The evidence convincingly shows that Yvonne Bustamante made only one statement identifying Leon Davis - - in response to Lieutenant Elrod's pointed questioning aimed at getting her statement before it wouldn't ever be gotten - - and the name Leon Davis (or Davis) was heard at that time by paramedics Froehlich and Johnson and by Evelyn Anderson. The prosecutor never made any specific argument to the contrary (in fact, it was the prosecutor who initially confronted Johnson with his taped statement to Officer Metz), and the trial judge never made any findings to the contrary. See 15/2394-95 (trial judge comments "[o]nce the police lieutenant gets on the scene and starts making inquiries, that's where the crux of my ruling comes into play, and anybody that overheard it, how I rule on that applies to everyone"), see also 79/2192-93)(prosecutor's opening statement; "You'll find out that when Lieutenant Elrod got to Yvonne that he will tell you that he saw her condition and he realized that he did not think she was going to survive. . . . But his concern was to find out what had taken place. So he begins to ask her, who did this to you. While he is asking her that these other people are around. Evelyn Anderson is there, the paramedics are there. And they will all tell you that they heard her responding in a very clear, very loud voice. It was Leon Davis"); see also 96/4983-84 (prosecutor's closing argument).

D. Ms. Bustamante's Statements to Lieutenant Elrod were Testimonial

The trial court correctly determined that Ms. Bustamante's statements to Lt. Elrod were testimonial (15/2411; 19/3080), but undersigned appellate counsel anticipates that the state may dispute that finding based on the U.S. Supreme Court's subsequent opinion in Michigan v. Bryant, 131 S.Ct. 1143 (2011), so he will address the issue, in order to show that Judge Hunter's resolution of the testimonial vs. nontestimonial question was proper under the Bryant "primary purpose" test as well.

Whether an out-of-court statement made in response to a police officer's questioning is testimonial or nontestimonial depends upon the primary purpose of the interrogation. The nature of what was asked by the officer, and what was answered by the declarant, must be viewed objectively to determine whether the primary purpose was (a) to resolve a present or ongoing emergency or (b) to obtain a narrative of past events and/or to create a substitute for live testimony. See Michigan v. Bryant, 131 S.Ct. at 1156,1160-61; Davis v. Washington, 547 U.S. 813,828,832 (2006); Delhall v. State, 95 So.3d 134,156-58 (Fla. 2012).

The Bryant Court said, "We reiterate, moreover, that the existence vel non of an ongoing emergency is not the touchstone of the testimonial inquiry"; rather, the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the emergency. Bryant, 131 S.Ct. at 1165, citing Davis, 547 U.S. at 822; see also Petit v. State, 92 So.3d 906,917 (Fla. 4th DCA 2012). This determination is made by

means of a "combined approach" in which "the statements and actions of both the declarant and interrogators [along with the circumstances in which the encounter occurs] provide objective evidence of the primary purpose of the interrogation." Bryant, 131 S.Ct. at 1160-61. Although the police officer's stated motivation is not necessarily dispositive, this Court has recognized that "Bryant focuses to a large degree on whether the statement was elicited primarily to create an out-of-court substitute for testimony." Delhall, 95 So.3d at 157. See also People v. Clay, 88 A.D.3d 14,22,926 N.Y.S.2d 598,605(2011)(recognizing that, under the Bryant test, whether the primary reason for an interrogation was to deal with an emergency or to create an out-of-court substitute for trial testimony is a fact-based question which must necessarily be answered on a case-by-case basis).

In the instant case, we know Lt. Elrod's actual motive for questioning Yvonne Bustamante because - - in response to the state's own line of questioning in the motion hearing - - he told us. See State v. Gurule, 303 P.3d 838,847-48 (N.M. 2013)(under Bryant, the question of whether a statement is testimonial "requires a court to objectively evaluate the circumstances in which the interrogation occurred, including the motives of the parties involved"). The prosecutor asked 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 statement before it wouldn't ever be gotten" (12/1791-92)]. Elrod even explained that he would not have started asking questions at that time if he thought the woman 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 speak with Yvonne and to ask her very pointed questions (12/1792). Clearly, his questioning was aimed at ascertaining the circumstances of the crime and creating a substitute for live testimony, rather than dealing with the ongoing emergency that the suspect had not yet been apprehended. [If his primary purpose had been dealing with the emergency, his decision whether or not to question her would not have depended on his assessment of her prospects for survival].

Even apart from Elrod's stated reason for questioning Yvonne as he did, an objective view (under the combined approach) of his questions and her answers supports the conclusion that her statements accusing Leon Davis and recounting the events of the crime were testimonial in nature. As in People v. Clay, supra. 88 A.D. 2d at 24, 926 N.Y.S.2d at 607, the totality of the surrounding circumstances objectively indicate that Lt. Elrod's primary purpose was to "nail down the truth about past criminal events", and to elicit statements from Yvonne that "do precisely what a witness does on direct examination" - - accuse a perpetrator of a crime.

Unlike, for example, Petit v. State, supra, 92 So.2d at 917 - - where the questions and answers objectively showed that the primary purpose of the interrogation was to enable police assistance - - the Q. and A. here objectively shows the opposite; the focus was on describing past events. See Hayward v. State, 24 So.3d 17,32 (Fla. 2009). Yvonne told Elrod, in response to his

questions, that she and the other lady were working and Leon Davis - - a customer - - "came in and demanded money from them, was trying to rob them. And when they didn't give him the money he wanted, he threw gasoline on them and set them on fire" (12/1293-94). See also Coronado v. State, 51 S.W.3d 315,324 (Tex.Crim.App. 2011)(under Davis, as well as the Supreme Court's more recent confrontation decision Bryant, "[i]f the objective purpose of the interview is to question a person about past events and that person's statements about those past events would likely be relevant to a future criminal proceeding, then they are testimonial").

E. Dying Declarations are not Exempt from The Right of Confrontation on "Historical Grounds"

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that out-of-court testimonial statements are barred by the Confrontation Clause of the Sixth Amendment, unless the witness is unavailable and the accused had a prior opportunity for cross-examination. The Crawford decision abrogated Ohio v. Roberts, 448 U.S. 56 (1980), and flatly rejected its rationale that testimonial statements could be introduced against an accused, notwithstanding the lack of an opportunity for confrontation, if the statements bear sufficient "indicia of reliability." As Justice Scalia wrote for the seven-Justice majority in Crawford, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. "Where testimonial statements are at issue, the only indicium of reliability sufficient to sat-

isfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69.

Crawford left open two potential exceptions - - on historical grounds if at all - - to the Sixth Amendment right to confront testimonial statements; one of these (forfeiture) was later thoroughly addressed by the Court in Giles v. California, 554 U.S. 353 (2008), while the other - - dying declarations - - remains an open question. See Michigan v. Bryant, supra, 131 S.Ct. at 1151 n.1 ("We noted in Crawford that we 'need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.' 541 U.S., at 56, n.6., 124 S.Ct. 1354. Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here").

In Hayward v. State, 24 So.3d at 33, this Court similarly declined to address whether a dying declaration might be an exception to the Confrontation Clause requirements set forth in Crawford.

In order for a common law exception to trump the rights guaranteed by the Sixth Amendment's Confrontation Clause, it must be an exception which was established at the time of the founding. Crawford v. Washington, 541 U.S. at 54; Giles v. California, 554 U.S. at 358. As the Supreme Court's historical analysis in Giles makes clear (in the context of forfeiture by wrongdoing), it is not sufficient that an exception existed at common law and an exception with the same name still exists today. In Giles - - in an opinion (as was Crawford itself) authored by Justice Scalia - -

the Court posed the questions, "We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right." 554 U.S. at 358 (emphasis supplied). The Court then determined that since California's theory was broader than the common-law doctrine, it could not be accepted on historical grounds as an exception to the right of confrontation. As explained in State v. Beauchamp, 796 N.W.2d 780,792(Wis.2011), "Notably the [Giles] Court did not say that the Confrontation Clause barred all testimony admitted pursuant to a forfeiture by wrongdoing doctrine. It merely described what kind of forfeiture by wrongdoing doctrine would comport with constitutional guarantees. . . . In other words, Giles stands for the proposition that the permissible contours of the doctrine of forfeiture by wrongdoing, and the point beyond which it becomes a violation of Confrontation Clause guarantees, are co-extensive with the contours of that exception at the time of the founding of our nation and specifically the Sixth Amendment's ratification." 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 at 28, 926 N.Y.S.2d at 609, n.2 ("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'").

Using the Giles analysis, it can plainly be seen that the rationale, contours, and application of the dying declaration exception that existed at common law and at the time of the founding was so profoundly different from the dying declaration exception that exists today that it cannot be recognized as an "historical exception" to an accused's Sixth Amendment right of confrontation. Historically, the rationale for the admissibility of dying declarations - - or at least for the dying declarations of individuals who adhered to the beliefs of the established Church - - was ecclesiastical:

> The exception for dying declarations-which antedates the development of the hearsay rule and the adoption of the Constitution-was originally held to rest on the religious belief 'that the dying declarant, knowing that he is about to die would be unwilling to go to his maker with a lie on his lips.'

State v. Satterfield, 457 S.E.2d 440,447 (W.Va.1995), quoting 4 Weinstein and Berger, Weinstein's Evidence 804 (b)(2)[01] at 804-124 to 804-125(1994).

See King v. Woodcock, 168 Eng.Rep. 352,353-54, 1 Leach 500,503 (1789)(cited in both Crawford, 541 U.S. at 56 n.6 and Giles, 554 U.S. at 632,regarding the English common law roots of the exception), which held that dying declarations were admissible only if the witness "apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her maker for the truth or falsehood of her assertions." See also 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.); and Garza v. Delta Tau Delta Fraternity National, 948 So.2d

84,91 n.13 (La.2006)(“Eighteenth century rationale was that the impending judgment of God imposed an obligation of honesty upon the dying, so as to justify an exception to the exclusionary hearsay rule”). “In previous centuries, religious reasons were credited with fostering a fear of impending death that was assumed to be as powerful an incentive for telling the truth as the obligation of an oath.” Garza, at 91. Therefore, “[a]t 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. McClendon v. State, 36 Okla.Crim.11,251 P.515,516(1926).

Clearly, then, the common law dying declaration exception which pre-existed the founding and the ratification of the United States Constitution was fundamentally different from the dying declaration exception which exists today; not only in its rationale but also in its application. The present-day exception may have evolved from a common law exception, but it is not the same thing, any more than a dog is a wolf or football is rugby.

In the United States, throughout the nineteenth century and well into the twentieth, the religious rationale continued to prevail, and to impact the way the dying declaration exception was applied. Over time, courts dispensed with the admissibility requirement that the declarant be a believer in God and an after-life of reward or punishment, but any declarant’s lack of such belief became fair game for impeachment of his or her dying declaration. In 1897 - - more than a century after the adoption of the U.S. Constitution and the Sixth Amendment’s Confrontation

Clause - - the Supreme Court in Carver v. United States, 164 U.S. 694,697 (1897) held that disbelief did not warrant exclusion of a dying declaration, but the declarant's statement could still be "discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of rewards or punishment." See 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).

