STATE OF WISCONSIN

IN SUPREME COURT

APPEAL NO. 2009AP806-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN BEAUCHAMP,

Defendant-Appellant-Petitioner.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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REVIEW OF A PUBLISHED DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING THE ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HON. JEFFREY A. WAGNER PRESIDING, DENYING BEAUCHAMP'S MOTION FOR POSTCONVICTION RELIEF

ISSUES PRESENTED FOR REVIEW

1. Does the Confrontation Clause bar the admission of testimonial dying declarations against a defendant in light of ***Crawford v. Washington*** and ***State v. Manuel***?

In its decision, the court of appeals concluded that the class of hearsay statements known as dying declarations has been recognized by the United States Supreme Court as an exception to the confrontation clause, permitting their admission. (***Beauchamp***, at ¶¶ 11-12; App. 106-08).

2. Does a defendant's right to due process of law restrict the substantive use of prior inconsistent statements?

The court of appeals did not address the issue, noting that no published appellate decision in Wisconsin cited ***Vogel v. Percy***, 691 F.2d 843, 846-47 (7th Cir. 1982), which adopted a 5-part test to determine whether the admission of a prior inconsistent statement as substantive evidence violated due process. ***Beauchamp*** slip op. at ¶ 17 (App. 111).

STATEMENT OF THE CASE

On October 18, 2006, a jury convicted Beauchamp of one count of first-degree intentional homicide while armed. (R.50:3). He was sentenced to life in prison with eligibility for release on extended supervision after 40 years. (R.53: 23). A judgment of conviction was entered on February 14, 2007. Beauchamp filed a motion for postconviction relief, seeking a new trial. Beauchamp alleged that the trial court had erroneously admitted dying declarations of the victim in violation of the Wisconsin rules of evidence and Beauchamp's constitutional rights to confront his accusers; Beauchamp also alleged that his due process rights had been violated by the substantive use of prior inconsistent statements of two State's witnesses. (R.33). On March 6, 2009, the trial court denied Beauchamp's motion. (R.37).

On appeal, the court of appeals affirmed the circuit court, holding that: (1) the circuit court did not abuse its discretion in admitting the dying declarations (***Beauchamp***, slip op. ¶ 9, Pet-App. 105); (2) that ***Giles v. California***, 554 U.S. ___, 128 S. Ct. 2678 (2008) recognized dying declarations as an exception to the confrontation clause and is binding (***Beauchamp***, slip op. ¶ 12, Pet-App. 107); and (3) trial counsel was not ineffective for failing to object to prior inconsistent statements on due process grounds, nor did the admission of those statements constitute plain error (***Id.***, slip. op. ¶¶ 18-19, Pet-App. 112). The court of appeals denied Beauchamp's Motion for Reconsideration.

(App. 201-05; 301). This Court granted review on September 13, 2010.

STATEMENT OF FACTS

In a criminal complaint filed on June 21, 2006, defendant Marvin Beauchamp was charged with one count of first degree intentional homicide while armed. (R.2). According to the complaint, Bryon Somerville (Somerville) was shot on June 16, 2006 at 9:45 a.m. at 3939 N. Sherman Blvd. The complaint alleged that prior to his death, Somerville told Milwaukee Police Officer Wayne Young that he had been shot by "Marvin" with a bald head and big forehead. The complaint also detailed statements allegedly made to police on June 17, 2006 by Dominique Brown (hereinafter "Brown") and Shainya Brookshire (hereinafter, "Shainya"). (R.2: 2).

According to the complaint, Brown told police that she had observed Beauchamp arguing with Somerville in the front yard of the house, and that she saw Beauchamp point a dark-colored pistol at Somerville and shoot into his body. (Id.). The complaint also alleged that Shainya told police that Somerville showed up at her house looking for her sister, and Brown arrived and told her that Beauchamp was on the side of the house with a gun. Shainya said she observed Beauchamp come around from the bushes to the front of the house and ask Somerville if he had a problem with her. Somerville said "Oh you got a gun, shoot me then" at which point she heard 4 or 5 gunshots.

At the preliminary hearing on July 3, 2006, the State called Shainya and Brown as witnesses. During their testimony, both repudiated the statements attributed to them in the criminal complaint. Shainya testified that she did not see Beauchamp at the house before the shooting. (R.41:8). The State then introduced one of the prior statements[1] she had made to police as a prior

[1] Both Shainya and Brown made multiple, inconsistent statements to police. The initial statements were exculpatory as to Beauchamp, while the latter statements implicated him in the shooting. Both women testified this was due to police threats of prosecution.

inconsistent statement, inculpating Beauchamp. (Id.: 17-19). Brown testified that Beauchamp had dropped her off at the house and that she did not see him shoot anybody. (Id.: 35-36). The State then introduced one of her prior statements to police inculpating Beauchamp. She then testified that she had told police that she saw Beauchamp shoot Somerville, but that she only did so because police threatened to charge her with the crime. (Id.: 48-50). Beauchamp was bound over for trial.

Prior to trial, the State moved to admit Somerville's statements as dying declarations. The court held an evidentiary hearing over two separate days. On the first day, the State called Milwaukee Police Officer Wayne Young. Young testified that he was assigned to ride in the ambulance with Somerville. (R.43:6; App. 506). Young testified that in the ambulance Somerville stated that he couldn't breathe and that "Marvin" shot him. (Id.). Young further testified that he was present in the emergency room and was able to ask Somerville a couple of questions there. According to Young, Somerville was not able to provide a last name for "Marvin" and gave a description of a dark-skinned male with a bald head and a big forehead. (Id.:7-8; App. 507-08). At the conclusion of Young's testimony, the hearing was adjourned to allow the State to locate another witness.

At the continued motion hearing on October 6, 2006, the State called Marvin Coleman, an Emergency Medical Technician (EMT) who drove Somerville to the hospital in the ambulance. Coleman testified that he was called to the scene of the shooting and that he knew Somerville personally, by his nickname "Tick." (R.44:6; App. 606). Coleman stated that when he tended to Somerville, the following exchange took place:

> Q. If you would relate what you observed about his physical condition.
> A. I observed him on his back. He seemed to be struggling. You know – he was injured. We figured -- I figured that he was shot because it came over as a possible shooting.

I went – I went to his side and I was like, what happened – you know — and –

Q. And what does he say when you asked him what happened?

A. He said – I actually asked him who did this to you and he said "Marvin."

Q. And your name is Marvin; correct?

A. Yes. I said "who did this." He said "Marvin." I said "who, me." He said "no, Big Head Marvin."

Q. So, when he stated that "no, Big Head Marvin," who did you believe he was referring to? Did you believe he was referring to you?

A. No, I had no clue because he said it wasn't me.

(Id.:7-8; App. 607-08). On cross-examination, Coleman stated that Somerville provided no additional information about the shooter, other than "Big Head Marvin." (Id.:18-19; App. 618-19).

At the conclusion of the hearing, the State moved for an order allowing the admission of Somerville's statements to Young and Coleman. Counsel for Beauchamp objected. The Court ordered that the statements were admissible under Wis. Stats. § 908.045(3), statements under a belief of impending death. (Id.:26; App. 626). The Court stated:

> …[O]bviously the declarant is not available and the belief of impending death may be inferred from the fact of death itself and the circumstances such as the nature of the wounds and, of course, the wounds in this case were a number. There were more than one in the chest area.
>
> And it would appear that based upon what was said and who said it, that these were life threatening, life threatening wounds – you know – considering the shots, the bullets, the exit wounds. What the doctor had indicated in the emergency room would indicate to the Court that this was an exception to the hearsay rule as far as the dying declaration is concerned.

> And I think they are exempt from the restrictions of Crawford and the confrontation clause because they are a firmly rooted hearsay exception exempt from these restrictions and limitation because I don't think the defendant can use the confrontation clause as a shield from the unavailable witness because allegedly the defendant procured the unavailability of the dead declarant. And there is also a rule of forfeiture by wrongdoing and so the Court would allow those statements as to the admissibility.

(Id.:26-27; App. 626-27).

At trial, the State presented the testimony of William Stone, a jailhouse informant with 15 prior convictions who testified in return for consideration at an upcoming sentencing hearing. Stone claimed that Beauchamp confessed to him in jail[2]. (R.46: 59-62). Shainya Brookshire then testified consistent with her testimony at the preliminary hearing, which did not incriminate Beauchamp. The State then admitted her prior statement to police, in which she said she had seen Beauchamp come around the side of the house and confront Somerville in the front yard, and that she heard gunshots. (R.46: 88-96). Shainya told the jury that her testimony was consistent with the first thing she told police, and that didn't she make the statement incriminating Beauchamp until police came back to talk to her. (Id.: 95-97). Shainya testified that she felt threatened by police when they came back and showed her Dominique Brown's statement and said that if Shainya agreed with Brown, they would release Brown from jail. (Id.: 111).

Dominique Brown was called next, and the prior-statement routine was repeated. Like Shainya, Brown testified consistent with her preliminary hearing testimony, telling the jury that Beauchamp had dropped her off and that she did not hear his voice in the front

[2] Stone was subsequently sentenced to a total of 6 months in jail for possession of cocaine and marijuana, both as second or subsequent offenses. When he was released, he promptly committed a murder. See Milwaukee County Case 07 CF 5349.

yard or see who shot Somerville. Brown testified that Beauchamp dropped her off on 44th Street, behind her cousin's house. (R.47:17-23). The State then introduced one of her prior statements to police. Just as she had at the preliminary hearing, Brown stated that she started lying to the police because they told her they were not going to let her go and that she would be charged with the murder. (Id.:24). She told the jury that she lied when she told the police that she saw Beauchamp shoot Somerville and that she heard his voice. (Id.:27-28).

Two citizens present at the shooting testified for the State and did not implicate Beauchamp. Jerrod Logan was selling bottled water for his church group in the street in front of the residence when he witnessed the shooting. He was shown a photo lineup with Beauchamp's picture and he did not identify Beauchamp as the shooter. (R.48: 39). Ronell Odle was in the living room of the house when the shooting occurred. He did not see the shooting happen, and he had not seen Beauchamp at the residence that day. (Id.: 70).

The State then introduced Somerville's dying declarations. Marvin Coleman testified that while attending to Somerville in the street immediately after the shooting, Somerville said "Big Headed Marvin" shot him. (R.48: 47). Somerville provided no last name or any other description to Coleman. Officer Wayne Young testified that he asked Somerville in the trauma room for any information on who shot him. Young told the jury that Somerville said it was an individual named Marvin, dark-complected, bald-headed, with a big forehead. (Id.: 75).

In closing argument, the State sought to focus the jury's attention on the out-of-court statements Brown and Shainya made to police implicating Beauchamp, Somerville's dying declarations, and the jailhouse informant's claim that Beauchamp confessed to him in jail. (R.49: 26-33; 38-39). The State presented no murder weapon, no DNA evidence, and no fingerprint evidence. The State's case consisted entirely of

statements and testimony admitted through exceptions to the rule against hearsay. Beauchamp was convicted and sentenced to life in prison. (R.50:3; 53:23).

ARGUMENT

I. THE ADMISSION OF UNCONFRONTED TESTIMONIAL DYING DECLARATIONS IS INCOMPATIBLE WITH THE CONFRONTATION RIGHTS OF THE ACCUSED

The admission of testimonial dying declarations is incompatible with ***Crawford v. Washington***, ***State v. Hale***, and the constitutional rights of confrontation. U.S. Const. amend. VI; Wis. Const. art. 1, § 7. The rule permitting dying declarations at common law was originally premised on the idea that such statements were inherently reliable. ***Crawford*** explicitly ruled that imbuing testimonial statements with a presumption of reliability and admitting them into evidence on that basis offends core constitutional principles.

A. ***Crawford*** and the Confrontation Right

In ***Crawford v. Washington***, 541 U.S. 36 (2004), the United States Supreme Court re-examined the scope of the confrontation right contained in the Sixth Amendment by looking to the English Common Law understanding of the confrontation right at the time of the founding of the United States. The ***Crawford*** Court's historical analysis sought, in part, to determine the scope of the confrontation-clause phrase stating: "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." ***Crawford*** at 42-43. The Court determined that this phrase was intended to cover those who "bear testimony" against the accused. ***Crawford*** at 51. This reading essentially created two classes of hearsay statements for confrontation clause purposes: testimonial and non-testimonial. Although the ***Crawford*** Court did not exhaustively list the types of statements that are testimonial, it did provide examples of the "core class" of testimonial statements that underlie the common-law right of confrontation:

> "ex-parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford at 51-52 (internal citations omitted).

Having defined the types of out-of-court statements to which the confrontation clause applies, the ***Crawford*** Court went on to hold that the right of the accused to confront the witnesses against him required that testimonial out-of-court statements by a witness who did not appear at trial be excluded from evidence unless the witness was unavailable to testify, and unless the defendant had had a prior opportunity to cross-examine the witness about the statement. ***Crawford*** at 53-54. A prior opportunity to cross-examine the witness about the statement is required, according to the Court, because the confrontation clause commands that the reliability of a statement be assessed in a particular manner: "by testing in the crucible of cross-examination." ***Crawford*** at 61.

Crawford's strict requirement that testimonial hearsay statements could not be admitted without a prior opportunity for cross-examination was a rejection of the hearsay paradigm embodied by ***Ohio v. Roberts,*** 448 U.S. 56 (1980), which allowed out-of-court statements to be put before a jury based upon a judicial determination of reliability. This, wrote Justice Scalia, was "fundamentally at odds with the right of confrontation." ***Id.*** at 61. He concluded, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." ***Id.*** 68-69. The Wisconsin Supreme

Court adopted this rule in ***State v. Hale***, 2005 WI 7, ¶ 51, 277 Wis. 2d 593, 691 N.W.2d 697.

Where the statements at issue are non-testimonial in nature, the framework of ***Ohio v. Roberts*** remains a viable means of determining admissibility. ***Crawford*** at 68; ***State v. Manuel***, 2005 WI 75 at ¶ 50, 281 Wis.2d 554, 697 N.W.2d 811.

B. Exceptions to the Confrontation Right Under ***Crawford***

Crawford did not hold that dying declarations have were exception to the confrontation clause. The ***Crawford*** Court explicitly accepted only one exception to the confrontation clause—forfeiture by wrongdoing. The Court accepted that forfeiture by wrongdoing was not constitutionally problematic because the doctrine was not held out as an alternative means of determining the reliability of the statement in question; rather, it permitted the admission of testimonial statements solely on equitable grounds. ***Crawford*** at 62.

In a footnote, the ***Crawford*** Court recognized a single "deviation" its historical analysis had uncovered with regard to the admission of unconfronted testimonial statements against an accused: dying declarations. ***Id.*** at 56, n. 6. The Court, however, explicitly left undecided whether testimonial dying declarations constituted an exception to the confrontation requirement. This Court has also acknowledged that this remains an open question. ***State v. Jensen***, 2007 WI 26, ¶ 36, 299 Wis. 2d 267, 727 N.W.2d 518.

C. The History of Dying Declarations

At common law, statements made by a person who believed his death was imminent and concerning the circumstances of his death were admissible. These statements, known as dying declarations, were admitted against defendants as early as 1722 in ***King v. Reason*** (16 How. St. Tr. (K.B.). Dying declarations were originally admissible based on the inherently-religious

view that the statements a person made while he believed he was about to die carried with them an unassailable aura of truth. ***King v. Woodcock***, (1789) 168 Eng. Rep. 352, 353 (declarations at the point of death have a guarantee of truth equal to the obligation of an oath in court); ***Idaho v. Wright***, 497 U.S. 805, 820 (1990) (persons making dying declarations highly unlikely to lie), citing ***The Queen v. Osman*****,** (1881) 15 Cox. Crim. Cases 1, 3 (Eng. N. Wales. Cir.)(Lush L.J.)("No person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips").

Eventually, however, the religious rationale's incompatibility with the principle of separation of church and State led to justifying the admission of dying declarations on tradition and necessity in the face of constitutional challenges, ***See, e.g., Mattox v. United States***, 156 U.S. 237, 244 (1895) (dying declarations admitted simply from the necessities of the case, and to prevent a manifest failure of justice); ***Carver v. United States***, 164 U.S. 694, 697 (1897)(dying declarations admissible based on necessities of the case, and "to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present"); ***Kirby v. U.S.***, 174 ***United States*** 47 (1899) ("the admission of dying declarations is an exception to the confrontation right which arises from the necessities of the case"). Though the stated rationale changed, the presumption of reliability remained. ***See Wright***, 497 U.S. at 820; ***Mattox***, 156 U.S. at 244 (sense of impending death presumed to remove all temptation to falsehood and to enforce as strict adherence to the truth as the obligation of an oath); ***and Kirby***, 174 U.S. at 61 (condition of the party making the statement being such that every motive to falsehood is silenced and the mind be impelled by the most powerful considerations to tell the truth).

Wisconsin has long recognized the common-law rule regarding dying declarations, observing it as far back as 1850 in ***State v. Cameron***, 2 Chand. 172 (Wis. 1850) (describing admissibility of dying declarations as well-

settled). Subsequent Wisconsin cases dealing with dying declarations have said nothing more about this class of statements other than that their admission was permitted at the time the Constitution was drafted and that the Constitution did not intend to abrogate the rule. ***See, e.g. Miller v. State***, 25 Wis. 384 (1870); ***State v. Dickinson***, 41 Wis. 299 (1877); ***Spencer v. State***, 132 Wis. 509, 112 N.W. 462 (1907).

Dying declarations were included in both State and Federal evidentiary statutes as "Statements Under Belief of Impending Death." Wisconsin Statute § 908.045(3) provides that where a declarant is unavailable, a statement made by that declarant while believing his death is imminent, concerning the cause or circumstances of what he believed to be his impending death, is not excluded by the hearsay rule. Except for the Federal Rule's express limitation to prosecutions for homicide and civil proceedings, Wisconsin's statute is identical to Federal Rule of Evidence 804(b)(2)[3]. Both State and Federal provisions also adopted the common-law limitation that only those portions of a statement concerning the circumstances of the declarant's impending death are admissible.

D. Admission of Testimonial Dying Declarations Cannot be Justified by Notions of Reliability

The admission of testimonial dying declarations on the grounds that such statements are inherently reliable is in direct conflict with the reasoning of ***Crawford***. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability." ***Id.*** at 61.

[3] FRE 804(b)(2) *Statement under belief of impending death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

The ***Crawford*** Court completely rejected the wholesale notion that certain types of statements were so inherently reliable as to dispense with the confrontation requirement. Specifically, the Court rejected the "general reliability exception" embodied by ***Ohio v. Roberts***, 448 U.S. 56 (1980). ***Roberts*** permitted the admission of hearsay statements when the declarant was shown to be unavailable and when the statement either fell "within a firmly-rooted hearsay exception" or bore "adequate indicia of reliability." ***Id.*** at 66. In this way, the ***Roberts*** test allowed a jury to hear evidence, untested by the adversarial process, based only on a *judicial* determination of reliability. ***Crawford*** at 62 (emphasis supplied). This, the Court held, was directly contrary to the procedural guarantee of the Sixth Amendment, which was that a testimonial statement's reliability be assessed through the engine of cross-examination.

In a published post-***Crawford*** opinion cited with approval by this Court in ***State v. Jensen***, 2007 WI 26, ¶ 49, 299 Wis. 2d 267, 727 N.W.2d 518, Judge Marbley of the Federal District Court for the Southern District of Ohio questioned the inherent reliability of dying declarations and rejected the argument that dying declarations should be treated as an exception to the confrontation clause. ***United States v. Mayhew***, 380 F.Supp.2d 961, 965 n.5 (S.D. Ohio, 2005). The ***Mayhew*** court rejected the government's post-***Crawford*** argument that testimonial dying declarations were an exception to the confrontation clause, finding the reliability of such statements suspect:

> For example, the declarant might have been in a revengeful state of mind which would color his dying statements. No longer subject to the fear of retaliation by his enemies, the declarant might falsely incriminate those persons whom he disliked. If the decedent had no religious belief or fear of punishment after death, the statements made while dying would seem to lose much of the trustworthiness traditionally attributed to them. In general, self-serving declarations would be particularly suspect, for the decedent could thereby exculpate himself from

> questionable association with the circumstances surrounding his death. The declarant's physical and mental state of mind at the moment of death may weaken the reliability of his statements.

380 F.Supp.2d 961, 965, n. 5 (S.D. Ohio, 2005).

Commentators have echoed this view. For example, Professor Richard D. Friedman questioned the the original rationale on the grounds that it would not apply to non-believers and that it did not address truthfulness, but rather sincerity:

> However valid the original rationale may have been in an earlier age, it hardly seems universally applicable now. For one thing, many people do not believe in a hereafter; for them, indeed, the impending end of life may offer relief from the consequences of speaking falsely. Furthermore, even if the classic rationale were accurate, it would bear only on the testimonial capacity of sincerity; it would not, in particular, offer any guarantee at all that, while the victim was being murdered, her capacity of perception was operating in an especially high gear.

Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 Israel L.Rev. 506 (1997). In addition, Michael J. Polelle criticized the religious rationale for ignoring other motivations that might be just as powerful, such as bias or the desire for revenge, and the organic changes attendant to traumatic injuries that can affect the brain and the victim's abilities to accurately perceive, recall, and recount what has occurred. Michael J. Polelle, *The Death of Dying Declarations in a Post*-Crawford *World*, 71 Mo. L. Rev. 285, 301-03. (2006)

Regardless of whether such statements should be imbued with inherent reliability in fact, where testimonial statements are concerned, ***Crawford*** has made clear that cross-examination is the *only* constitutionally legitimate method of determining reliability. A conclusion that testimonial dying declarations are admissible because they are inherently

reliable is directly contrary to Justice Scalia's observation that "[d]ispensing 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." ***Id.*** at 62.

II. THE COMMON LAW'S TREATMENT OF DYING DECLARATIONS AS AN EXCEPTION TO THE CONFRONTATION RIGHT IS NO LONGER JUSTIFIED

Most courts to consider the question, including the court below, have held that dying declarations are an exception to the confrontation right because they were admissible at the time of the founding. ***State v. Beauchamp***, 2010 WI App 42, ¶¶ 11-12, 324 Wis. 2d 162, 781 N.W.2d 254; s***ee also, e.g., People v. Monterroso***, 101 P.3d 956, 972 (Cal. 2005)(dying declarations admissible at common law, ***Crawford*** refers to right of confrontation at common law, therefore dying declarations do not violate Sixth Amendment); ***People v. Taylor***, 737 N.W.2d 790 (Mich. App. 2007)(same); ***State v. Bodden***, 661 S.E.2d 23 (N.C. App. 2008) (same); ***Cobb v. State***, 16 So.3d 207 (Fl. App. 2009)(dying declarations remain an exception to confrontation clause because historical exception; alternatively, defendant could still confront officers who testified about the dying declaration);; ***State v. Jones***, 197 P.3d 815 (Kan. 2008) (In light of dicta in ***Crawford*** and ***Giles***, Kansas court confident U.S. Supreme Court will one day hold that dying declarations are an exception to confrontation clause); ***People v. Gilmore***, 828 N.E.2d 293 (Ill. App. 2005) (***Crawford***'s historical discussion is strong statement of admissibility of dying declarations).

These cases rely entirely ***Crawford's*** statement that the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding" ***Id.*** at 54, and from that statement conclude that dying declarations are an exception to the confrontation clause. None of these cases, however,

have gone beyond a superficial historical review to analyze whether the common-law rule on dying declarations should remain. Clearly it should not.

When the original rationale for a rule is no longer applicable, the rule should give way. This Court has recognized that "common law rules are meant to develop and adapt to new conditions and the progress of society." ***State v. Picotte***, 2003 WI 42, ¶ 29, 261 Wis. 2d 249, 661 N.W.2d 381 (internal citation omitted). In ***Picotte***, this Court used its inherent power to modify the common law to abrogate the centuries-old year-and-a-day rule in homicide prosecutions. The rule was a common law criminal rule of causation dating back to thirteenth-century England, stating that if the victim died more than one year and a day from the injury it was conclusively proven that the injury did not cause the death. 2003 WI 42 at ¶ 11.

In abrogating the year-and-a-day rule, the ***Picotte*** Court held that there were three traditional justifications for the rule: (1) due to the primitive state of medical knowledge in the thirteenth century it was not possible to establish causation beyond a reasonable doubt when a great deal of time had passed between the injury and the victim's death; (2) in early English courts, juries had to rely on their own knowledge of the matter at issue and could not rely on expert witnesses; and (3) the rule was an attempt to avoid the harsh result that homicides of any form, from first-degree to manslaughter, were punishable by death. ***Id.*** at ¶¶ 30-32. The Court held that none of these justifications remained persuasive in light of advances in medical science that permitted the cause of death to be identified with great certainty, changes in the rules of evidence allowing juries to receive and consider expert testimony, and the fact that Wisconsin does not have the death penalty. ***Id.*** at ¶ 34.

In ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), this Court also used its inherent powers to abrogate the common law privilege to resist unlawful arrest. ***Hobson*** listed the public policy considerations behind the common law privilege: principally, that

arrests were made largely by private citizens, bail was not attainable, and the prospect of sitting in jail for extended periods of time carried with it the real possibility of death or mistreatment with no adequate judicial or administrative procedures for redress. 218 Wis. 2d 350, 374-75, 577 N.W.2d 825 (1998). The ***Hobson*** Court held that these considerations no longer justified the rule because arrests are now primarily conducted by professional police officers armed with lethal weapons and possessing scientific communication and detection devices that make it highly unlikely that a suspect will escape or deter an arrest. There are also many safeguards and opportunities for redress to protect against individuals languishing in jail, such as bail, speedy arraignments, and quick determinations of probable cause. ***Id.*** at 375-76.

As in ***Picotte*** and ***Hobson***, changes in the relevant public policy considerations warrant a change in the common law relating to the admission of testimonial dying declarations. The policies behind the admission of dying declarations despite the accused not having an opportunity to cross-examine the declarant were: (1) that such statements were reliable beyond question, and (2) that such statements were often the best or only evidence concerning the circumstances of the death. Such considerations no longer support the admission of testimonial dying declarations over a defendant's constitutional right to confront the witnesses against him.

Advances in police investigative methods and forensic sciences such as DNA, along with the ubiquity of audio and video recording devices, to name just a few developments, have introduced a huge swath of potential evidence that could not have been envisioned during the development of the common law and at the founding of the country. Such methods virtually assure that the statements of a dying victim will be neither the only nor the best evidence regarding the circumstances of the victim's death. Interestingly, at the same time, those same advances in investigative methods and forensic sciences have exposed eyewitness identification

evidence (the type of evidence most closely associated with dying declarations) as problematic and "hopelessly *unreliable*." ***See State v. Dubose***, 2005 WI 126, ¶¶ 29-30, 285 Wis. 2d 143, 699 N.W.2d 582 (emphasis supplied). Indeed, if the State's case is so weak that the statements of a dying victim are the best and only evidence the State has, the admission of such evidence presents grave concerns about the possibility of a wrongful conviction.

In addition, in light of ***Crawford v. Washington***, the continued admission of testimonial dying declarations could result in situations where the exact same hearsay statement is constitutional if admitted as a dying declaration but unconstitutional if viewed as an excited utterance, for example. ***See,*** POLELLE at 297; Daniel J. Blinka, WISCONSIN EVIDENCE, 3d Ed. § 8045.3, p. 855 (In most cases, the circumstances giving rise to a dying declaration also satisfy the excited utterance exception…Indeed it is difficult to conjure a scenario in which a 'dying declaration' would not also qualify as an excited utterance."). There is no adequate public policy rationale for concluding that the admission of the exact same statement is unconstitutional on one theory but not another.

The founders would have been unconcerned about how best to determine the reliability of dying declarations, as these statements were believed to be singularly trustworthy for religious reasons. Though this antiquated reasoning has been abandoned, the rule itself has not, despite the fact that no legitimate public policies justify the continuation of the rule. Dying declarations should become just another species of hearsay for confrontation purposes pursuant to ***Crawford*** and ***Hale***: if the statement in question is testimonial, it is barred unless the defendant had a prior opportunity to cross-examine the declarant.

III. THE ADMISSION OF SOMERVILLE'S STATEMENTS VIOLATED BEAUCHAMP'S CONFRONTATION RIGHTS

It is undisputed in this case that Somerville's statements to Marvin Coleman and Wayne Young were testimonial in nature. ***Beauchamp*** at ¶ 10. It is further undisputed that Beauchamp did not have a prior opportunity to cross-examine Somerville about his statements. Accordingly, the admission of Somerville's statements to Coleman and Young constitutes a violation of Beauchamp's State and Federal Constitutional rights to be confronted with the witnesses against him. He is entitled to a new trial.

IV. WISCONSIN COURTS SHOULD ADOPT *VOGEL V. PERCY'S* DUE PROCESS TEST FOR THE SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

Wisconsin law allows prior inconsistent statements of the State's own witness to be used as substantive evidence in a criminal case. ***Vogel v. State***, 96 Wis. 2d 372, 384, 291 N.W.2d 838 (1980). The use of such statements, however, is not without constitutional limitation. Substantive use of some unsworn, out-of-court inconsistent statements may violate a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Sec. 7 of the Wisconsin Consitution.

According to the Seventh Circuit Court of Appeals, a prior inconsistent statement can be constitutionally admitted as substantive evidence where: (1) the declarant was available for cross-examination; (2) the statement was made shortly after the events related and was transcribed promptly; (3) the declarant knowingly and voluntarily waived the right to remain silent; (4) the declarant admitted making the statement; and (5) there was some corroboration of the statement's reliability. ***Vogel v. Percy***, 691 F.2d 843, 846-47 (7th Cir. 1982)(reviewing the substantive admission of prior inconsistent statements under Wis. Stats. § 908.01(4)).

In the present case, Beauchamp was convicted entirely on the basis of several hearsay exceptions; notably, the substantive admission of prior inconsistent statements of multiple witnesses. Each of these statements tended to incriminate Beauchamp after the witnesses had given exculpatory testimony at trial.

Despite the fact that the Seventh Circuit's due process test came from a Wisconsin State case, there are no published Wisconsin cases that address this issue. Based on this lack of history, the court of appeals declined to address the merits of Beauchamp's claim. ***Beauchamp*** slip. op. at ¶ 17.

In holding that it was not bound by decisions of the Seventh Circuit, the court of appeals pointed to an Illinois case as an example of one State court that rejected the ***Vogel v. Percy*** analysis. ***Beauchamp***, slip op. at ¶ 17, citing ***People v. Govea***, 701 N.E.2d 76 (Ill. App. 1998). Illinois, however, has a statutory scheme regarding prior inconsistent statements that requires specific findings that address most of the core concerns of ***Percy***, which is that the prior statement have some indicia of reliability. Under Illinois law, the statement must be inconsistent with the testimony offered and the declarant must be available for cross-examination. ***See*** 725 ILCS 5/115-10.1. Once these requirements are met, the court must determine if the prior statements were (1) made under oath at a court proceeding; or (2) written, signed or acknowledged by the witness under oath and narrated, described or explained an event within the personal knowledge of the speaker. Wisconsin, on the other hand, requires only that the declarant be available and subject to cross-examination concerning the prior statement. Wis. Stats. § 908.01.

Given the lack of foundational predicates required by Wisconsin statutes for the substantive admission of prior inconsistent statements, this Court should recognize the due process implications noted in ***Vogel v. Percy*** and adopt its 5-factor test.

V. THE SUBSTANTIVE ADMISSION OF THE PRIOR INCONSISTENT STATEMENTS OF SHAINYA AND BROWN VIOLATED BEAUCHAMP'S DUE PROCESS RIGHT

Applying that test to the present case compels a finding that Beauchamp's due process rights were violated. The first factor in the test does not apply as both Shainya and Brown were available for cross-examination concerning their prior statements. The second part of the ***Percy*** test requires that the prior statement was made shortly after the events and was transcribed promptly. This requirement reflects the concern that if a significant amount of time passes between an event and a statement, a greater opportunity exists for a witness to fabricate a story. ***See Ticey v. Peters***, 8 F.3d 498, 503 (7th Cir. 1993).

Although each prior statement introduced by the State appears to have been transcribed shortly after it was made, neither statement was the first made by Shainya or Dominique after the shooting. Both were interviewed by the police at the house and again at the police station on the day of the shooting, and a third time at the police station the following day. The only significant difference is that unlike Shainya, Brown was not allowed to go home in between her second and third statements; she was held in a jail cell. The State only introduced the *third* statements each girl made to police. These statements were not made while perceiving the shooting or immediately thereafter. The girls' first statements to police, which would fit those criteria, did not implicate Beauchamp in the shooting. It was only after the passage of over 24 hours and multiple interrogation sessions that their statements changed to implicate Beauchamp. Under these circumstances, it cannot be said that there was little or no opportunity for the fabrication of a story (or for outside forces to influence the story being told). As a result, the prior statements introduced by the State were not those made shortly after the events and do not pass the second prong of the ***Percy*** analysis.

As for the third prong of the test, Shainya was never read her rights and, accordingly, could not have waived her right to remain silent. Brown did waive her right to remain silent before making the statement that incriminated Beauchamp; however, she had not been read her ***Miranda*** rights prior to the first two statements she made. The fact that she had been read her rights only before the third statement strongly suggests that she was formally taken into custody after making her first two statements, neither of which incriminated Beauchamp. This fact supports her claim that she made the statement implicating Beauchamp only after having been threatened with prosecution, and seriously undermines any reliability that her waiver accords the statement.

Lastly, there is little independent corroboration of either girl's prior statement. The corroborative evidence of the statements implicating Beauchamp came from the testimony of Jerrod Logan, who witnessed the entire shooting from the median on Sherman Boulevard. According to Logan, the shooter came around from the north side of the house, stated something to the effect of "You got a problem with her?", shots were fired, and the shooter ran back around the north side of the house. (R.48:26-30). Logan's information, however, has little independent corroborative value. Police obtained it in an interview at the scene of the shooting before they elicited the statements from Shainya and Brown. And, as Shainya testified, police shared at least part of this information with her when they were attempting to get a statement from her, leading her to include it in her statement even though she had not observed it first-hand. (R.41:17-19).