The Weir opinion also cites Donnelly v. State, 26 N.J.L. 507 (1857) and State v. Hood, 59 S.E. 971 (1907) for the proposition that - - contrary to the common law admissibility requirement - - it was no longer necessary to prove belief in a Supreme Being. Both of those decisions, however, make it clear that the declarant's religious belief, or lack thereof, remained the underlying rationale for dying declarations:

> In 1 Greenl. on Evidence, § 370, the principle is put in clear and intelligible terms. The distinguished writer says, "It should here be observed that defect of religious faith 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. The charity of its judgment is extended alike to all. The burthen of proof is not on the party adducing the witness to prove that he is a believer, but it is on the objecting party to prove that he is not."
>
> In this case the judge did not err by instructing the jury that they must be satisfied by the evidence that Moses [the deceased] was a nonbeliever.

Donnelly, 26 N.J.L.601 (emphasis in opinion).

It can be seen, then, that at the midway point in the evolution of the dying declaration exception from a common law religious doctrine to a secular (or at least nondenominational) rule

of evidence based on considerations of (supposed) reliability and necessity, there was a long period during which trials could easily degenerate into mini-trials where jurors would hear testimony and be called upon to pass judgment on the deceased's religious beliefs, or lack of them. This is compellingly illustrated by Gambrell v. State, 46 So.138 (Miss. 1908), in which a witness was offered "to show that the deceased was an infidel . . . [who] boasted of the fact that he did not believe in God, the devil, or anything of a like nature" and "was an irreligious man, and had contempt for the church, etc." The Supreme Court of Mississippi held that all of this was relevant and proper to discredit the dying declaration, and it was not even necessary to show that the declarant was an infidel at the time he made the dying declaration; if "such a state of mind existed at any time during the life of deceased . . . it was for the jury to say, under the facts, whether or not deceased had reformed or been converted to the faith." 46 So. at 1139 (emphasis supplied). Just as a witness' oath or affirmation "presupposes a belief by the party making it in that superior power which is clung to by all Christian people", for the same reason the credit to be given to a dying declaration may depend on the presence or absence of such belief. 46 So. at 138-139.

Four months before the Gambrell opinion was written, the Supreme Court of Appeals of West Virginia recognized that the common law doctrine regarding dying declarations might no longer hold water in America under the constitution:

> One objection to the dying declaration is that it does not appear that [the declarant] Barnes believed in a

> God, and rewards and punishment after death. By the common-law of England, want of such belief makes a witness incompetent, on the principle that one who does not have such religious faith will not consider himself bound by an oath. This was so strongly embedded in the common-law that it was said in a very well-considered opinion in Atwood v. Welton, 7 Conn. 74, that there is no adjudged case, and hardly a dictum, in the English books to the contrary.

59 S.E. at 972

However, the court noted, this common law rule was abrogated by the Virginia Bill of Rights and the Virginia Act of Religious Freedom, and by the West Virginia Bill of Rights. 59 S.E. at 972.

> Church and state are separate in America. The old rule prevailed when the government adopted and cruelly enforced one religion - - indeed one church - - as the only true one, but where the state has no religion, and religious freedom dominates, such a rule cannot and ought not live. It is too late in these days of liberalism to assert it. It is entirely against the spirit and letter of American constitutional law.

State v. Weir, supra, was decided in 1990 and the opinion was adopted by this Court a year later. [The Weir decision was pre-Crawford, and the question of whether dying declarations constituted an historical exception to the right of confrontation was not at issue there]. A trial judge in Weir had concluded that the dying declaration exception was a de facto judicial establishment of religion. The Fourth DCA and this Court disagreed, finding that the trial court's "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." Weir, 569 So.2d at 901 (emphasis supplied).

In Michael J. Polelle, The Death of Dying Declarations in a Post-Crawford World, 71 Mo.L.Rev. 285,288-89,300-01(2006)(emphasis supplied, footnotes omitted), the thesis is that the dying declaration exception in its present form should not be recognized as an historical exception to the Confrontation Clause:

> The classic justification for the exception at common law goes back to The King v. Woodcock in 1789. In Woodcock, Justice Eyre reasoned that hearsay declarations made at the point of imminent death are so motivated by a powerful incentive to tell the truth that the declarations are equivalent to testimony under oath in court. The original premise of this assumption was the fear of divine judgment for lying provided religious assurance that the dying person would speak the truth. In fact, one British commentator has noted that dying declarations were not used in Papua New Guinea where this kind of religious underpinning could not be assured. . . . Rejecting the example of early English precedent, American courts have typically discounted a lack of belief in God or a lack of belief in an afterlife of rewards and punishments as a basis for excluding dying declarations, specifically because freedom of religion or freedom from religion is constitutionally guaranteed in the United States. Besides the protection of the First Amendment guarantees, scarcely any defender of the exception now attempts to rest the exception on a religious basis, because the decline of organized religions from their medieval antecedents and the diversity of contemporary religious belief have destroyed the bedrock premise of shared Christian doctrine. In any event, the use of a dying declaration, even where the declarant is an avowed non-believer, guts the original religious rationale for the rule.

Polelle goes on to examine the remaining theories underlying the present-day dying declarations hearsay exception - - the supposed reliability of and the supposed necessity for the out-of-court statements - - and concludes that the internal logic of Crawford compels rejection of any claim that testimonial dying declarations are an exception to the Sixth Amendment right of confrontation.

> In any case, the logic of Crawford itself ultimately delivers the coup de grace to the reliability argument

> for dying declarations. Even aside from the questionable reliability of dying declarations as a generic hearsay exception, Justice Scalia in Crawford made it quite clear that general reliability, however great it may be, is no longer a sufficient justification for the use of testimonial hearsay exceptions against criminal defendants. Justice Scalia pointed out that the Sixth Amendment provided only one method of guaranteeing reliability, and that is through the exclusive process of cross-examining the testimonial statement, whether made in court of out of court. Therefore, even if dying declarations were systemically reliable, under the logic of Crawford, if the opportunity does not exist for extrajudicial cross-examination of the unavailable declarant, the reliability is immaterial. Any constitutional exceptionalism for dying declarations must therefore rest on some basis other than reliability...
>
> . . . . . .
>
> In short, the argument of necessity, if taken literally, is logically inconsistent with the general ban against hearsay in criminal cases, whether on common law or constitutional grounds. Hearsay is often needed by one side or the other to pursue its adversarial goals but need alone has never been the test of hearsay admission. Crawford demands both necessity, in the sense of unavailability, and an opportunity for cross examination before hearsay may be allowed against a criminal defendant. The presence of only one of these preconditions is insufficient to satisfy the Sixth Amendment. Crawford itself, therefore, recognizes by its own logic that necessity alone cannot justify an infringement of the very confrontation rights which that opinion claims to have rediscovered.

Polelle, supra, at 305-07 (footnotes omitted).

See United States v. Jordan, 66 Fed.R.Evid.Serv. (Callahan) 790 (D.Colo.2005)("Whether driven by reliability or necessity or both, admission of a testimonial dying declaration after Crawford" is contrary to the core holding in that case).

Considerations of reliability and necessity were the focus of the Ohio v. Roberts test, which was abandoned in Crawford in favor of Justice Scalia's view (shared by six other Justices) that the Confrontation Clause guarantees the right of confrontation.

Moreover, it has been noted that dying declarations "are not

so strong a safeguard against falsehood as they were when the rule admitting them was first laid down." Kidd v. State, 258 So.2d 423,427 (Miss. 1972); see People v. Nieves, 492 N.E.2d 109,113 (N.Y. 1986). Confrontation and cross-examination are indispensible to the truth-seeking function of a criminal trial, and it must be recognized that the right of confrontation is equally important whether the accused is trying to show that the witness is lying or whether he is trying to show that the witness is mistaken. See State v. Buckingham, 772 N.W. 2d. 64,72 n.6 (Minn. 2009)(emphasis in opinion) (" . . . [W]hile the fact that someone is dying might make an individual less likely to lie, it does not make that individual less likely to be mistaken. Indeed, depending on the injury, a dying person might be more likely to be mistaken). [In the instant case, for example, nobody has contended or implied that Yvonne Bustamante had any reason to lie. The defense's argument was that she and Juanita Luciano (who may have discussed with each other at some point during the robbery whether the robber was their insurance client Leon Davis (see 13/2006-14)) were mistaken in their identification. The defense's misidentification argument was buttressed by Yvonne's statement to Fran Murray (assuming arguendo that the conversation occurred) in which she did not identify Leon Davis, nor did she say it was a client or someone she knew; instead she told Murray that it was a black man and he should be on camera].

While this particular case involves a claim of mistake rather than a claim of deliberate falsehood, it has been recognized that the assumption that a dying person would never have reason to lie

is equally faulty. For example, the witness might be motivated by personal animosity, or seeking vengeance for a past wrong, or the financial benefit of his family members. See State v. Satterfield, supra, 457 S.E. 2d at 447, quoting Weinstein, supra, at 804-125 ("[T]he lack of inherent reliability of deathbed statements has often been pointed out: experience indicates that the desire for revenge or self-exoneration or to protect ones' loved ones may continue until the moment of death").

Absent the fear of external damnation - - which was the basis of the common law exception - - the supposed reliability of dying declarations cannot overcome the accused's Sixth Amendment right of confrontation, at least not when the statements are testimonial. The specific issue left open in Crawford will ultimately be resolved by the U.S. Supreme Court. Having made what he believes is a persuasive argument that the religion-based common law dying declaration exception could not survive the adoption of the Confrontation Clause (or the Establishment Clause, or freedom of religion, or equal protection) and therefore cannot be recognized as an "historical exception", undersigned counsel must recognize that there is a split of authority among state and federal courts, and that the numbers are not on his side. However, it is the reasoning of the competing constitutional arguments and historical analyses - - not the numbers - - which will determine which position will prevail. See State v. Pruitt, 289 N.W.2d 343,346 (Wis. App.1980)(recognizing that constitutional principles are not determined by a nationwide majority vote, or even near-unanimous vote, of state and federal courts). It is worth noting that Crawford itself was major and largely unanticipated change in the

law regarding the right of confrontation.

Two federal district courts have found, for reasons similar to those argued herein and those explained in the Polelle article, supra, 71 Mo.L.Rev. at 285-316, that dying declarations are not an exception to the Confrontation Clause. 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). On the other side of the issue are numerous state appellate courts (including Florida's Fifth DCA) which have followed the lead of People v. Monterroso, 101 P.3d 956 (Cal. 2004).[14] The California Supreme Court in Monterroso - - with no discussion of the differences between the English common law exception and the present-day exception - - blandly concluded "that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment." 101 P.3d at 971-72. The ensuing opinions tended to rely upon Monterroso, and then upon the growing body of state court decisions reaching the same conclusion, as support for allowing an "historical exception" for dying declara-

[14] See Cobb v. State, 16 So.3d 207 (Fla. 5th DCA 2009); White v. State, 17 So.3d 822 (Fla. 5th DCA 2009); People v. Gilmore, 828 N.E.2d 293,302 (Ill.App. 2005); Wallace v. State, 836 N.E.2d 996 (Ind.Ct.App.2005); State v. Martin, 695 N.W.2d 578,585 (Minn. 2005); Harkins v. State, 143 P.3d 706,711 (Nev.2006); People v. Taylor, 737 N.W.2d 790,795 (Mich.App.2007); State v. Lewis, 235 S.W.3d 136,148 (Tenn. 2007); State v. Calhoun, 657 S.E.2d 424,428 (N.C. 2008); Commonwealth v. Nesbitt, 892 N.E.2d 299,311 (Mass. 2008); State v. Jones, 197 P.3d 815,822 (Kan. 2008); Gardner v. State, 306 S.W.3d 274,289 (Tex.Crim.App.2009); State v. Minner, 311 S.W.3d 313,323 n.9 (Mo.App.2010); Satterwhite v. Commonwealth, 695 S.E.2d 555,568 (Va. 2010); State v. Beauchamp, 796 N.W.2d 780,795 (Wis. 2011); People v. Clay, 88 A.D.3d 14,26-27, 926 N.Y.S. 598,608-09 (2011); Grindle v. State, ___So.3d___, 2013 WL 4516730 (Miss. App. 2013).

tions. The opinions focused on the mere existence of a common law dying declaration exception, rather than the nature, rationale, and application of the common law exception.

However, while the supposed reliability of or the claimed necessity for dying declarations might have passed muster under the Ohio v. Roberts test, the internal logic of Crawford suggests that these factors cannot trump the constitutional right of confrontation. The original common law exception which predated the founding of the republic and the adoption of the Sixth Amendment was profoundly religious in nature, and rigidly sectarian in its application. At common law, only the dying statements of men or women who believed in an afterlife of eternal reward or punishment were admissible (and then, for an interim period, the deceased's religious beliefs, or lack of them, were fair game for impeachment). The contours of the common law doctrine were so fundamentally different from those of present-day dying declarations that no "historical exception" to the right of confrontation should be recognized.

F. The Forfeiture Doctrine was Erroneously Considered as an Alternative Ground for Admissibility

As an alternative ground for overruling the defense's objection based on the Confrontation Clause, Judge Hunter relied by analogy on the federal doctrine of forfeiture (19/3079; see 15/2397-2400,2409,2416). The judge recognized that Florida - - at the time of this motion hearing and trial - - had no provision authorizing the introduction of hearsay evidence on this basis, but he asserted that "Florida law does acknowledge that a party's wrongdoing may constitute waiver under certain circumstances. See

Ellison v. State, 349 So.2d 731, 732 (Fla. 3d DCA 1977) . . .” (19/3079). The judge characterized the forfeiture by wrongdoing doctrine as “extinguishing the defendant’s constitutional right on essentially equitable grounds” (15/2397, see 2319), and concluded that in Florida “it’s part of the clean hands doctrine” (15/2400, see 2409,2416). The underlying theory, he explained, is that the “defendant is responsible for the witness’ unavailability” by killing him or her (15/2397).

The trial court’s alternative justification for admitting the unconfronted testimonial statements must fail because (1) it is inconsistent with the limitation of the forfeiture doctrine recognized in Giles v. California; (2) it is, under the circumstances of this case, inconsistent with the constitutionally required presumption of innocence; (3) there was no statutory authorization in Florida for introducing hearsay evidence on this basis; (4) the trial court made no finding, prior to allowing the state to introduce the statements for the purpose of persuading the jury of Davis’ guilt, that Yvonne Bustamante’s murder was specifically motivated to prevent her from testifying; and (5) the trial court’s subsequent finding of the “avoid arrest” aggravating factor (made in the penalty proceedings, after Davis had been found guilty based in large part on the dying declarations, and when the presumption of innocence no longer applied) was - - in any event - - erroneous.

In Giles v. California, 554 U.S. at 355-57, in an opinion issued two years before this motion hearing and trial, the U.S. Supreme Court “ask[ed] whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era

exception to the confrontation right." 554 U.S. at 358. The Court concluded that it was not, flatly rejecting the broader theory of forfeiture by wrongdoing (i.e., that the defendant had forfeited his right of confrontation because his intentional murder of the victim had made her unavailable to testify, 554 U.S. at 357), and limited the use of that doctrine to the way it was applied at common law (i.e., only upon a showing that the motive for the murder was to procure the absence of a witness, 554 U.S. at 359-61 and 376-77). In the opinion of the Court, Justice Scalia noted that "We are aware of no case in which the [forfeiture] exception was invoked [at common law] although the defendant had not engaged in conduct designed to prevent a witness from testifying, such as offering a bribe" and that "[p]rosecutors do not appear to have even argued that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial." 554 U.S. at 361-62 (emphasis in opinion). Citing 18th century English caselaw and early-to-mid 19th century American caselaw, Justice Scalia states "Courts in all these cases did not even consider admitting the statements on the ground that the defendant's crime was to blame for the witness' absence – even when the evidence establishing that was overwhelming." 554 U.S. at 363. It was only within the last couple of decades, since 1985, that American courts began invoking the forfeiture doctrine "outside the context of deliberate witness tampering." 554 U.S. at 366. Therefore, the Court could not recognize any broader forfeiture theory as an "historical exception" to the accused's confrontation right.

Leon Davis' defense was that he was misidentified as the perpetrator of the charged robbery and murders. It is therefore impossible to conclude that he waived by his conduct his constitutional right of confrontation (which is indispensible to the truth-seeking function of a criminal trial), unless one also concludes before trial - - contrary to his equally important constitutional right to be presumed innocent unless and until proven guilty beyond a reasonable doubt - - that he is in fact guilty. As explained in Polelle, The Death of Dying Declarations in a Post-Crawford World, supra, 71 Mo.L.Rev. at 308 (footnote omitted):

> The argument for automatic forfeiture is essentially circular. It assumes that homicide defendants have committed the very crime of which they stand accused before they have been found guilty beyond a reasonable doubt. The inculpatory statements of the dying homicide victim are used against the defendant on the basis that the defendant prevented the in-court testimony of the victim by commission of the homicide and thus forfeited their constitutional right of confrontation. However, at the time the inculpatory hearsay statements are admitted into evidence, the defendant has not yet been found guilty of the homicide.

The same sound rationale underlies the decision in United States v. Lentz, 282 F.Supp.399, 426-27 (E.D.Va.2002), that the forfeiture by wrongdoing exception could not be applied when the asserted wrongdoing is the same criminal act for which the accused is on trial and maintains his innocence:

> Essentially, the Government asks the Court to find Defendant guilty of killing Ms. Lentz by a preponderance of the evidence in order to allow the evidence to be admitted to prove Defendant killed Ms. Lentz beyond a reasonable doubt. No case cited by the Government stands for this proposition. In this case for which Defendant is being tried under well settled Constitutional principles, Defendant is presumed to be innocent until proven guilty. To hold otherwise would be to de-

> prive a defendant of his right to a jury trial and allow for a judge to preliminarily convict a defendant of the crime on which he was charged. This Court is unwilling to extend the reasoning in Rule 804(b)(6) to allow in the testimony of a decedent victim for whose death a defendant is on trial.

See also People v. Gilmore, 2006 WL 744268 (Mich.App.2006) - - an unpublished opinion cited in Gonzalez v. State, 195 S.W.3d 114,124 n.38 (Tex.Crim.App.2006) - - in which the court "agree[d] with the reasoning in Lentz" and wrote:

> . . . [I]n the case at bar, the determination that defendant engaged in the wrongdoing that procured the witness' absence from trial is the determination of a fact at issue in the question of defendant's guilt. This leads to circular reasoning: we can use the victim's statement because defendant caused the victim's death and we know that defendant caused the victim's death because the victim's statements tells us so. In short, we can justify the admission of the statement only by ignoring the presumption of innocence and concluding that defendant is, in fact, guilty of the charged offense. But defendant, having denied killing the victim and having exercised his right to jury trial, is entitled to be presumed innocent of killing the victim until the jury renders a verdict to the contrary.

In the instant case, the trial court recognized that, at the time of this motion hearing and trial, Florida's Evidence Code provided no hearsay exception for forfeiture by wrongdoing. Instead he relied on a vague analogy to the broad (pre-Giles) federal doctrine, based on "equitable grounds" and "clean hands." That rationale is patently insufficient to overcome Davis' right of confrontation, especially in light of this Court's express refusal, a year before Davis' motion hearing and trial, to judicially authorize a forfeiture exception in this state:

> The State also argues that the common law doctrine of forfeiture by wrongdoing allows the introduction of statements by a witness if the witness is unavailable to testify due to the "means or procurement" of the defendant. *See Giles v. California,* 554 U.S. 353, ____,

> 128 S.Ct. 2678, 2683, 171 L.Ed.2d 488 (2008). The State urges us to hold that forfeiture applies in Hayward's case because he "procured" Destefano's absence by killing him. We decline to adopt such a theory.

Hayward v. State, 24 So.3d 17,31 (Fla. 2009)(emphasis supplied).

See also Chavez v. State, 25 So.3d 49,51 (Fla. 1st DCA 2009) ("We hold that the trial court's ruling was in error as a matter of law, because the common-law hearsay exception of forfeiture by wrongdoing is not authorized under Florida's Evidence Code . . .", which states in clear terms that except as provided by statute hearsay evidence is inadmissible); see also Mortimer v. State, 100 So.3d 99,102 (Fla. 4th DCA 2012).

[Ellison v. State, 349 So.2d 731 (Fla. 3d DCA 1997), relied on by Judge Hunter in support of his forfeiture analogy, is completely inapposite. In dicta in Williams v. State, 947 So.2d 517,520-21 (Fla.3d DCA 2006) - - dicta inconsistent with this Court's subsequent refusal in Hayward to judicially adopt a forfeiture exception - - the Third DCA cites Ellison for the unremarkable proposition that "Florida law does acknowledge that a party's wrongdoing may constitute waiver under certain circumstances." (see 19/3079). However, the "certain circumstances" presented in Ellison do not remotely involve a pre-trial presumption that the accused is guilty of the charged crime and therefore his assumed wrongdoing (by committing the crime) waives Sixth Amendment rights critical to his defense that he did not commit the crime. Rather, in Ellison, the defendant simply "opened the door" to an otherwise impermissible line of cross-examination about what he did or did not tell the police by bringing up the subject himself during his own testimony on direct. Ellison is,

quite simply, an "invited error" case. 349 So.2d at 732. To accept Judge Hunter's forfeiture rationale in the instant case, in contrast, would violate the core principle of Crawford: confrontation cannot be dispensed with based on the assumed reliability of the out-of-court testimonial statement nor on the assumed guilt of the defendant. See 541 U.S. at 62].