In addition, other critical details of Logan's account of the shooting do not match the statements of Shainya and Dominique. For example, Logan was close enough to the shooting to hear what was said between the parties and describe the shooter, but he did not identify Beauchamp as the shooter in a photo array. Further, Logan described the shooter as wearing a navy blue shirt and hat, and Shainya stated that the individual in

the alley that she thought was Beauchamp was wearing a long burgundy t-shirt. (R.46:109; App. 338).

Looking outside of Logan's statements does not uncover any other corroborating evidence. There is no physical evidence linking Beauchamp to the crime, and of several independent witnesses in the street, not one could identify Beauchamp as the shooter. The only individuals who did identify Beauchamp were Shainya and Brown in their out-of-court, unsworn statements, and William Stone, a jailhouse informant with 15 prior convictions who relayed Beauchamp's supposed confession to authorities in the hopes of receiving leniency on his pending cases.

Under the language of ***Percy***, the failure of a prior statement to meet even one of the criterion under the five-part analysis makes its admission as substantive evidence a violation of due process. 691 F.2d at 846-47. The prior statements of Shainya and Brown clearly did not satisfy the second, third, and fifth prongs of the Percy analysis. Accordingly, their admission into evidence denied Beauchamp his right to due process, and he is entitled to a new trial.

CONCLUSION

Based on the foregoing, Beauchamp respectfully requests that this Court find that the admission of testimonial dying declarations against Beauchamp violated his State and Federal Constitutional Right to confront the witnesses against him. Beauchamp further requests that this Court find that the substantive admission of prior inconsistent statements violated Beauchamp's constitutional right to due process. Beauchamp lastly requests that, in light of either or both of such findings, the Court enter an Order vacating his conviction and remanding the matter for a new trial.

Respectfully submitted this 2nd day of November, 2010.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,515 words.

Respectfully submitted this 2nd day of November, 2010.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

(1) I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(2)(a). I further certify that:

(2) This electronic brief is identical in content and form to the printed copy of the petition filed as of this date.

(3) A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

_/s/ *Craig S. Powell*_____
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STATE OF WISCONSIN
IN SUPREME COURT

CASE NO. 2009AP000806 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN L. BEAUCHAMP

Defendant-Appellant-Petitioner.

APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP806-CR

Cir. Ct. No. 2006CF3184

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARVIN L. BEAUCHAMP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Marvin L. Beauchamp appeals the judgment entered after a jury found him guilty of first-degree intentional homicide while armed. *See* WIS. STAT. §§ 940.01(1)(a) & 939.63. He also appeals the trial court's order denying his motion for postconviction relief. He claims that the trial court

erroneously admitted as dying declarations the victim's assertions that Beauchamp shot him, and that his due-process rights were violated because the trial court received as substantive evidence prior inconsistent statements by two of the State's witnesses. We affirm and discuss these contentions in turn.

I. Dying Declarations.

¶2 Beauchamp was convicted of shooting Bryon T. Somerville to death. According to the testimony of the assistant medical examiner who performed the autopsy, Somerville "had five gunshot wounds." Two persons testified that after he was shot, Somerville told them that Beauchamp did it—Marvin Coleman, an emergency medical technician with the Milwaukee Fire Department, and Wayne Young, a Milwaukee police officer. The trial court held that Somerville's assertions that Beauchamp shot him were admissible under WIS. STAT. RULE 908.045(3) as Somerville's dying declarations, and were not barred by Beauchamp's right to confront witnesses testifying against him.

A. *The Testimony.*

¶3 Coleman, who had known Somerville before he was sent to the shooting scene as part of his duties with the fire department, told the trial court that he went over to where Somerville was lying on the street and asked him who had shot him. Somerville replied "Big Head Marvin." No one on this appeal disputes that this was a reference to Beauchamp. Somerville also beseeched Coleman "three or four times," "Marv, please don't let me die." Coleman responded by telling Somerville "we're going to do the best we can. We are not going to let you die." Based on his sixteen-year career and having responded to between thirty and forty shootings, Coleman said he believed that Somerville's condition was "grave" when he saw him on the ground.

¶4 Coleman drove Somerville in an ambulance to Froedtert hospital, where he died. On the way to the hospital, two other paramedics worked on Somerville trying to save his life. Coleman told the trial court that Somerville was upset when they passed St. Joseph's hospital on the way to Froedtert: "He wanted to -- he was just saying why are we not going to St. Joe's." Young was also in the back of the ambulance with Somerville while the paramedics worked on him.

¶5 Young testified that Somerville was in pain during the ambulance ride and said that "he couldn't breathe." He also testified that Somerville kept repeating "that a guy named Marvin shot him," and that these assertions were not in response to any questions. Young explained that although he wanted to ask Somerville questions in the ambulance on the ride to the hospital, "the ambulance person was trying to work on him while he was saying all this" and that Young "didn't get a chance to talk to [Somerville] until we got to the hospital itself."

¶6 Once they got to the hospital, Young asked Somerville "a couple of questions" and Somerville, still "complaining of pain," again indicated that the person, whom everyone on this appeal agrees is Beauchamp, shot him. Coleman also related what happened at the hospital. He testified that while they were in Somerville's hospital room, one of the doctors who were trying to save Somerville's life got the results of an analysis of Somerville's blood and said, so that, according to Coleman, Somerville could probably hear, "this is not good, this is not good," telling Coleman that "[Somerville's] blood is poisoned." Coleman testified that the doctor then said to Young, "if you have any questions to ask him, you need to ask him now because he's not going to make it." At some point, although the Record is not clear when, Young asked Somerville at the hospital who had shot him and Somerville again said that it was "a guy named Marvin." The medical personnel intubated Somerville to help him breathe, and Somerville

then "lost consciousness." Although he was revived, he did not survive surgery. At no point, either in the ambulance or at the hospital, did Somerville ever say that he believed that he was going to die as a result of his wounds, and no one told him that, other than, perhaps, his ability to hear what the doctor said when he saw the results of Somerville's blood analysis.

¶7 As we have seen, the trial court ruled that Somerville's assertions about who shot him were admissible as dying declarations and were not barred by Beauchamp's right to confrontation. Our standard of review is mixed. Whether an assertion qualifies as a dying declaration, that is, whether it is admissible under the evidentiary rule, is within the trial court's discretion; whether dying declarations pass constitutional muster is a matter of law that we assess *de novo*. *See* ***State v. Jensen***, 2007 WI 26, ¶12, 299 Wis. 2d 267, 277, 727 N.W.2d 518, 523; ***State v. Manuel***, 2005 WI 75, ¶3, 281 Wis. 2d 554, 562, 697 N.W.2d 811, 815 (whether an assertion is within an exception to the rule against hearsay is a matter within the trial court's discretion) ("recent perception"). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***State v. Sullivan***, 216 Wis. 2d 768, 780–781, 576 N.W.2d 30, 36 (1998).

B. *The Rule.*

¶8 Ordinarily, of course, out-of-court assertions may not be used for their truth at a trial by virtue of the rule against hearsay. WIS. STAT. RULES 908.01 & 908.02. One exception to the rule against the admission of hearsay is the dying declaration, codified in WISCONSIN STAT. RULE 908.045(3): "A statement made by a declarant while believing that the declarant's death was imminent, concerning

the cause or circumstances of what the declarant believed to be the declarant's impending death." Under established law, a person whose assertion is sought to be used at trial need not specifically say that death is imminent. Rather, "belief of impending death may be inferred from the fact of death and circumstances such as the nature of the wound." Judicial Council Committee Note, 1974, WIS. STAT. RULE 908.045(3), 59 Wis. 2d R1, R317 (1973); *see also* ***Oehler v. State***, 202 Wis. 530, 534, 232 N.W. 866, 868 (1930), cited by the note, and ***Richards v. State***, 82 Wis. 172, 179, 51 N.W. 652, 653 (1892) (knowledge of impending death permissibly inferred when declarant *in extremis* and was aware of that) (apparently no specific statement acknowledging impending death). The law elsewhere is the same. Belief of impending death "may be made to appear from what the injured person said; *or* from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive." ***Mattox v. United States***, 146 U.S. 140, 151 (1892) (emphasis added); ***United States v. Mobley***, 421 F.2d 345, 347–348 (5th Cir. 1970) (declarant need not say that he or she is aware of impending death when circumstances permit that inference) (following ***Mattox***); ***United States v. Peppers***, 302 F.3d 120, 137–138 (3rd Cir. 2002) (following ***Mattox***).

¶9 As noted, the determination of whether evidence should be admitted under a particular rule is vested in the trial court's discretion. In light of the circumstances surrounding Somerville's injuries, his frantic concern that he not die as expressed to Coleman, his being upset when the ambulance passed one hospital on its way to another, and his significant pain and breathing difficulties, coupled with his spontaneous repeated assertions as to who shot him, the trial court did not erroneously exercise its discretion in ruling that Somerville's fingerings of Beauchamp as his shooter were dying declarations under WIS. STAT.

RULE 908.045(3) irrespective of whether Somerville implicated Beauchamp before or after he may have heard the physician's assessment of the blood analysis. Indeed, Beauchamp's trial lawyer conceded that it was "clear that he [Somerville] could have believed he was going to die." We now turn to whether receipt of those dying declarations violated Beauchamp's right to confrontation.

C. *Confrontation.*

¶10 "The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them." ***Jensen***, 2007 WI 26, ¶13, 299 Wis. 2d at 277, 727 N.W.2d at 523 (internal quotes and quoted sources omitted). "We generally apply United States Supreme Court precedents when interpreting these clauses." ***Id.***, 2007 WI 26, ¶13, 299 Wis. 2d at 278, 727 N.W.2d at 523–524. The confrontation right applies to statements that are "testimonial," ***Davis v. Washington***, 547 U.S. 813, 821 (2006), and we assume, as do the parties, that Somerville's dying declarations are "testimonial" within the ambit of a defendant's right of confrontation.

¶11 Not every testimonial out-of-court assertion, however, is barred by the right to confrontation. Thus, the Sixth Amendment's guarantee of the confrontation right does not apply "where an exception to the confrontation right was recognized at the time of the founding." ***Giles v. California***, 554 U.S. ___, ___, 128 S. Ct. 2678, 2682 (2008). Accordingly, if dying declarations were recognized as an exception to the confrontation right at the founding of our Republic, Beauchamp's constitutional right to confrontation was not trampled by the admission of Somerville's dying declarations implicating him as the shooter. *See* ***ibid.*** Dying declarations were so recognized:

> We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. *See* [***Crawford v. Washington***, 541 U.S. 36] at 56, n. 6, 62 [(2004)]. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying. *See, e.g., King v. Woodcock*, 1 Leach 500, 501–504, 168 Eng. Rep. 352, 353-354 (1789); *State v. Moody*, 3 N.C. 31 (Super. L. & Eq. 1798); United *States v. Veitch*, 28 F. Cas. 367, 367–368 (No. 16,614) (CC DC 1803); *King v. Commonwealth*, 4 Va. 78, 80–81 (Gen. Ct. 1817).

Giles, 554 U.S. at ___, 128 S. Ct. at 2682–2683. ***Crawford***, of course, was the watershed decision rejecting the balancing approach of ***Ohio v. Roberts***, 448 U.S. 56, 66 (1980), in favor of a flat-out application of the Sixth Amendment's guarantee of the confrontation right for testimonial assertions. ***Crawford***, 541 U.S. at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

¶12 Although the ***Giles*** analysis we have quoted could be viewed as *dictum*, it was a deliberate recognition of the Sixth Amendment's reach, given ***Giles***'s further analysis of the pre-founding cases it cited, *see* ***id.***, 554 U.S. at ___, 128 S. Ct. at 2684–2686, and because ***Crawford*** had previously left the matter open, ***Crawford***, 541 U.S. at 56 n.6. Thus, we view ***Giles***'s pronouncement as to whether the confrontation clause governs dying declarations as binding. *See* ***State v. Holt***, 128 Wis. 2d 110, 123, 382 N.W.2d 679, 686 (Ct. App. 1985) ("When an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision."). Indeed, we are unaware of any post-***Crawford*** court rejecting what ***Giles*** recognized as the dying-declaration exception to the confrontation clause. *See, e.g.*, ***State v. Lewis***, 235 S.W.3d 136, 148 (Tenn. 2007) ("Since ***Crawford***, we found no jurisdiction that

has excluded a testimonial dying declaration."). Receipt into evidence of Somerville's dying declarations did not violate Beauchamp's right to confrontation.[1]

II. Prior inconsistent statements.

¶13 Beauchamp claims that he was denied due process by the receipt, as substantive evidence, of statements given to the police by two persons who were present at Somerville's murder that were inconsistent with their trial testimony,

[1] The rationale for receipt of the dying declaration as an exception to the rule against hearsay is that it is assumed that no person will leave life with a lie on the lips. *See* ***Idaho v. Wright***, 497 U.S. 805, 820 (1990). Beauchamp argues, however, that whatever validity that assumption might have had in the era when the dying-declaration rule was first adopted, it has lost much of its vitality today. Thus, Beauchamp contends that the "rationale ignores other motivations that might be just as powerful, such as bias or the desire for revenge, and the organic changes attendant to traumatic injuries that can affect the brain and the victim's abilities to accurately perceive, recall, and recount what has occurred." This contention, however, ignores two things. First, the dying-declaration exception to the rule against hearsay is specifically recognized by WIS. STAT. RULE 908.045(3), and, as we explain in the main body of this opinion, the dying declaration is an exception to the right of confrontation. Second, a defendant who contends that the infirmities to which Beauchamp refers affect a dying-declaration's credibility may have the factfinder make that assessment by virtue of WIS. STAT. RULE 908.06, which provides:

> When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Further, WIS. STAT. RULE 904.03 permits the trial court to exclude a dying declaration under the balancing permitted by that rule: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

even though they were cross-examined by Beauchamp at the trial. Under WIS. STAT. RULE 908.01(4)(a)1, a statement by a witness that is inconsistent with that witness's trial testimony is not hearsay so long as the witness "is subject to cross-examination concerning the statement."[2] All of the statements were given to the police either on the day Somerville was shot or on the next day. Both witnesses acknowledged not only that they told the police what was received into evidence as their prior inconsistent statements but also affirmed that they had signed written reifications of those statements. The witnesses' trial testimony tended to exculpate Beauchamp, while some of what they told the police tended to inculpate him as the person who shot Somerville. The jury, of course, was able to assess the witnesses' trial testimony and what they had previously told the police, and presumptively did so in reaching its verdict.

¶14 Apparently recognizing both that prior inconsistent statements of witnesses who are subject to cross-examination are admissible as non-hearsay under WIS. STAT. RULE 908.01(4)(a)1 and that receipt of such statements does not violate a criminal defendant's right to confrontation, *see* ***State v. Nelis***, 2007 WI 58, ¶¶41–46, 300 Wis. 2d 415, 431–434, 733 N.W.2d 619, 627–628 (post-***Crawford***); ***State v. Rockette***, 2006 WI App 103, ¶¶18–27, 294 Wis. 2d 611, 623–628, 718 N.W.2d 269, 275–277 (post-***Crawford***), Beauchamp argues that his due-process rights were violated under the guidelines adopted by ***Vogel v. Percy***, 691 F.2d 843, 846–848 (7th Cir. 1982). The ***Vogel*** guidelines require the consideration of the following circumstances in assessing whether the receipt of a

[2] As material, WIS. STAT. RULE 908.01(4) provides: "A statement is not hearsay if: (a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony." (Formatting altered.)

witness's prior inconsistent statements as substantive evidence violates the due-process rights of a defendant in a criminal case:

> (1) the declarant was available for cross-examination; (2) the statement was made shortly after the events related and was transcribed promptly; (3) the declarant knowingly and voluntarily waived the right to remain silent; (4) the declarant admitted making the statement; and (5) there was some corroboration of the statement's reliability.

Id., 691 F.2d at 846–847. Beauchamp's trial lawyer, however, never objected to the receipt of the witnesses' prior inconsistent statements on ***Vogel*** grounds, and, accordingly, Beauchamp's contention that his due-process rights were violated are assessed by us in the context of whether Beauchamp was denied effective assistance of trial counsel. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 374 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension); ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 (in the absence of an objection we address issues under the ineffective-assistance-of-counsel rubric); ***State v. Ellington***, 2005 WI App 243, ¶14, 288 Wis. 2d 264, 278, 707 N.W.2d 907, 913–914 (confrontation).

¶15 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. Further, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8 (2003) (per curiam); *see also* ***id.***, 540 U.S. at 11 (lawyer need not be a "Clarence Darrow" to survive an ineffectiveness contention).

¶16 To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697. Beauchamp has not shown that his trial lawyer gave him deficient representation by not asserting the federal ***Vogel*** decision as a potential bar to the receipt into evidence of the witnesses' prior inconsistent statements.

¶17 On federal questions, Wisconsin courts are bound only by the decisions of the United States Supreme Court. ***State v. Moss***, 2003 WI App 239, ¶20, 267 Wis. 2d 772, 781, 672 N.W.2d 125, 130; ***McKnight v. General Motors Corp.***, 157 Wis. 2d 250, 257, 458 N.W.2d 841, 844 (Ct. App. 1990) (decisions of the Seventh Circuit are not precedent in Wisconsin state courts). We have found no published Wisconsin appellate decision that even cites ***Vogel***, no less adopts its five guideline factors. Thus, the trial court was not bound by the ***Vogel*** guidelines, and, of course, neither are we.[3]

[3] ***People v. Govea***, 701 N.E.2d 76, 83 (Ill. App. Ct. 1998), also declined to apply the guidelines adopted by ***Vogel v. Percy***, 691 F.2d 843, 846–848 (7th Cir. 1982), because those guidelines conflicted with Illinois law that allowed, *inter alia*, the admission of a witness's prior inconsistent statements if: (1) "the witness is subject to cross-examination concerning the statement"; and (2) "narrates, describes, or explains an event or condition of which the witness had personal knowledge, and (A) the statement is proved to have been written or signed by the witness." *See* 725 ILCS 5/115-10.1.

¶18 Under Wisconsin law as it existed during Beauchamp's trial in October of 2006, and as it exists today, the prior inconsistent statements of a witness in a criminal case were and are admissible so long as the witness was subject to cross-examination on the matter. *See* ***Rockette***, 2006 WI App 103, ¶¶18–27, 294 Wis. 2d at 623–628, 718 N.W.2d at 275–277 (decided May 31, 2006); ***Nelis***, 2007 WI 58, ¶¶41–46, 300 Wis. 2d at 431–434, 733 N.W.2d at 627–628. Beauchamp's trial lawyer had no ***Strickland*** responsibility to either seek a change in Wisconsin law or lay a fact-predicate to try to precipitate that change. *See* ***State v. Maloney***, 2005 WI 74, ¶¶28–30, 281 Wis. 2d 595, 609–611, 698 N.W.2d 583, 591; ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621, 628 (Ct. App. 1994) ("We think ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue."). Beauchamp's trial lawyer did not give him ineffective representation during his trial by not seeking to have the trial court adopt the ***Vogel*** guidelines.

¶19 Beauchamp also contends that the trial court's failure to consider and apply the ***Vogel*** guidelines was "plain error." Invocation of the "plain error" doctrine to permit the review of unobjected-to matters is, however, reserved for those rare situations where the error is "'obvious and substantial.'" ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 154, 754 N.W.2d 77, 85 (quoted source omitted). Given that no published Wisconsin appellate decision has even cited the ***Vogel*** guidelines and that, as seen in footnote 3, an Illinois appellate court did not adopt those guidelines when to do so would modify Illinois law whose protections for the defendant essentially mirrored those given to Beauchamp here, Beauchamp's contention that the trial court committed "plain error" is without merit.

¶20 We affirm.

By the Court.—Judgment and order affirmed.

Publication in the official reports is recommended.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 09 AP 806 -CR

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

MARVIN L. BEAUCHAMP,

Defendant-Appellant.

MOTION FOR RECONSIDERATION

Pursuant to Wisconsin Statute § (Rule) 809.24, Defendant-Appellant, Marvin Beauchamp (Beauchamp) hereby moves the Court of Appeals, District I, to reconsider its opinion and order in the above-captioned matter, entered on February 2, 2010, and to correct certain factual inaccuracies contained therein. As grounds, Beauchamp states the following.

1. The Court's recitation of the facts in ¶ 6 of the opinion is inaccurate and unsupported by the record. Specifically, the Court wrote:

> [Coleman] testified that while they were in Somerville's hospital room, one of the doctors who were trying to save Somerville's life got the results of an analysis of Somerville's blood and said, so that, according to Coleman, Somerville could probably hear, "this is not good, this is not good," telling Coleman that "[Somerville's] blood is poisoned." Coleman testified that he doctor then said to Young, "if you have any questions to ask him, you need to ask him now because he's not going to make it."

2. The record does not support that Somerville "could probably hear" the doctor say his blood was poisoned. Coleman's testimony is ambiguous about exactly where the conversation took place:

> Q. Where were you when you heard the doctor talking about his physical condition?

A. Right next to the doctor.
Q. And where was Byron [sic] Somerville?
A. In the trauma center on the table.
Q. And was the doctor next to Mr. Somerville?
A. Well, in the trauma center the way that they approach that situation is they have two doctors at the head next to a nurse and two doctors at the foot next to a nurse and then there is one doctor calling the shots.
Q. And which doctor did you hear speaking about his condition?
A. The one that was calling the shots.
Q. And what if anything, did you hear him say about his condition?
A. The doctor received a blood sample and shortly after getting the results of that blood sample he said "this is not good, this is not good." And then I said "what's going on" and he said "his blood is poisoned." And at that point the doctor said to the cop that if you have any questions to ask him, you need to ask him now because he's not going to make it.

(R.44: 13-14; App. 213-14).

Whereas Officer Young was crystal clear that the doctor came into another room where Young was waiting, and where Somerville was not present, to tell him he better ask Somerville questions now:

Q. And at no time did you overhear any of the medical personnel telling [Somerville] that he was going to die?
A. Well, actually the ER doctor – because I left the room briefly while they was working on him and he came and got me out of the room that *we* was waiting at and said if you want to ask some questions ask him now because he don't think he's going to make it.
Q. Now, that was a conversation you had with what doctor, do you know the name?
A. I forgot the name of the doctor.
Q. And that was a conversation that you had outside of the ER room?
A. Yes.
Q. And obviously Mr. Somerville was not present for that conversation?
A. No, he wasn't.

(R.43:12; App. 112).

3. The record does not support that Somerville could probably hear the doctor say that his blood was poisoned that he was not going to make it. State v. Beauchamp, slip copy at ¶ 6. This portion of the opinion should be corrected to reflect that Somerville would not have been aware of the doctor's statements, and the analysis of the statutory admissibility of Somerville's statements should be undertaken with this factual predicate.

4. Second, in its opinion, the Court states that "Two persons testified that after he was shot, Somerville told them that Beauchamp did it – Marvin Coleman, an

emergency medical technician with the Milwaukee Fire Department, and Wayne Young, a Milwaukee Police Officer." Beauchamp at ¶ 2. That statement is misleading. No such testimony is in the record. Coleman and Young both testified that Somerville said "Marvin" or "Big Head Marvin" was the one who shot him. The Court may simply be attributing the jury's apparent conclusion that Somerville was referring to Beauchamp in his statements, however, the Court's wording suggests decisive statements from Somerville that Beauchamp shot him; that is not the case. This paragraph of the opinion should be corrected to accurately reflect the testimony of Coleman and Young regarding Somerville's actual statements about the identity of the shooter.

5. Third, the Court makes multiple statements to the effect that Beauchamp does not dispute that Somerville was referring to him when he said that "Big Head Marvin" shot him: "No one on this appeal disputes that this was a reference to Beauchamp," Id. at ¶ 3, and, "...Somerville, still 'complaining of pain,' again indicated that the person, whom everyone on this appeal agrees is Beauchamp, shot him." Id. at ¶ 5.

6. Beauchamp has *never* made any such concession. The Court, apparently, requires more from Beauchamp than his not guilty plea to maintain that he was not the shooter identified by Somerville as "Big Head Marvin." To the extent the Court qualifies its statement by saying that "no one *on this appeal* disputes that this was a reference to Beauchamp," the Court would appear to demand that counsel go outside the record on appeal to make an explicit statement on Beauchamp's behalf that he was not who Somerville described as "Big Head Marvin." Beauchamp exercised his Constitutional right not to testify and thus does not have an explicit denial, apart from his plea, in the record to cite. Surely, the Court is not treating Beauchamp's decision not to testify as a concession that he was the shooter.

7. Even without testimonial denials by Beauchamp at trial, the record of the trial proceedings makes abundantly clear that Beauchamp's trial defense was that he was not the shooter, ergo, he was not "Big Head Marvin." Beauchamp's trial counsel explicitly said so during the jury instruction conference when explaining why she thought an instruction for first-degree reckless homicide would be inappropriate: "I think the position as taken during the course of the trial is that Mr. Beauchamp did not do this, and therefore, I think it would probably be totally in appropriate to suggest to the jury that the issue of intent/recklessness if really the issue here." (R.49: 10). There was no concession by Beauchamp at trial that he was "Big Head Marvin" and there has not been one on appeal. The Court's statements to the contrary are not only inaccurate, they are gratuitous, having no

relevance to the legal questions addressed by the Court[1]. They should be removed from the opinion.

WHEREFORE, Beauchamp respectfully requests that this Court correct the factual inaccuracies detailed herein, and amend the opinion in this matter as required.

Martin E. Kohler
State Bar No. 1016725
Craig S. Powell
State Bar No. 1046248
For Defendant-Appellant Marvin Beauchamp

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735 N. Water Street, Suite 1212
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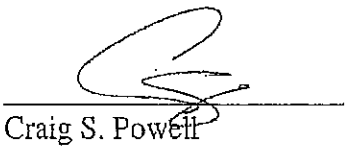
[1] Though irrelevant, the Court's statement that "no one disputes [Somerville's statements] were a reference to Beauchamp is interesting because is precisely illustrates the problems with the admission of Somerville's statements. The only person who could say who he was referring to by "Big Head Marvin" is Somerville, who was not available to be asked.

CERTIFICATION

I hereby certify that this motion conforms to the rules contained in Wis. Stat. § 809.24(1) for a motion to reconsider produced with a proportional serif font. The length of this brief is **1085** words.



Craig S. Powell
State Bar No. 1046248

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DISTRICT I

February 26, 2010

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
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You are hereby notified that the Court has entered the following order:

2009AP806-CR State of Wisconsin v. Marvin L. Beauchamp (L.C. #2006CF3184)

Before Curley, P.J., Fine and Kessler, JJ.

Marvin L. Beauchamp moves for reconsideration of our decision of February 2, 2010. After reviewing the motion, we conclude that reconsideration is not warranted.

IT IS ORDERED that the motion for reconsideration is denied.

David R. Schanker
Clerk of Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
Branch 38

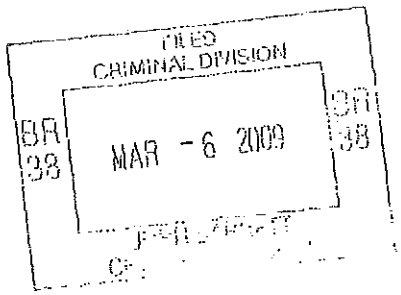
STATE OF WISCONSIN,

Plaintiff,

vs.

MARVIN BEAUCHAMP,

Defendant.



Case No. 06CF003184

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

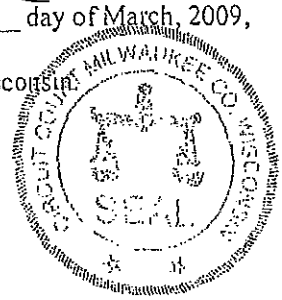
On December 22, 2008, the defendant by his attorney filed a motion for postconviction relief claiming that the court erroneously allowed the State to present the victim's dying declaration and that the State's reliance on prior inconsistent statements of two of its witnesses violated his right to due process. The court set a briefing schedule, to which the parties have responded. The court concurs with the State's analysis of the issues, and accordingly, denies the motion.

The record shall stand with regard to the court's ruling on the first issue, as the court does not believe it erroneously permitted the victim's dying declaration as evidence. Further, the court cannot find that the defendant's right to due process was denied based on the testimony of Shainya Brookshire and Dominique Brown. Under the circumstances, defendant's claim that trial counsel was ineffective for failing to object to their testimony on constitutional grounds would not have been successful and is rejected.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for a new trial is DENIED.

Dated this 6th day of March, 2009,

at Milwaukee, Wisconsin.



BY THE COURT:

Jeffrey A. Wagner
Circuit Court Judge

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 38

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 06CF3184

MARVIN L. BEAUCHAMP,

Defendant.

SEPTEMBER 26, 2006

HONORABLE JEFFREY A. WAGNER
Presiding Judge

APPEARANCES:

JOANNE HARDTKE, Assistant District Attorney, appeared on behalf of the State.

BRIDGET E. BOYLE, Attorney-at-Law, appeared on behalf of the Defendant.

The defendant appeared in person.

Kelly Janowski - Court Reporter

EXAMINATION INDEX

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: State of Wisconsin versus Marvin Beauchamp, 06CF003184.

MS. HARDTKE: Joanne Hardtke appears for the State.

MS. BOYLE: Bridget Boyle appearing on behalf of Mr. Beauchamp who is present. Good morning.

THE COURT: Good morning. Are we set to proceed with this?

MS. HARDTKE: We are. Your Honor, this was set here for a motion for admission of a dying declaration. The State has one witness here; that is, Officer Wayne Young. Another officer who was subpoenaed, Officer Steve Myles, has left the force, and just briefly before this happened he left the force I'm told, and he did not receive a subpoena. I'm not certain -- I'm hoping we are going to be able to locate him to subpoena him.

THE COURT: If we don't?

MS. HARDTKE: Pardon?

THE COURT: If we don't?

MS. HARDTKE: Well, Officer Young can testify to the declaration.

THE COURT: Okay.

MS. HARDTKE: So it's not fatal to our case, but certainly it helps our case with having Officer Myles available also. In addition, Lieutenant Rebecca from the Milwaukee Fire Department was subpoenaed for today's date. He had just returned from vacation.

We moved this hearing as the court knows from this afternoon to this morning, and he did not receive the new time prior to this morning. They are locating him. However, they want to make sure they have coverage for their med-care unit before having him come down.

I'm not certain what time he will be available, and I haven't had a chance to speak with him regarding his testimony, but I can begin the proceedings with Officer Young.

THE COURT: Okay.

WAYNE YOUNG, called as a witness herein, being first duly sworn, was examined and testified as follows:

THE COURT: You want to state your name for the record and spell your last name.

THE WITNESS: Officer Wayne Young. Last name, Y-o-u-n-g.

DIRECT EXAMINATION

BY MS. HARDTKE:

Q. Officer Young, where are you employed?

A. Milwaukee Police Department.

Q. How long have you been so employed?

A. 12 and a half years.

Q. And where are you currently assigned?

A. District No. 7, 36th and Fond du Lac.

Q. You're a patrol officer with District 7?

A. Yes.

Q. Were you so employed and on duty on June 16 of 2006?

A. Yes.

Q. And on that date, what was your assignment?

A. Assigned to Squad 76 with Officer Myles.

Q. And at approximately 9:45 that day, were you dispatched to a shooting?

A. Yes, we were.

Q. And did that occur at 3900 North Sherman Boulevard?

A. Yes.

Q. In the City and County of Milwaukee?

A. Yes.

Q. At that location, did you come into contact with an individual who was later identified as Bryon T. Somerville?

A. Yes, I did.
Q. What was the nature of your contact with Mr. Somerville?
A. I was assigned to ride with him in the ambulance going down to Froedtert Hospital because he was shot.
Q. When you arrived, what did you observe about Mr. Somerville?
A. While in the ambulance, I noticed that he was in pain. He stated to me that he couldn't breathe, and he kept making a statement that a guy named Marvin shot him.
Q. Did he make that statement in response to a question you asked or did he just state that?
A. He just stated that.
Q. Do you recall his words?
A. That's pretty much like, "Marvin shot me." And quote, "That mother fucker shot me."
Q. Did you ask him any questions in response to that statement?
A. I was trying to, but at that time the ambulance person was trying to work on him while he was saying all this. I didn't get a chance to talk to him until we got to the hospital itself.
Q. The ambulance personnel was working on him?

A. Yes.
Q. Was he making any statements regarding his condition?
A. He complained of not being able to breathe and felt very uncomfortable, and he kept moving and fidgeting.
Q. And you accompanied him into the hospital?
A. Yes, I did.
Q. What did you observe at the hospital?
A. While in the ER, they had his shirt off, and I noticed at least three gunshot wounds to the left side of his upper chest to mid torso.
Q. And was he then -- What did they do with him at the hospital when he arrived?
A. They tried to stable him, and then after a brief time, they took him up to the operating room.
Q. When you say, "A brief time," do you recall approximately how long it was before they took him into surgery?
A. Anywhere between 30 to 45 minutes.
Q. And were medical personnel working on him that entire time?
A. Yes.
Q. Did he make any further statements while he was at the hospital with regard to how he obtained those

injuries?

A. At that time I was able to ask him a couple of questions. Again, he stated that a guy name Marvin shot him. I asked if he knew his last name. He stated he didn't. I tried to get a brief description of him and he gave me such a description. It was quite brief.

Q. What was that description?

A. I have to refer to the reports there.

Q. You did prepare a report with regard to this investigation?

A. Yes.

Q. Showing you what's marked as Exhibit Number One can you identify what that is?

A. Yes. It's my police report I had written that day.

Q. And can you review that report to yourself now?

A. Yes.

Q. Let me know when you're finished.

A. Okay. I'm finished.

Q. Now, do you recall what, if anything, else he said with regard to who shot him?

A. He just gave me a description. The name was Marvin as being the dark skinned male with a bald head and a big forehead.