While the Florida legislature has subsequently enacted a forfeiture statute (Fla.Stat. §90.804(2)(f), effective April 27, 2012), that provision can neither retroactively justify the introduction of Ms. Bustamante's statements, nor render the error "harmless." First of all, Davis does not concede that §90.804 (2)(f) is constitutional, at least not if applied to a case (like Davis' and unlike Mortimer v. State, 100 So.3d at 101-04) where the charged crime and the act which caused the witness' unavailability are one and the same. See Lentz; Gilmore, and Polelle, supra, at 308. Secondly, Judge Hunter's penalty phase finding of the "avoid arrest" aggravating factor was unsupported by the evidence. See Part G, infra. Thirdly, even if that penalty phase finding had been based on anything more than speculation, it cannot be assumed that - - in the event of a retrial - - the successor judge[15] would necessarily reach the same conclusion on this disputed question. And fourth - - to the extent that the "harmless error" finding in Mortimer is partially based on the assumption that the hearsay testimony would be admissible in the event of a retrial - - it is wrongly decided. See Sullivan v. Louisiana, 508 U.S. 275,279 (1993)(harmless error review looks to

[15] Judge Hunter is retired and is not on senior status.

the basis on which "the jury actually rested its verdict", and the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error")(emphasis in opinion); see also State v. DiGuilio, 491 So.2d 1129,1136,1139(Fla.1986)(focus is on whether the error may have contributed to the actual verdict reached); Wilson v. Mitchell, 498 F.3d. 491,504 (6th Cir. 2007)("The Supreme Court has indicated that of these two [harmless error] meanings the proper one is the first (i.e., whether the error had an actual impact on the outcome), and not the second (i.e., whether a hypothetical new trial would likely produce the same result").

G. The Penalty-Phase "Avoid Arrest" Aggravating Factor was Not Proven

At the time he accepted forfeiture as an alternative ground for overruling the defense's constitutional objection to the introduction of Yvonne Bustamante's dying declarations, Judge Hunter made no finding that her murder was motivated in order to procure her absence as a witness. The dying declarations were then introduced at trial and - - as the judge recognized - - in all likelihood they contributed substantially to the jury's decision to find Davis guilty (98/5328). The case proceeded to a penalty phase, and in his order sentencing Davis to death the judge found as an aggravating factor that Yvonne's murder was committed for the purpose of avoiding or preventing a lawful arrest (66/10851-53). [Conversely, the judge found that "the State failed to prove beyond a reasonable doubt that the sole or

dominant motive for the murder of Juanita Luciano was to eliminate a witness (66/10853)]. Even if the "avoid arrest" death penalty aggravator had been established by the evidence as to Yvonne, it could not retroactively serve as a constitutionally acceptable basis for admitting the dying declaration in the guilt phase under a forfeiture theory. But, in fact, the evidence failed to prove this aggravator as to either Yvonne or Juanita.

[Due to page considerations, undersigned counsel is submitting this argument both as part of his challenge to the admissibility of the dying declarations and as a claim that the aggravator was improperly found and weighed in the judge's decision to impose the death penalty].[16]

As this Court has repeatedly made clear, the "avoid arrest" aggravating factor cannot be found "unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses." Urbin v. State, 714 So.2d 411,415 (Fla. 1998), quoting Menendez v. State, 368 So.2d 1278,1282 (Fla. 1979)(emphasis in Urbin opinion). The inquiry must focus on the defendant's motivation for the crime; the proof of the requisite intent must be very strong, and speculation will not suffice.

See e.g., Urbin, 714 So.2d at 415-16; Kalisz v. State, ___So.2d___ (Fla. 2013)(2013 WL 5642073); Jones v. State, 963 So.2d 180,186-87 (Fla. 2007); Bell v. State, 841 So.2d 329,336 (Fla. 2002); Hurst v. State, 819 So.2d 689,695-96 (Fla. 2002);

[16] The undersigned also does not concede that the CCP aggravator was proven, but, due to page and tactical considerations, he is not raising that as an issue on appeal. See Davis v. State, 461 So.2d 67,71 (Fla. 1984); Davis v. Wainwright, 498 So.2d 857 (Fla. 1986).

Looney v. State, 803 So.2d 656,676-78(Fla. 2001); Hertz v. State, 803 So.2d 629, 648-49 (Fla. 2001); Connor v. State, 803 So.2d 598, 610 (Fla. 2001); Zack v. State, 753 So.2d 9,20 (Fla. 2000); Consalvo v. State, 697 So.2d 805,819 (Fla. 1996); Geralds v. State, 601 So.2d 1157,1164 (Fla. 1992).

The fact that the victim knew and could potentially identify the defendant is not, without more, sufficient to establish this aggravator. Jones; Bell; Hurst; Looney; Hertz; Zack; Consalvo; Geralds. In many cases where the "avoid arrest" aggravator was upheld, there were discussions prior to or during the criminal episode, or statements made after the crime, in which the defendant expressed concern about being identified or about the need to eliminate a witness or witnesses. See, e.g. Reynolds v. State, 934 So. 2d 1128,1157 (Fla. 2006); Trease v. State, 768 So.2d 1050,1056 (Fla. 2000); Jennings v. State, 718 So.2d 144,151 (Fla. 1998); Sliney v. State, 699 So.2d 662,671 (Fla. 1997); Lopez v. State, 536 So.2d 226,230 (Fla. 1988); Looney, 803 So.2d at 677; Hertz, 803 So.2d at 649.

Conversely, in cases where the evidence is consistent with several possible motives, and therefore does not prove that witness elimination was the sole or dominant motive, a trial court's finding of this aggravator cannot be sustained. See Green v. State, 975 So.2d 1081,1087 (Fla. 2008); Bell, 841 So.2d at 336; Hurst, 819 So.2d at 695-96; Connor, 803 So.2d at 610.

[For purposes of the penalty phase argument only, appellate counsel will assume, without conceding, that Leon Davis was the person who committed the robbery-murders at Headley Insurance]. In the instant case, apart from the fact that both Yvonne (more

often) and Juanita (on one occasion, six weeks before the crime, when he came in to cancel his Victoria policy)[17] had dealt with Davis as an insurance client, and the possibility that he may have been an acquaintance of Michael Bustamante (Yvonne's brother and Juanita's boyfriend) in high school more than a decade earlier, the evidence establishes at least two other plausible motives for the murders, as well as the possibility (asserted by the prosecutor in his guilt-phase rebuttal argument to the jury) that this may have been a motiveless act of rage:

> . . . I'm not going to bring up the pictures, but, I want you to think about what happened to these women. And what Mr. Norgard wants you to try and engage in is to use rational thought to figure out that irrational act. For 28 and a half years I have been doing this, and for 28 and a half years I have listened to lawyers try to get juries to use rational thought to understand irrational acts. And you can't do it. There is no way to understand. You could go back in that jury room and you'll be there forever if you try to figure out why somebody set these two women on fire . . .

(97/5164, see 5167)(emphasis supplied)

Witness elimination, on the other hand, is a rational (although reprehensible) and easily explainable motive. The evidence in this case shows that the robber had a gun, and if his primary motive had been to eliminate witnesses the logical way to do that would have been to shoot the victims in the head or the heart while they were tied up. [The state cannot reply that he didn't want to make noise by firing the gun, because the prosecutor agreed that he did fire two or three gunshots while he and the women were inside the insurance agency (including, in all likelihood, the shot which struck Yvonne in the wrist)(79/2181-

[17] See 91/4170,4187-88,4195.

82; see 51/8408)]. Under the circumstances of this case, setting the victims on fire is much more indicative of rage or irrationality than it would be indicative of a primary motive to prevent them from identifying him.

Moreover, even assuming that there was a motive, the evidence in this case suggests two other equally plausible ones. First, the state vehemently insisted throughout this trial that Leon Davis was under financial stress, and there is evidence that several months before the crime an incident occurred involving his car insurance which infuriated him. The testimony of Kelly Curlee, a teller at Mid-Florida Credit Union, was presented by the state. In June 2007, six months before the crimes at Headley, Davis came in to make a forty dollar withdrawal. Ms. Curlee pulled up his account and found it was overdrawn, so she informed him she couldn't do the transaction until he cleared up the negative balance. Davis "flew off the handle . . . [and] started cussing". When Ms. Curlee researched previous months, she realized that his automatic insurance payment had been increasing by twenty to thirty dollars every month; she was shocked by the amount of the increase. Davis was "floored" and very upset; he had not been aware that this was happening. [Curlee testified that this can occur without the customer's knowledge]. As a result of his account being overdrawn, the bank charged him a fee, which put him even more in the negative. Curlee was eventually able to calm him down, and she told him if he had a problem he needed to take it up with the insurance company (91/4148-61).

In his closing argument, the prosecutor told the jury that

the state had called Kelly Curlee “only to show that at least at one point a couple of months earlier that Mr. Davis was very upset at Headley Insurance and the credit union” (96/5037). See also 96/5048 (“Covered the complexion, the financial trouble, covered him being angry, the black car he abandoned his car at the nightclub, the women are burned”).

Ms. Curlee’s testimony alone - - presented by the state - - is enough to establish a plausible motive for a murder which was committed in a manner more consistent with rage or a long simmering anger than with witness elimination. In addition, there is the testimony of Sylvia Long, who testified that she witnessed an angry confrontation between Yvonne Bustamante and a tall black male on what may have been the morning of the day of the crime. The circumstances under which Ms. Long’s testimony was introduced are odd. The prosecutor told the jury in his opening statement that Ms. Long would tell them that she came into Headley a week or two before the crime, where she saw Yvonne waiting on a man. When she saw Leon Davis’ photograph on the news after the crime occurred, she recognized him as the man whom she’d seen at Headley (79/2209-11). However, the state did not call Ms. Long as a witness, because her testimony - - as it turned out - - was inconsistent with the state’s time line. Rather, it was the defense which presented Ms. Long’s testimony. She said she went into Headley to make a payment when they opened one morning in December of 2007. Ms. Long didn’t know the exact date, but she was sure it was the morning of the same day that later in the afternoon she saw a lot of commotion at Headley; police, ambu-

lances, and fire trucks (92/4345-50,4362-63,4366-68). Inside the insurance agency that morning Ms. Long observed a conversation between Yvonne Bustamante and a black male "and it was quite heated on the gentleman's side". It was obvious that he was angry from the tone of his voice. Yvonne was trying to calm him down. The situation lasted about five or six minutes, until the man got up, pushed the chair into the table, and "walked out the door quite fast" (92/4353-54). Ms. Long only saw the man from the side and did not see his face (92/4355). [There was no testimony that she later recognized him on the news]. On cross-examination and in closing argument, the prosecutor suggested that Ms. Long was merely mistaken about the date (see 92/4358-66;97/5169), while the defense's position was that the black male she saw couldn't have been Davis because the state's own evidence (including video) placed him in Haines City at Enterprise Car Rental (see 96/5066,5108-09).

In any event - - assuming again for purposes of this sub-issue only that Davis was the person who committed this crime - - there is evidence of anger directed both at Headley Insurance and at Yvonne Bustamante which could account for why he may have chosen to rob and burn that particular business, and why he may have set the women on fire (when, in contrast, a witness elimination motive could have been accomplished more effectively with the gun). The circumstances of this case - - to the limited extent that we even know them - - are therefore very different from two burning cases which the state will likely rely on, Willacy v. State, 696 So.2d 693, 696 (Fla. 1997) and Henry v. State, 613 So.2d 429, 430, 433 (Fla. 1992). In neither of those

cases did the perpetrator have a firearm he could have used, and - - more importantly - - in neither of those cases was there evidence of another plausible pre-existing motive.

Moreover, even apart from the evidence that Davis may have had anger issues directed toward the insurance agency, there is little which sheds light on what happened during the robbery itself. See Menendez v. State, 368 So.2d at 1282. Both Yvonne (in the dying declaration which is being challenged herein) and Juanita (in a dying declaration which the trial court excluded) told Lt. Elrod that Leon Davis "came in and demanded money from them, was trying to rob them. And when they didn't give him the money they wanted, he threw gasoline on them and set them on fire" (12/1793-94, see 1803)(emphasis supplied). Under that scenario (apart from the possibility that the murders were motivated by his anger at Headley), it is sheer speculation to assume that even if they hadn't resisted the robbery he would have burned them anyway to eliminate witnesses. See Menendez, at 1282 ("We cannot assume [defendant's] motive; the burden was on the state to prove it).

For all of these reasons, the trial court's finding that the state failed to prove that the sole or dominant motive for the murder of Juanita Luciano was to eliminate a witness (66/10884) was absolutely correct. And the only difference between Juanita and Yvonne on this score is that - - while Juanita also knew him as an insurance client - - Yvonne had dealt with him more often. That falls far short of proving that her murder was motivated by a desire to eliminate her as a witness, which is the standard for

both the aggravating circumstance and for a finding of forfeiture under Fla. Stat. §90.804(2)(f) (assuming arguendo that that provision of the Evidence Code could be applied retroactively, and that it would not violate the constitutional presumption of innocence if applied under the circumstances of this case).

H. Ms. Bustamante's Statements to Lt. Elrod were Also Inadmissible Under Florida's Evidence Code

Davis' main position is that Ms. Bustamante's out-of-court testimonial statements were barred by the Confrontation Clause. His secondary position is that they were also inadmissible under state evidentiary law. See Michigan v. Bryant, 131 S.Ct. at 1162 n.13 ("Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence"). Therefore, in the event that this Court concludes - - contrary to Davis' contention in Part E - - that dying declarations are an "historical exception" to the Confrontation Clause, the Court must then determine whether Yvonne Bustamante's out-of-court statements fall within the parameters of the dying declaration exception under Florida evidentiary law. See Bryant, 131 S.Ct. at 1167; see also People v. Clay, supra, 926 N.Y.S.2d at 609.

There are two components to the state law issue. The first is that the trial court's ruling finding Yvonne's statements to Lt. Elrod admissible (while finding Juanita's statements to Elrod

inadmissible) is predicated on the testimony of Fran Murray, concerning a conversation which she claimed took place while Yvonne was leaning against Evelyn Anderson's Tahoe in front of Headley. When Murray's testimony is considered in pari materia with the observations of other state witnesses, there is considerable reason to doubt that this conversation ever occurred, and therefore there is simply no reliable predicate for the introduction of Yvonne's later statements made in response to Lt. Elrod's questioning.

According to Fran Murray, she first encountered Yvonne in back of Headley, on the other side of the chainlink fence, when a tall, husky black male came up behind the woman with a gun raised, "[a]nd you heard pop, pop, pop." Brandon Griesman was shot in the face and fell to the ground, and Yvonne was shot in the left hand (11/1616-28). Then Yvonne went around to the front of the building, where Murray later found her leaning against Evelyn Anderson's SUV. Murray testified "I watched her [Yvonne] get shot in the hand" (11/1663), and when Murray later (in front of the building) asked her if she'd been hit in the hand, Yvonne said yes (11/1624,1659,1663). According to Murray, she never saw the second woman - - Juanita - - until she went to the Havana Nights restaurant to get water for Yvonne (11/1618,1629-30, 1634,1637).

Murray testified that when she reencountered Yvonne by the SUV she was screaming and was in obvious pain, and she said she needed something to drink. Murray asked her if she'd like her to get her a glass of water. Murray then ran across the street to the Havana Nights café, while Evelyn Anderson stayed where she

was. Murray got the water and brought it back; she held the cup for Yvonne as she drank a little bit of the water.

After she returned with the water, according to Murray's account, a somewhat lengthy and personal conversation occurred between herself and Yvonne. Murray told Yvonne she needed to calm down because more stress adds to things. She introduced herself as Fran and said she'd stay until the ambulance arrived. Yvonne said she was in so much pain. Murray asked her if she knew who did this to her. Yvonne answered that a black man had tied or taped her hands and doused her with gasoline, and he should be on camera (11/1631,1647,1659,1664;81/2486,2522-25). Yvonne then started talking about her kids, and saying over and over that her body hurt so bad. According to Murray, Yvonne said "[P]lease keep me in your prayers. I'm not going to make it" (11/1631). Murray told her that God worked miracles and all she had to do was believe. Yvonne said she didn't do anything for this and she didn't know why it was happening to her. Murray told her she would keep her in her prayers, and she would come to see her if they'd let her. Yvonne said she would like that, but she didn't believe she was going to make it, and Murray told her to just keep faith (11/1632). At that point, the police and then the ambulance arrived (11/1632,1654-55).

According to Murray, she helped the paramedic load Yvonne onto the gurney, and she continued talking to her until they closed the doors of the ambulance. Murray did not recall whether or not there was any conversation between Yvonne and the police officer (11/1633,1655-59).

Murray's version of events is irreconcilable with that of the state's other witnesses. First of all, Yvonne Bustamante was never behind the Headley building, and (as recognized even by the prosecutor) the gunshot which struck her in the left wrist was fired inside the insurance agency.[18] Evelyn Anderson testified that after she parked her Tahoe in front of the building, she tried the front door and found it locked (11/1706-08,1713, 1727).[19] Then she heard three popping sounds, whereupon a tall black man came out the front door which she had just tried to open. She asked him what was going on and he said there's a fire in there. By the time the man made it to the corner, a burned, nearly naked woman (who, in the context of all the evidence, was unquestionably Yvonne) ran out the same front door, briefly got inside Anderson's Tahoe, and then (at Anderson's suggestion) got out and leaned against the hood of the vehicle (11/1708-15,1724-28). "And that's where she stayed until the paramedics got there" a short time later (11/1726,see 1715). At no point in time did Yvonne go behind the building (11/1726-27).

Anderson's observations were corroborated by Ashley Smith, who saw the black male come out the front door as the older lady (Anderson) was about to open it. Then Smith saw Yvonne Bustamante (whom she knew personally) come out the same door. Ms. Anderson was patting her down, trying to get some charred stuff off her, and Yvonne ran to the truck and jumped in (SR1/20-29,35-37).

---

[18] See 79/2181-82;51/8408.

[19] In fact, Evelyn Anderson's account was the only evidence supporting Judge Hunter's finding in his sentencing order that the robber had locked the front door to prevent customers from entering (66/10846-47,10851).

The burned woman who was behind Headley when Brandon Greisman got shot was (as Greisman testified, as the prosecutor agreed, and as the trial judge found) was Juanita Luciano, not Yvonne (see 15/2459,79/2186-87,51/8408-11;66/10875-76,10880). And this cannot be written off simply as Fran Murray confusing the two women, because Murray insisted that she actually saw the woman in back of Headley get shot in the hand. As the medical examiner testified, Yvonne had a bullet wound to her left hand, while Juanita (whose burn injuries were even more severe than Yvonne's) had no other injuries (11/1745-47,1761). So Fran Murray's version of events is highly suspect, even before what supposedly occurred while Yvonne was leaning against Evelyn Anderson's Tahoe.

From there it only gets worse. The entire conversation recounted by Fran Murray, after she returned from Havana Nights and held the cup of water for Yvonne to drink, had to have taken some time (see 11/1631-32,1654). However, according to Vicky Rivera, Yvonne was leaning against the SUV in pain and screaming for water. Fran Murray went to get her some, and by the time Fran came back with the water uniformed personnel (either police officers or paramedics or - - at the prosecutor's suggestion - - possibly a firefighter) were already on the scene assisting Yvonne (11/1682-83,1697-1704).

Evelyn Anderson was right there with Yvonne the entire time from when she came out the front door and went to the Tahoe until the paramedics arrived (11/1726-27,1731-32). Anderson testified that when she saw Fran Murray and Vicky Rivera at the motion

hearing she did not recognize either one of them; “in fact, I had never seen them until we started coming to this hearing” (11/1729-30). Anderson could not absolutely exclude the possibility that either of those women could have come up and gotten close to Yvonne or given her some water, only because she wasn’t concerned about who else was there; her attention was focused on Yvonne (11/1730-31,see 1715).

These are all state witnesses, and their testimony is all over the map. If Fran Murray (who we already know was wrong about seeing Yvonne in back of Headley and seeing her get shot in the hand) had had the personal conversation with Yvonne that she described, it is virtually inconceivable that Evelyn Anderson - - who was right there with Yvonne as well - - wouldn’t have seen or heard at least some it, and wouldn’t even have been aware of Murray’s presence. Also, in order for Murray to have had the conversation with Yvonne, there had to be a significant time lapse between when Murray returned with the water and when the first paramedics or police officers arrived. However, according to Murray’s friend Vicky Rivera, there was no time lapse at all.

Finally, Yvonne’s statement, in response to Murray’s asking her if she knew who did it to her, that a black man had tied or taped her hands and doused her with gasoline, and he should be on camera, strongly suggests that Yvonne did not know who the perpetrator was. According to Murray, Yvonne did not mention a name, nor indicate that it was someone she knew (such as an insurance client); “[s]he just said that he should be on camera, and that was it” (11/1664,see 1631,1647,1659;81/2486,2522-25). Assuming the conversation with Murray occurred, these statements

cast some doubt on Yvonne's later testimonial statements to Lt. Elrod accusing Leon Davis. On the other hand, if the conversation with Murray did not occur, then the predicate ("[P]lease keep me in your prayers. I'm not going to make it") relied on by the trial judge for introducing the statements to Elrod as dying declarations is gone.

The state will likely argue, incorrectly, that Fran Murray's testimony was not the only basis for the introduction of Yvonne's later statements in response to Elrod's questioning as "dying declarations". At the motion hearing the state introduced Dr. Nelson's testimony that the probability of survival of burn injuries is roughly inversely proportional to the percentage of body surface which is burned, factoring in the person's general constitution and state of health. [Under this calculation, Yvonne - - who had second and third degree burns to 80-90% of her body surface - - would have a 10-20% chance of survival, while Juanita - - who had third and fourth degree burns to 90% of her body surface - - would have a 10% chance]. Even with the best of care at a burn treatment center, there is a great risk of fluid loss and bacterial infection. When people die as a result of burns, the specific cause of death is usually pneumonia or (as in Yvonne's case) 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).

Of the seven police officers, paramedics, e.m.t.s, and flight nurses who saw Yvonne and/or Juanita, five concluded, based on their own experience, that survival was impossible or extremely unlikely, while two did not form an opinion. None of them communicated his opinion that the prognosis was poor to the patient. Lt. Elrod when he encountered Yvonne, estimated that 80% of her body surface had been burned. She was awake, calm, and quiet, and she did not appear to be in acute pain, or else she was in shock. “If you know much about burns and stuff...she was not feeling any pain, I don’t think, at that time” (82/2638,see 2672-74; 12/1810,1814). [Elrod’s observation is consistent with Dr. Nelson’s testimony that the pain a person would feel from burns would begin almost immediately, but as the burn advances and the nerve endings are destroyed, the pain may subside. This can occur in a relatively short time (11/1749-51,1760-65)]. According to the paramedic Froehlich, when he asked Yvonne about pain, her main complaint was that she had been shot in the hand (12/1861;82/2702; see 7/1048).