Q. At the time he was at the hospital, was he making

any other statements with regard to his physical condition?

A. Just moaning and groaning that he was trying to work with him, work on him, and he was complaining of pain, but then he just fell unconscious.

MS. HARDTKE: I don't have any further questions for this witness at this time.

THE COURT: Cross.

MS. BOYLE: Thank you.

CROSS EXAMINATION

BY MS. BOYLE:

Q. Officer, when you got onto the scene, it was at the 3900 block of North Sherman Boulevard, correct?

A. Yes.

Q. And while you were there, at any point in time did the victim, Bryon Somerville, state that it was Marvin that shot him?

A. Only in the ambulance.

Q. All right. So the conversations that you told us about what the victim had said were either in the ambulance or at the ER, correct?

A. Yes.

Q. During the time that you were in the ambulance with him how many personnel from the fire department were working on him?

A. At least two.
Q. And during the time that the fire department personnel were working on him did you ever hear Mr. Somerville state, "I'm going to die"?
A. Not that I can recall.
Q. All right. And the only information that he told you about his physical condition that being Byron Somerville is that he couldn't breathe?
A. Yes.
Q. When he was in the ambulance, was he doing the moaning and groaning that was going on in the ER or was that just in the ER?
A. Yes. He did it both in the ambulance and in the ER.
Q. At any point in time while in the ambulance, did you hear anyone tell Mr. Somerville that he was going to die?
A. Not that I can recall.
Q. And there was no information from Mr. Somerville that he thought that he was going to die in the very near future, correct?
A. No.
Q. Now, while he was in the ambulance, he indicated to you that quote, "Marvin shot me," when you asked him the question, "Who shot you?"
A. I didn't ask him any questions while in the

ambulance.

Q. So there were no questions that you asked him while in the ambulance?

A. No.

Q. Did he offer information while in the ambulance that Marvin shot him?

A. He just kept making statements.

Q. Marvin shot him?

A. Yes.

Q. He never indicated the last name of Marvin?

A. No.

Q. When you get to the ER, that is where you have the ability to and ask him the question about a description of Marvin, correct?

A. Yes.

Q. He indicates to you that he was a dark skinned male; is that right?

A. Yes.

Q. With a bald head and a big forehead?

A. Yes.

Q. He also indicated to you at the ER that again Marvin is the one that shot him?

A. Yes.

Q. At no time while were you in the ER did Mr. Somerville state to you that, I'm going to die,

correct?

A. No.

Q. And at no time did you overhear any of the medical personnel telling him that he was going to die?

A. Well, actually the ER doctor -- because I left the room briefly while they was working on him and he came and got me out of the room that we was waiting at and said if you want to ask some questions ask him now because he don't think he's going to make it.

Q. Now, that was a conversation you had with what doctor, do you know the name?

A. I forgot the name of the doctor.

Q. And that was a conversation that you had outside of the ER room?

A. Yes.

Q. And obviously Mr. Somerville was not present for that conversation?

A. No, he wasn't.

Q. And the only thing that Mr. Somerville complained of at the time verbally was that he was not able to breath very well?

A. Yes.

Q. And you were the only one from MPD that was present with Mr. Somerville in the ambulance, correct?

A. Yes.

Q. And you were the only person that was present from MPD at the ER at least while Mr. Somerville was there?

A. Yes.

Q. And obviously your partner wasn't with you in the ambulance or at the ER?

A. No. He stayed at the scene.

MS. BOYLE: I have nothing further.

MS. HARDTKE: No redirect.

THE COURT: Thanks.

(The witness is excused.)

MS. HARDTKE: Your Honor, I'm being informed that the other witness is on the phone with someone from victim witness. I would ask for an adjournment, at least a brief adjournment at this time so I can ascertain what his schedule is and then we can continue. We'll try this morning if not.

THE COURT: All right. Take a short recess for a second.

MS. HARDTKE: Thank you.

(whereupon, a short break was taken.)

THE COURT: It's my understanding

that we are going to be putting this over for the State to obtain some of their other witnesses.

MS. HARDTKE: Yes.

THE COURT: You're going to notify the defense about who the witnesses are.

THE CLERK: Next date October 6 at 9:45 for continuation of motion.

(Whereupon, the proceedings were adjourned.)

* * *

STATE OF WISCONSIN)

MILWAUKEE COUNTY)

I, Kelly Janowski, do hereby certify that I am a Registered Merit Reporter, that as such I recorded the foregoing proceedings, later transcribed by me, and it is true and correct to the best of my abilities.

Dated this 14th day of May, 2007, at Milwaukee, Wisconsin.

Kelly Janowski - Court Reporter

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 38

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 06CF-003184

MARVIN L. BEAUCHAMP,

Defendant.

DYING DECLARATION MOTION

DATE: October 6, 2006

HON. WILLIAM JEFFREY A. WAGNER
Circuit Court Judge, Branch 38, Presiding

APPEARANCES:

Joanne Hardtke, Assistant District Attorney, appeared on behalf of the State.

Bridget Boyle, Attorney at Law, appeared on behalf of the Defendant.

Defendant Present in Court.

Judith Sebold,
Official Reporter

INDEX OF WITNESSES

PROCEEDINGS

THE CLERK: State of Wisconsin versus Marvin Beauchamp, 06CF-003184.

MS. HARDTKE: Joanne Hardtke appears for the State.

MS. BOYLE: Bridget Boyle appears on behalf of Mr. Beauchamp who is present in court. Good morning.

THE COURT: Good morning. Are we set to go?

MS. HARDTKE: Yes, Your Honor. The State does have a witness ready to testify. That is Marvin Coleman. I will inform the Court that another witness that I had intended to call this morning, Susan Moore, was subpoenaed for this morning. She had conversations with our victim/witness specialist and myself this morning. She indicated to me that last night her tires were slashed and that she was fearful of coming to court today and was not being cooperative with the subpoena.

At this time we actually have a detective in route to her house to investigate that matter. I don't know whether she will be here this morning or not. I'm waiting to hear from the police department as to further information with regard to that witness. But I am prepared to go forward with one witness, Marvin Coleman. I have a second witness that I don't know whether I will need to call. That's Lieutenant Rybicki. He is also present and I'm not certain whether I will need to call him.

THE COURT: Okay.

MS. HARDTKE: The State would call Marvin Coleman.

MARVIN COLEMAN, Called as a witness by the State, having been first duly sworn, was examined and testified as follows:

THE COURT: Could you state your name for the record, please, and spell your last name.

THE WITNESS: First name, last name?

THE COURT: Your last name.

THE WITNESS: Marvin L. Coleman, C-o-l-e-m-a-n.

DIRECT EXAMINATION BY MS. HARDTKE

Q Mr. Coleman, how are you employed?

A With the Milwaukee Fire Department as a heavy

equipment operator.

Q How long have you been employed with the Milwaukee Fire Department?

A About 16 years.

Q In your duties as a heavy equipment operator are you called to certain scenes?

A Yes.

Q Where your department is on call.

A Yes, I am.

Q And did that occur -- were you called to a scene on June 16th on Sherman Boulevard?

A Yes, I was.

Q And what were your duties when you were called to that scene?

A To provide medical attention to the patient.

Q And when you say "provide medical attention" can you describe what your training is with regard to that?

A I'm an EMT. I'm a licensed EMT with the fire department and the state.

Q And what does EMT stand for?

A Emergency medical technician.

Q And what type of training do you go through with regard to being a licensed EMT?

A We go through various training. We go through patient assessment, wound care, CPR and

defibrillation, and just a wide range of anything medical pretty much.

Q And how long have you been a licensed EMT?

A For about 16 years.

Q And have you during the course of your duties with the fire department responded to a number of incidents where individuals have been -- have suffered gunshot wounds?

A Yes.

Q So, this was not your first time?

A No.

Q Approximately how many times have you responded to such situations?

A Several. I mean probably -- well, at one point in my career I would say I think I went to about ten in one year but over the course of my career maybe 30 times. Thirty, 40 times.

Q And how many times out of those 30 or 40 times, if you know, did the patient not survive?

A Quite often.

Q On the occasion of June 16th, 2006 when you went to Sherman Boulevard did you have contact with the victim on that scene?

A Yes, I did.

Q And did you identify who that individual was?

A Yes, I did.
Q And who was it?
A Byron Somerville. We called him Tick.
Q Is that B-r-y-o-n?
A Yes.
Q And the last name is spelled S-o-m-e-r-v-i-l-l-e?
A Yes. We call him Tick.
Q Tick as in T-i-c-k?
A Yes.
Q When you say "we call him Tick" are you indicating that you previously had contact with this individual?
A Yes.
Q How did you know him?
A Just from various -- just acquaintances. My current girlfriend is friends with one of Tick's friends. His -- I'm sorry, let me rephrase that. My current girlfriend's brother-in-law is Tick's friend.
Q Approximately how many times did you have contact with him prior to this incident?
A This year maybe four or five times.
Q So, you weren't close friends with him?
A No.
Q But he was someone that you knew from previous encounters?

A Yes.
Q When you first observed Byron Somerville what was his condition?
A He was in the street on his back. His feet were pointing west and his head was pointing east.
Q Was he alert, coherent?
A Yes, he was.
Q What, if anything, did you observe about him, about his physical condition in terms of any injuries?
A He was shot quite a few times. We initially could see the holes in his shirt when we got there.
Q When you say "we" --
A The fire department, Ladder 13.
Q I'm going to ask that you refer to the things that you personally observed.
A Sure.
Q Okay?
A Okay.
Q If you would relate what you observed about his physical condition.
A I observed him on his back. He seemed to be struggling. You know -- he was injured. We figured -- - I figured that he was shot because it came over as a possible shooting. I went -- I went to his side and I was like, what happened -- you know -- and --

Q And what does he say when you asked him what happened?
A He said -- I actually asked him who did this to you and he said "Marvin."
Q And your name is Marvin; correct?
A Yes. I said "who did this." He said "Marvin." I said "who, me." He said "no, Big Head Marvin."
Q So, when he stated that "no, Big Head Marvin", who did you believe he was referring to? Did you believe he was referring to you?
A No, I had no clue because he said it wasn't me.
Q Okay. Did you have any further conversation with him?
A Yes.
Q And what was that?
A Well, I asked him what happened and he told me he was over at this person's -- he was at this residence and he was inside and I guess he had an argument with whoever inside the residence and he said that he was led outside where the person shot him as soon as he came out the door.
Q At the time that you had contact with him did he state anything to you regarding his own physical condition?
A Yes, he said to me "Marv, please don't let me die."

Q And did he say that more than once?
A He said it three or four times.
Q And what did you do in response?
A I told him that -- I said we are going to do our best. We are not going to let you die. We are not going to try to let you -- you know -- let you die.
Q What was your assessment of his physical condition at that time?
A Grave, grave.
Q When you say "grave" what do you mean by that?
A His wounds. I had seen -- his wounds indicated to me that it was -- he probably wouldn't make it.
Q And when you say "his wounds" what wounds specifically are you referring to?
A The one -- the couple in the chest area and we rolled him over. Looked for exit wounds and we seen three holes near his back.
Q How many holes -- bullet holes did you see on his chest?
A I believe two, two to four. Two. Something like that. Two in the chest and I observed one lower left side and I thought maybe exit wounds on his back.
Q And what did you do in response to his medical condition?
A We -- well, I tried to -- I gave him high flow

oxygen by way of a non-breathing mask. His blood pressure was -- I didn't actually take his blood pressure. That I didn't do. We just tried to patch the holes on his chest area and the ones on his back and we tried to get him on the cot to get him to the hospital.

Q When you say "tried to get him on the cot" were you able to?

A Yes, we were. We were able to -- I was able to get him on the cot with help.

Q And what was your role from there on?

A To drive him to the hospital.

Q So, you actually drove the medical unit that took him to the hospital?

A Yes. In instances like that where the med unit needs to have two paramedics, they need to have their hands on this guy at all times. They require a third driver -- a driver, a third person to drive.

Q When you say in situations like that when they need two paramedics, under what circumstances are two paramedics required to ride with the person in the back?

A In life threatening conditions.

Q And it was the assessment in this case that his injuries were indeed life threatening?

A Yes, they were. Yes, it was.
Q Were you able to hear any statements made while he was being transported to the hospital?
A Yes.
Q And what, if anything, did you hear?
A He seemed to be concerned -- well, he was concerned about why we were passing St. Joe's Hospital and --
Q And in what respect was he concerned?
A He wanted to know why he wasn't going to the closest hospital.
Q And what, if anything, else did you observe during the time that you were transporting him to the hospital?
A He became agitated.
Q Can you describe what you mean by "agitated"?
A Like he wanted to jump off the cot if he could.
Q What was he expressing at that time?
A He wanted to -- he was just saying why are we not going to St. Joe's.
Q So, it was at the time you were passing St. Joe's that he was acting as though he wanted to jump off the cot?
A Yes. He made that statement -- I believe I was on Sherman and Center at that time so I had passed Burleigh.

Q And what happened after that?
A He -- basically the paramedics got him to calm down and try to relax. To give himself a chance to try to lay there and let them administer the help that he desperately needed I would say.
Q In addition to the two paramedics who were in the back with him was there also a police officer accompanying him?
A Yes.
Q Did you go into the hospital when you arrived at Froedtert Hospital?
A Yes.
Q And that was where you transported him to; right?
A Yes, it was Froedtert.
Q And what was his condition upon arrival at the hospital?
A He was still alive at that point and that's all I can tell you. He was still alive.
Q Was he still able to speak? Was he still conscious?
A Yes, he was still conscious.
Q Did he indicate anything about his physical condition at any time that you observed or heard?
A I didn't hear him say anything about his physical condition, no. I did hear a doctor mention his physical condition.

Q Where were you when you heard the doctor talking about his physical condition?

A Right next to the doctor.

Q And where was Byron Somerville at this time?

A In the trauma center on the table.

Q And was the doctor next to Mr. Somerville?

A Well, in the trauma center the way that they approach that situation is they have two doctors at the head next to a nurse and two doctors at the foot next to a nurse and then there is one doctor calling the shots.

Q And which doctor did you hear speaking about his condition?

A The one that was calling the shots.

Q And what, if anything, did you hear him say about his condition?

MS. BOYLE: Well, I think for purposes of the record I have to object. This is hearsay.

THE COURT: Overruled. You can answer the question.

THE WITNESS: The doctor received a blood sample and shortly after getting the results of that blood sample he said "this is not good, this is not good." And then I said "what's going on" and he said "his blood is poisoned." And at that point

the doctor said to the cop that if you have any questions to ask him, you need to ask him now because he's not going to make it. He's probably not going to make it.

Q What, if anything, happened after that?

A They decided that they would intubate him, to breathe for him. That's when they stick the tube down his throat and they were going to sedate him.

Q Did the officer ask him any questions prior to them intubating him?

A I believe the officer did take a position too but I couldn't hear what was being said. I don't know if he ever got to that point because at that point they were going to intubate him and there was no room. Being that there was a doctor and a nurse on each side there was no room to be asked.

Q And what happened after they intubated him?

A After they intubated him I believe that's when he lost consciousness and coded on the table at that point.

Q When you say he "coded" what does that man?

A His heart stopped beating.

Q And what happened next?

A They proceeded to revive him.

Q And what happened next?

A They did revive him to rush him to surgery.

Q Do you know whether he survived that surgery?

A Yes, I do know.

Q Did he?

A No.

MS. HARDTKE: I don't have any further questions at this time.

THE COURT: Go ahead.

MS. BOYLE: Thank you.

CROSS EXAMINATION BY MS. BOYLE

Q Mr. Coleman, when you get on scene can you tell me how many other people are around there that might have been either law enforcement, fire department personnel or citizens? Do you have any idea?

A When we were on scene our actual -- our boss from Ladder 13 was on scene first only because he was leaving Ladder 13 to go to a different training and he stumbled upon the shooting.

Q And what's your boss's name?

A Jim Miller.

Q And so he's there. Who else? Anyone else?

A There were police there.

Q And were there any citizens attending to the victim at all?

A There was supposed to be -- there was a woman that

came to me and said that she revived him prior to our arrival.

Q Now, when you get there Mr. Somerville is lying on the street; correct?

A Yes.

Q And it's clear to you based upon your knowledge and experience that he's got some major, major problems; right?

A Yes.

Q You approach him and do you make the determination that you know him right when you get on scene -- right when you get up to the body?

A No, I knew him -- I knew it was him from the truck.

Q Okay.

A Because he was -- he was laying next to his truck. We both drive Rovers.

Q And so as a result of seeing his green Land Rover you knew that this was Byron Somerville when you approached him?

A Yes.

Q When you got up there what is the first thing that he says to you?

A "Marv, please don't let me die."

Q The next thing that you say to him was that -- you do respond to that I guess I should ask.

A Yes.
Q And what do you say to him?
A I said "we're doing the best we can. We are not going to let you die."
Q What does he then -- or what do you say?
A I asked him "who did this to you."
Q And he says to you what?
A Marvin.
Q Now, at that point in time it is your belief that he's saying your name to get your attention; right?
A Yes.
Q And you then as a result of that say to him what?
A He said "Marvin." I said "Marvin" and I said "who, me." He said, "no, Big Head Marvin."
Q And you knew from hearing the words "Big Head Marvin" that he no longer was talking about you. He was giving you the -- at least the name or nickname or something along that lines of the person who shot him.
A Yes, based -- just because he said -- I said "who, me." He said "no."
Q Big Head Marvin?
A Yes.
Q The next thing that you ask him is what happened?
A Yes.

Q And he says to you what?
A That he was inside the house. He was arguing and he decided -- he told me he felt like he was led outside and at which point he opened the door and I guess that's where it happened.
Q You at some point in time had an interview just recently with the Milwaukee Police Department; correct?
A Yes.
Q And it indicates at least in there that -- it's something that Mr. Somerville said to you. "Me and a chick were arguing." I'm sorry, "me and a chick were in the house arguing. I feel like they lured me outside. The guy was waiting on me."
A Yes.
Q Did he at all say who was the chick?
A No.
Q When you learned that information about -- after your question of what happened did you at all ask him any more information about a description of who shot him?
A I just asked "who did it."
Q Okay. Did he at all offer any other information about a description of who shot him such as he was wearing a baseball hat, he was wearing a blue shirt,

anything along that line?

A No. He said "Big Head Marvin."

Q Okay. And did you learn from any -- strike that. You indicated to us today that you drove in the med unit. You were the driver of the med unit; correct?

A Yes.

Q And you also went to the hospital; correct?

A Yes.

Q There was a police officer in the med unit along with two other fire department personnel.

A Yes.

Q And there was a police officer at least in the trauma room; right?

A Yes, but he -- at that point the police officer was standing near the -- where they view the x-rays.

Q Okay.

A Right there. So, he's maybe three feet away from me.

Q When you're driving the med unit are you able to hear absolutely everything that's going on in the back?

A I can hear pretty well but I didn't hear the officer ask any questions or anything. They were really just trying to keep him at some point on the cot because he seemed to be pretty agitated about us passing St. Joe's.

Q And do you -- is it possible that the cop asked him questions in the med unit that you just didn't hear?
A Yeah.
Q At no time did you indicate to Mr. Somerville that he was dying; right?
A No.
Q And at no time did you hear anyone else specifically tell Mr. Somerville that he was dying; right?
A I heard the doctor say to him -- say to the cop inside of the ER, the trauma center, that you should ask him questions -- if you have any questions, ask him now because I don't think he's going to make it.
Q All right. Was that directed to Mr. Somerville or just to the police officer?
A That was directed to the police officer but at that point he was still -- he was still alert. He was still awake.
Q Judge, I just want to check with my client -- oh, you didn't or Mr. Somerville didn't offer any information about the name of the chick that he indicated; correct?
A No.
Q And based upon what he told you -- strike that. The information that you acquired from Mr. Somerville, did it lead you to believe that the shooting kind of

took place right as he walked out of the house, the residence that he was in?

A Yes, I believe that.

MS. BOYLE: I have nothing further Thank you.

THE COURT: Any re-direct?

MS. HARDTKE: No.

THE COURT: What time did you get to the scene?

THE WITNESS: 9:40, 9:40ish I believe the call came in.

THE COURT: In the morning?

THE WITNESS: In the morning, a.m. And we were stationed on 49th and Fiebrantz so it took me a minute. Maybe 9:41, 9:42 is when I arrived maybe. Because there is construction right there on Sherman.

THE COURT: And what time did you leave with him? Leave to Froedtert.

THE WITNESS: To Froedtert. I want to say we were probably on the scene ten minutes because we had to wait for the med rig, med unit to come. So by the time I made it there, by the time the med rig made it there, I think the total time elapsed was probably ten minutes and from the time

we were leaving.

THE COURT: And then you got to Froedtert?

THE WITNESS: Yes. We got to Froedtert in about -- I would say about nine, ten minutes from Sherman and Capital.

THE COURT: Half hour later. You got there about 9:40 --

THE WITNESS: I would say we made it to Froedtert at about 10:05, somewhere up in there.

THE COURT: Thank you. Any other questions?

MS. HARDTKE: Nothing from the State.

MS. BOYLE: None from the defense.

THE COURT: Thanks a lot.

(Witness Steps Down)

MS. HARDTKE: At this time I would ask for a brief recess so I can speak with the detective.

THE COURT: Go ahead. We will take a short recess for a second.

(Whereupon, a brief recess was taken, after which the following proceedings were had)

THE COURT: We will go back on the record. Go ahead.

MS. HARDTKE: Your Honor, I have confirmed through the police department that Ms. Moore is not going to be here today. They also did confirm, however, that the tires were slashed last night on her vehicle at her home. At this point given that I am not asking the Court to issue a warrant for her, however, I would first ask that the Court issue a no-contact order to the defendant and indicate to him that any contact by any third party with this witness or any of the witnesses in this case is prohibited other than through his attorney.

I would also ask that the Court be willing to consider on the trial date if we are able to produce Ms. Moore, another motion with regard to the statement made to Ms. Moore as a dying declaration as well. But at this point I would not be calling her today.

THE COURT: Well -- okay. The Court will order the defendant not to have any contact with any of the witnesses in this case directly or indirectly.

MS. BOYLE: Judge, if I could just say something just quickly for the record. Miss Hardtke told me about the issue with the witness this morning. I have not had any contact with my client

since the last time we were in court. Miss Hardtke told me between the last time we were in this court and during the course of our discussion that this woman was going to come in as a witness.

My client had no idea that she was coming in as a witness and I never indicated that to his mother who I have contact with often. So, I mean Mr. Beauchamp who is currently in prison serving a sentence does not have access directly obviously to the witnesses in this matter and certainly I have no problem with the no-contact order but at least for the purpose of the record Mr. Beauchamp had no idea.

THE COURT: And that may be. I'm not making any -- there is no inference that he did. So, what are you requesting, an adjournment for the hearing on this or what?

MS. HARDTKE: I would ask that -- I believe that the Court can rule as to the statements that have been testified to, the statement to the police officer that was testified to last week, and the statement that was made to Mr. Coleman. I would ask that the Court make rulings as to those statements. I would ask that the Court allow the State to reopen or to raise yet another motion with regard to yet another dying declaration to Miss

Moore should we be able to produce her for the trial date.

THE COURT: Counsel, did you want to say anything?

MS. BOYLE: Judge, I have discussed this at great length with my client. I am well aware of what the case law says and as it relates to what the State must show. Whether or not the victim either knew he was dying or had a reasonable belief that he was dying. I think it's clear from the fire fighter who testified today that the victim at least indicated don't let me die and I think that is one indication that the victim may have been under the impression that he was going to die.

It's also clear to me that what was being done to Mr. Somerville during the time that he was on scene, while in transport and at the facility, the hospital facility, that it's clear that he could have believed he was going to die.

It seems to me also that the information that the victim has indicated was answers that were given upon questions being asked by law enforcement or fire fighters. So, as a result of that I think it would be very difficult for me to do anything other than a pro forma motion to exclude

the statements of the victim.

THE COURT: And you heard the same evidence that the Court heard and I believe that you're correct. After listening to the testimony of the prior witness -- who was it -- I believe it was Wayne Young.

MS. BOYLE: That's correct.

THE COURT: And listening to that testimony, the testimony of the tech fire fighter who had the opportunity to have some conversations with the victim of the offense and what was stated in 908.045(3) allows for the admission of hearsay statements under a belief of impending death if obviously the declarant is not available and the belief of the impending death may be inferred from the fact of death itself and the circumstances such as the nature of the wounds and, of course, the wounds in this case were a number. There were more than one in the chest area.

And it would appear that based upon what was said and who said it, that these were life threatening, life threatening wounds -- you know -- considering the shots, the bullets, the exit wounds. What the doctor had indicated in the emergency room would indicate to the Court that this was an

exception to the hearsay rule as far as the dying declaration is concerned.

And I think they are exempt from the restrictions of Crawford and the confrontation clause because they are a firmly rooted exception exempt from these restrictions and limitations because I don't think the defendant can use the confrontation clause as a shield from the unavailable witness because allegedly the defendant procured the unavailability of the dead declarant. And there is also a rule of -- rule of forfeiture by wrongdoing and so the Court would allow those statements as to the admissibility.

MS. HARDTKE: Thank you.

MS. BOYLE: Thank you, Judge.

THE COURT: Okay. What's the status of this?

MS. HARDTKE: It's set for October 16th.

MS. BOYLE: I believe we are the go case.

THE COURT: Pardon?

MS. BOYLE: I believe we are the go case.

THE COURT: Okay.

MS. HARDTKE: I would note for the record that I did file with the Court today a motion in limine -- just standard motions in limine as well as a witness list and jury instructions and I have provided those to defense counsel.

MS. BOYLE: And I will get you my copies on Monday.

THE COURT: Okay.

(WHICH CONCLUDED THE PROCEEDINGS)

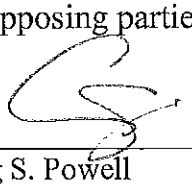
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

(1) I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19(13). I further certify that:

(2) This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

(3) A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.



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STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP806-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN BEAUCHAMP,

Defendant-Appellant-Petitioner.

ON A PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND SENTENCE AND AN ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did the circuit court's admission of the victim's dying declarations identifying the man who shot him as "Marvin" and "Big Headed Marvin" violate the defendant's Sixth Amendment right to confront the witnesses against him? Was any error harmless?

- The circuit court found no constitutional violation.

- The court of appeals found no constitutional violation.

2. Was the victim's statement to the emergency medical technician admissible under *Davis v. Washington* and *Ohio v. Roberts* because it was nontestimonial?

- Not raised in the courts below.

3. Did the State's use of prior inconsistent statements by two of its trial witnesses violate Beauchamp's due process rights?

- Not raised in the circuit court.
- The court of appeals answered: no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

ARGUMENT

II. THE CIRCUIT COURT'S ADMISSION OF THE VICTIM'S DYING DECLARATIONS IDENTIFYING THE MAN WHO SHOT HIM AS "MARVIN" AND "BIG HEADED MARVIN" DID NOT VIOLATE BEAUCHAMP'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES; MOREOVER ANY ERROR WAS HARMLESS.

A. Facts.

On June 21, 2006, Byron Somerville was shot five times in the front yard of 3939 North Sherman Boulevard in Milwaukee (2:1).

Shortly after the shooting, Marvin Coleman, an emergency medical technician ("EMT") employed by the Milwaukee Fire Department, arrived on the scene (44:4-5). Coleman asked Somerville "who did this" (44:8). Somerville answered: "Big Head Marvin" (*id.*). Somerville told Coleman that he had been inside the residence, and "had an argument with whoever [was] inside … he said that he was led outside where the person shot him as soon as he came out the door" (*id.*; *accord* 44:18).

Officer Wayne Young accompanied Somerville in the ambulance to the hospital (43:5-6). At the trauma center, the attending physician told Young "that if you have any questions to ask him, you need to ask him now because he's not going to make it" (44:14). In response to Young's questions, Somerville "stated that a guy name[d] Marvin shot him. I asked if he knew his last name. He stated he didn't…. He just gave me a description. The name was Marvin as being the dark skinned male with a bald head and a big forehead" (43:8). Shortly thereafter, Somerville died (44:14-15).

The State filed a motion in limine seeking admission of Somerville's statements as dying declarations pursuant to Wis. Stat. § 908.045(3) (42:2). Coleman and Young testified in support of the State's motion (43; 44).[1]

The court ruled that Somerville's statements were admissible under the dying-declaration exception to the hearsay rule (44:26-27). The court further ruled that the statements were "exempt" from the requirements of the Confrontation Clause (44:27).

The jury found Beauchamp guilty of first degree intentional homicide (50:3).

---

[1]The preceding summary of Young and Coleman's statements is from the motion hearing. Their trial testimony was substantially similar (48:47-52, 75-77).

Beauchamp filed a postconviction motion (30). He argued that Somerville's statements did not satisfy the test for dying declarations under Wis. Stat. § 908.045(3). Furthermore, even if the statements satisfied the hearsay rule, their admission violated his rights under the Confrontation Clause (30). The court denied the motion (37).

Beauchamp appealed. The court of appeals affirmed the circuit court (Pet-Ap. 101-13). The court held that Somerville's statements were admissible as dying declarations under Wis. Stat. § 908.045(3) (*id.* at 104-06). On the confrontation issue, it held that the United States Supreme Court's statement in *Giles v. California*, 128 S.Ct. 2678 (2008), that dying declarations were probably admissible under the Confrontation Clause was binding authority (*id.* at 107).

This court granted Beauchamp's petition for review of the court of appeals' confrontation ruling. Beauchamp did not seek review on the hearsay question.

B. Dying Declarations Are a Historical Exception to the Confrontation Clause.

Whether the admission of Somerville's dying declarations violated Beauchamp's confrontation right is a legal question subject to plenary review. *See State v. Weed*, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485.

The Confrontation Clause of the United States Constitution guarantees that: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…." U.S. Const. amend. VI; *accord* Wis. Const. art. I, § 7. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that the Confrontation Clause

bars the criminal trial use of "testimonial" hearsay statements not subject to confrontation by the accused.

The *Crawford* Court analyzed the Framers' intent.

> [T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the [Confrontation Clause] is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.

Crawford, 541 U.S. at 53-54.

Four years after *Crawford*, the Court examined the interplay between the confrontation right and the forfeiture-by-wrongdoing doctrine. *See Giles v. California*, 128 S.Ct. 2678 (2008). As in *Crawford*, the Court took a historical approach. It studied the founding-era cases and found that "[t]he manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." *Id.* at 2684. Against this historical background, the Court concluded that the Confrontation Clause allows an accused to forfeit his confrontation right by wrongdoing *only* if the *purpose* of the wrongdoing was to make the witness unavailable for trial. *Id.* at 2686.

The *Crawford* court noted that "one deviation" from the general rule of mandatory confrontation involves "dying declarations." *Crawford*, 541 U.S. at 56 n.6 "The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." *Id.* (citations omitted). The *Crawford* court did not, however,

definitively decide whether dying declarations qualify as an exception to the Confrontation Clause. In *Giles*, the Court again noted that "declarations made by a speaker who was both on the brink of death and aware that he was dying" "were admitted at common law even though they were unconfronted." *Giles*, 128 S.Ct. at 2682.

Eighteenth-century English case law confirms this. *See King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (K.B. 1789); *King v. Radbourne*, 1 Leach 456, 168 Eng. Rep. 330 (1787) (basis for admitting statement not stated); *King v. Reason*, 16 How. St. Tr. 1, 24-38, 1 Strange 499, 93 Eng. Rep. 659, 660 (K.B. 1722). So do the treatises of the time. *See* 1 EDWARD HYDE EAST, PLEAS OF THE CROWN § 124, at 353-54 (1806); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE Ch. 2, § 2, at 63-64 (3d ed. 1808); *see also* JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 205 (1825). Post-independence case law also confirms the existence of the exception to the common law confrontation right. *See*, *e.g.*, *Anthony v. State*, 19 Tenn. 265, 1838 WL 1124, *8 (Tenn. 1838); *Hill v. Commonwealth*, 2 Gratt. 594, 43 Va. 594, 1845 WL 2707, *6 (Va. Gen. Ct. (1845).[2] According to one scholar's exhaustive historical study, "a dying declaration of a murder victim was the only kind of unsworn out-of-court statement that could be admitted in a criminal trial to prove the guilt of the defendant." Thomas Davies, *Not "The Framers' Design,"* 15 J.L. & POLICY 349, 414 (2007).

In *Anthony*, the Tennessee Supreme Court wrote:

> [W]e are all of opinion that the Bill of Rights can not be construed to prevent declarations properly made in *articulo mortis,* from being given in evidence against defendants in cases of homicide… In this case, … the object of the Bill of Rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial

[2]For the court's convenience, the State has included copies of these authorities in its appendix.

> victory, achieved with difficulty, after a violent and protracted contest. That our view of this question is correct is made manifest by the fact, that, after more than forty years from the adoption of our first Constitution this argument against the admissibility of dying declarations on the ground of the Bill of Rights is for the first time made, so far as we are aware, in our courts of justice, and if made elsewhere it does not appear to have received judicial sanction in any State.

Anthony, 1838 WL 1124, *8. The Virginia court's analysis in *Hill* was similar. *See Hill*, 1845 WL 2707 *6 ("[L]ong anterior to the year 1776, the period of the declaration of the bill of rights, the rule of evidence [admitting unconfronted dying declarations] was well established. And it is remarkable, that in all the commentaries it underwent in *England,* it was never supposed that the rule was a violation of the rights of the subject as secured by *Magna Charta.*").

A century before *Crawford*, the Supreme Court concluded in dicta that the Confrontation Clause did not bar the use of dying declarations:

> We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination,

> nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice….

Mattox v. United States, 156 U.S. 237, 243-44 (1895); *accord Pointer v. Texas*, 380 U.S. 400, 407 (1965) ("[t]his Court has recognized the admissibility against an accused of [unconfronted] dying declarations"); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby v. United States*, 174 U.S. 47, 61 (1899) ("This exception was well established before the adoption of the constitution, and was not intended to be abrogated.").

The Wisconsin Supreme Court has also long recognized that Wisconsin's confrontation clause does not bar the use of dying-declaration hearsay. *See Jackson v. State*, 81 Wis. 127, 51 N.W.2d 89 (1892); *State v. Dickinson*, 41 Wis. 299, 308 (1877); *Miller v. State*, 25 Wis. 384, 387-88 (1870). Like the United States Supreme Court, this court analyzed the historical relationship between dying-declaration hearsay and the confrontation clause. The court concluded that the Wisconsin Constitution "secured" the confrontation right as it existed at common law. At common law, it was subject to the dying-declaration exception.

> [I]t appears that the right of the accused to meet the witnesses face to face was not granted, but secured, by the constitutional clauses mentioned. It is the right, therefore, as it existed at common law that was thus secured. That right was subject to certain exceptions. One of these exceptions was that the declarations of a murdered person, made when he was at the point of death, and every hope of this world gone, as to the time, place, and manner in which, and the person by whom, the fatal wound was given, are admissible in evidence, notwithstanding such deceased person was not sworn nor examined, much less cross-examined.

> This court has frequently held that the constitutional clause quoted [Wis. Const. art. I, § 7] is no bar to the admission in evidence of such declarations. In these cases it is, in effect, said that such rule as to the admission of such dying declarations was well settled before the adoption of our constitution, and that the same was not abrogated by the clause of the constitution quoted.

Jackson, 81 Wis. at 131; *accord Dickinson*, 41 Wis. at 308; *Miller*, 25 Wis. at 387-88.

Throughout the twentieth century, this court has repeatedly noted the dying-declaration exception in dicta. *See State v. Manuel*, 2005 WI 75, ¶23, 281 Wis. 2d 554, 697 N.W.2d 811; *Virgil v. State*, 84 Wis. 2d 166, 186-87, 267 N.W.2d 852 (1978); *State v. Lenarchick*, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976) ("That meeting the witness 'face to face' is not a literal requirement is borne out by the recognized and constitutionally approved exception—in terms of confrontation requirements—for dying declarations."); *State ex rel. Drew v. Shaughnessy*, 212 Wis. 322, 329, 249 N.W. 522 (1933); *Spencer v. State*, 132 Wis. 509, 511-12, 112 N.W. 462 (1907) (dying-declaration exception "well recognized at the time of the adoption of our constitution").

Since *Crawford*, at least fourteen state appeals courts have published opinions addressing this issue. They have uniformly held that the Confrontation Clause incorporates the common law exception for dying-declaration hearsay. *See People v. Monterroso*, 101 P.3d 956, 765 (Cal. 2004); *Cobb v. State*, 16 So.3d 207, 212 (Fla. App. 2009); *People v. Gilmore*, 828 N.E.2d 293, 302 (Ill. Ct. App. 2005); *Wallace v. State*, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005); *State v. Jones*, 197 P.3d 815, 822 (Kan. 2008); *Com. v. Nesbitt*, 892 N.E.2d 299, 310-11 (Mass. 2008); *People v. Taylor*, 737 N.W.2d 790, 795 (Mich. App. 2007); *State v. Martin*, 695 N.W.2d 578, 585-86 (Minn. 2005);[3] *State v. Minner*, 311 S.W.3d 313, 323,

[3] *Abrogated on other grounds*, *Davis v. Washington*, 547 U.S. 813 (2006).

n.9 (Mo. App. 2010); *State v. Calhoun*, 657 S.E.2d 424, 427-28 (N.C. App. 2008); *Harkins v. State*, 143 P.3d 706, 711 (Nev. 2006); *State v. Lewis*, 235 S.W.3d 136, 147-48 (Tenn. 2007); *Gardner v. State*, 306 S.W.3d 274, 289 n.20 (Tex. Crim. App. 2009); *Satterwhite v. Commonwealth*, 695 S.E.2d 555, 568 (Va. App. 2010) ("*Crawford* did not upend the traditional view that dying declarations serve as an exception both to the common law hearsay rule and the constitutional right of a defendant to confront his accusers").

Monterroso was the first and remains the leading case. Like *Mattox* and *Jackson*, *Monterroso* employed a historical analysis.

> Dying declarations were admissible at common law in felony cases, even when the defendant was not present at the time the statement was taken. In particular, the common law allowed "'the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed,'" provided that "'the deceased at the time of making such declarations was conscious of his danger.'" (*King v. Reason* (K.B.1722) 16 How. St. Tr. 1, 24-25.) To exclude such evidence as violative of the right to confrontation "would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished." … Thus, if, as *Crawford* teaches, the confrontation clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding," it follows that the common law pedigree of the exception for dying

> declarations poses no conflict with the Sixth Amendment.

Monterroso, 101 P.3d at 972 (citations omitted except where indicated).

The State agrees with Beauchamp that the court of appeals' decision was wrong insofar as it held that the *Giles* dicta was *binding* authority on the question of whether unconfronted testimonial dying declarations are exempt from the Confrontation Clause. However, the historical analysis underlying that dicta, the dicta in *Crawford* and *Mattox*, the nineteenth-century decisions of *Miller*, *Hill*, and *Anthony*, and the decisions of the fourteen state appellate courts cited above, provide powerful persuasive authority that dying-declaration hearsay is constitutionally admissible after *Crawford*.

The *Crawford* court analyzed the intent of the Framers to determine whether unconfronted hearsay was constitutionally admissible in a criminal trial. The Court explained that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54; *accord Mattox*, 156 U.S. at 243 ("We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject…."). The Court has repeatedly acknowledged—before, during, and after *Crawford*—that the dying-declaration exception to confrontation was recognized at common law. *See*, *e.g.*, *Giles*, 128 S.Ct. at 2682-83; *Crawford*, 541 U.S. at 56, n.6; *Mattox*, 156 U.S. at 243-44. As shown above, this observation has appeared throughout the published decisions for 200 years. Thus, modern courts are bound to recognize the dying-declaration exception as part and parcel of the confrontation right itself.

This court should affirm the ruling of the circuit court on the basis of the historical analysis applied by *Crawford*, *Giles*, *Mattox*, *Miller*, and every published state court opinion that has reached the question.

C. Beauchamp's Arguments Are Contrary to *Crawford*, Irrelevant, and Unsupported.

Beauchamp argues that the historical rationale for recognizing a dying-declaration exception to the Confrontation Clause is antiquated. He states that the common law exception was based on the belief that a person would not go to "'his Maker … with a lie upon his lips.'" Beauchamp's Brief at 11. He asserts that by the end of the nineteenth century necessity, rather than fear of accountability in the hereafter, justified the admissibility of unconfronted dying declarations.[4] He contends that the religious rationale is no longer valid in the twenty-first century. *Id.* at 18. Because the historical exception is no longer justified, Beauchamp concludes, unconfronted dying-declaration hearsay violates the Confrontation Clause and is inadmissible under *Crawford.*

Beauchamp's argument should be rejected for several reasons.

1. The *Crawford* admissibility test is based on history.

Crawford was a watershed decision that abrogated the test for admitting unconfronted hearsay statements established nearly twenty-five years earlier in *Ohio v.*

[4]Beauchamp offers no support for his statement that the religious rationale lost favor because of its "incompatibility with the principle of church and State." Beauchamp's Brief at 11.

Roberts, 448 U.S. 56 (1980). Despite the upheaval it caused, *Crawford*'s intellectual approach is straightforward. The Court explained that the Confrontation Clause must be interpreted and applied in the twenty-first century as it was interpreted and applied in the eighteenth century. *See Crawford*, 541 U.S. at 54. Thus, today's Confrontation Clause comes to us with the limitations and restrictions that affected the exercise of the right at common law. *See id.*

The *Crawford* approach is a return to the pre-*Roberts* understanding of the Confrontation Clause. Significantly, the nineteenth-century cases concluding that unconfronted dying declarations are constitutionally admissible all employed the historical analysis that *Crawford* would use in 2004. *See supra* at 6-9. These cases emphasized that the Confrontation Clause secured a preexisting right; it did not create a new right. Once constitutionalized, that preexisting right was still subject to the limitations or exceptions existing at common law. Thus, because dying declarations were an exception to the common law confrontation right, they were also an exception to the constitutional confrontation right.

Beauchamp contends that this court should reject the dying-declaration exception to the Confrontation Clause because the exception's rationale is "antiquated" and the statements admitted under the exception are unreliable. Beauchamp's contentions ignore the approach to Confrontation Clause questions set forth in *Crawford* and followed in *Giles*. *See Giles*, 128 S.Ct. at 2684; *Crawford*, 541 U.S. at 54. Under *Crawford*, there is only one question to ask: were dying declarations a recognized exception to the confrontation right at common law? The answer to that question is: yes.

2. Beauchamp's reliability arguments are irrelevant and unsupported.

Confusingly, Beauchamp argues simultaneously that dying declarations are not reliable and that *Crawford* rejected reliability as a constitutional standard for admitting unconfronted hearsay. Beauchamp's Brief at 12-15.

On page 12, Beauchamp quotes *Crawford*: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Crawford*, 541 U.S. at 61. *Crawford* continues:

> [N]one of the [historical] authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id.

In this passage, the Court explained its rejection of *Roberts*, which premised the admissibility of unconfronted hearsay on its reliability. *See Roberts*, 448 U.S. at 65-66. Five pages earlier, with no mention of reliability, the Court acknowledged historical authority for the admission of unconfronted dying declarations at common law. *Crawford*, 541 U.S. at 56, n.6. The teaching of *Crawford* is this: unconfronted hearsay exceptions to the Confrontation Clause are based on history, not reliability. Thus, if dying declarations are admissible, they are admissible on the basis of history, not reliability.

Nevertheless, Beauchamp argues that dying declarations are not reliable, citing *United States v. Mayhew*, 380 F.Supp.2d 961 (S.D. Ohio 2005), and two law review articles. Beauchamp's Brief at 13-14. The language Beauchamp quotes from *Mayhew* comes from a law review note. *See Mayhew*, 380 F.Supp.2d at 966 n. 5 (quoting Note, *Affidavits, Depositions, and Prior Testimony*, 46 IOWA L. REV. 356, 375-76 (1961)).

Mayhew and the law review commentary argue that dying declarations are unreliable for three reasons. First, a person without a religious belief in the hereafter has no reason to tell the truth, and may feel liberated to lie when he no longer fears accountability in this life. Second, a vengeful person, without fear of retaliation, might falsely incriminate an enemy. Third, the victim's powers of perception might not be accurate because of the stresses associated with oncoming death.

Beauchamp's anti-reliability arguments are irrelevant to *Crawford*'s historical approach. If these arguments could be considered under *Crawford*, they should nevertheless be rejected by the court in this case because they are factually unsupported. If a defendant seeks the abolition of a common law exception to the confrontation right, he must make more than a conclusory argument based on lawyerly suppositions. As stated above, the Confrontation Clause entered the constitution as it existed at common law, *i.e.*, limited by the dying-declaration exception. *See supra* at 6-9. If the defendant seeks to disturb the understanding of the Founders, he must make a stronger case than Beauchamp has.

a. The religious rationale.

Beauchamp's leading idea is that the religious rationale for the dying-declaration exception is historically antiquated and should therefore be abandoned. His argument is conclusory, and fails to make explicit the

assumptions about American religious beliefs that presumably underlies it. The State assumes that Beauchamp bases his argument on the assumption that twenty-first-century Americans do not share the views about the afterlife held by eighteenth-century Americans and Englishmen.

The State acknowledges that the foundation for the Founding era's dying-declaration exception appears to be the presumption that, because of her belief in divine accountability, a dying victim would not knowingly make a false accusation. *See*, *e.g.*, 1 EAST, § 124, at 353. Beauchamp implicitly argues that Americans no longer hold this belief. But he provides no evidence to support this contention.

A party seeking to challenge the theoretical basis of an established principle of law on grounds of history or social science must present expert scholarly evidence to support his position, allowing the opposing party the corresponding opportunity to rebut that evidence with scholarship of its own. Ideally, this proof should be presented in the trial court, as the question presented is a question of fact. *See*, *e.g.*, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 933-37 (N.D. Cal. 2010) (same-sex marriage case), *stay granted*, 2010 WL 3212786 (9th Cir. 2010); *Massachusetts v. United States Department of Health and Human Services*, 698 F.Supp.2d 234, 236-39 (D. Mass. 2010) (same). However, under certain circumstances, such scholarship may be presented for the first time in the supreme court. *See*, *e.g.*, *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (eyewitness identification);[5] *see also Roper v. Simmons*, 543 U.S. 551 (2005); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[5]In *Dubose*, this court relied on seven scholarly articles cited in Dubose's brief on appeal. *See Dubose*, 285 Wis. 2d 143, ¶¶29-30; *State v. Dubose*, Case No. 2003AP1690-CR, Petitioner's Brief at 18-28.

To prove that the historic religious rationale no longer supports the dying-declaration exception, Beauchamp should have made a factual record of the comparative religious beliefs of eighteenth-century Americans and twenty-first-century Americans in the trial court, or, failing that, in this court. He has not done so. What modern Americans believe about the afterlife, and whether they believe that a false accusation at the moment of death has consequences, are questions of fact.

The 2010 "U.S. Religious Landscape Survey" conducted by the Pew Forum on Religion & Public Life reports that 74 percent of Americans believe in the afterlife and 59 percent believe in hell (R-Ap. 169, 170).[6]

> Most Americans (74%) believe in life after death, with an equal member saying they believe in the existence of heaven as a place where people who have led good lives are eternally rewarded…. Belief in hell, where people who have led bad lives and die without repenting are eternally punished, is less common than is belief in life after death or heaven, with about six-in-ten Americans (59%) expressing belief in hell.

(*Id.* at 169, 170). This survey may not provide a definitive answer to the questions raised by Beauchamp. However, the survey surely demonstrates that Beauchamp's assumption that Americans no longer believe that a false statement at death can have negative repercussions in the afterlife is not obvious and not necessarily accurate. His claim, based on no evidence, should be given no credence by this court.

Furthermore, the founding-era assumption that dying declarations were reliable may be better understood as reflecting a broad psychological truth rather than a narrow religious belief. As noted by the Federal Rules Advisory Committee: "While the original religious justification for the exception may have lost its conviction

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[6] *See* http://religions.pewforum.org/pdf/report2religious-landscape-study-key-findings.pdf at pages 10-11.

for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present." FED. R. EVID. 804, Adv. Comm. Note to Subdivision (b), Exception (2) (1972) (citations omitted). Wigmore agrees: "Even without such a belief, there is a natural and instinctive awe at the approach of an unknown future—a physical revulsion common to all men, irresistible, and independent of theological belief." 5 WIGMORE ON EVIDENCE § 1443, at 302 (Chadbourn rev. 1974).

The Pennsylvania Supreme Court concluded that, religious belief aside, the human "awe and apprehension of death" was a universal psychological condition that justified the dying-declaration exception:

> [A]ppellant argues that the concept of a dying declaration is predicated upon a vestige of the past and is without meaning in our modern society. He would have us conclude that the sophistication of mankind today is such that the knowledge of impending death no longer engenders apprehension of the unknown and fails to deter falsehood and is incapable of inspiring truth. With this novel proposition we cannot agree. While many thing[s] have changed in our country and throughout the centuries, one constant force has been man's awe and apprehension of death…. The feelings engendered in the souls of men faced with the phenomenon of death have not changed from those expressed so beautifully and poignantly by William Shakespeare in his famous soliloquy in the play 'Hamlet.'

Commonwealth v. Douglas, 337 A.2d 860, 864 (Pa. 1975) (citations and footnote omitted).

This insight undermines Beauchamp's basic premise. Beauchamp contends that a hearsay exception to the Confrontation Clause is valid only if its eighteenth-century rationale makes sense in the twenty-first century. Beauchamp reads the dying-declaration exception's original rationale narrowly, and concludes that it no longer makes sense. However, the broad psychological rationale articulated by the Advisory Committee, Wigmore, and

Douglas makes sense today even if, as Beauchamp asserts, we are a less religious society than we once were. The broader psychological rationale is capable of encompassing the narrower religious one. Put the opposite way, the specific apprehensions and expectations certain religious faiths associate with death is a subset of the uncertainty or fear nearly all humans associate with it. Thus, Beauchamp's ahistorical religious critique can be harmonized with *Crawford*'s historical approach by interpreting the basis of the dying-declaration exception within the broader psychological framework.

b. Revenge and other motivations to accuse falsely.

Beauchamp's second reliability contention is that a dying person could be motivated by revenge or other base motives to falsely accuse another person of his murder. Therefore, he concludes, dying declarations are not inherently reliable. Beauchamp's Brief at 14. Beauchamp does not go so far as to argue that this possibility makes *all* dying declarations inherently suspect. Therefore, the State will limit its response to the notion that dying people are *sometimes* motivated by revenge or related emotions to make false accusations.

Dying-declaration testimony, like any other evidence, is subject to impeachment. *See* Wis. Stat. § 908.06 ("credibility of the declarant may be attacked"); *Carver v. United States*, 164 U.S. 694, 607 (1897); *Werner v. State*, 189 Wis. 26, 39-40, 206 N.W. 898 (1926); *accord State v. Morrow*, 731 N.W.2d 558, 563 (Neb. 2007).[7] Under § 908.06, the defendant may introduce any germane impeachment evidence to establish the declarant's motive for making a false accusation and his likelihood of doing so. Even "inconsistent hearsay

[7]*Disapproved on other grounds*, *State v. McCulloch*, 742 N.W.2d 727 (Neb. 2007).

statements that tend to impeach a dying declaration are admissible." Wis. Stat. § 908.045, Jud. Council Comm. Note to Subdivision (3), (1974). The declarant's veracity can be questioned during closing argument. *See Lenarchick*, 74 Wis. 2d at 457.

The fact that a specific dying declaration might be attributable to the victim's desire to stain his enemy or clear his friend does not mean that dying declarations are per se barred by the Confrontation Clause. Instead, they are constitutionally admissible but subject to impeachment. In the circuit court, Beauchamp made no effort to impeach Somerville's statement that he had been shot by "Big Head Marvin" (44:8). At no point has Beauchamp ever suggested that Somerville had a grudge against him, or any other motive to make a false accusation. Beauchamp forfeited the opportunity to impeach Somerville's identification with evidence that Somerville had a malicious reason for naming Beauchamp.

c. Perception.

Beauchamp's final reliability argument is that, even if sincere, a dying declarant's identification of his killer is suspect because of "the organic changes attendant to traumatic injuries that can affect the brain and the victim's abilities to accurately perceive, recall, and recount what has occurred." Beauchamp's Brief at 14. Beauchamp supports this statement by citing a law review article. That is inadequate.

At trial, Beauchamp could have impeached Somerville's statements on medical grounds just as he could have impeached them on malice grounds. But, again, he forfeited his opportunity to do so. Beauchamp could have questioned EMT Coleman or the emergency room doctor who examined Somerville about Somerville's mental status and level of awareness at the time he made

the dying declarations to Coleman and Young. He did not. Significantly, Beauchamp has never suggested that Somerville's mental ability to identify his attacker was actually impaired.

Similarly, Beauchamp offered no trial evidence to support his general theory about the perceptive abilities of a person suffering the aftermath of a traumatic injury. He could have called a scientific expert to testify about a gunshot victim's ability to identify his attacker, but he did not. Expert evidence would have been necessary, because Beauchamp's claim is not within the "common knowledge" of the fact-finder. *Cf. State v. Shomberg*, 2006 WI 9, ¶17 nn.7-8, 288 Wis. 2d 1, 709 N.W.2d 370 (where fact-finding judge had reviewed expert's report about the problems of eyewitness testimony, expert testimony was unnecessary). Again, Beauchamp forfeited the opportunity to develop this evidence.

As explained in the religion section, in some cases it may be appropriate to present such evidence on appeal. *See*, *e.g.*, *Dubose*, 285 Wis. 2d 143, ¶¶29-30; *State v. Dubose*, Case No. 2003AP1690-CR, Petitioner's Brief at 18-28. Unlike Dubose, Beauchamp cites no scientific evidence in his appellate brief about the impact of a traumatic injury on a victim's perception of the source of his injury. The court should not credit his unsupported assertion of scientific fact.[8]

d. Conclusion of reliability section.

Beauchamp asks this court to abandon a rule of law recognized by the courts of this nation and State since

[8]Beauchamp cites *Dubose* for the proposition that eyewitness identification is "*hopelessly* unreliable." Beauchamp's Brief at 18. *Dubose* concerned the unreliability of eyewitness identification at police-organized lineups. *Dubose*, 285 Wis. 2d 143. ¶28-30. The *Dubose* insight does not apply where, as here, the declarant identified by name his assailant, whom he knew personally (44:8).

their respective foundings. He seeks a ruling that unconfronted dying-declaration hearsay is inadmissible in a criminal trial because it is based on "antiquated" religious beliefs and is unreliable. The State has shown that Beauchamp has failed to adequately support either his religion argument or his perception argument. It has also shown that Beauchamp could have impeached Somerville's dying declarations at trial with evidence of malice, bias, or lack of mental capacity, but did not. For all these reasons, Beauchamp's reliability argument must be rejected.

3. Beauchamp's Other Arguments.

In a separate subsection, Beauchamp cites *State v. Picotte*, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, and *State v. Hobson*, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), and asks this court to use its inherent authority to abrogate obsolete common law rules and eliminate the dying-declaration exception to the Confrontation Clause. The State has shown that Beauchamp's critique of the exception is premised on factual assumptions supported by no evidence. For that reason, the case is clearly distinguishable from *Picotte* and *Hobson*, in which the grounds for abrogation were clearly supported.

Picotte abrogated the thirteenth-century year-and-a-day rule. The rule's first justification, the difficulty of establishing the cause of a death occurring long after the crime, was antiquated due to medical advances in the ensuing seven hundred years. *Picotte*, 261 Wis. 2d 249, ¶¶31, 34. The second justification, based on the medieval jury's fact-finding function, had been superseded by modern American criminal procedure and evidence law. *Id.* at ¶¶32, 34. The third concern, protection against capital punishment, was legally irrelevant in Wisconsin. *Id.* at ¶¶33-34. Thus, the court abrogated the rule because

its justifications were *undeniably* outdated as a factual matter, and/or irrelevant as a legal matter.

In *Hobson*, the court abrogated the right to forcibly resist an unlawful arrest. The right was historically justified by harms associated with wrongful imprisonment. *Hobson*, 218 Wis. 2d at 373-74. But, by 1998, jails were no longer disease-ridden, bail was available, prompt arraignment and determination of probable cause were mandatory, every accused had the right to counsel, exclusionary rules prohibited the use of tainted evidence, and unlawful police action was subject to discipline and review. *Id.* at 374-76. With the exception of sanitary jail conditions, this catalogue of historical changes was exclusively law-based, and supported by citations to legal authority. *See id.*

As his final point, Beauchamp observes that a single statement can be characterized as either a dying declaration or an excited utterance. He assumes that an unconfronted excited utterance would be constitutionally inadmissible, and argues that it is illogical as a policy matter to admit such a statement as a dying declaration. Beauchamp's Brief at 18. But evidence is often admissible on one ground and not another. *See* Wis. Stat. § 901.06. Indeed, the common law dying-declaration exception was used to admit unconfronted statements that were inadmissible under the so-called Marian statutes. *See*, *e.g.*, *Woodcock*, 168 Eng. Rep. 352.

In sum, Beauchamp's additional arguments do not warrant the abrogation of the dying-declaration exception to the Confrontation Clause.

D. Harmless Error.

Any conceivable error here was harmless. *See State v. Searcy*, 2006 WI App 8, ¶58, 288 Wis. 2d 804, 709 N.W.2d 497. The State called fifteen witnesses to

prove Beauchamp's guilt. William Stone[9] testified that Beauchamp admitted to shooting Somerville (46:59-63); Dominique Brown and Shaniya Brookshire (whose statements will be discussed in detail below), identified Beauchamp as the shooter (46:121-26; 47:68-75); and Jerrod Logan, the water seller who watched the shooting from the Sherman Boulevard median, substantially corroborated Brown and Brookshire's statements (48:25-34). Taken together, this evidence shows beyond a reasonable doubt that a rational jury would have convicted Beauchamp without Somerville's statements.

III. THE STATEMENT TO EMT COLEMAN WAS ADMISSIBLE UNDER *DAVIS V. WASHINGTON* AND *OHIO V. ROBERTS* BECAUSE IT WAS NON-TESTIMONIAL.

Somerville's statement to EMT Coleman is admissible on the alternative ground that it was a non-testimonial excited utterance, which does not violate *Crawford*.[10] Although this argument was not considered by the trial court, this court "may review the record to determine if a statement is admissible under a particular hearsay exception even though the trial court did not admit the statement on that basis." *State v. Kutz*, 2003 WI App, ¶33, 267 Wis. 2d 531,671 N.W.2d 660.

Crawford did not definitively define "testimonial." Instead, it described three "formulations of [the] core class of 'testimonial' statements": (1) "'*ex parte* in-court testimony or its functional equivalent'"; (2) "extrajudicial

[9]Beauchamp's update on Stone's status, *see* Beauchamp's Brief at 6 n.2, is improper and should be ignored. *See Jenkins v. Sabourin,* 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

[10]In the court of appeals, the State assumed, but did not concede, that the statement was testimonial. State's Court of Appeals Brief at 12 n.5.

statements … contained in formalized testimonial materials"; and (3) statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52, *quoted and adopted in Manuel*, 281 Wis. 2d 554, ¶¶37-38. Whether the declarant intended his statement to be testimonial is evaluated objectively. *See State v. Jensen*, 2007 WI 26, ¶25, 299 Wis. 2d 267, 727 N.W.2d 518.

In *Davis v. Washington*, 547 U.S. 813 (2006), the Court held that a victim's statements to a 911 operator were Confrontation Clause. The victim described an assault by her ex-boyfriend either while it was taking place or immediately thereafter. *Id.* at 817-18. The Court concluded: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. The victim "was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial." *Id.* at 828 (citation omitted). "No 'witness' goes into court to proclaim an emergency and seek help." *Id.*

> [T]he nature of what was asked and answered … viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon.

Id. at 827.

Since *Davis*, numerous courts have applied this reasoning to victim statements to first responders. *See*, *e.g.*, *United States v. Clemmons*, 461 F.3d 1057, 1058-61 (8th Cir. 2006); *People v. Osorio*, 81 Cal.Rptr.3d 167, 175-76 (Cal. App. 2008); *Sanford v. State*, 695 S.E.2d 579, 584 (Ga. 2010); *Wright v. State*, 916 N.E.2d 269,

276-77 (Ind. App. 2009): *Head v. State*, 912 A.2d 1, 11-12 (Md. App. 2007); *Harkins*, 143 P.3d at 715; *Clark v. State*, 282 S.W.3d 924, 931-32 (Tex. App. 2009), *writ of habeas corpus granted on other grounds*, 2010 WL 1882003 (May 12, 2010).

These cases hold that the victim's statement, including the identification of the assailant, is non-testimonial when the statement's primary purpose is to obtain assistance to meet an ongoing emergency. *See Clemmons*, 461 F.3d at 1058-61; *Osorio*, 81 Cal.Rptr.3d at 176 (police sergeant "obtained just enough information from [victim] to warn the other officers to be on the lookout for the attacker"); *Sanford* 695 S.E.2d at 582-84; *Wright*, 916 N.E.2d at 277 ("To the extent [officer's] inquiry into the perpetrator's identity is claimed to be investigatory, such inquiries have been deemed necessary to resolve situations … where it is imperative that dispatched officers know they might be encountering a violent felon."); *Head*, 912 A.2d at 11-12; *Harkins*, 143 P.3d at 715 (while "assailant's name was not likely necessary to assist [victim] medically, that information could be used by police to prevent further harm"); *Clark*, 282 S.W.3d at 931-32.

The Michigan Supreme Court reached a different conclusion in *People v. Bryant*, 768 N.W.2d 65 (Mich. 2009), *cert. granted*, 130 S.Ct 1685 (2010). In *Bryant*, the victim told the officers who arrived on the scene that the defendant had shot him. *Id.* at 135-36. The court found that *Davis* was inapposite and that the statement was testimonial. "[U]nlike in *Davis,* this victim was describing past events, rather than describing a criminal episode as it was unfolding, and, unlike in *Davis,* this victim was away from defendant and the crime scene, and was in the protection of five police officers." *Id.* at 75. Furthermore, the police sought—and the victim provided—information about past acts, not present circumstances. *Id.*

The Supreme Court granted Michigan's certiorari petition. Thus, the Court will decide this term whether the Michigan Supreme Court or the non-Michigan courts have correctly interpreted the ongoing emergency doctrine.

Under the non-Michigan cases cited above, Somerville's statement to Coleman when Coleman arrived on the scene was not testimonial under *Davis*. Somerville told Coleman about the circumstances leading up to the shooting, and identified "Big Head Marvin" as the shooter (44:8).

The statement was admissible under the excited utterance exception to the hearsay rule. When speaking to Coleman, Somerville

> was describing a startling event—his encounter with [Beauchamp], during which he claimed that he was [shot]…. [Somerville] spoke with [Coleman] only a few minutes after the event occurred. According to [Coleman], [Somerville] was visibly upset and bleeding. Therefore, it is reasonable to conclude that [Somerville] made the statement while "under the stress of excitement caused by the event…." Wis. Stat. § 908.03(2).

State v. Mayo, 2007 WI 78, ¶54, 301 Wis. 2d 642, 634 N.W.2d 115.

A nontestimonial hearsay statement is subject to the pre-*Crawford* confrontation analysis of *Roberts*. *See Searcy*, 288 Wis. 2d 804, ¶45. Under *Roberts*, an unconfronted statement is admissible at a criminal trial if the declarant is unavailable and "the out-of-court statement bore adequate indicia of reliability." *Id.* at ¶43. A statement that falls within "a firmly rooted hearsay exception" bears adequate indicia of reliability. *Id.* An "excited utterance" falls within "a firmly rooted hearsay exception" and is thus admissible under *Roberts*. *Id.* at ¶56.

If the Supreme Court reverses the Michigan Supreme Court's decision in *Bryant*, Somerville's

unconfronted statement to Coleman is a nontestimonial statement admissible under *Davis* and *Roberts*.

IV. THE STATE'S USE OF PRIOR INCONSISTENT STATEMENTS BY TWO OF ITS WITNESSES DID NOT VIOLATE BEAUCHAMP'S DUE PROCESS RIGHTS.

A. Facts.

Dominique Brown was Beauchamp's girlfriend at the time of Somerville's death (47:12-13). She was at 3939 North Sherman Boulevard on the morning of June 16, 2006, when the shooting took place (2:1; 47:14-17). She gave one or two oral statements to officers on the scene (47:25, 28-29). That afternoon, she was questioned at the Police Administration Building in Milwaukee, and apparently told officers that Beauchamp was not the shooter (41:52-55).

Detective Thomas Fischer interviewed Brown the next morning (2:2). Brown received *Miranda* warnings[11] (41:53). Brown told Fischer that she was at 3939 North Sherman Boulevard on the morning of June 16, and saw Beauchamp and Somerville arguing outside of the house (2:2). She heard Beauchamp say "'you got a problem with her?'", to which Somerville responded "'what nigga? You got a pistol'" (*id.*). At that point, Brown walked around the house to where the men were standing five feet apart. She saw Beauchamp raise his right arm towards Somerville holding what appeared to be a gun (*id.*). Then "[s]he observed the defendant shoot once into the body of Mr. Somerville at which point Mr. Somerville doubled over and grabbed at his stomach area" (*id.*). Brown ran to a neighbor's house; as she ran she heard more gunshots

[11] *Miranda v. Arizona*, 384 U.S. 436 (1966).

(*id.*).[12] Brown told Fischer that she had lied about Beauchamp's involvement the night before because Beauchamp had called her earlier in the day and told her to keep her "'mouth shut'" (47:69-70).

At the preliminary hearing, Brown testified that she didn't see Beauchamp shoot Somerville (41:36). The State showed her a transcribed copy of her June 17 statement to Detective Fischer (41:37). Brown admitted that she initialed each page of the statement, signed it, and signed assurances that it was a "true and correct" statement given "with no threats or no promises" (41:37). Nevertheless, Brown contended that the parts of the statement where she accused Beauchamp were not true (41:49-50). She denied hearing Beauchamp talk to Somerville, seeing Somerville double over and grab his stomach, or telling Shaniya Brookshire that she saw Beauchamp shoot Somerville (41:54-55). Brown said she fingered Beauchamp only "after they told me if I didn't tell them what they wanted to hear that he wouldn't let me go, I would be charged with murder because I was there" (41:38). Alternatively, Brown said that she lied because the police threatened to charge her with obstruction (41:44).

Brown testified at trial (47:11-66). Again, she claimed the assertions in her June 17 statement inculpating Beauchamp were false and the result of police intimidation (47:24-38). With respect to many of the assertions, she claimed either that she did not remember making the statements to Fischer or did not remember whether the statements were factually accurate (*id.*).

Without objection, Brown's transcribed June 17 statement was read into evidence (47:68-75).

Shaniya Brookshire lived at 3939 North Sherman Boulevard, and was present when Somerville was shot

[12]This summary of Brown's statement to Fischer is taken from the criminal complaint (2:2). It is consistent with the statement she gave to Fischer as read into the record at trial (47:69-75).

(2:2). Somerville was dating Brookshire's sister Dalynn at the time of the shooting (*id.*).

On June 16, 2006, Detective Mark Walton interviewed Brookshire for the first time; she did not implicate Beauchamp in Somerville's murder then (46:97, 99; 47:6). Brookshire gave Walton a second statement later that day (46:99-100).