In order for an out-of-court statement to be admissible as a dying declaration under Florida law (Fla. Stat. §90.804(2)(b)) it is necessary to show that the declarant understood her “condition as being that of an approach to certain and immediate death”. Hayward v. State, 24 So.3d 17,30 (Fla. 2009). The “[a]bsence of all hope of recovery” and “appreciation by the declarant of [her] speedy and inevitable death” are foundational requirements for admissibility. Hayward, at 31; see also Cardenas v. State, 49

So.3d 322,325 (Fla. 1st DCA 2010). As the Mississippi Supreme Court, construing that state's dying declaration hearsay 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).

In excluding Juanita Luciano's out-of-court statements, Judge Hunter correctly applied this standard: "Although the Court thinks 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 Ms. Luciano reasonably believed her death from her injuries was imminent" (19/3081). Plainly, then, the judge's decision to allow the introduction of Yvonne's accusatory statements, while excluding those of the even more severely burned Juanita, was based entirely on Fran Murray's assertion that Yvonne had said to her that she wasn't going to make it.

Even assuming arguendo that the state's evidence considered as a whole was sufficient to show that the claimed conversation between Fran Murray and Yvonne occurred, it cannot be assumed that Yvonne's state of mind at the time of that conversation was necessarily the same as her state of mind when she was questioned by Lt. Elrod. According to Murray, Yvonne was screaming and was in extreme and obvious pain, and she was saying over and over that her body hurt so bad. By the time Lt. Elrod saw her, on the other hand, Yvonne was calm and quiet, and she did not appear to him to be feeling any pain. Her main complaint to the paramedic concerned the gunshot wound to her left hand. Elrod was not sur-

prised by this because - - like the medical examiner and the paramedics - - he was familiar with burn injuries and knew that the acute pain subsides after the nerve endings are destroyed. However, it is highly unlikely that Yvonne would have known this. Given that she was now being attended by paramedics and was about to be transported to a hospital for medical treatment, and given that the extreme pain she was feeling earlier had now subsided, it cannot be assumed that she believed at that time that she had no hope of recovery and that her death was certain and imminent. Therefore, under Florida law, her statements were inadmissible as dying declarations. Hayward.

I. Conclusion

Yvonne Bustamante's out-of-court testimonial statements to Lt. Elrod were barred by the Confrontation Clause of the Sixth Amendment, and in any event were inadmissible under Florida law. As recognized by the trial judge, her dying declarations were the most compelling evidence in the case, and one of the main factors which led to the jury's guilty verdicts (98/5328). The prosecutor went so far as to tell the jury that the state could have put on Yvonne's statements to Elrod accusing Leon Davis of the crime "and stopped right there. I don't think any defendant can get around this" (96/4983).

The introduction of impermissible evidence which could have contributed to the jury's verdict is harmful error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Davis' conviction and death sentences must be reversed for a new trial.

[ISSUE II] THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE THE PRETRIAL AND IN-COURT IDENTIFICATIONS MADE BY BRANDON GREISMAN AND CARLOS ORTIZ, BECAUSE (1) DETECTIVE TOWNSEL SHOWED THEM AN IMPERMISSIBLY AND UNNECESSARILY SUGGESTIVE PHOTOPACK, AND (2) GREISMAN'S AND ORTIZ' IN-COURT INDENTIFICATIONS WERE INSUFFICIENTLY RELIABLE TO OVERCOME THEIR TAINTED PRETRIAL IDENTIFICATIONS.

A. Introduction

Suggestive pretrial identifications "are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188,198 (1972). However, the use of an unnecessarily suggestive line-up or photopack does not necessarily amount to a violation of due process. As recognized in Manson v. Brathwaite, 432 U.S. 98,114 (1977) "reliability is the linchpin" in determining the admissibility of both the pretrial identification itself and any ensuing in-court identification. As this Court explained in Fitzpatrick v. State, 900 So.2d 495,517-18 (Fla. 2005):

> [T]he test for suppression of an out-of-court identification is two-fold: "(1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." *Rimmer v. State*, 825 So.2d 304,316 (Fla. 2002). This Court considers the following factors in evaluating the second prong, the likelihood of misidentification:
>
> > [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Grant v. State, 390 So.2d 341,343 (Fla. 1980)(quoting *Neil v. Biggers,* 409 U.s. 188,199-200, 93 S.Ct.375,34 L.Ed.2d 401 (1972)).

"Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Manson v. Brathwaite, 432 U.S. at 114.

Similarly, when a witness' pretrial identification is the product of an impermissibly suggestive procedure, any subsequent in-court identification may not be introduced "unless it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime." Fitzpatrick, 900 So.2d at 519, quoting Edwards v. State, 538 So.2d 440, 442 (1989). See also State v. Gibson, 109 So.3d 251,254-55 (Fla. 2d DCA 2013). As to both the pretrial identification and the in-court identification, the witness' opportunity to observe the perpetrator, the witness' degree of attention, and the accuracy (or inaccuracy) of the witness' description are important factors in determining whether the identification is sufficiently reliable to overcome the taint of the suggestive procedures. See Edwards, 538 So.2d at 442-45.

"The scientific literature generally divides the factors affecting the reliability of eyewitness identifications into two categories: system variables and estimator variables." State v. Lawson, 291 P.3d 724,740 (Or. 2012). System variables refer to the circumstances surrounding the identification procedure itself, which are generally within the control of law enforcement. Estimator variables refer to the characteristics and perceptions of the witness, the characteristics of the alleged perpetrator, and the conditions of the crime or event "that

cannot be manipulated or adjusted by state actors." Lawson, at 740; see also State v. Collins, 300 P.3d 238, 243-44 (Or.App. 2013); State v. Henderson, 27 A.3d 872,896,904 (N.J. 2011); State v. Almaraz, 301 P.3d 242,251-53 (Idaho 2013). These variables dovetail with the two-step analysis for determining whether the introduction of an eyewitness identification violates due process: system variables "are factors that courts should consider in determining whether identification procedures were overly suggestive", while correspondingly the estimator variables serve as a framework for the Neil v. Biggers reliability inquiry. See Almaraz, 301 P.2d at 252-53.

B. Preservation

After an extensive pretrial evidentiary hearing, the trial court ruled adversely to the defense's motion to exclude Greisman's and Ortiz' identifications (18/2828-39,2950; 19/3043-46). See McWatters v. State, 36 So.3d 613,627 (Fla. 2010) and Fla. Stat. §90.104(1)(pretrial ruling on admissibility of evidence preserves issue). In addition, at the beginning of trial, defense counsel renewed his pretrial motions (specifically including the motions to suppress identifications), and was allowed a standing objection (79/2139-40).

C. The Photopacks

The photopack identification procedure administered by Detective Townsel was suggestive in several ways, the most egregious and unnecessary being the inclusion of the book-in numbers. As the police practices expert William Gaut testified at trial, he believed he - - or an average person - - could have

picked the suspect out by process of elimination, given the witness statement that the suspect had no facial hair, was about 28-30 years old, and was wearing a gray shirt (94/4772). The double-blind procedure was not used, since Detective Townsel was well aware that Leon Davis was the suspect, and she knew Davis was in the photopack, and where his photo was positioned. See Lawson, 291 P.3d at 686 and 705-06; Henderson, 27 A.3d at 896-97; Almaraz, 301 P.3d at 252, regarding the importance of blind administration. Moreover, when asked whether she told Carlos Ortiz - - after the tape was turned off - - that he'd identified the right guy, Detective Townsel said, "I don't remember if I did or not" (17/2814). See Lawson, 291 P.3d at 687,704-05, and 710-11; Henderson, 27 A.3d at 899-900; Almaraz, 301 P.3d at 252 n.4 and 256, regarding the corrupting effect of "confirmation feed-back" on the witness' subsequent in-court identification.

However, the most serious - - and entirely gratuitous - - lapse on the part of law enforcement was the inclusion of the book-in numbers on the photopack. The number corresponding to Davis' picture began with 2007 (which was the current year), while the numbers corresponding to the five other pictures all began with 93 or 94. Detective Townsel explained that these numbers were for the police department's own use. (In case the witness points to an unknown suspect, they can call the sheriff's office and identify who it is)(16/2518).

These telltale numbers could easily have been cropped from the photopacks with scissors, or covered with tape. Whether or not they potentially could serve some later investigative purpose

for law enforcement, there is simply no excuse for allowing the witness to see them. See Henderson v. United States, 527 A.2d 1262,1268 (D.C.App.1987)(photo array was unduly suggestive where, inter alia, "the date shown on appellant's mug shot is 1984, while all the others date from the early to mid 1960s except for one dated 1979"; remand necessary to determine whether identification was nevertheless reliable); State v. Davis, 504 A.2d 1372,1374 (Conn. 1986)(photo array was unnecessarily suggestive where "[t]he only recent arrest date on the photograph . . . was the date of March 1982, which was on the photograph of the defendant", and where the defendant was depicted in the photo wearing the same clothes worn by the robber; however, on the second prong, considering the factors outlined in Manson v. Brathwaite, the out-of-court and in-court identifications were found to be reliable)[20]; see also Adkins v. Commonwealth, 647 S.W.2d 502,504-05 (Ky.App.1982); Brown v. Commonwealth, 564 S.W.2d 24,27 (Ky.App.1978).

In the instant case, in contrast to the Connecticut Supreme Court's second-prong finding in State v. Davis, the reliability factors - - especially those involving Greisman's and Ortiz' opportunity to observe the suspect (very fleeting), their degree of attention (under highly stressful and distracting conditions), and their descriptions of the suspect (extremely vague; except for the hairstyle which was different from Leon Davis') - - weigh heavily in favor of the conclusion that their pretrial and in-

[20] [Contrast State v. Outlaw, 582 A.2d 751,757 (Conn. 1990)(April 1986 date on defendant's photograph was not meaningfully related to September 1988 date the crime occurred, nor was it the most recent of all the dates on the photos contained in the array)].

court identifications were insufficiently reliable to overcome the tainted photospread. See Part D, infra. Detective Townsel testified that it is the Sheriff's office which prepares photopacks using book-in photos, while the FDLE uses driver's license photos. The driver's license photos, Townsel explained, have a blue background "and a lot of times we would photocopy them and make them black and white" (16/2484). The book-in numbers should have been an even easier fix; crop them or cover them. In People v. Velarde, 541 P.2d 107, 109 (Colo.App.1975) (emphasis supplied) the appellate court noted that "[p]hotographic arrays are a permissible part of investigative procedure if conducted within certain guidelines":

> These safeguards include: (1) The pictures must not be improperly suggestive because only one of the array fits the description given to police; (2) the pictures must not be presented in a suggestive manner; (3) all numbers or other indications that the pictures are mug shots must be covered. See Stovall v. Denno, 388 U.S. 293,87 S.Ct.1967, 18 L.Ed.2d 1199.

See also Houston v. State, 360 So.2d 468,469 (Fla. 3d DCA 1978); Fuster v. State, 480 So.2d 173,175 (Fla. 3d DCA 1985).