Walton and Detective Kent Corbett interviewed Brookshire a third time on June 17 (46:99). At the third interview, Brookshire told the officers that on the morning of June 16, Somerville came to Brookshire's house looking for Dalynn (2:2). Outside of the house, Brookshire met Brown who told her that Beauchamp was "'hiding in the bushes on the side of the house and he has a gun'" (2:2). Brookshire saw Beauchamp walk around the house towards Somerville. She heard Beauchamp say, "'what's up b? You got a problem with her?'", to which Somerville responded, "'nah, the bitch got a problem with me. Oh, you got a gun. Oh, you're going to shoot me. Shoot me then'" (*id.*). Brookshire immediately heard four or five gunshots, and, with Brown, ran to the back of the house (*id.*). Brown told Brookshire that Marvin had shot Byron, that she had seen blood, and that Brookshire should not tell the police that Marvin did it (2:2-3). Brookshire knew that Brown wanted her silence because "'she loves [Beauchamp] and did not want him to get into trouble'" (2:3).[13]

Like Brown, Brookshire changed her story at the preliminary hearing. At first, she claimed that she did not lie to the police when she spoke to them (41:10). She recalled telling the police that she saw Beauchamp walking around the house towards Somerville, but denied that she ever saw him (41:11). She said that she never saw Beauchamp near the house until after the shooting and did not know that he was in the area before the

[13]This summary of Brookshire's June 17 statement is taken from the criminal complaint (2:2-3). It is consistent with Detective Walton's summary of that statement at trial (46:121-26).

shooting (41:8-9). She admitted telling the police that she saw Beauchamp going towards Somerville with his arm down at his side and behind his leg as if he were concealing a gun, but now said that was a lie (41:11-12).

> I told the detectives that because they asked me a whole bunch of questions, and they really didn't believe what I was saying. They told me that my cousin said some things to them, and I was just trying to get out of there because I was very afraid and very, very nervous.

(41:12). Next, she admitted that Brown told her that Beauchamp was on the side of the house with a gun, but insisted that she did not see him with a gun herself (41:12-14).

Brookshire maintained that she heard Somerville say to someone "you got a gun, you going to shoot me, shoot me then," but denied hearing Beauchamp say anything to Somerville (41:13-14). She denied that she had ever told the police that she heard Beauchamp—or anyone else—speak to Somerville (41:14). The State showed her the transcribed copy of the statement she made to the detectives, which she acknowledged she had signed and initialed (41:14-16). The State again asked her if she had heard Beauchamp speak to Somerville (41:17). She insisted that she never heard Beauchamp say anything.

> The detectives, before I even went downtown, told me he said that. They asked me if he said any of those things and I said no … no. Before I went downtown I'm saying. When I got downtown, this was on the 17th, then they told me some things that Nikki [Brown] had said, and they told me if I didn't tell them—basically if I didn't tell them that I saw the shooter, then I would be in trouble. But I didn't see him until afterward.

(41:18-19).

Brookshire said that everything she said in her June 17 statement to the police was accurate *except* the parts

that implicated Beauchamp (41:22). However, she did agree that Brown had told her that Beauchamp had shot Somerville and that Brown didn't want Brookshire to tell that to the police (41:25-26).

Brookshire testified at trial. Again, she denied that she heard Beauchamp or anyone else speak to Somerville before Somerville was shot (46:82-83). She admitted that she saw a man she thought was Beauchamp run through a nearby alley after the shooting (46:85). She admitted telling the police that Brown told her that Beauchamp was hiding in the bushes with a gun, but denied that Brown actually said that (46:87-88). She testified that she did not recall telling the detectives that Brown told her that Beauchamp shot Somerville (46:89). She also failed to recall telling the detectives that Brown told her not to tell the police that Beauchamp shot Somerville (46:114). However, she testified that Brown told her that she saw blood and didn't want Beauchamp to get into trouble (46:115-16). Brookshire did not recall telling the detectives in her second statement that she had lied in her first statement about who shot Somerville because she was covering up for Beauchamp and trying to keep Brown out of trouble (46:97).

Without objection, Detective Walton testified about Brookshire's June 17 statement in which she inculpated Beauchamp (46:121-26).

B. Legal Principles.

A prior inconsistent statement is not hearsay, and is admissible as substantive evidence provided the declarant testifies at trial and the statement is inconsistent with the declarant's testimony. Wis. Stat. § 908.01(4)(a). Generally, a prior inconsistent oral statement made by a witness to a police officer is subject to *Crawford. State v. Nelis*, 2007 WI 58, ¶¶42-43, 300 Wis. 2d 415, 733 N.W.2d 619. *Crawford* is satisfied where the declarant

testifies at trial and the defendant has the opportunity to cross-examine her about her statements to the police. *See id.* at ¶46; *see also State v. Rockette*, 2006 WI App 103, ¶26, 294 Wis. 2d 611, 718 N.W.2d 269.

This court has explained "that the due process elements of confrontation are satisfied when the declarant is present and subject to cross-examination." *Robinson v. State*, 102 Wis. 2d 343, 349, 306 N.W.2d 668 (1981); *accord Vogel v. State*, 96 Wis. 2d 372, 387, 291 N.W.2d 838 (1980) ("we perceive both of these arguments as simply slight variations of the same central theme"); *Lenarchick*, 74 Wis. 2d at 438-41 ("no due-process problem" where all witnesses "produced in court" and no attempt "made to introduce testimony, the declarant of which was unavailable") .

In *Vogel v. Percy*, 691 F.2d 843, 846-47 (7th Cir. 1982) (hereinafter, "*Percy*"), the Seventh Circuit adopted a five-factor test from *United States v. Leslie*, 542 F.2d 285, 290-91 (5th Cir. 1976), to determine whether the admission of a prior inconsistent statement violates a defendant's due process rights. In *Ticey v. Peters*, 8 F.3d 498 (7th Cir. 1993), the court explained that *Percy* provided "guidelines" and "a framework by which reliability of out-of-court statements is assessed," not "a litmus test for the admissibility (and reliability) of a prior unsworn inconsistent statement." *Id.* at 501-02. After nearly thirty years, *Percy* has never been accepted in a published Wisconsin appellate decision. Thus, the courts below are not bound by *Percy*. *See State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993) (collecting cases).

A claim of error, even on constitutional grounds, "will be deemed waived unless timely raised in the trial court." *State v. Gove*, 148 Wis. 2d 936, 941, 437 N.W.2d 218 (1989). Forfeited errors may be reviewed on appeal under the "plain error" or "ineffective assistance of counsel" doctrines.

The "plain error" doctrine permits appellate consideration of unobjected-to errors that affected the defendant's substantial rights. *Virgil*, 84 Wis. 2d at 189. Such error must be "fundamental, obvious, and substantial." *State v. Jorgensen*, 2008 WI 60, ¶20, 310 Wis. 2d 138, 754 N.W.2d 77. The defendant bears the burden of showing that the error is "fundamental, obvious, and substantial." *Id.* at ¶23. If the defendant makes this showing, the burden then shifts to the State to prove that the error was harmless beyond a reasonable doubt. *Id.*

A defendant claiming ineffective assistance of trial counsel must show *both* that counsel's performance was deficient *and* that this deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668 (1984). The court need not address both prongs of *Strickland* if there is an insufficient showing on either one. *Manuel*, 281 Wis. 2d 554, ¶72. Relief "should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). A postconviction "*Machner* hearing" is a prerequisite to appellate review; an appellate court may not conclude that counsel was ineffective without a *Machner* hearing. *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (explaining *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)). Appellate review is mixed. The circuit court's findings of fact will be upheld unless clearly erroneous; deficiency and prejudice are questions of law reviewed de novo. *Mayo*, 301 Wis. 2d 642, ¶32.

C. Analysis.

Relying exclusively on the Seventh Circuit's *Percy* opinion, Beauchamp argues that the admission of Brown's and Brookshire's prior inconsistent statements as substantive evidence violated his due process rights. *Percy* is not the law in Wisconsin. *See Mechtel*, 176 Wis.

2d at 94. Instead, this court recognizes that "due process elements of confrontation are satisfied when the declarant is present and subject to cross-examination." *See*, *e.g.*, *Robinson*, 102 Wis. 2d at 349. The use of a prior inconsistent statement of a witness who is available for cross-examination at trial does not violate a criminal defendant's confrontation rights under *Crawford*. *See Nelis*, 300 Wis. 2d 415, ¶26. Thus, the Brown and Brookshire statements are admissible under both the Confrontation Clause and the Due Process Clause. *See id.*; *Robinson*, 102 Wis. 2d at 349.

Brown and Brookshire gave statements to the police on the day after Somerville's death (2:2-3). The State learned at the preliminary hearing that they were recanting the portions of those statements implicating Beauchamp (41:10-22, 36-55). They reiterated their preliminary hearing testimony at trial (46:82-89, 115-16; 47:24-38). Thus, their trial testimony was inconsistent with their prior statements. Accordingly, their prior inconsistent statements were admissible as substantive evidence under Wis. Stat. § 908.01(4)(a). Because both women were available for cross-examination—and were cross-examined—*Nelis, Crawford*, and *Robinson* were also satisfied.

Moreover, the admission of Brown's and Brookshire's statements satisfied the *Percy* test. The *Percy* guidelines permit the use of prior inconsistent statements as substantive evidence if:

> (1) the declarant was available for cross-examination; (2) the statement was made shortly after the events related and was transcribed promptly; (3) the declarant knowingly and voluntarily waived the right to remain silent; (4) the declarant admitted making the statement; and (5) there was some corroboration of the statement's reliability.

Percy, 691 F.2d at 846-47.

Beauchamp concedes that the first and fourth factors are satisfied. Beauchamp's Brief at 23. Notably, with respect to the fourth guideline, Brown and Brookshire admitted making the inculpatory statements *and* admitted that the statements were true except where they accused Beauchamp (41:22, 49-50).

The second guideline is satisfied because the statements were made and transcribed one day after the homicide. *See Johnson v. Washington*, 119 F.3d 513, 519 (7th Cir. 1997) (statement made three weeks after event satisfies *Percy*); *Percy*, 691 F.2d at 847 (statement made and transcribed one day after event satisfies test). The purpose of the promptness test is to reduce "[t]he opportunity for fabrication and concomitant problems of reliability." *Id.* The fact that Brown was in a jail cell the night before her third statement (41:52-53), while Brookshire was at home (46:100), makes a joint fabrication of their inculpatory statements unlikely. Thus, the timing of the inculpatory statements satisfies both the letter and the spirit of *Percy*.

Beauchamp resists this simple conclusion by observing that the women had each made two other statements before they made the inculpatory statements. Beauchamp's Brief at 21. Beauchamp implies that the earlier statements were more reliable and perhaps consistent with the women's trial testimony, and that the third statements were "influence[d]." *Id.* At trial, Beauchamp could have questioned the women more clearly about their initial, purportedly exculpatory, statements, and developed his coercion theory more fully. Thus, the earlier statements notwithstanding, the second prong of *Percy* is satisfied.

The third guideline requires a valid *Miranda* waiver by the witness before she makes the statement. Brown did waive her rights after receiving *Miranda* warnings (47:68). Brookshire was never in custody, so the *Miranda* requirement is simply inapplicable to her statement.

Beauchamp seems to argue that the *Miranda* factor weighs against the State both because Brookshire never had *Miranda* warnings to waive, and because Brown made two non-custodial statements before receiving *Miranda* warnings (47:25, 28-29). Beauchamp's Brief at 22. But the existence of these non-custodial statements does not weigh against the State. The core concern of the third factor is custodial statements made by a declarant who is also a suspect, typically an accomplice. *See Johnson*, 119 F.3d 513; *Percy*, 691 F.2d 843; *Leslie*, 542 F.2d at 290-91; 7 Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 801.401 at 675-76 n.2. The third factor is inapplicable when the declarant was the victim of the crime. *See Ticey*, 8 F.3d at 503. It should likewise be inapplicable where, as here, the declarant is being interviewed as a witness to the crime.

The final *Percy* guideline asks whether other evidence provides "some corroboration of the statement's reliability." *Percy*, 691 F.2d at 847. It does not, as Beauchamp implies, demand full corroboration of the statement in all its particulars. Here, evidence corroborating the statements was supplied by William Stone, who testified that Beauchamp admitted the shooting (46:59-63); Somerville's dying declarations (48:47, 75-76); Brookshire's probable sighting of Beauchamp running through a nearby alley immediately after the shooting (46:84-85); and the testimony of the water boy, Jerrod Logan. Logan confirmed many of the details in the women's June 17 statements describing their own movements around the 3939 North Sherman property at the time of the shooting as well as the behavior of Beauchamp and Somerville (48:25-41). "In addition, the fact that [both] statements are quite similar is some evidence of reliability, at least where the statements are made very soon after arrest and before the declarants are able to agree on one version." *Leslie*, 542 F.2d at 290-91.

Further corroboration was provided by the sheer implausibility of each witness's attempt to distance herself from her inculpatory statement.

When she first spoke to the police, Brown did not identify Beauchamp as the shooter. She testified that she changed her story on June 17 because of police coercion—they wanted her to say that Beauchamp shot Somerville (41:40). With this explanation in mind, the prosecutor questioned Brown about the allegation in her June 17 statement that she had originally lied to the detectives because after the shooting, "Marvin called her aunt's home and told her, quote, keep your mouth shut" (41:43-44). The prosecutor asked Brown if that explanation was a lie and if she included it in her June 17 statement because that's what the police told her to say. Brown said she lied when she said Beauchamp threatened her, but gave no reason for that lie (41:44, 46). Brown further claimed that she lied when she told the police she was scared of Beauchamp because of the threat (41:47). She explained that she fingered Beauchamp because she was worried about being charged in the case herself. The prosecutor asked: "And you said, the best way to get out of jail was to lie to the police and stick this murder on my boyfriend?" (41:48). Brown answered: "Yes" (*id.*).

For her part, Brookshire implausibly maintained that she could clearly hear Somerville's final words to the man who shot him, but did not see the shooter or hear what he said to Somerville (46:82-83). At trial, she claimed that she changed her statement from one that was silent about Beauchamp to one that inculpated him in order to tell the police what they wanted to hear. Brookshire said the police told her that Brown had made a statement, and she tried to match that statement (46:111). With that in mind, the prosecutor asked Brookshire about the allegation in her June 17 statement that Brown told her that Beauchamp was hiding in the bushes with a gun. Brookshire admitted that she told the police that story, but claimed that it was false (46:87-88). Recalling Brookshire's claim that she was just trying to match Brown's statement, the prosecutor asked her if she told the police the gun-in-the-bushes story because it was in Brown's statement (46:112-13). Brookshire could not recall (46:113). In fact, there was no such allegation in

Brown's statement (47:68-74). As a further twist, Brookshire testified at the preliminary hearing that Brown *had* told her that Beauchamp was in the bushes with a gun (41:12-14).

Beauchamp forfeited the *Percy* issue. Therefore, as the court of appeals found, the alleged error must be reviewed either for "plain error" or ineffective assistance of counsel.

The Brown and Brookshire statements were admissible under *Nelis*, *Crawford*, and *Robinson*. Therefore, there was no error here, plain or otherwise. Beauchamp premises error on the circuit court's failure to exclude evidence on the basis of a non-binding Seventh Circuit opinion. The State knows of no case where plain error has been found on the ground that the circuit court failed, sua sponte, to apply non-binding precedent. Such an "error" cannot be "fundamental, obvious, and substantial." *Jorgensen* 310 Wis. 2d 138, ¶23.

For the same reason, Beauchamp has failed to show that he received ineffective assistance of counsel. Since the statements were admissible under *Nelis*, *Crawford*, *Robinson*, and, indeed, the non-binding *Percy*, trial counsel did not perform deficiently and did not provide ineffective assistance by failing to make a *Percy* objection. Furthermore, trial counsel could not have performed deficiently for failing to interpose a *Percy* objection. Since *Percy* is not controlling law in Wisconsin, she had no clear duty to raise it. *See McMahon*, 186 Wis. 2d at 85.

In sum, the admission of the statements of Brown and Brookshire did not violate Beauchamp's due process rights. There was no error. The circuit court's order denying Beauchamp's postconviction motion should be affirmed.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the court of appeals decision affirming the circuit court's judgment and order.

Dated this 7th day of December, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,944 words.

_____
Maura FJ Whelan
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of December, 2010.

_____
Maura FJ Whelan
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP806-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN BEAUCHAMP,

Defendant-Appellant-Petitioner.

ON A PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND SENTENCE AND AN ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Maura FJ Whelan
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 7th day of December, 2010.

Maura FJ Whelan
Assistant Attorney General

whether, under these circumstances, the said Isaac Cockwaine be guilty of felony the Jurors pray the direction of the Court. And if, &c."

This was at first intended as a special verdict, but was afterwards drawn up as a special case, and referred to the Twelve Judges; and it came more than once under their consideration; but no opinion was ever given.

[500] The prisoner remained in Newgate in February Session 1790, after which he received a pardon, and before the April Session following he was discharged.

1789.

CASE CCXXXI.

THE KING v. WILLIAM WOODCOCK.

(In murder, the declarations of the deceased after the mortal wound is given, may be received in evidence, though the party did not express any apprehension of approaching dissolution: but the examination of such a person taken by a magistrate extrajudicially cannot be received.)

[S. C. 1 East, P. C. 354, 356. Followed, *R.* v. *Dingler*, 1791, *post*, p. 561; *R.* v. *Quigley*, 1868, 18 L. T. 211. Approved, *R.* v. *Perry*, [1909] 2 K. B. 697. Referred to, *R.* v. *Dalmas*, 1844, 9 J. P. 120; *R.* v. *Howell*, 1845, 1 Cox C. C. 151; *R.* v. *Colclough*, 1882, 15 Cox C. C. 92; *R.* v. *Gloster*, 1888, 16 Cox C. C. 471.]

At the Old Bailey January Session 1789, William Woodcock was tried before Lord Chief Baron Eyre, present Mr. Justice Ashhurst, and Mr. Serjeant Adair, Recorder, for the wilful murder of Silvia Woodcock, his wife.

It appeared in evidence, that she was found lying in a ditch, in a narrow lane, called Robinson's Lane, in the vicinity of Chelsea, in the county of Middlesex. She had received eight wounds about the head, face, and neck, which seemed to have been inflicted with the end of a blunt instrument; and was so exhausted by the loss of blood as to be apparently dead. The body was taken to Chelsea Poorhouse, put into a warm bed, and by medical assistance restored to life. In the course of eight hours, she recovered her senses to such a degree, as to be enabled to give a rational account of the circumstances by which this catastrophe was accompanied. The overseers of the parish, therefore, thought it expedient to desire the attendance of a magistrate, for the purpose of taking her information in legal form. Mr. Read, a Justice of the Peace for the county, attended at the Poor-house accordingly. He found the informant, who was a baptized mulatto, and native of the East Indies, in a state of perfect recollection. He told her that he was a magistrate come to take her examination, and admonished her to speak the truth; and as she appeared sensible of the impiety and dangers of falsehood, he administered an oath to her, and received her information, which he reduced, in her own words, into writing. He afterwards read it over to her with great deliberation, and gave it to her to sign, and she made her mark on the paper in approbation of its contents. The magistrate then signed it himself; and being proved on the [501] trial, it was read in evidence. It also appeared, from the evidence of the surgeons, that she died in about eight-and-forty hours after the examination had been taken, and that it was impossible from the first moment that she could live long; but that although she retained her senses to the last moment, and repeated the circumstances of the ill usage she had received, she never expressed any apprehension, or seemed sensible of her approaching dissolution. The evidence, independent of the information or declarations of the deceased, was of a very pressing and urgent nature against the prisoner.

Under these circumstances a question arose with the Court, Whether the evidence which had been obtained from the deceased could legally be left with the Jury? The learned Judge therefore stated the case to them, independent of that evidence; and then stated his opinion of the admissibility of the examination to the following effect:

Eyre, Chief Baron.—If I were satisfied that the case was quite full without the circumstances which the deceased has disclosed, I should willingly omit to state them as evidence against the prisoner, because there is some difficulty as to the legality of their admission. Great as a crime of this nature must always appear to be, yet the inquiry into it must proceed upon the rules of evidence. The most common and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two other species which

are admitted by law: The one is the dying declaration of a person who has received a fatal blow (*a*)[1]; the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of a particular Act of Parliament, which authorizes Magis-[502]-trates to take such examinations, and directs that they shall be returned to the Court of Gaol Delivery. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact (2 Strange, 925). In the present case a doubt has arisen with the Court, to which doubt I entirely subscribe, Whether the examination of the deceased, taken in writing at the poor-house by Mr. Read, the Magistrate, is an examination of the nature I have last described? It was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of contradicting the facts it contains. It was not in the discharge of that part of Mr. Read's duty by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a voluntary and extrajudicial act, performed at the request of the Overseer; and although it was a very proper and prudent act, yet being voluntary, and under circumstances where the Justice was not authorized to administer an oath, it cannot be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken.(*a*)[2] But although we must strip this examination of the sanction to which it would have been entitled, if it had been taken pursuant to the directions of the Legislature, yet still it is the declaration of the deceased, signed by herself, and it may be classed with all those other confirmatory declarations which she made after she had received the mortal wounds, and before she died. Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.(*b*). But a difficulty also arises [503] with respect to these declarations; for it has not appeared, and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state (*a*)[3] of mortality as would inevitably oblige her soon to answer before

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(*a*)[1] *Rex* v. *Ely*, at Old Bailey, 1720, before L. C. J. King, 12 Viner's Abr. 118; 1 Hale, 585.

(*a*)[2] See the case of *Rex* v. *Reason and Tranter* for the murder of Mr. Lutterell, 1 Strange, 499; 6 State Trials, 195, 202; and *Bambridge's* case, 9 vol. of Harg. State Trials, 161.

(*b*) See Johnson's Shakspeare, King John, Act the 5th, Scene the 6th, line 27, and Loffit's Edition of Gilb. Evidence, 1 vol. p. 280.

(*a*)[3] In the case of *Henry Welbourn*, who was indicted at Lincoln Summer Assize 1792, for poisoning Elizabeth Page, his fellow-servant, she declared that she was with child by him, and by his persuasion and procurement had been taking bitter apple, and a white powder, which was found to be arsenic, for the purpose of producing abortion. She had recently been in great pain, and was extremely ill, apparently dying, and seemed to be sensible of her situation and danger, though she did not say so, but at the time she made the declaration she was free from pain, a mortification, in the opinion of the apothecary, having taken place, and from being so free from pain he believed that she thought she was getting well. She died, however, in an hour afterwards. The declaration was received, and the prisoner was found guilty; but the case was referred to the Judges on the question, whether although in the first part of the apothecary's evidence he swore that he made the deceased sensible of her danger before she made the declaration, yet as he afterwards said, that at the time she made the declaration she believed that she was getting better from the pain ceasing, the evidence ought not to have been rejected: and a majority of the Judges were of opinion that it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration; on the contrary, she had reason to think that if she told what was the matter with her she might have relief and recover. 1 East, C. L. 359, 360.

her Maker for the truth or falsehood of her assertions. The several witnesses could give no satisfactory information as to the sentiments of her mind upon this subject. The surgeon said, that she did not seem to be at all sensible of the danger of her situation, dreadful as it appeared to all around her; but lay, submitting quietly to her fate, without explaining whether she thought herself likely to live or die. Upon the whole of this difficulty, however, my judgment is, that inasmuch as she was mortally wounded, and was in a condition which rendered almost immediate death inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; her declarations, made under these circumstances, ought to be considered by **[504]** a Jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman. She continued to repeat, rationally and uniformly, the facts which she had disclosed from the moment her senses returned, until her tongue was no longer capable of performing its office. Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury, under all the circumstances of the case. His Lordship then left it with the Jury to consider, whether the deceased was not in fact under the apprehension of death, though she did not seem to expect immediate dissolution; and said, that if they were of opinion that she was, then the declarations were admissible; but that if they were of a contrary opinion, they were not admissible.(*a*)

The prisoner was convicted, and executed on Monday, 19th January 1789.

1788.

[505] CASE CCXXXII.

THE KING *v.* YOUNG AND OTHERS.

(To constitute an offence within the 30 Geo. II. c. 24, money or goods must be obtained by a false pretence, with an intention to defraud; but the pretence may relate to a future transaction; and if made by one, in the presence of and in concert with others, they may be all included jointly in the same indictment.)

[S. C. 3 Term Rep. 98; S. C. 2 East, P. C. 828, 833. Referred to, *R.* v. *Darley*, 1803, 4 East, 174; *R.* v. *Parker*, 1837, 7 C. & P. 825; *O'Connell* v. *R.*, 1844, 11 Cl. & Fin. 155; *R.* v. *Downing*, 1845, 1 Cox C. C. 156; *Hamilton* v. *R.*, 1846, 9 Q. B. 271; *Campbell & Haynes* v. *R.*, 1846, 1 Cox C. C. 269; *R.* v. *Mitchel*, 1848, 3 Cox C. C. 1; *Latham* v. *R.*, 1864, 5 B. & S. 635; *R.* v. *Heywood*, 1864, 9 Cox C. C. 419; *Castro*

(*a*) The same point occurred in *Dingler's* case at Old Bailey September Session, 1791; and by Mr. Justice Gould was decided accordingly upon the authority of this case. See *post.* In the case of *Thomas Johns*, who was tried at the Carmarthen Spring Session 1790, for the murder of Rachael his wife, the declarations of the wife, made between the time of the mortal blow and the death, were received in evidence although it did not appear that she had expressed any apprehension of danger. It was objected that these declarations were not admissible, as it was not proved that she considered herself at the time as a dying person; the evidence not being express on that head: but that if the evidence were admissible, it ought to have been left to the Jury to consider whether she was at the time conscious of approaching death. But the Court was of opinion that the evidence of the state of her health at the time the declaration was made was sufficient to shew that she was actually dying, and that it was to be inferred from it that she was conscious of her situation; and gave no particular direction on the subject to the Jury, who found the prisoner guilty. But the case was saved, and in Easter Term, 1790, all the Judges agreed that it ought not to be left to the Jury to say whether the deceased thought she was dying or not; for that must be decided by the Judge before he receives the evidence; and if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence. 1 East's Crown Law, 357, 358. And the same point was again decided in the case of *Henry Welbourn*, Lincoln Summer Assizes 1792, before Mr. Justice Ashhurst, on a case saved for the opinion of the Judges. 1 East's C. L. 360.

once been rendered liable, and enable him thereby to prejudice the interests of third persons, by giving evidence against them.

On the part of the Crown it was contended, that the King's pardon not only remits the punishment, but restores the convict to his *plenam et liberam legem* (4 Hawk. ch. 33, s. 132).(*b*)

[456] The Court were clearly of opinion, That in cases of felony a pardon from the Crown restores the competency of the convict; and that the verdict against Macdaniel was to be considered as a conviction of a felony committed through the medium of perjury, and not as a conviction of perjury itself. The testimony of Macdaniel was accordingly received in evidence, and the Jury acquitted Abraham Davis, and found Thomas Reilly guilty of the offence with which he stood charged in the indictment. But the judgment was respited, and the case submitted to the consideration of the Twelve Judges.

Mr. Justice Wilson in June Session 1788, after stating the particulars of the case as above recited, delivered the opinion of the Judges to the following effect.—The learned Judge who tried this indictment entertained some doubt respecting the competency of Macdaniel's testimony. The case was accordingly reserved for the consideration of the Judges; and they are of opinion, That if Macdaniel had not received his Majesty's pardon, some doubt might have been entertained; but as he was pardoned, and that pardon regularly allowed, they are clear that it not only respites the convict from punishment, but entirely absolves him from the crime, and restores him completely to his former competency and credit. The case of *Cuddington* v. *Wilkins*, in Ld. Ch. Justice Hobart's Reports (Hob. 67, 82; Raym. 369; 5 Co. 110; 5 Mod. 15; 3 Lev. 426; Salk. 689), is precisely in point, and decisive of the question; for it is there expressly determined, that the King's pardon doth not only clear the offence itself, but all the dependencies, penalties, and disabilities incident to it. The Judges therefore are of opinion, That the testimony of Macdaniel was properly admitted in evidence; and that Thomas Reilly, the prisoner at the bar, has been legally convicted on this indictment.

The prisoner received sentence of death.

[457] CASE CCXII.

THE KING v. HENRIETTA RADBOURNE.

(A person indicted of petty treason and murder, combined in one count, may be found guilty of the murder, and acquitted of the treason. S. C. 1 East, P. C. 339, 356; 1 Hale, 184, 292; Foster, C. L. 104. An information before a Justice, made by the deceased on oath, in the presence of the prisoner, may be given in evidence on the trial, though the informant was not apprehensive of death, and though the information be signed by one magistrate only. S. C. 1 East, 356.)

At the Old Bailey in July Session 1787, Henrietta Radbourne was tried before Mr. Justice Wilson, present James Adair, Esq. Recorder, on an indictment consisting of one count only; which charged, that "Henrietta Radbourne, late of the parish of St. Mary-le-bone, in the county of Middlesex, widow, late servant of Hannah Morgan, widow, her mistress, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, contriving and intending her the said Hannah Morgan, her mistress, to deprive of her life, and feloniously and traitorously to kill and murder on the 31st May, in the 27th year, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Hannah, the mistress of the said Henrietta, feloniously, traitorously, wilfully, and of her malice aforethought, did make an assault; and that the said Henrietta, with a certain stick having a bayonet fixed at the end thereof, of the value of two shillings, which stick she, the said Henrietta, in both her hands then and there had and held, in and upon the top of the head of her the said Hannah, did then and there feloniously, traitorously, wilfully, and of her malice

(*b*) It is said by Lord Hale that if the King pardon these offenders they are thereby rendered competent witnesses, though their credit is to be still left with the Jury, for the King's pardon takes away *pœnam et culpam in foro humano*; but yet it makes not the man always an honest man, and therefore he shall not be a Juryman, and cites the case of *Cuddington* v. *Wilkins*, in Hob. 67, 81.

aforethought, her the said Hannah Morgan strike, cut, stab, and penetrate, giving to the said Hannah, by such striking, cutting, stabbing, and penetrating of the said Hannah, with the bayonet so fixed at the end of the stick aforesaid, in and upon the top of the head of her the said Hannah, one mortal wound, of the length of one inch and of the depth of half an inch, of which mortal wound the said Hannah, from the said 31st May in the year aforesaid, until the 11th day of July in the year aforesaid, in and at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 11th day of July in the year aforesaid, at the parish aforesaid, in the county aforesaid, of the mortal wound aforesaid, she the said Hannah Morgan died: And so the Jurors aforesaid, upon their oath aforesaid, do [458] say, that the said Henrietta Radbourne, otherwise Henrietta Gibbons, her the said Hannah Morgan, her said mistress, in manner and by the means aforesaid, feloniously, traitorously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our said Lord the King, his crown and dignity."

The Coroner's Inquisition was for murder generally.

Mrs. Morgan, the unfortunate victim of the prisoner's avarice and rapacity, was an elderly lady who lived in George-street near Manchester-square, and who was supposed to be possessed of a large sum of money and other valuable property. Being in want of a servant, she applied in the month of May 1787 to an office for hiring servants, and soon afterwards, the prisoner was sent to her with a written character so highly in her favour, that Mrs. Morgan was induced to admit her immediately into her service, but her conduct was so different from the character she was described to possess, and indeed it had been written by her father in the character of her master, that her mistress was soon obliged to give her warning, and to seek out for another servant to supply her place. On the evening of the 31st May, between the hours of twelve and one, Mrs. Morgan desired the prisoner to go to bed, but instead of obeying her commands, she loitered about the house; and about half past one, while her mistress was undressing, went into the bed-room, and during some desultory conversation asked her if she had said her prayers, but Mrs. Morgan conceiving it to be only matter of impertinence, although it was the first time she had ever made such an enquiry, desired her to mind and say her own prayers and go to bed. She accordingly retired; and her mistress having, as she supposed, fastened the night-bolt of her bed-room door, which appeared to her to go very hard into the socket, and which had been prevented by some person from receiving the bolt, retired to rest without the least suspicion of there being any design in the mind of the prisoner to destroy her life. Scarcely, however, had she been in bed one hour, before she was awakened from her sleep by repeated blows and stabs about her head and neck; and jumping up she ran, with vio-[459]-lent outcries of fire and murder, into a back-room on the same floor. Her continued cries alarmed the watch and neighbourhood, and on entering the house she was found, amidst a profusion of blood, to have received five large wounds on her head, two on the top, one on the left side, and two on the right side, in three of which the skull was laid quite bare; a large wound on the back part of her right hand; and several very bad bruises on her elbows and her left hip. On the right hand side of the fire-place in the bed-room was found a long stick with an iron head, that had a tuck coming out of the stick, with a bayonet at the other end, upon the point of which there were several grey hairs, resembling those on Mrs. Morgan's head; but there was no other person found in the house except Mrs. Morgan and her maid, nor were there any means discovered by which another person (had any been there) could have escaped, excepting through the front parlour window, the sash of which was up about eight inches, and through which a neighbour got, for the purpose of opening the door for the watchmen, when the alarm was given. About three o'clock in the morning of the 31st May, the wounds and bruises were examined by Mr. John Heaviside, a surgeon of great skill and eminence in his profession; and, though on removing the scalp and the covering of the skull there was no appearance of fracture, he declared that from the wounds and bruises her life was in great, though not immediate danger. While she languished in this state, she was visited by James Crofts, Esq. and Sir Robert Taylor, two magistrates for the county of Middlesex, and on the 9th June 1787, she was carried to the Public Office, where Mr. Crofts, in the presence of the prisoner, took down her deposition and the depositions of Henry Holmes and Rebecca Holmes, in writing, stating in substance the circumstances above described. The whole of this examination, Mr. Crofts declared on his

oath, was heard by the prisoner; that the depositions were distinctly read over to her in the presence of Mrs. Morgan; that they were signed by Mrs. Morgan and the other deponents in his presence; that they contained correct accounts of what each deponent had said; and that he signed them, as having been taken before him as a magistrate for the county. The situa-[460]-tion of Mrs. Morgan continued nearly the same for about three weeks after these depositions were made, when symptoms appeared of matter being formed in her brain, and upon trepanning that part of the skull which the wounds had left bare, great quantities of matter were found immediately under the wounds; and after languishing for two days, during which she became paralytic, she died on Wednesday morning the 11th July. On opening the head it was discovered that the brain was putrefied, and there was no doubt, but that the wounds and bruises she received had brought the brain into this diseased state, and occasioned her death. The two deponents, Henry Holmes, who was a chairman in Duke-street, near Manchester-square, and Rebecca his wife, were acquaintances of the prisoner both before and after she went to live as a servant with Mrs. Morgan; and on the morning of the trial, Mr. Heaviside, the surgeon, visited the prisoner in Newgate, with a view of learning from her whether any other person had been concerned in this horrid transaction, when she told him, that she had let Holmes and his wife into the house through the window of the front parlour, and that it was they who had given her mistress the mortal wounds, and immediately escaped; but it appeared, that there had been a violent quarrel between the Holmes and the prisoner, on account of their having refused to carry messages for her to the man whose name she had assumed, and with whom she had been connected, but who had abandoned her on account of her bad character, and disposition to tell lies: and, indeed, both Holmes and his wife, who were examined as witnesses on the trial, not only denied the fact, but appeared free from all imputation.

Garrow, for the Crown, in opening this case to the Jury, contended that Mrs. Morgan's deposition was admissible in evidence upon the one of two grounds; First, as the declaration of a person who had received a mortal wound from the hand of a murderer, and who was, at the time the declaration was made, lingering under a well-founded apprehension that her life was in imminent danger; for that a declaration made under such circumstances, by a person who was sensible she was about soon to give an account at the high tribunal of the Almighty, of the truth or falsehood with which it was [461] made, was considered by the law to be made under a sanction more awful and impressive than that of an oath itself. Secondly, that if the circumstances of her health at the time were such as would not render the deposition admissible on this ground, it was admissible as an information taken by a regular magistrate, under the statutes of Philip & Mary; for it had been given in the presence and hearing of the prisoner, upon an oath lawfully administered to Mrs. Morgan, who had thereby called God to witness that what she said was true, and who had in the presence of the prisoner, made an additional attestation of its truth, by putting her signature thereto; for that any thing that was said, either by a prosecutor, a prisoner, or a witness, in the presence and hearing of each other, although said in common conversation and under no solemnity, was admissible evidence in all Courts both criminal and civil; and the circumstance of Mrs. Morgan's testimony before the magistrate, in the presence of the prisoner, having been reduced into writing, instead of destroying its admissibility rendered it more eligible, inasmuch as what was said was thereby rendered more certain, and less liable to be mistaken.

The Court received the deposition in evidence (see the case of *W. Woodcock, post*, Dec. Sess. 1788); but the fact having been committed at the dead of night, there was no positive evidence, either by the contents of this information, or by the several witnesses who were examined *viva voce*, that the prisoner was guilty.

The evidence, however, though entirely circumstantial, was extremely strong; but as there was not any set of circumstances proved by two witnesses, the learned Judge thought the prisoner could not be legally convicted of the charge of *petit* treason (*a*), the statute 1 Edw. 6, c. 12, s. 22, providing, that no person indicted for treason, petty treason, or misprision of treason, shall suffer any pain of death unless the offender be accused by two sufficient and lawful witnesses; and this being con-

(*a*) It is said that many of the Judges, on consulting on this case, observed that the statutes of Philip and Mary do not extend to treason.

firmed by the statutes 5 & 6 Edw. 6, c. 11, [462] s. 12, which not only requires, that no person shall be condemned of petty treason, unless he be thereof accused by two lawful accusers; but that the said accusers shall, if then living, be brought in person before the party so accused, and avow what they have to say against him; and these statutes not being repealed by the 1 & 2 Phil. and Mary, c. 10, which orders that all trials of treason shall be according to the course of the common law.(a)

The Jury found the prisoner guilty, both on the indictment and inquisition, of the murder only; and the verdict was entered upon the record, "Jury say Guilty of the wilful murder, but Not Guilty of the treason."

The judgment was respited upon this conviction, and three questions were submitted to the consideration of the Twelve Judges (see Cro. Car. 532; 1 Com. Dig. 366, 368).

First, Whether a prisoner can be convicted of murder upon an indictment or inquisition for petty treason? That is, whether the acquittal for the petty treason does not involve in it an acquittal of the murder also?

Secondly, Whether the information of Hannah Morgan, the deceased, authenticated by one witness only, was legally received in evidence on an indictment for petty treason?

Thirdly, Whether the information of Hannah Morgan was admissible in evidence, she not appearing, at the time she gave it, to be apprehensive of her approaching dissolution?

Mr. Recorder, on the first day of the December Session following, reported, that it was the unanimous opinion of eleven Judges, Lord Mansfield being absent, that the learned Judge did right in admitting the information of Hannah Morgan to be received in evidence, and that the prisoner was legally convicted of murder on the indictment and inquisition for petit treason.(b)

[463] The prisoner accordingly received sentence of death, and was executed.

CASE CCXIII.

THE KING v. FORSGATE.

(An indictment for stealing the wearing apparel of a son, who is an apprentice to his father, and furnished with his clothes in pursuance of his indentures, must lay them to be the property of the son, and not of the father. See 2 East's Pleas Crown, p. 654 acc.)

At the Old Bailey in October Session 1787, Robert Forsgate was tried before Mr. Justice Heath for stealing a cloth coat, a linen shirt, a waistcoat, and other articles of wearing apparel, the property of John Wilson.

It appeared in evidence, that the wearing apparel had been furnished by John Wilson to his son George Wilson; that his son George, who was nineteen years of age, was bound an apprentice to him; and that by the indentures he was bound to find his said son and apprentice in board, lodging, clothing, &c.

The Court. The goods being laid to be the property of John Wilson renders the

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(a) The statute of 7 & 8 Will. 3, c. 3, s. 2, requires two witnesses in high treason, or the misprision of such treason only; but see Hawk. P. C. Bk. 2, ch. 46, s. 6.

(b) Mr. Justice Foster, in considering the question, whether it may be adviseable to proceed upon an indictment of murder against a person plainly appearing to be guilty of petty treason, says, "Put the case, that a person is brought to his trial upon an indictment for petit treason, and that one witness only can be produced, or that the prosecutor is not furnished with any evidence except the depositions taken before the coroner, or information taken on oath before Justices of Peace, pursuant to the statutes: and let it be supposed that these witnesses are living, but unable to travel, or kept out of the way by the procurement of the defendant. What is to be done in this case? Is the defendant to be acquitted of the whole charge? I think not. I think this evidence, though not sufficient to convict of petty treason, is still admissible evidence, and proper to be left to the Jury as upon a charge of murder; and the Jury, if they are satisfied, may find the defendant Guilty of the murder, and acquit him of the treason." Foster's C. L. 328.—See also the opinion of Sir M. Hale, 2 H. H. P. C. 292, and of Mr. Justice Wright and Mr. Justice Foster in the case of *Rex v. Swan and Jefferies.* Foster's Cro. Law, 106, 10 State Trials, 36 accordant.

LORD BERNARD *vers.* SAUL.

On non assumpsit an usurious contract may be given in evidence. Bull. L. N. P. 152. Fort. 336, S. C.

On a motion for leave to plead double, the Court declared, that on non assumpsit the defendant might give in evidence an usurious contract, because that makes it a void promise; but in the case of a specialty, it must be pleaded. And on the trial the defendant was admitted to that evidence upon the general issue, and the plaintiff was nonsuit.

DOMINUS REX *vers.* BICKERTON.

If a libel be true it will be an inducement to B. R. to leave the same to a grand jury. Mich. 9 Geo. *Rex* v. *Beharrel*, an information for a libel upon the cornfactors at Bearkey denied for the same reason.

On a motion for an information for a libel in advertising that one Madox an apothecary had personated Dr. Crow a physician, and wrote and took his fee (which the apothecary did not pretend to deny) the Chief Justice declared, that though truth be no justification for a libel, as it is for defamatory words, yet it will be sufficient cause to prevent the interposition of the Court in this **[499]** extraordinary manner, and induce them to leave it to the ordinary course of justice before a grand jury. Whereupon the rule for an information was discharged (1).

(1) As to when the prosecutor for a private libel must deny the charge made in it upon oath to induce the Court to grant an information and when he need not. Vide *Rex* v. *Miles*, Doug. 284. *Rex* v. *Haswell*, ib. 387, and the cases there cited. *Rex* v. *Pearce*, 30 Geo. 3, ib. 390 n. *Rex* v. *Webster*, 3 Term Rep. 388.

JEWELL *vers.* HILL.

Judge of an Inferior Court may set aside a verdict for irregularity.

In the Borough Court after notice of trial the parties agreed to refer the cause, and during the reference the plaintiff, without new notice went on to trial and had a verdict, which the Judge afterwards set aside. And upon motion against him the Court declared, that the Judge of an Inferior Court might set aside such a verdict, upon the foot of irregularity (1).

(1) Vide *Brooke* v. *Ewers*, ante, 113. *Bayley* v. *Boorne*, ante, 392, and the cases there cited.

DOMINUS REX *vers.* REASON AND TRANTER.

Manslaughter quid. 6 St. Tr. 195, S. C.(1).

The defendants being indicted by the grand jury that attends the Court of B. R. for the murder of Mr. Lutterell, were brought up to the Bar and arraigned, and pleaded not guilty; and upon their request were remanded to Newgate, instead of being turned over to the marshal.

Upon the trial (which was at Bar) we who were counsel for the King offered to give in evidence several declarations made by the deceased on his death-bed, whereby he charged the defendants with barbarously murdering him, and without much hesitation the Court let us into that evidence. Whereupon we called a clergyman who attended him, and he swore that being desired by some friends of the defendants to press Mr. Lutterell to declare what provocation he had given the defendants to use him in that manner; he declared upon his salvation, that as he was a dying man he gave them no provocation, but they barbarously murdered him: that in the afternoon of the same day, two justices of the peace being present, and having given him his oath, he made another and more particular declaration to that purpose, which the

witness at the desire of the justices took down in writing, but Mr. Lutterell not being able to write, it was not signed by him, and therefore we did not deliver it in. And the same witness proved, that upon his administring the sacrament to him he exhorted him in the most proper manner to deal ingenuously, and declare once more, whether there was no provocation given by him, and whether he would stand by the account he had before given; upon which the deceased answered, that as he hoped to be judged at the last day, it was every syllable true, and soon after expired.

[500] When this gentleman had finished his evidence, the Court called upon us to produce the paper that had been written from the mouth of the deceased, saying that was better evidence than the memory of the witness; whereupon we acquainted the Court, that we had not the original, it being in the custody of one of the justices, whom going to subpœna we found he was in Wales; but the clergyman said he had a copy of it, which he took for his own satisfaction, before he delivered in the original to the coroner, and he offered to swear this to be a true copy.

Whereupon a debate arose, whether this copy was evidence or not: we who were for the King insisting, that the paper being only the writing of the witness, not signed by the examinant, this which he now produced, was as much an original as that. But the Court refused to let it be read, unless we could shew the original was lost, whereas it appeared we might have had it to produce, if we had sent after it in time (2).

It was then objected by the Chief Justice, that since the written evidence was not produced, the whole evidence of the deceased's declarations ought to be rejected, for the first, second and third being all to the same effect, are but one fact, of which the best evidence was not produced; and therefore he was of opinion, that we could not be let in to give any account of the first and third conference.

But the other Judges were of opinion we might, saying they were three distinct facts, and there was no reason to exclude the evidence as to the first and third declaration, merely because we were disabled to give an acconnt of the second.

Thereupon the witness was directed to repeat his evidence, laying the examination before the justices out of the case, which he did accordingly.

And upon the whole evidence the fact (upon which the question of law arose) was this:

The defendants were officers of the Sheriff of Middlesex, and had a warrant to arrest Mr. Lutterell for 10l. they arrested him coming out of his lodgings, whereupon he desired them to go back with him to his lodgings, and he would pay the money. They complied with this, and Reason went up with him into the dining-room, having sent Tranter to the attorney's for a bill of the charges. Whilst Reason and the deceased continued together, **[501]** some words passed between them in relation to civility-money, which Mr. Lutterell refused to give, and thereupon went up another pair of stairs to order his lady to tell out the money, and then returned to Reason with two pistols in his breast, which upon the importunity of the maid he laid down upon the table (3), and retired to the fire which was at the other end of the room, declaring he did not design to hurt the defendants, but he would not be ill used.

By this time Tranter returned from the attorney's with the bill, and being let in by the boy, went directly up stairs to his partner, being followed by the boy, who swore, that as he was upon the stairs (Tranter being that minute gone into the dining-room) he heard a blow given, but could not tell by whom, and thereupon hastening into the room he found Tranter had run the deceased up against the closet door, and Reason with his sword stabbing him. Mr. Lutterell soon sunk down upon the ground, and begged for mercy (4); but Reason standing over him continued to stab him, till he had wounded him in nine places.

By this time the maid came in, and seeing her master in that posture, she and the boy ran out for help, and immediately heard one of the pistols go off (5) and presently after the second, which a woman looking out at a window on the other side the way proved to be fired by Reason; and several people upon the alarm of the maid coming into the room fonnd Mr. Lutterell upon the ground where the maid left him, without any sword or pistol near him.

Upon the defendant's evidence it appeared, that Mr. Lutterell had a walking-cane in his hand, and that Tranter had a scratch in his forehead, which might be probably

a blow with the cane, and the blow heard by the boy upon Tranter's first going into the room. And one of the surgeons deposed, that the deceased had made such declarations to the clergyman, but this witness afterwards being alone with Mr. Lutterell pressed him very earnestly to discover the truth, upon which Mr. Lutterell did say, that he believed he might strike one of them with his cane, before they run him through.

Upon this the question arose; whether Mr. Lutterell's striking one of the bailiffs first would reduce the subsequent killing to be manslaughter only?

For the King it was argued, that notwithstanding such stroke the defendants would be guilty of murder, that not being a sufficient provocation for giving the death's wound with the pistol: and for this *Holloway's case* Cro. Car. 139, and Kelying 127, were cited, where the woodward finding a boy in the park who came [502] to steal wood, tied him to a horse's tail in order to correct him, the horse ran away and the boy was killed: and this was adjudged to be murder, because the tying him to the horse's tail, being an act of cruelty, for which no sufficient provocation had been given, he was answerable for all the consequences of it.

The defendants insisted, that the bringing down the pistols was a sufficient alarm to them to be upon their guard; and then when he struck one of them, it was reasonable for them to apprehend themselves to be in danger; and in such case a prudent man would not leave it any longer in the power of his adversary to do him any further mischief.

To this it was answered by the counsel for the King, that if Mr. Lutterell had continued to keep the pistols in his bosom, there might be some colour for an apprehension of danger; but the contrary appearing, viz. that he was at a distance from the pistols, with the defendants between him and them: they had no ground to fear any harm upon that account: and the death's wound was given after Mr. Lutterell was fallen down with the wounds he had received with the sword, and was intirely in the power of the defendants: so that what they did afterwards was murder in them, because it exceeded the bounds of self-preservation.

But the Court in the direction of the jury did positively declare, that if they believed, Mr. Lutterell made the first assault upon the bailiffs, the killing with the pistol after he was down would be but manslaughter (6) and the jury upon that direction found them guilty of manslaughter only, though otherwise they were disposed to have hanged them for the barbarity of the fact.

The defendants prayed the benefit of the statute, and were burnt in the hand.

(1) But see the variations between the report here and the cases as printed in the State Trials, pointed out by Mr. J. Foster in his 2d discourse, Fost. Cro. Law, p. 293, who is of opinion, that upon the facts stated here, the bailiffs would have been guilty of murder, but on those proved at the trial, it amounted only to manslaughter at most.

(2) Vide 1 St. Tr. 169. Ib. 780, 2 vol. 575, and see *Sayer's case*, 12 Vin 96. (A. b. 23), pl. 7, which, as reported there, seems contra.

(3) "In the St. Tr. it is stated, that he said he brought them down because he would not be forced out of his lodgings." Fost. Crown Law 293.

(4) "That on the ground he held up his hands as if begging for mercy." Ib.

(5) "One of the officers was wounded in the hand with a pistol." Ib.

(6) The direction is stated to be, "that if the jury believed that Mr. Lutterell endeavoured to rescue himself, which he seemed to think was the case, and very probably was the case, it would be justifiable homicide in the officers. However, as Mr. Lutterell gave the first blow, accompanied with menaces to the officers; and the circumstances of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared it could be no more than manslaughter." Ib.

Between the Parishes of Cranly and St. Mary Guilford.

A lease at will gains a settlement. Cas. of Set. and Rem. p. 100. No. 135, S. C.

Upon a special order of sessions it was stated, that a certificate-man agreed with the lessee of a mill (1), that he should occupy the mill, and pay 12l. per annum; that

A

TREATISE

OF THE

Pleas of the Crown.

By EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE.

Quid tristes querimoniæ,
Si non supplicio culpa reciditur.
HORAT. Lib. 3. Ode 24.

VOL. I.

PHILADELPHIA:
PRINTED FOR P. BYRNE, LAW BOOKSELLER.
.....
1806.

Ch. V. § 122. *Accessaries.*

prevails. Thus an indictment of A. as accessary to B. and C. is proved by evidence of his being accessary to B. only. But if two be indicted as principals, and it appear that one of them were accessary before, he shall be discharged of the indictment. In like manner one indicted as accessary before cannot be convicted upon evidence proving her to have been present aiding and abetting at the fact. This was the case of Winifred Gordon, who together with Thomas Gordon were indicted, for that *they* on the 23d July 1788 *made an assault* on George Linnel, a constable, in the execution of his office; that Thomas Gordon shot and killed him; and that Winifred Gordon "before the felony and murder aforesaid "said by the said T. G. in manner and by the means aforesaid "said done and committed, to wit, on the said 23d of July "with force and arms at, &c. then and there feloniously "wilfully, and of her malice aforethought did incite, move, "instigate, stir up, counsel, direct, advise, and command "him the said T. G. the felony and murder aforesaid in the "manner and by the means aforesaid to do and commit," and then concluded that both the prisoners "in the manner and by the means aforesaid then and there feloniously, wilfully, and of their malice aforethought did kill and "murder the said George Linnel," &c. After argument in the Exchequer-chamber, it seemed to be the opinion of all the judges, though they differed in other respects, that this indictment only amounted to a charge as against Winifred Gordon of being an accessary before, though it charged her, as it should seem improperly, with having joined in the assault against the deceased. And indeed the counsel for the prosecution admitted that it must be so considered upon the authority of Haydon's case; where it is holden necessary to charge a principal in the second degree with being present aiding and abetting. But it was the opinion of all the judges that she might be indicted again as principal, in which the four concurred, if, as the others thought, she could not be convicted upon this indictment charging her as accessary before.

Sum. 265, 6. 2 Hawk. ch. 46. s. 40. Rex v. Winifred Gordon, Northampton Lent Ass. 1789, MS. Buller, J. ante, s. 81. and tit. Principal and Accessary S.C. *vide* 2 Inst. 182.

24th June 1789.

4 Co. 42. b.

An indictment against one as accessary before to murder, charging that he "maliciously excited, moved, and "procured," &c. is sufficient to oust clergy, by force of the 4 & 5 Ph. & M.; the words whereof are, "that

2 Hawk. ch. 33. s. 25. Lodowike Grevil's case, And. 195.

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persons who maliciously *command, hire, or counsel* any person, &c.; for the counselling another is necessarily included in *exciting, moving, and procuring* him. And the word "[murder] in the statute is sufficiently expressed by saying the murder to be *of malice aforethought.*

Accessaries in another county. 2 Hawk. ch. 29. s. 51. Lord Sanchar's case, 9 Co. 118.

Where accessaries in one county to a murder committed in another are indicted in the county where they became accessaries, under the stat. 2 & 3 Ed. 6. c. 24. s. 2. the indictment ought to recite the fact, that the principal committed the act in another county, and not barely that he was indicted for it there; for that is only an argument, and not direct averment that he did it.

§ 123. *No accessaries before in manslaughter.* 1 Hale, 437. 450. 466. 2 Hawk. ch. 29. s. 24. 41, 2, 3, 4.

As there can be no accessaries before to manslaughter, it follows that an indictment against any one as such is purely void. And so if the indictment be for murder, and the principal be only found guilty of manslaughter, those who were indicted as accessaries before must be discharged of that indictment: but not the accessary after, though the principal have his clergy, since the stat. 1 Ann. st. 2. c. 9. s. 1. which makes a conviction in this respect equivalent to an attainder.

§ 124. *Declarations of deceased. Vide* general title Evidence in Felony. Rex v. Reason and Tranter, 6 St. Tr. 201, &c. 1 Stra. 499. Ealing's case, O. B. Dec. 1720, per King, C. J. *vide* 12 Vin. Abr. 118.

Besides the usual evidence of guilt in general cases of felony, which is elsewhere treated of, there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow, as to the fact itself, and the party by whom it was committed. Evidence of this sort is admissible in this case on the fullest necessity (*a*); for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of. But in order to preserve as far as

(*a*) But necessity is not the general ground of its admissibility: for evidence of the declaration of a convict at the time of his execution was offered on the indictment of one Drummond for robbery, in order, as was supposed, to shew that he the convict was the person who had committed the robbery; but the evidence was rejected by Eyre, B. and Gould, J. on the ground that as the party was then attainted his testimony could not have been received even on oath; and consequently not his dying declaration, which can only be admitted on the presumption that it was made under the same sanction as an oath. George Drummond's case, O. B. Sept. 1784. Leach, 275.

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possible the purity and rectitude of such evidence, it must appear that the deceased at the time of making such declarations was conscious of his danger; such consciousness being considered as equivalent to the sanction of an oath, and that no man could be disposed under such circumstances to belie his conscience: none at least who had any sense of religion. But such consciousness need not have been expressed by the deceased: it is enough if it might be collected from circumstances. And the court are to judge of this consciousness previous to the admission of this sort of testimony.

Vide tit. Witness.

Woodcock's case, O.B. 1789, post. 356. and John's case, post. 357.

Margaret Tinckler was indicted for the murder of Jane Parkinson, by inserting pieces of wood into her womb. A second count charged her as accessary before the fact. It was proved by several witnesses, that from the first time of the deceased taking to her bed, which was on the 12th of July, she thought she must die, making use of different expressions, as, *that she was going; that she was working out her last*, and exclaiming, *Oh! that Peggy Tinckler has killed me.* She lingered till the 23d, when she died. She never was up but once during that time, when on telling a friend who attended her that she thought herself better, she advised her to get up, which the deceased did, and walked as far as the passage going out of the room, but was forced to return and go to bed again. It appeared by the testimony of several witnesses, that from the moment of her taking to her bed till the time of her death she had declared, *that Tinckler had killed her and dear child*, (stating the particular means used) which agreed with the charge in the indictment; and that during the same period she had declared more particularly, "that she was with child by one P. a married man, who being fearful lest his wife should hear of it if she were brought to bed, advised her to go to the prisoner, a midwife, to take her advice how she should get rid of the child, being then five or six months gone." "That the prisoner gave her the advice" in question which she followed accordingly. It was proved by the testimony of a witness that three days before the delivery, which was on the 15th of July, she saw the deceased in the prisoner's bed-chamber, when the prisoner took her round the waist and shook her in a very violent manner six different times, and tossed her

Margaret Tinckler's case, Durham, 1781, cor. Nares, J. MS. Gould, J. and MS. Crown Cas. Res.

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and down: and that she was afterwards delivered at the prisoner's house. The deceased also declared during her labour, that after her delivery the prisoner gave her the child to take home; and bid her go to bed that night and sleep, and get up in the morning and go about her business, and nobody would know any thing of the matter; but that applying very ill the next day at a relation's house, they had advised her to go home and go to bed, which she did. The child was born alive, but died instantly; and the surgeons, who were examined, proved that it was perfect. There was no doubt but that the deceased had died by the accelerating of the birth of the child: and upon opening her womb it appeared that there were two holes caused by the skewers, one of which was mortified, the other only inflamed; and other symptoms of injury appeared. A short time before her death she was asked whether the account she had from time to time given of the occasion of her death, and the prisoner's treatment of her were true; and she declared it was. It was objected that the above evidence of the deceased's declarations ought not to be admitted, as she herself was reus criminis, and likewise as it appeared at the time of the declarations she was better, or thought herself so. But Gould, J. was of opinion, that however this objection might hold with respect to the second count, in which the prisoner was charged as an accessary with the deceased, yet the deceased was not willingly or knowingly an accessary to her own death, and therefore it was like the common case of any other murder. And as to the objection that she once thought herself better, and tried to get up, yet the same declarations when then made had been made repeatedly before to persons in whom in confidence she told that she never should survive, when she first took to her bed; and she had repeated the same declarations the day before she died, and within a few hours of her death. And as to the fact itself, he was clearly of opinion it was murder, on the authority of Lord Hale. (1 Hale, 429.) The jury found the prisoner guilty on the first count, charging her as a principal in the murder, and execution being respited to take the opinion of the judges on the whole case, they all met to consider of it: and were unanimously of opinion that these declarations of the deceased were legal evidence: First day of Mich. term 1781, at Serjeant's Inn.

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dence: for though at one time the deceased thought herself better, yet the declarations before and after and home to her death were uniform and to the same effect. And as to her being particeps criminis, they answered, that if two persons be guilty of murder, and one be indicted and the other, the party not indicted is a witness for the crown. And though the practice be not to convict on such proof uncorroborated, yet the evidence is admissible; and here it was supported by the proof of the prisoner tossing the deceased in her arms in the manner stated. Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a particeps criminis, as she considered herself to be dying at the time, and had no view or interest to serve in excusing herself, or fixing the charge unjustly on others. But others of the judges thought that her declarations were to be so considered; and therefore required the aid of the confirmatory evidence.

MS. Buller, J.

R. v. Radburne, alias Gibbons, O. B. July 1787, cor. Wilson, J. MS. Buller, J. *Vide* general title Evidence, Depositions, and 2 Leach, 512. S. C.

In the case of Henrietta Radburne, who was indicted for petit treason in murdering her mistress Hannah Morgan, the deposition of the latter before her death before a magistrate, by whom it was authenticated in the presence of the prisoner, was read in evidence, though made by her when under no apprehension of danger: but this was evidence by force of the statutes of Ph. & Mary (*a*): and the prisoner was convicted of the murder and acquitted of the petit treason, which was afterwards approved of by all the judges. And it was observed by many of them, that the statutes of Philip and Mary do not extend to treason.

Woodcock's case, O.B. 1789, cor. Lord C. B. Eyre, Ashhurst, J. and Adair Serjt. Recorder, Leach, 397. new edit. 563. *Vide* Dingler's case, ib. 638.

In Woodcock's case it was considered, that such an examination taken before a magistrate who attended for the purpose at the place where the deceased was then lying with the mortal wound received, and without hopes of recovery, and being taken in the presence of the prisoner in the manner prescribed by the acts (*a*), could not be received in evidence as examinations, after her death: but they were received as authentic declarations of the deceased in extremis, there being then no probability of her recovery, though she herself expressed no sense of her danger, but lay quietly resigned and submitting to her fate.

Trowter's case, B. R. E. 8 G. 1. 10 Vin. Abr. 118.

In Trowter's case the court would

(*a*) 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10.

not admit parol evidence of the declarations of the deceased which had been reduced into writing.

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On the prosecution of Thomas John for the murder of Rachael his wife, it was proved by the confession of the prisoner himself in conversation with others before his wife's death, that in September 1789, upon a quarrel between them, he had laid hold of his wife, and they had fallen down, he uppermost, and he had given her several violent kicks and blows, so that according to his own words, he knew she never would raise her hand against him again. It was also proved that she died in the same month; that she was taken ill on a Friday, took to her bed the next day, and died on the Sunday sevennight following, being confined to her bed during her illness, which was severe, the whole time. But it did not appear that she had expressed any apprehension of danger, though she retained her senses till the day before her death. Three witnesses deposed to conversations during her illness, at which the husband was present, in which she attributed her situation to his ill treatment; and the conduct and answers of the husband were given in evidence, although it was objected on his behalf that what was said by the wife and in the presence of the husband, and to which he replied answers tending to charge himself, ought not to have been received. Evidence was also given of her declarations in the prisoner's absence, after she was confined to her bed, some of which tended to shew the circumstances of violence he had committed upon her. It was objected, that the declarations of the wife in the absence of the prisoner ought not to have been admitted in evidence, as it was not proved that she considered herself at the time as a dying person; the evidence not being express on that head: but that if the evidence were admissible, it ought to have been left to the jury to consider whether the wife were at the time conscious of approaching death. Objection was also made, that these kind declarations of a wife against her husband were not in that account evidence. The court was of opinion, that the reason of the rule that a wife shall not be admitted to give evidence against her husband did not apply to this case. And upon the other point, that the evidence of the state of the wife's health, at the time the declarations were made, was sufficient

Thomas John's case, Carmarthen Sp. Sess. 1790, MS. Buller, J.

Whether or not the declarations of the deceased were made under an apprehension of danger must be determined by the judge, in order to receive or reject the evidence, and not by the jury after the evidence is received. The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the state of the wound or illness or other circumstances indicating the same.

Vide general title *Witness.*

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sufficient to shew that she was actually dying; and that it was to be inferred from it, that she was conscious of her situation: and no particular direction was given to the jury on the subject. The jury having found the prisoner guilty, these points were referred to the judges, who at a conference in Easter term 1790 all agreed that it ought not to be left to the jury to say, whether the deceased thought she was dying or not; for that must be decided by the judge before he receives the evidence. And if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. But as to the declarations themselves in this case, all the judges, except two, thought that there was no foundation for supposing that the deceased considered herself in any danger at all.

Upon the prosecution of Henry Welbourn for the murder of Elizabeth Page by poison, a witness deposed that the deceased and the prisoner lived with her as her servants; that perceiving the deceased alter and appear very ill, she taxed her with being with child, which she owned, and the next day continuing very ill she confessed she had taken something; at which time the witness believed that the deceased was sensible of her situation and danger, though she did not say so. But when the apothecary came to see her the same evening she said that she was very bad, and did not know if she should get the better of it. The apothecary himself deposed that when he first saw the deceased she was then apparently dying; but he believed that she was not sensible of her danger; that after he had been with her some time he made her sensible of her danger, in order that he might get from her what she had done. She desired him to give her something to ease her pain. He told her he must first know what she had done; and that she would not live two hours unless proper relief were afforded. (She did not in fact live above an hour afterwards.) The witness had no other reason for thinking that she knew her danger from any thing that she said, except that on his telling her of her danger she told him what was the cause, which she had before refused to do. She then described to him the symptoms of pain which she had felt, and again repeated that she wished

Henry Welbourn's case, Lincoln Sum. Ass. 1792, cor. Ashhurst, J. MS. Buller, J. To the same effect as the last case, and further,

If the deceased thought she should recover at the time the declarations were made they ought not to be received in evidence.

Ch. V. § 124. Evidence. Declarations of the deceased.

ished he would give her something to compose her. The witness then again urged the necessity of knowing the cause of those symptoms, and she told him with reluctance, that she had been three or four months gone with child, and that during the last fortnight she had been constantly prevailed upon to take bitter apple in order to procure an abortion; and that not producing the desired effect, the person had prevailed on her to take a white powder, (which was the day before she was taken ill,) and that the symptoms came on in about three or four hours after. The witness then urged her to say by whom she had been prevailed upon, when with increased reluctance and hesitation she told him it was their fellow-servant Welbourn; and that he had prevailed upon her by assuring her that there was no crime in procuring an abortion whilst the child was so young. At this moment she was free from pain, and the witness thought that mortification had taken place. From the deceased's description of the white powder, and from the inspection of the body afterwards, the witness believed it to be arsenic. On his cross examination he said that at the time she made the declaration he believed that she thought she was getting *Vide post* 360. better from the being so free from pain. It appeared from other witnesses that on the day when the deceased had said that she had taken the white powder, the prisoner and she were observed in discourse together; and he was shaking a bottle of something: and he had before applied for some bitter apple, which the witness had refused to get him. It was left to the jury to consider, whether from the whole of the evidence they were satisfied that the deceased at the time she made the declarations was satisfied of the danger of her situation; and whether they thought those declarations true, and that her death was owing to poison administered by the prisoner; in which case they should find him guilty. The jury accordingly found him guilty. But a doubt afterwards occurring to the learned judge, whether though in the first part of the apothecary's evidence he stated that he made the deceased sensible of her danger before she made the declaration, yet as he afterwards said that at the time she made the declaration *she believed that she was getting better from the pain ceasing*, he should not have rejected

Ch. V. § 124. *Evidence. Declarations of the deceased.*

jected the evidence and directed an acquittal: the prisoner was therefore respited to take the opinion of the judges on the case. In Michaelmas term 1792 a majority of the judges were of opinion that it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration: on the contrary she had reason to think that if she told what was the matter with her she might have relief and recover. But as to what the apothecary had said on his cross examination they laid no stress on it, being mere opinion unwarranted by fact. And they all agreed that whether the deceased thought herself in a dying state or not was matter to be decided by the judge in order to receive or reject the evidence, and that that point should not be left to the jury (*a*).

§ 125. *Articles of war.* Rex v. Withers, Stafford Ass. 1784, cor. Buller, J. and by all the judges in Mich. term 1784, MS. Gould and Buller, Js. 5 Term Rep. 446.

The articles of war are frequently required to be given in evidence on prosecutions for homicide: for it has been ruled that the Court cannot take judicial notice of them without their being proved: but that a copy, purporting to be printed by the king's printer, is sufficient. In Withers's case, there being no such evidence, nor any evidence of the usage of the army, it was holden that the prisoner, who was a private soldier, and had killed the deceased a serjeant in the same regiment, upon an arrest by the latter, and after a struggle between them, could only be guilty of manslaughter.