Here the problem was far worse than that the presence of numbers indicated that the pictures were mugshots. The fact that the number corresponding with Davis' picture began with 2007 - - where the crime and the photo identification procedure both took place in 2007, and where the five other numbers all began with 93 or 94 - - was, or at least may have been perceived as, an arrow pointing to Davis. Admittedly it was a small and subtle arrow, but there is no excuse for its being there at all, and as recognized in Henderson, 27 A.3d at 896, and Almaraz, 301 P.3d at 252

n.3, even subtle cues can influence a witness' behavior. "Yet the witness is often unaware that any cues have been given." Henderson, at 896-97. See also People v. Carlos, 138 Cal.App.4th 907,912,41 Cal.Rptr. 873,876 (2006)("Although the name placement is not quite an arrow pointing to Carlos, it is plainly suggestive").

"It is a matter of common experience" that once a witness has picked out the accused at a live or photographic lineup, "he is not likely to go back on his word later on . . ." United States v. Wade, 388 U.S. 218,229(1967); Young v. Conway, 698 F.3d 69,78 (2nd Cir. 2012). This might account for the marked defensiveness exhibited by both Greisman (whom even the trial judge described as "squirrely", and who had obvious personal animosity toward defense counsel)[21] and Ortiz (a four-time convicted felon who was on probation at the time of the events at Headley) during their cross-examination, not only at trial but every time they took the stand.[22] [This is revealed throughout their testimony, but see for example 84/2942-43 (Greisman accusing defense counsel of trying to trap him; "I'm sorry I'm not as intelligent as you, I guess"; "I guess I'm retarded"); 84/2993-95,3006-07 (Greisman on hairstyle discrepancy); 17/2765-73; 85/3116-24 (Ortiz on his inconsistent statements as to whether he saw newspaper before or after photopack identification procedure); 85/3101-09 (Ortiz on hairstyle discrepancy). Ortiz in particular, given his own

[21] See 84/2990-91; 54/8886.

[22] Greisman and Ortiz each testified in the Arthur hearing, the hearing on the motion to exclude their identifications, the trial which ended in a mistrial, and the trial which resulted in guilty verdicts.

criminal history, might readily have understood the significance of the book-in number beginning with 2007, as opposed to 93 or 94. (See 18/2835). Even though it cannot be conclusively shown whether or not the witnesses' selection of Davis' photo was actually influenced, directly or subtly, by the numbers, the fact remains that the photopacks themselves - - the system variables within the control of law enforcement - - were gratuitously suggestive. See Neil v. Biggers, 409 U.S. at 198. The question of whether the pretrial identifications and the ensuing in-court identifications violated due process depends on an analysis of their reliability, or lack thereof.

D. The Identifications

Where the police have used an unnecessarily suggestive pretrial identification procedure, the witness' subsequent in-court identification may not be introduced "unless it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation." Edwards v. State, 538 So.2d at 442; see Fitzpatrick v. State, 900 So.2d at 519. This inquiry delves into the totality of the circumstances, and weighs the nonexclusive lists of factors set forth in Neil v. Biggers and United States v. Wade; among these are the witness' opportunity to observe the perpetrator at the time of the crime; the witness' degree of attention, and the accuracy of the witness' description. Edwards, at 443.

Because the trial judge erroneously found that there was nothing suggestive about the way the photopacks were presented, he stated that he didn't need to address the second prong (18/

2836-37). Then he briefly addressed it anyway (as to Ortiz), and concluded that there was nothing to suggest that either his pretrial or in-court identification would be unreliable (18/2837-39). However, in his order issued three months later concerning the admissibility of Dr. Brigham's expert testimony on the factors affecting the reliability of eyewitness identification, the judge found that "Mr. Ortiz' encounter with the Defendant was brief, the conditions stressful, and . . . a weapon was involved" (41/6606). In the same order he found that Brandon Greisman saw a black man with a pistol in his hand, who fired a shot and Greisman realized he'd been shot in the nose; "this encounter was brief and highly stressful." (41/6606). The court also noted that the identifications were cross-racial; Greisman being white, Ortiz Hispanic, and Davis black (41/6606). See Henderson, 27 A.3d at 904-07; Almaraz, 301 P.3d at 252 and n.6 and 8; Young v. Conway, 698 F.3d at 79 (research has shown that among the variables which diminish the reliability of a witness' identification are stress, weapon-focus, and the cross-racial nature of the identification).

As recognized by this Court in Edwards, 538 So.2d at 444, and by the U.S. Supreme Court in Wade, 388 U.S. at 228-29, the danger of misidentification is "particularly grave when the witness' opportunity to observe was insubstantial." In the instant case, Brandon Greisman said that after the burned lady (Juanita Luciano) bumped into him and he saw her injuries, everything got scrambled; [e]verything happened so quick that it just happened right away" (83/2914-15; 15/2459). There was a man

walking toward Greisman and the woman, and Greisman thought he was coming to help (15/2439-42). Asked if he concentrated on the man's face, Greisman said "It happened so fast, but I did get a look at his face" (15/2441). There was more than one significant thing going on at once that he was trying to pay attention to (83/2915). The black male had appeared all of a sudden. At the same time, there were other people - - including some other black people - - standing around, and as Greisman was glancing up and noticing the person who was coming toward him and the lady, he was also noticing other people in the area (84/2918-19,2923). As far as he could remember, Greisman was focusing on trying to help the injured woman, then he glanced up and noticed the black male that he thought was coming to help, and then he directed his attention back to the injured woman (84/2923,3009). Almost immediately, the black male pulled a gun out of his red or orange lunch bag or possibly out of his back pocket (15/2443-44; 83/2880-81; 84/2924-26,2932-33). At that point, Greisman was focusing on the weapon (84/2926,2928-29,2981-82,2995). As soon as he saw the gun, Greisman turned his head to try to run, and as he turned (although he didn't realize it right away) he was shot in the nose (15/2444-46; 83/2882-84). He had a ringing in his ears and he might have blacked out (15/2445-46; 84/2945). Meanwhile (according to Greisman's motion hearing testimony) the black male "was walking away like nothing had ever happened" (15/2446). At that point, Greisman could only see him from quite a distance away and from behind (legs and back); he never saw the man's face after the shooting occurred (15/2446-47). By the time of the trial Greisman no longer remembered seeing the man walking

away, and his prior statements failed to refresh his recollection; “I’m pretty much trying to forget what I saw” (84/2955-58). He described it as “like a puzzle that’s missing pieces” (84/2959). He no longer remembered the color of the man’s shirt (which he’d previously said was dark; maybe gray or black) or whether it had long or short sleeves; “Sir, if somebody was pointing a gun at you, would you be looking at what they were wearing?” (84/2980-82). Nor did Greisman notice whether or not the man had facial hair; “I was just trying to get out of the way” (84/2984-86).

Carlos Ortiz testified that after Brandon Greisman came back toward him saying “I been shot in the face. That guy shot me in the face” he looked at the man Greisman pointed out. Ortiz saw a tall black male crossing Stuart Avenue and heading north on Phillips Street. He had a pistol in his hand. He put his hand into his lunch bag, and after that Ortiz didn’t see the gun anymore (17/2742-48; 84/3040-50,3084-85; 85/3086-94). Ortiz was watching him to make sure he didn’t turn around and come toward them, or shoot at them (84/3043-44). According to Ortiz, he made eye contact with the man and got a clear view of his face (17/2747; 84/3044; 85/3095,3042,3147,3149). However, he acknowledged that there were all kinds of distractions - - people screaming and running around - - and the amount of time he was able to see the black male was roughly the amount of time it would have taken him to cross the street (85/3087-90). As the man was crossing the street, Ortiz saw a glimpse of him from the front, then the side, then the back, and then he lost sight of him (85/3090).

Both Greisman's and Ortiz' opportunity to observe the shooter was very fleeting, under extremely stressful and chaotic conditions. See Edwards, 538 So.2d at 444. Contrast Fitzpatrick, 900 So.2d at 505,519 (witness testified that Fitzpatrick, a pizza delivery man, was at his house for 10-15 minutes, during which time they had a conversation in which Fitzpatrick told him the pizza was free and asked him if Romines (the murder victim) was there; around midnight Romines left "arm and arm" with the pizza guy).

Neither Greisman nor Ortiz was able to give a very detailed description of the suspect, beyond the fact that he was black and tall. Greisman attributed some of this to his focus on the weapon, and his trying to get out of the way (84/2981-82,2986). Aside from the length of his hair, Greisman said, "I don't remember too much" (84/2995). Ortiz had described the suspect as having a goatee, and he acknowledged (when shown a photo of Leon Davis at the Sheriff's substation taken the same night) that Mr. Davis does not have a goatee (85/3102-03).

The one aspect of the suspect's appearance which both Greisman and Ortiz noticed and remembered was his hairstyle. Greisman had described it as an Afro but not a full Afro (84/2994-95). When defense counsel showed him a photograph of Leon Davis (State Exhibit 7081) taken at the Sheriff's substation a few hours after the events at Headley, Greisman three times in quick succession parried counsel's question with a question: "Could he have gotten a haircut before he came in?" "You don't think he could have gotten clippers and cut his hair before he came in?" "But don't you think it is possible he cut his hair

before he came in" (84/2994). Defense counsel asked Greisman to listen to his question carefully:

> That can't be the person you saw because that person's hair is not an inch long, unless that person cut his hair before this picture, correct?
>
> GREISMAN: Yeah.

(84/2994)

At the end of cross, Greisman agreed once again that the person he saw outside Headley had a different hair style than the person (Leon Davis) in the photo, and he could not explain why the hairstyle was different (84/3006-07).

Similarly, Carlos Ortiz had described the black male he saw walking up Phillips Street as having a small Afro (17/2782-83); "Afro hair curly hair" (85/3103-04). Defense counsel showed Ortiz two photographs of Leon Davis taken at the Sheriff's office substation a few hours after the events at Headley. Counsel said, "That person doesn't have an Afro, do they?", and Ortiz said "No" (85/3103-04). Ortiz acknowledged that the two hair-styles were different, and he had no explanation for the discrep-ancy other than "maybe he got a haircut" (85/3108-09).

When shown the photographs of Leon Davis taken that evening when he turned himself in, neither Greisman nor Ortiz said anything like "That's what I meant by a small Afro" or "Yeah, that's pretty much what the guy I saw's hair looked like." Instead, they said the hair was different, and the only explana-tion either witness could think of was that maybe he got a haircut. However, the evidence in this case includes videos taken at Enterprise Car Rental on the morning of the crimes at

Headley, Beef O'Brady's at lunchtime on same day, and Mid-Florida Credit Union around 4:20 p.m. (about half an hour after the crimes) - - depicting a large black male who both the state and the defense agreed was Leon Davis[23] - - showing him with the same closely cropped hair as he still has in the Sheriff's substation photos. [State Exhibits 9031 (Enterprise); 9032 (Beef's); 9026 (Mid-Florida, Davis in black shirt)[24]; Defense Exhibit 10 (Mid-Florida and Enterprise); State Exhibits 7081,7083 (photos at Sheriff's substation)].

In Edwards, 538 So.2d at 444, this Court said "Nor does Walters' prior description of the person he saw at the Quick Stop support an independent basis for the courtroom identification. Although Walters' prior description fits [Edwards], it also fits the general description of many black males." In Manson v. Brathwaite, 432 U.S. at 115 (emphasis supplied), regarding the "accuracy of the description" factor, the description given by the witness included the suspect's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included the clothing [he] wore. No claim has been made that respondent did not possess the physical characteristics so described."