§ 126. *Trial.*

Of the Trial, Arraignment, Verdict, and Judgment.

Where this offence may be examined into and tried is the next object of inquiry; and this resolves itself into seven different considerations. 1. Where the stroke and death happen in the same county. 2. Where they happen in different counties. 3. Where one is accessary in one county to a murder committed in another. 4. Where both the stroke and death happen in Wales, or one in Wales and the other in an English county. 5. Where the one happens at sea or out of England and the other within a county.

(*a*) Vide Woodcock's case, O. B. 1789, Leach, 397. where that was left to the jury by Ld. C. B. Eyre.

6. Where

Where both the stroke and death happen at sea; or, In parts beyond the sea. Ch. V. § 126. *Trial.*

§ 127. *Stroke and death in same county.* 3 Inst. 27. 1 Hale, 283. 374. 2 Hale, 22. 163. 4. 2 Hawk. ch. 25. s. 35, 36. 33 H. 8. c. 23. Ely's case, O. B. Dec. 1720. Roache's case, Dec. 1775. Post. s. 133.

1. Regularly by the common law in this as in other matters of criminal jurisprudence the offence must be inquired of and tried in the same county in which it was committed. But the stat. 33 Hen. 8. c. 23. enacts, that upon examination before three of the counsel, treasons, misprisions thereof, and murders, committed in any place within the king's dominions or without, may be inquired of, heard, and determined in any county where the king by his commission of over and terminer shall appoint. This seems not repealed by the stat. 1 & 2 W. & M. c. 10. as to murder; the circumstances required by the statute of Henry 8. being observed; which I shall presently have occasion to mention again.

If a person be stricken and die in the county of A., and the body be found in B., it shall be removed into A. for the coroner of that county to take the inquest. 2 Hale, 66. 1 MS. Sum. 54.

Also by the statute of Articuli super chartas, c. 3. special provision is made concerning homicide within the verge. *Verge.* 2 Inst. 549, 550. 2 Hale, 54.

§ 128. *Stroke and death in different counties.* 1 Hawk. ch. 31. s. 13. 2 Hawk. ch. 25. s. 36. ch. 29. s. 48, 49, 50. 1 Hale, 426. 2 Hale, 66. 163. Post. s. 131. 2 & 3 Ed. 6. c. 24.

2. Where the stroke and death are in different counties, it was doubtful at common law whether the offender could be indicted at all, the offence not being complete in either; though the more common opinion was, that he might be indicted where the stroke was given; for that alone is the act of the party, and the death is but a consequence, and might be found though in another county: and the body was removed into the county where the stroke was given (*a*). But now by the stat. 2 & 3 Ed. 6. c. 24. s. 2. it is enacted, "that where any person shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, an indictment thereof found by jurors of the county where the death shall happen, (whether before the coroner, or before the justices, &c. having authority to inquire, &c. which extends to the Court of (1 MS. Sum. 54. 2 Hale, 66.) 3 Inst. 49. 135. 2 Hawk. ch. 29. s. 52.

(*a*) That opinion, however, is contrary to the sense of the legislature as expressed in the stat. 2 & 3 Ed. 6. c. 24. s. 2. which declares that "in such case it hath not been found by the laws or customs of this realm that any such indictment thereof can be taken in either of the said two counties."

A

COMPENDIUM

OF

The Law

OF

EVIDENCE.

By THOMAS PEAKE, Esq.

OF LINCOLN'S-INN,

BARRISTER AT LAW.

THIRD EDITION, WITH ADDITIONS.

LONDON:

Printed by Luke Hansard & Sons,

FOR W. REED, LAW BOOKSELLER,

BELL YARD, TEMPLE BAR; AND

FLEMING AND PHELAN,

UPPER ORMOND QUAY, DUBLIN.

1808.

Court of Law or Equity in England, for which cauſe ariſes in India. Ch. II. ſ. 2. *Depoſitions.*

But in caſes where a party offers this ſecondary degree of evidence, he ought to adduce ſome kind of proof to ſhew that he is not capable of giving that which is ordinarily required; and therefore when the witneſs is uſually reſident in England, or was here when the examination was taken, it muſt be proved that he is out of the juriſdiction of the Court at the time his depoſition is offered in evidence, for if he is within it he himſelf muſt be called as a witneſs. Vide Salk. 691.

In criminal caſes depoſitions are taken by virtue of the ſtatutes 1 and 2 Ph. and M. c. 13, and 2 and 3 Ph. and M. c. 10. By the firſt of thoſe ſtatutes it is enacted, "That juſtices of the peace, or one of them, when a priſoner is brought before them for manſlaughter or felony, before any bailment or mainpriſe, ſhall take the examination of the priſoner, and information of them that bring him, of the fact and circumſtances thereof; and the ſame, or as much thereof as ſhall be material to prove the felony, ſhall put in writing, &c." The [62] proviſions of this ſtatute, relative to caſes where the party is admitted to bail, are by the other ſtatute extended to thoſe where he ſhall be committed to priſon. On theſe ſtatutes it has been holden: that if in a caſe of felony one magiſtrate take the depoſition on oath of any

Ch. II. ſ. 2. *Depoſitions.*

any perſon in the preſence of the priſoner,[1] whether the party wounded, or even an accomplice;[2] and the deponent die before the trial, the depoſitions may be read in evidence; but if the priſoner be not preſent at the time of the examination, it cannot be read as a depoſition taken on oath; though in caſes where the party wounded declared himſelf apprehenſive of death, or was in ſuch imminent danger of it as muſt neceſſarily raiſe that apprehenſion, it may be read as his dying declaration.[3] This act of parliament only extends to caſes of felony, and therefore ſuch examination cannot be read on an information for a libel.[4]

In like manner depoſitions taken before a *coroner*,[5] have, in caſes of the death, or abſence beyond ſea, of the witneſſes, and where there is reaſon to believe that the priſoner ſent them away, been uſed on a trial for murder. *(m)*

[1] Rex v. Radbourne, Leach Cr. Caſ. 512.

[2] Rex v. Weſtbeer, ibid. 14.

[3] Rex v. Dingler, ibid. 638.

[4] Rex v. Paine, Salk. 281.

[5] Bromwich's caſe 1 Lev. 180. Thatcher and Waller's caſe, Sir T. Jones 53. Vide Harriſon's caſe, 4 St. Tr. 496.

(m) In the caſe of the *King* and *Eriſwell*, it was argued by Mr. J. Buller that the examination of the pauper was admiſſible; and in anſwer to the objection, that it was taken in the abſence of the parties to be affected by it, he inſtanced the caſe of depoſitions taken before a *coroner*, which were always evidence, though the party was not preſent. I do not find that this point has been expreſsly decided in any reported caſe; Mr. J. Buller is reported to have ſaid that it was ſo ſettled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in thoſe books—nevertheleſs the practice has been to admit them after the death of the witneſs, without inquiry whether the party was preſent or not; and notwithſtanding the objection of counſel, they were received by Mr. B. Hotham, in the King and Purefoy, Maidſtone Sum. Aſſ. 1794.

And

And where a pregnant woman died after examination, but before an order of filiation, ſuch examination taken under the Stat. 6 G. 2. *c.* 31. was held to be admiſſible evidence on an application to the Quarter Seſſions to make an order of filiation on the putative father; and uncontradicted, to be concluſive. But in a caſe where two juſtices had taken the examination of a pauper relative to his ſettlement, but did not remove him thereon, and he afterwards became inſane, the Judges of the Court of King's Bench were equally divided on the queſtion, whether two other juſtices could remove his family on that examination. The opinions of the Judges in this caſe, not only on the point before the Court, but alſo as to hearſay evidence in general, are too valuable to be omitted or abridged, and therefore are printed at length in a ſubſequent page.

Rex v. Ravenſtone, 5 T. Rep. 373.

Rex v. Eriſwell, 3 T. Rep. 707.

Vide Appendix No. I.

Several other caſes under ſimilar circumſtances, have ſince come before the Court; in one, the pauper having been examined and removed by two juſtices, after notice of appeal, and before the trial of it, abſconded, and could not be found; nevertheleſs the Court held that the reſpondents could not read his examination on the hearing of the appeal; and in two ſubſequent caſes the Court of King's Bench declared that the evidence offered in the caſe of the *King* and *Eriſwell* was

Rex v. Nuneham Courtney, 1 Eaſt. 373.

[64]

Rex v. Ferry Fryſtone, 2 Eaſt. 54.

Ch. II. f. 2. *Depoſitions.*

was not admiſſible, and rejected a ſimilar examination even after the death of the pauper.

Rex v. Abergwilly, ibid. 63.

It was before obſerved that a verdict could not in general be given in evidence againſt a man who was not a party to the cauſe, and therefore had no power to croſs-examine the witneſſes. This rule applies equally to the caſe of depoſitions, which are, as to a ſtranger to the cauſe, mere ex parte examinations; and therefore, unleſs in particular caſes where the Legiſlature has made them evidence againſt all perſons, they are not admitted to be read againſt him. The other rule, namely, that a man who is not bound by proceedings, ſhall not avail himſelf of them, applies with ſtill greater force; for if this were allowed, he might uſe all thoſe depoſitions which made for him, and thoſe of a contrary deſcription could not be uſed againſt him, becauſe he had no power to croſs examine the witneſſes.

Rushworth v. Counteſs of Pembroke, Hard. 472.

I ſhall here mention only one caſe in which depoſitions are made evidence againſt all perſons by particular Act of Parliament, and that is in the caſe of bankruptcy. By Stat. 5, G. 2. c. 30. it is enacted, "that commiſſions and depoſitions, or any part of ſuch depoſitions, may, on petition to the Lord Chancellor, be entered on Record, and in caſe of the death of the witneſſes *proving the bankruptcy*, or in caſe the commiſſion, depoſitions, proceedings, or other matters or things, ſhall be loſt or miſlaid,

[65]

A TREATISE

ON

JUDICIAL EVIDENCE,

EXTRACTED FROM THE MANUSCRIPTS OF

JEREMY BENTHAM, ESQ.

BY

M. DUMONT,

MEMBER OF THE REPRESENTATIVE AND SOVEREIGN COUNCIL OF GENEVA.

TRANSLATED INTO ENGLISH.

LONDON:

FROM THE LAW JOURNAL—PUBLISHED BY MR. J. W. PAGET, NO. 5,
QUALITY-COURT, CHANCERY-LANE.

1825.

dence, they may fill up gaps which would have rendered a whole narrative improbable and confused.

Comparison between the proving power of casual writings and hearsay

What is the comparative amount of proving power between a fact attested by a casual writing, and a fact attested on hearsay? Which of these species of evidence ought to inspire most confidence?

I. In favour of the writing we observe, 1. That it presents only a single author; there is only one individual to whom attach the various reasons of suspicion, whether they be founded on interest or intellectual capacity. The writing, it is true, must be proved; but there may be witnesses above suspicion to establish its authenticity.

In hearsay, you have always two witnesses; the one who speaks before the judge, and the supposed extra-judicial original witness. Two witnesses—and with all the various reasons of suspicion attached to each of them.

2. In the writing, the tenor of the language is fixed and permanent. The assertion contained in it cannot be changed (unless the writing itself be changed), and its contents will almost always present circumstantial evidence, which will aid the judge in forming an opinion of its value.

In hearsay, if the deposing witness is inclined to lie, falsehood is much more easy. That certain words were uttered by a particular person in a certain sense, is a fact of a passing and evanescent nature, and leaves no physical trace by which it might be confirmed; but even in the case of the greatest veracity, the deposing witness may be inaccurate from defect of memory, particularly if the recital be of any length. To this almost inevitable source of error is to be added the danger of the witness mistaking the meaning of the words, or omitting some essential circumstance.

II. Still there are cases in which hearsay evidence will be superior to that of a casual writing. Why? Because, in following out the chain of indications connected with hearsay, you may be put on the way of tracing many circumstances and accessories, which a mere writing could never have furnished.

I am dying; Titius wounded me. Suppose that a letter, containing these words, is discovered in the closet of a person who is found dead, and that it is in his own hand; this instantly produces a strong presumption against Titius. But suppose, farther, that he and the deceased are known to have been violent enemies, that they were seen together at a time which strengthens the suspicion, and that Titius was even seen to raise the weapon, and strike a blow. Few

judges would hesitate to condemn Titius on such evidence, particularly if there were no opposing testimony; and I do not say they would be wrong. But still, this evidence is far from excluding the possibility of innocence. Let us suppose (what is very possible) that these words, written by the deceased, were only the beginning of a letter which weakness prevented him from finishing, and that he would have continued thus: *Titius wounded me, but slightly, and without intending it. It was Sempronius who gave me the fatal blow.*

I go farther, and say, that cases may be imagined, in which the same assertion, transmitted verbally, will be stronger and more satisfactory than the original writing itself. The deceased has uttered the words, *Titius wounded me; I am dying*, in the presence of well known and irreproachable witnesses, who agree in their depositions. So far, the belief produced is not greater than what, on the foregoing supposition, would be produced by the writing. But the witnesses are examined to ascertain, whether he said nothing more concerning the cause of his death. No, is their unanimous answer. Had he time to do it? Assuredly, for he spoke of his family, his friends, his will, &c. Who does not see, that this mass of testimony excludes Titius from that possibility of innocence which existed in the case of the supposed letter?

But, while the superiority of casual written evidence over hearsay is admitted, there is no general or absolute rule to direct the opinion of judges. Each particular case will present different probabilities.

CHAPTER V.

HEARSAY TRANSMITTED THROUGH SEVERAL INTERMEDIATE PERSONS.

THE statement of the supposed direct witness may pass through an infinite number of mouths. A hearsay, which passes through only one medium, is hearsay of the first degree; that which passes through two media is hearsay of the second degree, and so on.

In the famous case of Calas, there were no fewer than five intermediate witnesses between the supposed direct witness, and the deposing witness; and he, who was declared to have heard the father threaten his son, was not even named; he was some unknown person, and nobody could ever recollect him.

In circumstances which strongly excite the passions, a town is filled with clamours; the stories, at first inconsistent, gradually acquire some uniformity; the history is arranged; the belief of one

19 Tenn. 265, 1838 WL 1124 (Tenn.), 33 Am.Dec. 143, Meigs 265
(Cite as: 19 Tenn. 265, 1838 WL 1124 (Tenn.))

Supreme Court of **Tennessee.**
ANTHONY
v.
THE **STATE.**
December Term, 1838.

West Headnotes

Constitutional Law 92 ⚿4670

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4670 k. Hearsay. Most Cited Cases
(Formerly 92k266(1))

Homicide 203 ⚿1076

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1076 k. Grounds of Admissibility in General. Most Cited Cases
(Formerly 203k200)
The principle asserted in the Bill of Rights, and that as to the admissibility of dying declarations, are coeval rules of the common law. The first was inserted in the Bill of Rights, because it had been maintained, with difficulty, against the Crown, by the popular party. The other had never been debated between them, and hence was omitted.

Criminal Law 110 ⚿662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases
(Formerly 92k268(6))

19 Tenn. 265, 1838 WL 1124 (Tenn.), 33 Am.Dec. 143, Meigs 265
(Cite as: 19 Tenn. 265, 1838 WL 1124 (Tenn.))

Witnesses 410 ⚿2(1)

410 Witnesses
410I In General
410k2 Right of Accused to Compulsory Process
410k2(1) k. In General. Most Cited Cases
(Formerly 92k268(6))

Constitutional Law 92 ⚿4677

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4677 k. Right to Present Witnesses; Compulsory Process. Most Cited Cases
(Formerly 92k268(6))

Homicide 203 ⚿1076

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1076 k. Grounds of Admissibility in General. Most Cited Cases
(Formerly 203k200)
The provision of the Bill of Rights declaring the right of the accused, in criminal cases,-"to meet the witnesses face to face, and have compulsory process for obtaining witnesses in his favor," is not violated by the admission of dying declarations.

Homicide 203 ⚿541

203 Homicide
203II Murder
203k539 First Degree, Capital, or Aggravated Murder
203k541 k. Intent or Mens Rea; Malice. Most Cited Cases
(Formerly 203k22(2))

Homicide 203 ⚿542

203 Homicide
203II Murder
203k539 First Degree, Capital, or Aggravated Murder
203k542 k. Deliberation and Premeditation. Most Cited Cases
(Formerly 203k22(2))

19 Tenn. 265, 1838 WL 1124 (Tenn.), 33 Am.Dec. 143, Meigs 265
(Cite as: 19 Tenn. 265, 1838 WL 1124 (Tenn.))

To constitute murder in the first degree the killing must be wilful, and malicious, and deliberate, and premeditated.

Homicide 203 ⚿542

203 Homicide
203II Murder
203k539 First Degree, Capital, or Aggravated Murder
203k542 k. Deliberation and Premeditation. Most Cited Cases
(Formerly 203k22(2))

Homicide 203 ⚿543

203 Homicide
203II Murder
203k539 First Degree, Capital, or Aggravated Murder
203k543 k. Sufficiency of Deliberation; Time Required. Most Cited Cases
(Formerly 203k22(2))
A killing not superinduced by passion or provocation, deliberate and premeditated, is murder in the first degree, though deliberated and premeditated but a moment.

Homicide 203 ⚿545

203 Homicide
203II Murder
203k544 Second Degree Murder
203k545 k. In General. Most Cited Cases
(Formerly 203k23(1))

Homicide 203 ⚿657

203 Homicide
203IV Manslaughter
203k657 k. Murder and Manslaughter Compared and Contrasted. Most Cited Cases
(Formerly 203k23(1))

Homicide 203 ⚿668

203 Homicide
203IV Manslaughter
203k666 Sudden Passion or Heat of Passion
203k668 k. Passion as Element or as Factor Affecting Degree or Grade of Offense. Most Cited Cases

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(Cite as: 19 Tenn. 265, 1838 WL 1124 (Tenn.))

(Formerly 203k39)

Homicide 203 ⚿673

203 Homicide
203IV Manslaughter
203k670 Provocation
203k673 k. Sufficiency as Cause of Passion. Most Cited Cases
(Formerly 203k42)
A killing under the influence of passion or upon provocation, before the passion had time to subside, would only be murder in the second degree,-or manslaughter, if the provocation was a sufficient and legal one.

Homicide 203 ⚿1076

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1076 k. Grounds of Admissibility in General. Most Cited Cases
(Formerly 203k200)
In a trial for murder, the admission of declarations of the deceased as to the cause of his death is not a violation of the constitutional right of the accused to meet the witnesses face to face.

Homicide 203 ⚿1079

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1077 Condition of Declarant
203k1079 k. Danger and Imminence of Death. Most Cited Cases
(Formerly 203k202)
If a dying person either declare that he knows his danger, or it is reasonably to be inferred, from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence. The Rule stated, 1 East P.C., 354, recognized.

Homicide 203 ⚿1080(3)

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1077 Condition of Declarant
203k1080 Sense of Impending Death
203k1080(3) k. Necessity of Statement by Deceased as to Belief in Impending

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(Cite as: 19 Tenn. 265, 1838 WL 1124 (Tenn.))

Death. Most Cited Cases
(Formerly 203k203(2))
If a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence.

Homicide 203 ⚿1094

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1094 k. Determination of Admissibility. Most Cited Cases
(Formerly 203k218)
It is the duty of the court to determine, in the first place, the admissibility of declarations sought to be introduced as dying declarations.

***1** On the 18th of December, 1837, the grand jury of Bedford county indicted the defendant for murder committed on the body of Mary, his wife, by feloniously, wilfully, and of his malice aforethought shooting her with a pistol charged with powder and a leaden bullet, on the 16th of December, 1837, thereby giving her a mortal wound whereof she languished until the 17th of December, and then died.

A *capias* having been issued and the defendant arrested and committed to jail, he was brought to the bar the same day on which he was indicted, and being arraigned pleaded not guilty, and issue was thereupon joined, and by consent the cause was continued till April term, 1838, when he was put upon his trial.

Caroline Anthony, the defendant's daughter, aged eleven years swore that she and a negro woman had left the house a few minutes before the pistol fired to bury some cabbage; that when she returned her father was standing in the door, and the baby was near him on the floor; that her father directed her to take out the child, which she did, and took it to the kitchen; that in about half a minute after she got to the kitchen she heard a pistol fire and her mother exclaim. She immediately ran back, and her father was standing at the door with his pistol in his hand, and said to her, "I have killed your mother, don't cry;" that she went into the house, and her father came in and said, "Polly, have I hurt you? where did I hit you?" and then went away, and came back after awhile with Mrs. Hiles and others. When the witness first went into the house her mother was lying on the floor near the fire, and she got up, after her father went away, and crawled into the bed by herself. When the witness left the house to bury the cabbage, her mother was engaged in putting bats in a quilt. Her father and mother were then in a good humor, and had been so all that day. When she took the child from the door, her father had no pistols in his hands that she then saw. The pistols were usually kept in a chest in the same room of the house.

Mrs. Hiles, who, with her husband, lived about 250 yards from defendant's, had dined at his

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house on the day of the killing, and had remained there till about an hour before it. The defendant and deceased were as friendly and affectionate as could be. The defendant, immediately after the killing, came to her house with two pistols in his hands, and threw them at her feet. She and several others accompanied him back to his house. He was the first to suggest sending for a physician, and urged the messenger to go with speed; and though advised to make his escape, he remained at home during the whole night, and was under no restraint.

Dr. Barksdale, the physician, stated that about ten or eleven o'clock on the night of the day on which the deceased was shot, he inquired of her, "Whether she was shot accidentally or by design?" The defendant's counsel objected to his detailing the dying declarations, the witness stating that previous to his inquiry, he had made no communication to her, nor heard any made by any other person, informing her of her approaching dissolution; nor heard her say any thing concerning her consciousness of her approaching dissolution, only that she was suffering great pain, burning heat, and great sickness of the stomach; that the wound was a large pistol shot, and that such a wound, ninety-nine times in a hundred, produces death. He thought she was fast sinking at the time of his inquiry, but she did not die until the next day about ten or eleven o'clock.

*2 The defendant's counsel, upon this statement objected to the witness's speaking of the dying declaration; but the Court overruled the objection, to which opinion the counsel excepted. The witness then stated, that in reply to his question, the deceased said, "It was done with design, and what she had long expected, but the defendant was not right."

Dr. Barksdale further stated that he had known the defendant for many years, and saw no evidences whatever of derangement or insanity on that night, or at any other time. He got to the defendant's house in this county about dark, or a little after, a few hours after the shooting. The defendant paid no attention to his wife that night, but lay down by the fire. He stated that his attention was directed to the defendant during the night, to see what was the condition of his mind, and was satisfied that he was not insane.

Thomas J. Loyd was at the defendant's all the night after the killing, did not see the defendant wait on his wife until Dr. Barksdale had gone to bed, which was late at night. He lay with defendant at the fire.

Samuel Sloan saw the defendant going along the road in April, 1837, when some young mules having got around his colt, and hemmed it up, the defendant said, "It is a plot made up, and I must have blood, and now is as good a time as any."

Something more than twelve months before the trial, the defendant sent for witness, and when he went he found the defendant sitting some distance from the house on a log. He talked strangely, saying that he had made peace with God and God with his soul; that he could not sleep at night and wanted laudanum; that witness got him some; that, on one occasion the deceased showed witness a vial of laudanum, and said she was afraid the defendant would do himself some injury, he had taken a small portion of one of the vials of the laudanum, which witness got him.

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Dr. A. M. Hoyt had known defendant for several years; saw him once two or three years ago, when he was laboring under a slight attack of *mania a potu;* had all the symptoms of that disease as contained in the books; had seen him twice since, when he considered him partially insane from the same cause. The last time was during the summer of 1837.

Benjamin Rives lived in a mile of defendant; was well acquainted with him, and never saw him at any time when he thought him deranged. At times, when he was drinking, his habits were like other drinking men's. He drank by sprees, was always a shrewd, active, money-making man. See Ray's Med. Juris. section 319.)

There was other testimony concurring in stating him to be sane and shrewd, and some stating vaguely that he sometimes behaved strangely.

There was also testimony showing that he and his wife had, in the spring of 1837, separated, and she had gone to her father's, where she had stayed till defendant persuaded her to return, and that they had had frequent jars.

Dillahunty, J., holding the Court instead of Anderson, J., charged the jury. The part of the charge excepted to by the defendant's counsel was,--

***3** "That to constitute murder in the first degree, it would not be sufficient that the killing was wilful and malicious (5 Yerg. 340). It must also have been deliberate and premeditated; that, in the absence of passion or provocation, the length of time during which the prisoner deliberated and premeditated was immaterial; that if there was neither passion nor provocation, and the design to kill was formed, it would then make no difference whether that design had been deliberated on but one moment, one day or one week; (2) but if the design to kill was formed, under the influence of passion, or upon provocation, and the killing ensued before the passion had time to subside, it would only be murder in the second degree; or manslaughter if the provocation was a sufficient and legal one, as above explained to the jury."

The jury returned a verdict in the following words: "We find him, the defendant, Alfred Anthony, guilty of murder in the first degree, in manner and form as charged in the indictment; but we are of opinion there are mitigating circumstances in his case."

The defendant was called upon by the Court to know if he had any thing to say why judgment should not be pronounced against him, when his counsel moved that the cause be adjourned till the next day, which was done. On the next day, April 10, 1838, his counsel moved for a new trial, which was denied, and the defendant being again asked whether he had any thing further to say why judgment of the law should not be pronounced against him, said he had not, whereupon the Court adjudged, "That the defendant should be confined in the jail and penitentiary house for and during his natural life; that he should pay the costs in this case; and that the sheriff of Bedford county be charged with the execution of this sentence forthwith."

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And thereupon the defendant's counsel moved the Court for an appeal in the nature of a writ of error to the Supreme Court, which was granted; and a bill of exceptions, containing the above facts, among others, was presented and signed and sealed, and made a part of the record.

Long, with whom was James Campbell, for the plaintiff in error, said a reversal of the judgment in this case is asked for on three distinct grounds:

1. The charge of the circuit judge, "That, in the absence of passion or provocation, the length of time which the prisoner deliberated and premeditated was immaterial," and that if the "design (to kill) was deliberated on but one moment" it was the same as if deliberated on "one day or one week," is erroneous, and particularly calculated to mislead a jury. The Act of 1829 requires that deliberation shall be proved before a killing, however wilful and malicious, shall be deemed murder in the first degree, and punished capitally. This, the charge does not in terms deny, but erroneously undertakes to instruct the jury what time is necessary for deliberation to transpire in the mind. The word "deliberation," as used in our statute, means just what it does in all other well written productions, and, as defined in the dictionary, "the act of balancing in the mind, weighing, considering, hesitating," &c. It is not a technical word or word of art, and always conveys an idea the very reverse of sudden or instantaneous. Deliberation is a mental process which requires more or less time in its performance, according to the complication of the subject deliberated on, and the activity of the mind engaged in deliberating. In fact, a design may be formed instantly (or in a "moment"), and it may be formed deliberately; but the latter can only constitute the first degree of murder. This is too obvious to require argument; for if it were otherwise, the absurdity would follow that an instant and deliberate design to kill are one and the same thing; and if so, why insist on the word deliberate in the statute?

***4** This statute must be construed, *stricti juris,* in favor of life and liberty. This court have construed "deliberately" to mean "with cool purpose," as opposed to a purpose formed in the heat of blood and warmth of feeling. Dale's Case, 10 Yer. 551. But in that case, the length of time necessary for deliberation to transpire in the mind was not discussed or considered. There the intent to kill was expressed by Dale (when cool and unexcited) an indefinite time, from five to twenty minutes, before the killing, as evidenced by the conversation which passed between him and the deceased. The Court therefore only say what deliberation is, under the circumstances of that case, but do not so much as hint in what time it can occur. The Court were only called upon to decide whether the defendant was actuated by passion, and there being no direct evidence of its existence, they were naturally led to inquire whether there was any provocation from which passion might be inferred. Neither passion nor provocation appearing, and from three to twelve hundred "moments" having intervened between the absolute expression of an intention or design to kill, and the shooting, the Court refused to say the jury were clearly wrong in finding the defendant guilty of deliberating. Suppose, for the sake of illustration, that the judge had told the jury, in Dale's case, that deliberation could not transpire in less time than one hour, will any one doubt that such a charge would have been false in point of fact, and erroneous, because a matter of fact which should have been left to the jury altogether? This reason is exactly applicable to the pre-

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sent case. The judge told the jury in substance, as a matter of fact, that deliberation may transpire in the mind in one moment. We contend, in the first place, that he was evidently mistaken in the fact; and, in the second place, that he erred in attempting to charge upon a matter of fact. The Constitution (Art. 6, section 9) declares that judges shall not charge juries upon matters of fact, but may state the evidence and declare the law. What law provides that the human mind can deliberate upon any subject, no matter how intricate, or how sluggish the particular intellect engaged in deliberating, in "one moment, as well as one day or one week?" In order to escape this view of the subject, it may be contended that the charge of the Court does not affirmatively state that one moment is long enough to deliberate upon any subject. This may, strictly speaking, be true; the words are, "if the design (to kill) was deliberated on but one moment," in the absence of passion or provocation; and, further, that the "length of time in which the prisoner deliberated and premeditated was immaterial," &c. What could plain men understand from this language, but that if a design was formed without any reflection or deliberation whatever, and then the defendant kept that design "one moment" in his mind before he executed it, he would be guilty of murder in the first degree, because he had ""deliberated for one moment," that being all that is necessary?

***5** It will be noticed that the charge of the Court maintains that one moment's deliberation must happen after the design is formed, in order to make murder in the first degree, but denies, provided there be neither passion nor provocation, that there need be even so much as one moment's deliberation in the formation of that design. This is clear; from which it may be inferred, either that the judge considered it "immaterial" how suddenly the design to kill be formed, so that it be not formed in passion, or else that passion alone can prevent a design from being formed with deliberation. Provocation, of course, is only mentioned because it is likely to excite passion. Did the judge then mean to state to the jury, as a matter of fact, that all designs, no matter how hasty and ill-advised, were necessarily formed deliberately, if not formed from the mere impulse of passion? If so, then it is objected as in the other view of the case, that he misstated the fact upon which he improperly attempted to charge the jury.

The charge of the judge would have been unexceptionable had it stated to the jury, that, if they believed the defendant had only one moment to deliberate in, and that he did, in fact, during that moment actually "balance, weigh, and consider," or deliberate the subject before he killed, then he would be guilty of murder in the first degree. But this he did not do. On the contrary, he told them it made "no difference whether the design was deliberated upon one moment, one day or one week;" that is, if defendant had consumed so much time as one moment in deliberating, but had not "weighed, balanced, and considered" the design; or, in other words, had not completed the process of deliberating-- still he was guilty of "deliberation," and therefore of murder in the first degree. Upon the whole, therefore, the jury were either misled by understanding the judge to charge them that the process of deliberation could always occur in one moment--that is, that all minds under all circumstances can "weight, consider, and balance" all subjects in one moment-- or else, that, if deliberation be commenced, but in "one moment," and before the mind has ""weighed, balanced, and considered" the design, killing takes place, it is murder in the first degree.

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Whether the verdict of the jury were influenced by this remarkable error in the charge of the circuit judge, it is not necessary to inquire because impossible to ascertain with any certainty. This Court, it is apprehended, will not refuse to correct an error of such magnitude as this is supposed to be, when appealed to for the purpose, because its application to the particular case in which it is advanced may not be very manifest. The great duty of this Court is to correct errors and establish principles for the government of the country in all future time.

Unless the foregoing view be mainly correct, it is respectfully submitted whether the distinction in murder contemplated by our statute is not rendered unmeaning and insensible. The enlightened and humane distinction in that act, expressed in plain and inartificial language, rejects as absurd and cruel, the idea of trying all men, however different their temperament, habits, and education, by the same unbending standard. The common law made no allowance for passion unless excited by a certain amount of provocation,--or, if you please, considered a certain measure of provocation necessary to excite passion in all minds. This is called a "sufficient legal provocation," which was the same in all cases,--the dull phlegmatic temperament being placed on a level with the sanguine or bilious. Our statute, on the contrary, very wisely discriminates in this respect, and says a killing even without any legal provocation, shall not amount to the first degree of murder, unless it be premeditated and deliberate.

***6** 2. The Circuit Court manifestly erred in admitting the dying declarations of the deceased, in the absence of any proof of their having been made in apprehension of death. The ground upon which the judge admitted these declarations, the "necessity of the case," is believed to be novel and erroneous. Roscoe's Crim. Law 25-27, and authorities there cited. 1 McNally, 386. The opinion of the physician not expressed to the deceased, could not affect her conscience, or place her under the obligations of an oath. This point is deemed too clear for argument, and is most confidently relied upon for a new trial.

If it should be insisted that the defendant should not ask a reversal on this ground, because the declarations improperly admitted support the other defence, that of insanity, the answer is plain: No witness saw the killing, and the jury might have acquitted the defendant on the ground of accident, but for the deceased saying that he shot her by design, which was the only direct evidence on that point. If the jury had thought the insanity insufficiently proved, it is difficult to perceive how that of accident could have been avoided. The deceased was standing behind a bedquilt, putting bats into it, when shot. The defendant was within a few feet of her. The wound was low down on the left side of the abdomen, so that he must have shot under the bedquilt. This is inconsistent with a design to kill her: 1. Because a wound inflicted there was not likely to produce instant death, which a wound in the head or chest would have done; and 2d, because he could have fired his other pistol when he found she was not dead, and thus have cut off all evidence from her. This he did not do, but sent for a physician, and made no attempt to escape. The insanity, under which the proof shows him to have been laboring the morning before, may have caused him to have been handling his pistols without any sensible reason for so doing. *Mania a potu,* being a disease primarily of the nerves, and only affecting the brain secondarily, would

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render an accidental firing of the pistol in his hand much more likely. Therefore, but for the declarations of the deceased, that it was not so, the jury would most probably have decided that the shooting took place by accident, and may have convicted exclusively upon this illegal testimony. It is also insisted here, that dying declarations are, by the Constitution of this State, inadmissible; which says, "The accused shall be confronted by witnesses, face to face," &c.