In the instant case the suspect was described, in very general terms, as male, black, and tall. See Edwards. Ortiz was unable to describe the man's clothing at all; not as to color, or

[23] The only video in which the identity of the person shown was disputed is the Walmart video. State Exhibit 9034; Defense Exhibit 9.

[24] There is another large black male, who is not Davis, in the Mid-Florida video wearing a red shirt.

whether he was wearing long or short sleeves or long or short pants (17/2780-81,2818). At the motion hearing he attributed this to the fact that it had happened almost two years ago, but in his interview with Detective Townsel four days after the events Ortiz told her he remembered nothing about the suspect's clothing (15/2375,17/2780). Greisman, at the time of the photopack procedure, had told Townsel that he thought the person he saw was wearing a dark colored shirt "like maybe gray or black", but by the time of the trial he no longer remembered even that much (15/2363; 84/2980-82). Ortiz described the person he saw as having a goatee, which Leon Davis did not have (85/3102-03). Greisman said the whole thing happened so fast that he didn't notice whether the man had facial hair or not; "I was just trying to get out of the way" (84/2984-86). The only individualized description which either Ortiz or Greisman was able to give was hairstyle - - and that part of the description didn't fit Leon Davis.

Two additional factors, relating to Carlos Ortiz' photopack and in-court identifications, further demonstrate the unreliability of those identifications. First, there is the matter of Ortiz' deviousness when confronted with his inconsistent statements about when he saw newspaper accounts of Leon Davis' arrest. Detective Townsel testified that she wouldn't even have shown the photopack to a witness who had seen the suspect's picture on the news (17/2812). Because this case had been all over the news by then, she asked Ortiz if he had seen it, and Ortiz replied that he had not; "you know I am going through a lot, so I'm not really into what's going on out there" (17/2811-12; 15/2372). He

was then shown the photopack and he selected Davis' picture.

Subsequently, in his deposition, Ortiz stated that he might have learned Leon Davis' name in the newspaper which his neighbors brought to him; "It was in the paper, I believe, the next day" (17/2768-69)(emphasis supplied). In the same deposition Ortiz was asked if he watched any of the news coverage on TV with his neighbors or by himself. Ortiz answered "The next day I caught the report in the morning news, but I was - - I didn't need to watch it on the news. I had the news right outside the door" (17/2770)(emphasis supplied). Having twice volunteered that he saw news accounts the next day, Ortiz was confronted by defense counsel about the inconsistency with what he'd told Detective Townsel, whereupon Ortiz reversed his field and decided he didn't see the news accounts until after the December 17 photopack. As explained in the motion hearing:

> DEFENSE COUNSEL: You thought hard about it when later on in the deposition, after you'd already told me that you saw it in the newspaper the next day, I said, well, then why did you tell the police you hadn't seen the news, right? That's when you changed the date you saw the newspaper, right?
>
> ORTIZ: Correct. (17/2770).

In the motion hearing and at trial, Ortiz claimed that defense counsel had confused him with the way he was phrasing his questions (17/2769,2771; 85/3117,3121).

The likelihood that Ortiz may have seen Leon Davis' picture in the newspaper and/or on TV does not go to the first prong (suggestiveness of the photopack) only because Detective Townsel was unaware of it, and therefore it was not a "system variable" within the control of law enforcement. See Lawson; Henderson;

Almaraz. However, it very much goes to the second prong, in that it detracts from the already dubious reliability of both Ortiz' photopack identification and his ensuing in-court identification.

Secondly - - returning to the "accuracy of the description" factor - - Ortiz insisted that he was certain that the car parked behind the vacant house, which the suspect walked toward and which Ortiz then saw driving away, was a Maxima (17/2748-50, 2787). Yet there was no dispute (and it was an integral part of the circumstantial portion of the state's case) that Leon Davis was driving his wife's car, which was an Altima. (See, e.g., 2/56-57,177-79,185-88; 61/10129-34,10141-48; 79/2161-62,2184-85, 2191,2706).

Time and opportunity to observe, degree of attention, stress, weapon focus, cross-racial nature of the identification, vagueness of the description (and the inaccuracy of the one aspect of the description which wasn't vague) - - all of these factors demonstrate the unreliability of Ortiz' and Greisman's eyewitness identifications. Therefore, the introduction of both their pretrial and in-court testimony identifying Leon Davis, after being shown an unnecessarily suggestive photopack, gave rise to a very substantial likelihood of irreparable misidentification, in violation of the standard required by the Fourteenth Amendment's Due Process clause. See Manson v. Brathwaite, 432 U.S. at 113-114.

E. Conclusion

The identification of strangers is proverbially untrustworthy. United States v. Brownlee, 454 F.3d 131,141 (3rd Cir.2006).

The unreliability is magnified when the stranger was observed for at most a few seconds under highly stressful conditions. Although eyewitness misidentification has been recognized as "the single greatest cause of wrongful convictions in this country" [Henderson, 27 A.3d at 885; Almaraz, 301 P.3d at 251], "there is almost nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one'." Almaraz, 301 P.3d at 251; see Brownlee, 454 F.3d at 142, both quoting Justice Brennan's dissenting opinion in Watkins v. Sowders, 449 U.S. 341,352 (1981). As discussed in Young v. Conway, 698 F.3d at 87-89, studies show that eyewitness identification testimony often has as much or more impact as physical evidence, or even confession evidence; moreover, the eyewitness identification increases the perceived strength of the other evidence presented.

In the instant case, two witnesses pointed the finger at Leon Davis and insisted that he was the one they saw. A police detective had showed each of them a gratuitously suggestive photopack - - flawed in several respects but made especially egregious by her failure to crop or cover the book-in numbers - - and the prosecution fought tooth-and-nail to introduce Ortiz' and Greisman's in-court identifications. The state cannot now show beyond a reasonable doubt that these eyewitness identifications could not have had their intended effect on the jury, and could not have contributed to their verdicts. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Davis' convictions and death sentences must be reversed for a new trial.

[ISSUE III] THE INTRODUCTION OF 43 GRUESOME MORGUE AND HOSPITAL PHOTOGRAPHS WHICH WERE NOT RELEVANT TO ANY ISSUE IN DISPUTE WAS FUNDAMENTAL ERROR.

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." Almeida v. State, 748 So.2d 922,929 (Fla. 1999)(emphasis in opinion); see Jennings v. State, ___ So.2d___ (Fla. 2013)(2013 WL 3214442); Seibert v. State, 64 So.3d 67,88 (Fla. 2011); Smith v. State, 28 So.3d 838,861 (Fla. 2010). Since, in the instant case, it was clear to the trial judge (who repeatedly made it equally clear to the actual and potential jurors), the prosecutors, and the defense attorneys that the only contested issue in this case was the identity of the perpetrator, and that nobody was disputing how these two women and the unborn child died, it follows that any gruesome photographs (much less 43 gruesome photographs [25], projected on a large TV screen[26], prominently displaying a wide variety of medical procedures) were irrelevant and inadmissible. The only question is whether their introduction amounted to fundamental error requiring reversal in the absence of an objection.

The procedure which was followed in this case was that three photos (one depicting each victim) were shown to each prospective juror, and the ones who said they couldn't handle it or that it

[25] The photographs, which have been transmitted to this Court pursuant to its August 6, 2013 order, are State Exhibits 8002-8019 (Yvonne Bustamante autopsy photos); 8032-8044 (Juanita Luciano autopsy photos); 8045-8051 (photos of Juanita Luciano while still alive in the hospital); and 8061-8065 (Michael Bustamante autopsy photos). See 61/10155-92,10202-28; 62/10229-42,10243-52; 88/3682-96.

[26] See 74/1372,1376; 75/1401,1462; 79/2149-50; 88/3680.

would affect their ability to be fair and impartial were excused for cause. However, given the extremely graphic and disturbing nature of these photographs, their sheer number, and way they were displayed to the jury, coupled with their complete irrelevance to any disputed issue in the guilt-or-innocence phase of this trial[27], that procedure was woefully insufficient to ensure Davis' right to a fair trial on the critical issue of whether or not he was the person who committed the crimes.

Judge Hunter was well aware that these photographs were extraordinarily gruesome - - "as graphic as I have ever seen" (73/1086)[28] - - and he expressed the concern that jurors could be traumatized (48/7845). It worried him to the point of inquiring of the Court Administrator if he could have counselors standing by, but "he said there was no funding for that kind of thing" (48/7845; see 88/3701). Judge Hunter was equally well aware that "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).[29]

That being the case, the 43 photographs were irrelevant and inadmissible. Almeida; Jennings; Seibert; Smith. They served no purpose but to evoke sympathy for the victims and anger toward the only person who was on trial for their murders - - Leon

[27] Undersigned counsel agrees that photographs (although probably not 43 of them) would have been relevant and admissible in the penalty phase, since the defense contested the weight to be given the HAC aggravator.

[28] See also 8/1224,1226,1228; 10/1472; 68/279.

[29] See also 68/279; 70/623; 71/803-05; 72/1005; 73/1107; 74/1266, 1274-75,1304,1330,1350,1365,1380,1390; 75/1463; 88/3700.

Davis.

After the photographs were first shown to the jury during the testimony of crime scene technicians Lopez and Hancock, Judge Hunter observed that one of the jurors, Ms. Zelazny, seemed visibly shaken. The judge was confident that she looked at every picture, "[a]nd I don't know that it is important. I don't think there is any disputing the cause of death" (88/3700)(emphasis supplied). The prosecutor said that Dr. Nelson (the medical examiner) was going to come in and they would go back through the photographs a second time. The judge reiterated that the juror looked distressed, and the prosecutor replied, "Well, they are distressing, Judge" (88/3700-01). That was when the judge commented - - for the second time - - about the lack of funding for stress counselors to assist jurors after the trial ends (88/3701).

Then Dr. Nelson was called to the stand and the morgue and hospital photographs were shown to the jury again, with accompanying explanations of the visible medical equipment and procedures (88/3707-25).

Under the circumstances here, the introduction and presentation of 43 gruesome, disturbing, and irrelevant photos created "an unacceptable risk of impermissible factors influencing the jury's decision" on the only contested issue in this trial - - whether Leon Davis was the person who committed the crimes which caused the women's burn injuries and the premature delivery of Juanita's baby, or whether he was misidentified - - "and thus constituted inherent prejudice to [his] right to a fair trial resulting in fundamental error." Shootes v. State, 20 So.3d

434,440 (Fla. 1st DCA 2009)(fundamental error where defendant's right to a fair trial was prejudiced by the presence of a large number of identifiable law enforcement personnel in courtroom on last day of trial); see also Stephenson v. State, 31 So.3d 847 (Fla. 3d DCA 2010). A new trial should be granted.

CONCLUSION. Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his convictions and death sentences and remand for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Tamara Milosevic at tamara.milosevic@myfloridalegal.com and to the Office of the Attorney General at Capapp@myfloridalegal.com, on this 2nd day of December, 2013.

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,

/s/ Steven L. Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
sbolotin@pd10.state.fl.us
mjudino@pd10.state.fl.us

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200