3. But the great point upon which a reversal is asked in this case, is that of insanity. It is true there is no positive evidence of insanity at the moment of the killing, if the dying declarations be excluded. But in the great case of Hadfield (Roscoe's Crim. Ev. 783), the absurd doctrine of requiring what is nearly impossible, proof of insanity at the very time of killing, is completely exploded. The proof in this case exhibits habitual insanity for several years, and one of the strongest instances of it was manifested to Hiles the morning before the killing. The disease of *mania a potu* usually occurs by paroxysms of from one to three days in duration, and results from intemperance most usually. On Thursday, defendant drank excessively; on Friday morning he was sober, but insane, being the commencement of the paroxysms; and the paroxysms always increase in length as they occur more frequently. He had been subject to the disease for years, as Dr. Holt proves, and an attack of medium length would not have subsided before Sunday or Monday after the killing. But there are strong circumstances to prove this, aside from the general nature of the disease. Among these may be mentioned the apparent insensibility of the defendant after his wife was shot, and the remarkable fact that he attempted no excuse or defence at any time. It is almost impossible to conceive of a guilty man remaining in the presence of the person he had murdered, for a day and night, unrestrained and never once suggesting an excuse for the act. This is madness in the extreme. Roscoe's Crim. Ev. 784; 1 Hale, p. 6, 32; 1 Russ. 8; 5 Mason, 28; American Jurist, vol. 3, p. 5; Martin & Yer. 147. But the attention of the Court is particularly directed to Ray's Med. Ju. c. 24.
The Attorney-General, on behalf of the State, as to the supposed error of his Honor in admitting the dying declarations, cited 2 Russell, B. 6, section 3, pages 636 to 640, top paging, 3d Am. ed. It is not left to the jury to say whether the deceased thought she was dying or not. That must be decided by the judge before he receives the evidence. John's case, 1 East's P. C. c. 5, section 124; note in 2 Russell, *loc. cit.;* 15 Johnston, 286, Wilson v. Boem.

*7 In reply to the argument that dying declarations are inadmissible upon constitutional grounds, he said, that the right of a party accused of a crime to meet the witnesses against him face to face, and the admissibility of dying declarations, for the reason that the sanction under which they are made is of equal solemnity with that of statements made on oath, were principles of the common law of like antiquity and authority; that because the former had been questioned and denied in the relentless State prosecutions engendered in England by party animosity, it was thought by the framers of our Constitution to be a rule of fundamental importance, and to be worthy of recognition in that instrument. But it was not to be supposed, that because a particular rule of law had, from adventitious circumstances, become invested with the character of a political principle, therefore it annulled a correlative rule, introduced by the same authority, common usage, and founded upon reasons equally cogent.

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He said that there was no error in the explanations given by his Honor of what is necessary to constitute murder in the first degree, and cited Mitchell v. The State, 5 Yerger, 340.

Upon the point of the alleged insanity of the plaintiff in error, he referred to the twenty-third chapter of Ray's Medical Jurisprudence, to show that the evidence upon that point had not been developed on the trial with sufficient detail and precision to be the basis of a decision. Nevertheless, he admitted that the fact of the insanity was not destitute of probability. He cited Ray's twenty-fourth chapter, and referred to Smollett's remarks on the case of Earl Ferrers, c. 33, section 9, of his History of England.

He added that the testimony was comparatively unimportant at any rate. It was not relied upon to prove the killing, but only to prove that it was done by design, a fact which the prosecution need not prove at all; since where there is a killing, design is presumed, and the want of it is matter of defence.

Reese, J., delivered the opinion of the Court.

For the plaintiff in error it is insisted: 1. That the Circuit Court erred in refusing to set aside the verdict and grant a new trial, because it is alleged that the facts proved on the trial are not sufficient to sustain the verdict.

On attentively considering the proof set forth in the bill of exceptions. we are unable to come to the conclusion that the evidence does not warrant the verdict. On the contrary, we are all of opinion that the verdict of conviction is well sustained by the evidence; and indeed properly, and almost necessarily, resulted from it. It were a task neither necessary nor profitable, to refer to the testimony, for the purpose of maintaining, by commentary and argument, the opinion which we have announced.

2. For the plaintiff in error it is insisted that the Circuit Court erred in that part of the charge which relates to murder in the first degree; the part of the charge excepted to was as follows: "That to constitute murder in the first degree, it would not be sufficient that the killing was wilful and malicious. It must also have been deliberate and premeditated; that in the absence of passion or provocation, the length of time during which the prisoner deliberated and premeditated was immaterial; and if there was neither passion nor provocation, and the design to kill was formed, it would make no difference whether that design had been deliberated on but one moment, one day, or one week; but if the design to kill was formed under the influence of passion or upon provocation, and the killing ensued before the passion had time to subside, it will only be murder in the second degree, or manslaughter, if the provocation was a sufficient and legal one, as explained to the jury."

***8** We are all of opinion that in the charge to the jury above quoted there is no error. It is maintained by the opinion of this Court, in Dale's case, 10 Yer. 552, that in cases other than those, the circumstances of which are specified in the statute to constitute murder in the first degree, "the

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killing must be done wilfully--that is, of purpose, with intent that the act by which the life of a party is taken should have that effect; and deliberately--that is, with cool purpose; and maliciously--that is, with malice aforethought; and with premeditation--that is, a design must be formed to kill, before the act, by which the death is produced, is performed." The opinion of the Circuit Court we regard as in exact conformity to the above authority.

3. For the plaintiff, it is insisted that the Circuit Court erred in permitting the declarations of Mary Anthony, the deceased, made in *articulo mortis,* to go to the jury as testimony, and this upon two grounds: first, as being contrary to the Bill of Rights, which secures compulsory process for witnesses in behalf of defendants in criminal cases, and provides that they shall be confronted with the witnesses against them; and, secondly, because it did not sufficiently appear that Mary Anthony was conscious at the time of such declarations of her danger and of impending death.

Upon the first ground of objection, we are all of opinion that the Bill of Rights can not be construed to prevent declarations properly made in *articulo mortis,* from being given in evidence against defendants in cases of homicide. The provision of the Bill of Rights was intended only to ascertain and perpetuate a principle in favor of the liberty and safety of the citizen, which, although fully acknowledged and acted upon before and at the time of our Revolution, had been yielded to the liberal or popular party in Great Britain after a long contest, and after very strenuous opposition from the crown, from crown lawyers, and, if I may so speak, crown statesmen. In this case, as in that of libels and some others, the object of the Bill of Rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest. That our view of this question is correct is made manifest by the fact, that, after more than forty years from the adoption of our first Constitution this argument against the admissibility of dying declarations on the ground of the Bill of Rights is for the first time made, so far as we are aware, in our courts of justice, and if made elsewhere it does not appear to have received judicial sanction in any State.

2. As to the other ground of objection, namely, that there is not sufficient evidence to show that the deceased knew or thought herself to be in imminent danger of death at the time the declaration was made, a majority of the Court are of opinion that it also is not tenable. The general principle deduced from all the cases is stated, 1 East, P. C. 354, to be that "it must appear that the deceased, at the time of making such declarations, was conscious of his danger, such consciousness being equivalent to the sanction of an oath; and that no man could be disposed, under such circumstances, to belie his conscience, none at least who had any sense of religion. But such consciousness need not have been expressed by the deceased. It is enough if it might be collected from circumstances; and the Court are to judge of this consciousness previous to this sort of testimony.

***9** The declaration in the case before us was made about twelve hours before the death of the deceased; and the physician to whom it was made, states that the wound was a large pistol shot en-

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tering near the navel, and was such a wound as would ninety-nine times in a hundred produce death; that he thought at the time of the declaration that the deceased was fast sinking, but that he had made no communication to her, nor heard any made by any other person, informing her of her approaching dissolution, nor heard her say any thing concerning her consciousness of her approaching dissolution, only, "that she was suffering great pain, burning heat, and great sickness of the stomach."

If the dangerous nature and character of the wound, the state and illness of the party, her sinking condition, and her statement of extreme suffering, and of those symptoms which usually precede death, are circumstances from which in any case the consciousness of danger can be collected, they exist in the present case, and would justify the inference of such consciousness. In Woodcock's case, 1 Leach, 503, Old B. 1789, before C. B. Eyre, Ashhurst, J., and Adair, Serg., Recorder, when a woman, who had been dreadfully wounded, and who afterwards died of the wounds, made a declaration, the question was, whether it was made under the impression that she was dying. The surgeon said she did not appear to be at all sensible of the danger of her situation, dreadful as it seemed to all around her, but lay quietly submitting to her fate, without explaining whether she thought herself likely to live or die. Eyre, C. B., was of opinion that inasmuch as she was mortally wounded, and in a condition that rendered immediate death almost inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation-- her declarations made under these considerations were to be considered by the jury as being made under the impression of her approaching dissolution, for, resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman. And in Winter's case, 40 George III., McNally, 386, before Lord Kilwarden, ?? J., and Kelly, J., the declarations of the deceased were received, although she did not intimate that she considered herself in a dying condition, or that she had any apprehension of immediate death, it appearing that she had been absolved, and received extreme unction from a Catholic priest. In John's case, reported in 1 E. P. C. 1790, from the MSS. of Buller, J., it was ruled in the trial among other things, "that the evidence of the state of the deceased's health, at the time the declarations were made, was sufficient to show that she was actually dying, and that it was to be inferred from it that she was conscious of her situation." The prisoner having been found guilty, this point, among others, was referred to the judges, who, at a conference in Easter term, 1790, all agreed that it ought not to be left to the jury to say whether the deceased thought she was dying or not, for that must be decided by the judge before he receives the evidence. "And that if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence."

***10** It is obvious that this rule or principle, so distinctly stated, does not mean that the inference may be drawn from the mere fact that the wound, in the opinion of the man of science, was in point of fact mortal; but that the nature of the wound or the state of illness should be such as to affect the knowledge, and control the opinion of the dying person himself, as to the danger to which he stands exposed; for in that very case, where the wounds were bruises and contusion from blows or kicks, all the judges but two held that there was no foundation for supposing that

the deceased considered herself in any danger at all. But in the case before us, the dreadful nature of the wound, the state of illness as proved by the physician and declared by the deceased herself, were such as could not leave her or any rational being in doubt as to her being in great danger of immediate death.

The evidence in question, in reference to the state of facts shown upon the record, was of very slight importance, if of any, on the part of the State; but we lay no stress upon that consideration.

Let the judgment be affirmed.

NOTE.--In the twenty-first volume of the American Jurist, 468, there is a brief notice of a dissertation by C. I. Mittermaier upon criminal imputability. In this dissertation, the author, to arrive at a solution of the questions: By what signs is it to be known that the agent has not a knowledge of the morality of his act, and the liberty to abstain from it? What degree of injury of the intellectual faculties is necessary to destroy imputability?--lays down the following practical

RULE.

In order to withdraw the agent from the imputability of his act, it it not sufficient that his mind should for the moment be blinded by a transient cause, it is necessary that the feeling which impels him to crime should arise from a disease;

That this disease should be its only source;

And that its power should be so irresistible, that the liberty to act cases completely to exist.

When any form of insanity is relied upon as a defense, the inquiries to be made and prosecuted by the triers, according to this rule, would be, Was there a disease? If there was, what was the degree of it? And the solution of these questions, it is manifest, would require a painful collection and investigation of minute and various facts, to be derived, in most instances, from unskillful witnesses, and involving a scrutiny of the prisoner's past life. Should the disease be established, then the inquiry must be made, Was the prisoner impelled to the act by the specific feeling which arose from the disease and that only? For in case of strict monomania, the party is perfectly sane except upon a single point or subject; and hence monomaniacs are as capable of crime as others, except in the case only where they act under the influence of the feeling produced by the disease.

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2 Gratt. 594, 43 Va. 594, 1845 WL 2707 (Va.Gen.Ct.)
(Cite as: 2 Gratt. 594, 43 Va. 594 (Va.Gen.Ct.), 1845 WL 2707 (Va.Gen.Ct.))

C

General Court of **Virginia.**
HILL
v.
THE **COMMONWEALTH.**
December Term, 1845.

***1** (Absent *Smith* and *Clopton,* J.)

1. On a trial for murder, the dying declarations of the deceased, if made in expectation of death, are competent evidence against the prisoner.

2. The proof of the deceased's expectation of death is not confined to his declarations; but the fact may be satisfactorily established by the circumstances of the case.

3. Regularly the Court should first ascertain that the deceased expected to die, before his dying declarations are permitted to be given in evidence to the jury.

4. But if the Court permits the dying declarations of the deceased to be given in evidence to the jury, reserving the question whether they are made under an expectation of death, and it appears from the testimony that they were made in expectation of death, and were therefore competent testimony, this is no error of which the prisoner can complain.

5. Where a homicide is proved, the presumption is that it is murder in the second degree. If the Commonwealth would elevate it to murder in the first degree, she must establish the characteristics of that crime. And if the prisoner would reduce it to manslaughter, the burden of proof is upon him.

6. The rule of law is: That a man shall be taken to intend that which he does; or which is the immediate, or necessary consequence of his act.

7. A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie,* wilful, deliberate, and premeditated killing; and throws upon the accused the necessity of proving extenuating circumstances.

8. *Quære,* whether declarations made by the deceased immediately after the wound is inflicted, and before he has had time to fabricate a story, and when the *lis mota* did not exist, may not be given in evidence as a part of the *res gesta.*

9. When a case depends upon the tendency and weight of evidence; and the jury and the Judge who tried the cause concur in the weight and influence to be given to the evidence, it is an abuse of the appellate powers of this Court to set aside a verdict and judgment, because the Judges of this Court, from the evidence as it is written down, would not have concurred in the verdict.

10. This Court will only set aside a verdict because it is contrary to the evidence, in a case where the jury have plainly decided against the evidence, or without evidence.

11. The law has affixed no limit to the terms of the Circuit Superior Courts, except that the Judge holding the Court shall adjourn in time to hold the next Court in his circuit at the time appointed by law. And the Judge may continue the session of his Court until the latest period which will allow him time to get to the next Court by 4 o'clock, P. M. of the fourth day of the term.

At the October term 1845, of the Circuit Superior Court for the county of *Nansemond, Hunter Hill* was put upon his trial for the murder of *Robert R. Smith.* On the trial of the cause, the Commonwealth offered in evidence the declarations of the deceased, which were objected to by the counsel for the prisoner, until the Court should decide whether they were properly admissible as evidence for the jury; and moved that before such evidence should be received, the Court should first proceed to enquire whether the said declarations were made under such circumstances as rendered them competent evidence to go to the jury; but the Court deeming it proper to receive proof of all the declarations of the deceased before determining upon the competency of the said declarations as evidence for the jury, overruled the objection and permitted the examination of the witnesses to proceed, and evidence of the said declarations to be given in. When all the evidence was given in, the prisoner by his counsel moved the Court to reject so much of the said testimony as relates to the declarations of the deceased; but the Court overruled the motion, and permitted the said declarations to go in evidence to the jury. To these opinions of the Court, overruling the objection to the introduction of the declarations of the deceased before the Court had decided upon their admissibility as evidence before the jury; and overruling the motion to exclude said declarations as evidence before the jury, the prisoner by his counsel took a bill of exceptions, which embraced all the testimony given upon the trial. The substance of this testimony is stated in the opinion of the Court.

***2** The trial, which commenced on Tuesday the 14th of October, was continued until the following Monday the 20th; when the jury returned a verdict by which they found the prisoner guilty of murder in the first degree. The prisoner then moved the Court for a new trial on the ground that the verdict was contrary to law and the evidence; but the Court overruled the motion; and the prisoner excepted. This bill of exceptions referred to the evidence as set out in the first bill of exceptions, which the Judge certified was all the evidence given at the trial.

On the 21st of October at 9 o'clock A. M., the prisoner was brought to the bar to receive the sentence of the law, when he moved the Court to arrest the judgment, on the ground that at the time the verdict was rendered, and when the Court was about to pronounce sentence upon him, the term of the Court had ended, and the Court had therefore no power, at that day, to pronounce

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judgment upon the said verdict. It appeared that the Circuit Superior Court for *Isle of Wight* county, which was in the same judicial circuit with the county of *Nansemond,* and comes next after the Court in *Nansemond,* was appointed by law to commence on Saturday the 18th of October; before the verdict was rendered in this case; but it also appeared, that the courthouse in *Isle of Wight* was only about seventeen miles from the courthouse in *Nansemond* county, and might be reached in three hours ordinary travelling. The Court therefore overruled the motion, and proceeded to pronounce judgment upon the prisoner. To this opinion of the Court overruling the motion in arrest of judgment, the prisoner by his counsel excepted. Upon the grounds stated in his several bills of exceptions, the prisoner applied to this Court for a writ of error.

West Headnotes

New Trial 275 ⚿68.1

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k68.1 k. Contrary Verdict in General. Most Cited Cases
(Formerly 275k68)

New Trial 275 ⚿70

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k70 k. Sufficiency of Evidence. Most Cited Cases
The refusal to set aside the verdict as contrary to the law and the evidence is proper where it sufficiently appears that the verdict was not plainly against the evidence or without evidence to sustain it.

Homicide 203 ⚿908

203 Homicide
203IX Evidence
203IX(B) Presumptions and Inferences
203k908 k. Intent or Mens Rea. Most Cited Cases
(Formerly 203k145)
The rule of law is that a man accused of murder shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act.

Homicide 203 ⚿910

2 Gratt. 594, 43 Va. 594, 1845 WL 2707 (Va.Gen.Ct.)
(Cite as: 2 Gratt. 594, 43 Va. 594 (Va.Gen.Ct.), 1845 WL 2707 (Va.Gen.Ct.))

203 Homicide
203IX Evidence
203IX(B) Presumptions and Inferences
203k910 k. Deliberation and Premeditation. Most Cited Cases
(Formerly 203k147)

Homicide 203 ⚿941

203 Homicide
203IX Evidence
203IX(C) Burden of Proof
203k940 Excuse or Justification
203k941 k. In General. Most Cited Cases
(Formerly 203k147)

A mortal wound, given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight, provocation, is prima facie willful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances; the rule of law being that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of the act.

Homicide 203 ⚿915

203 Homicide
203IX Evidence
203IX(B) Presumptions and Inferences
203k915 k. Grade, Degree, or Classification of Offense. Most Cited Cases
(Formerly 203k152)

Homicide 203 ⚿936

203 Homicide
203IX Evidence
203IX(C) Burden of Proof
203k936 k. Grade, Degree, or Classification of Offense. Most Cited Cases
(Formerly 203k152)

Where a homicide is proved, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, the characteristics of that crime must be established; and if the prisoner would reduce it to manslaughter, the burden of proof rests on him.

Criminal Law 110 ⚿366(3)

110 Criminal Law

2 Gratt. 594, 43 Va. 594, 1845 WL 2707 (Va.Gen.Ct.)
(Cite as: 2 Gratt. 594, 43 Va. 594 (Va.Gen.Ct.), 1845 WL 2707 (Va.Gen.Ct.))

110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k366 Acts and Statements of Person Injured
110k366(3) k. Subsequent to Commission of Crime in General. Most Cited Cases
(Formerly 203k174(9))
Whether declarations made by the deceased immediately after the wound is inflicted, and before he has had time to fabricate a story, and when the lis mota did not exist, may not be given in evidence as part of the res gestae, quaere.

Homicide 203 ⚿1076

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1076 k. Grounds of Admissibility in General. Most Cited Cases
(Formerly 203k200)
Upon the trial of an indictment for murder, the dying declarations of the deceased, made in contemplation of death, may be given in evidence against the prisoner.

Homicide 203 ⚿1080(3)

203 Homicide
203IX Evidence
203IX(E) Dying Declarations
203k1077 Condition of Declarant
203k1080 Sense of Impending Death
203k1080(3) k. Necessity of Statement by Deceased as to Belief in Impending Death. Most Cited Cases
(Formerly 203k203(2))
The proof of the deceased's expectation of death is not confined to his declarations, but the fact may be satisfactorily established by the circumstances of the case.

Criminal Law 110 ⚿681(2)

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k681 Admission of Evidence Dependent on Preliminary Proof
110k681(2) k. Provisional or Conditional Admission. Most Cited Cases
(Formerly 203k267)
Regularly, the court should first ascertain that the deceased expected to die before his dying dec-

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larations are given in evidence to the jury; but if first given in evidence, and it appears that they were proper evidence, it is no error of which the prisoner can complain.

Courts 106 ⚿65

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k65 k. Duration of Terms. Most Cited Cases
The law having fixed no limit to the term of the circuit superior court, the judge of that court may continue the session until the latest period which will allow him time to get to the next court by 4 p.m. of the third day of the term.

Appeal and Error 30 ⚿1005(4)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1005 Approval of Trial Court
30k1005(4) k. Verdict Against Weight of Evidence. Most Cited Cases
When the judge and jury who tried the case concur in the weight and influence to be given to the evidence, it is an abuse of the powers of the appellate court to set aside the verdict and judgment, because that court, from the evidence as it is written down, would not have concurred with the jury.
The cause was argued here, by *C. Johnson,* and *Milson,* for the prisoner; and by the *Attorney General,* for the Commonwealth.

DUNCAN, *J.* delivered the opinion of the majority of the Court.

***3** The prisoner was indicted for the murder of *Robert R. Smith;* and was found guilty by the petit jury of *murder in the first degree;* and sentence of death was pronounced by the Court.

On the trial, the dying declarations of the decedent were given in evidence to the jury, and this was objected to by the prisoner. Before this Court, the objection assumed three distinct grounds:

1st. That the admission of the dying declarations in evidence, is a violation of the bill of rights: the 8th article of which secures to every citizen charged with crime the right to be confronted with the witnesses against him.

2d. That the Court permitted the dying declarations to go to the jury, and be heard by them, before having determined whether the decedent was in the condition at the time to render them legally admissible.

2 Gratt. 594, 43 Va. 594, 1845 WL 2707 (Va.Gen.Ct.)
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3d. That the decedent was not in the condition when he made the declarations to render them legally admissible as evidence.

After the verdict of the jury, the prisoner moved the Court for a new trial, upon the ground that the evidence and the law did not authorize the jury to find him guilty of *murder in the first degree;* and the motion being overruled by the Court, the prisoner thereupon, moved in arrest of judgment, on the ground that the verdict of the jury was rendered after the expiration of the term of the *Nansemond* Court; and after the time appointed by law for the Judge who presided to hold the Court of *Isle of Wight* county. This motion was also overruled, and sentence of death pronounced upon the prisoner. The cause now comes up before the General Court, upon an application for a writ of error for the causes aforesaid.

In assigning the reasons for the opinion of the Court in this case, it is proposed to pursue the course of the argument of the prisoner's counsel; and to commence with the application for a new trial, on the ground that the law and evidence did not justify the jury in finding the prisoner guilty of murder in the first degree. In other words, that the evidence did not make out a case under the law, of *wilful, deliberate and premeditated killing.* Without designing to enter into a disquisition upon the terms of our statute creating the distinction of murder in the first and second degree, we shall content ourselves with the reasoning of the General Court in *Jones's* Case, 1 Leigh 598, and adopt it. We also concur with the prisoner's counsel in their position, that under our statute, every homicide is, *prima facie,* murder in the second degree; and in order to elevate the offence to murder in the first degree, the burden is cast upon the Commonwealth to bring it by proof either within the specific class of cases, such as killing by poison, or by laying in wait, &c. enumerated in the statute, or within the general class of "wilful, deliberate and premeditated killing." On the other hand, in order to reduce the offence from murder in the second degree to manslaughter, the burden is cast upon the accused. As the homicide in question has been found by the jury to be murder in the first degree, the question arises, was there sufficient evidence before the jury to elevate the offence to that grade? As there was no evidence tending to bring the homicide within the specific class of cases which by the statute are made to constitute murder in the first degree, does the evidence bring it within the general class of "wilful, deliberate and premeditated killing?"

***4** The principal difficulty, we apprehend, that exists in distinguishing between murder in the first and second degree, is in determining what proof is sufficient on the part of the Commonwealth to shew that the killing was wilful, deliberate and premeditated. In order to elevate the offence from murder in the second to murder in the first degree, there must be proof that the accused deliberated; and that the killing was the result of such deliberation. This being proved, it is not material how recently the deliberation preceded the killing. The practical difficulty in cases of this kind, is, in determining what is sufficient evidence of deliberation. A homicide rarely declares his intention; may, he often, under the disguise of friendship and kind offices, sedulously conceals his fatal purpose. Often the resolution to kill may be fixed, but the time and the means not determined upon. The most wilful, deliberate and premeditated murders would often go un-

punished unless means existed of proving the intention, independent of the admissions or declarations of the homicide. We are of opinion that such means are furnished by the rule: "That a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act." 2 Stark. Evi. 738, and the authorities there referred to.

To illustrate this rule, let us suppose that a man is seen, within shooting distance of another, to raise his gun, take aim, and fire, and the man falls; the ball having inflicted a mortal wound: and that these are all the facts proved; is this murder in the first or second degree? To respond to this enquiry, we have only to apply the rule just quoted. The taking aim, and firing such a weapon, one from which death would most likely ensue, would itself be *prima facie* evidence that he intended it; and was, therefore, a wilful, deliberate and premeditated killing.

Now, let us apply this rule to the prisoner's case; and in the first instance, to examine it as if all the evidence which are technically classed as *dying declarations* were out of the case. Some of these declarations, it might be insisted, were parts of the *res gesta;* and as such, proper evidence. These will be adverted to presently; and the reasons assigned why they ought to be admitted as part of the *res gesta.*

The proof to which we will now refer as exclusive of the dying declarations, is as follows: On the evening of the 13th of September last, (the evening of the homicide,) the decedent, who resided 18 miles from *Suffolk,* being on a visit to his estate adjoining, or near to the town of *Suffolk,* came to the town, and was at the Washington Hotel. The prisoner who resided in the town of *Suffolk,* casually met him there: friendly salutations passed between them: a mixed conversation took place in the company; (there being several persons present;) when about the hour of 7 o'clock, the prisoner asked the decedent to walk with him, as he wished to say something to him. The decedent complied, and they walked off together towards *Bayly's* storehouse; which is about 50 feet from the end of the porch of the tavern from which they started: and *Bayly's* store is in view of persons stationed in the end of the porch. No person seems to have observed the parties after they started on their walk. The prisoner had with him a sword cane. After the lapse of between 5 and 10 minutes, the decedent was seen to approach the tavern, staggering. He fell before he got to the porch. Some of the company who were in the porch went to his aid, carried him into the porch, and laid him down. He was pulseless, and his countenance was pale and death like. Some of the persons present thought he was dead. He lay in this situation some minutes, when he revived a little, turned himself over and vomited. Remedies were applied to restore sensibility, and in about 10 minutes he was sufficiently restored to be able to speak; and upon being asked what ailed him, "he put his hand to his left breast, and said *here it is, here it is."--"Hunter Hill* asked me to walk out, and stabbed me here." (See Duke's evidence, page 8 of the record.) His clothes were opened, and a wound discovered on the left breast, opposite the region of the heart. It was also proved that the decedent from the time he was discovered to be wounded, looked pale and haggard; his extremities were cold; a clammy sweat exuded from him; he laboured under great bodily prostration; he complained of coldness, and pain in his bowels; his voice, though distinct, was weak; his breathing gradually became more difficult; his manner was composed and firm; and about 9 o'clock of the morning he died. A *post mortem* examination of him disclosed

that the wound had penetrated into the left ventricle of the heart, and was inflicted by an instrument, such as a sword cane; and that the pericardium contained from 6 to 12 ounces of coagulated blood. It was also proved that some months prior to the supposed murder, the prisoner had taken umbrage at the decedent, who was a major of militia, for not appointing him captain of a patrol; that upon one occasion speaking of that matter, he remarked, "major *Smith* must mind how he cuts his cards with me;" and on another occasion, he remarked, "major *Smith* has treated me rascally; and that he (the prisoner) had come to a low ebb if he could not have a patrol commission." It was also proved, that subsequent to the affair of the patrol, the relations of the parties were apparently amicable. The prisoner was the tenant of the deceased. Common place civilities passed between them; but there was no other evidence of a change of the prisoner's feelings growing out of the patrol affair. It was further proved, that on the evening of the alleged murder the prisoner was not seen after starting to walk with the decedent; that he fled that night, and was arrested in the State of New York. On the part of the prisoner it was proved, that he had on the day before the night of the alleged murder, and on preceding days, paid out money that he had collected as a constable; that he had appointed to go at 12 o'clock that night in search of a runaway slave; and to dine on the next day with a friend. The foregoing includes, we believe, a fair synopsis of all the evidence except the "dying declarations" of the decedent: unless the first expression of the decedent upon his revival in the porch, to wit: "*Hunter Hill* asked me to walk out, and stabbed me here," is to be excluded as not constituting a part of the *res gesta.* How then will the prisoner's case stand upon the evidence as stated? Has the Commonwealth made out a case of wilful, deliberate and premeditated killing? And here, it should be premised, that this was a question resting upon the tendency and weight of the evidence; and proper for the jury to determine. And where the jury and the Judge who tried the cause concur in the weight and influence to be given to the evidence, it is an abuse of the appellate powers of this Court, remote as it is from the scene of the transaction, having the evidence only on paper, divested of many elements which enter into every jury trial, and which from their nature cannot be presented on paper, to set aside a verdict and judgment, because the Judges of this Court, from the evidence as written down, would not have concurred in the verdict. Although we have, contrary to the rule of the English Courts, decided that it is within the appellate powers of this Court to set aside a verdict because it was not authorized by the evidence, yet it is only in a case where the jury have plainly decided *against the evidence, or without evidence,* that this appellate power will be exercised. *M'Cune's* Case, 2 Rob. R. 771. The evidence we have quoted, establishes these facts: That the prisoner had sometime prior to the fatal transaction, taken umbrage at the decedent. His pride had been wounded. To what extent this feeling had fermented in his bosom we know not: but we do know, that in some temperaments, the feelings of wounded pride are more durable, and more vindictive than those produced by any other kind of injury: and it by no means follows that the most vindictive and deadly purposes may not be concealed by a social demeanor. Malice can caress and smile upon, and then stab its victim. This condition of the prisoner's feelings was, to say the least of it, a circumstance proper for the consideration of the jury; a jury from the vicinage, and who are presumed to know the man: and the weight that should be given to that circumstance is a matter that an appellate Court cannot determine. The next fact is, that the prisoner asked the decedent to walk with him, as he wished to say something to him. Why he desired privacy does not appear? He took the decedent from the friends and company that surrounded him into the shade

of the night. He had with him a sword cane; and in the short space of between 5 and 10 minutes, the decedent is seen returning from whence he started--he falls--rises--staggers--falls again, in a state of utter insensibility, and physical prostration, from a stab in the heart, by an instrument such as that in the possession of the prisoner: and the prisoner under the cover of the night, flies from his home and his country. Suppose the evidence stopped precisely at this point--the first enquiry would be, who stabbed the decedent? He was seen going off in company with the prisoner at his request, who is armed with a sword cane; and who it is known, had entertained feelings of umbrage at the decedent some time prior thereto. In a very few minutes afterwards, the decedent is found mortally stabbed, with an instrument such as a sword cane; and the prisoner has fled. Upon these facts alone, could the jury have come to any other conclusion than that the prisoner stabbed the decedent? Having arrived at that conclusion, the next enquiry would be, was the act wilful, deliberate and premeditated? To ascertain this, they would look into the previous condition of the prisoner's feelings; they would couple it with the fact, that it was the prisoner who procured the decedent to leave the company and walk with him under the shade of the night: and they would also couple these with the facts, that in a few minutes, the blow was struck with a weapon from which death would likely ensue; that it was aimed at a vital part; and sent with force sufficient to reach the heart; and that the prisoner fled. Are not these circumstances sufficient? Nay, could the jury have come to any other conclusion than that it was murder in the first degree? But if we connect with these circumstances, the first declaration of the decedent, ""Here it is--here it is," placing his hand on his left breast, "*Hunter Hill* asked me to walk out, and stabbed me here"--as part of the *res gesta*--the fact of the killing by the prisoner is proved beyond all doubt; and the circumstances before referred to shew the *quo animo* with which it was done. That this declaration is part of the *res gesta,* remains now to be shewn. There can be no doubt that the situation and condition of the decedent after he received the wound; his staggering as he approached the tavern; his *falling;* his pulseless and insensible state; his vomiting; the coldness of his extremities; his physical condition; the remedies resorted to; all he said and did up to the period of his death, except his declaration as to the commission of the act, are all parts of the *res gesta:* and why not his declarations as to the commission of the act? The reason is, that he may have fabricated or made up a story. But on the one hand, if under the circumstances of the case he could not have had time to make up a story, and that the declarations were made when the *lis mota* did not exist, then they may be received as part of the *res gesta.* On the other hand, if made after time sufficient had been allowed to fabricate a story, or the *lis mota* may be supposed to exist, they are not to be considered as part of the *res gesta.* In this case the decedent was stabbed to the heart; he immediately attempted to return to the tavern; he fell, recovered to his feet, staggered, fell again, and fainted; and remained insensible for about 10 minutes, when, and after the application of stimulants, he revived so as to be able to speak; and immediately made the declaration referred to. Where was the time within which he could have arranged his thoughts, and fabricated a story? *A priori* a stab in the heart would instantaneously suspend the powers of reflection; and we have seen its physical effect upon the deceased. All the time then from receiving the stab until he revived from his fit of fainting he was clearly not in a condition to arrange his ideas and fabricate a story: and the declaration was immediate upon his revival. In *Rex v. Foster,* 25 Eng. C. L. R. 421, the statements of a deceased who had been run over by a cabriolet, made recently after receiving the injury, were allowed as part of the *res gesta.* So in

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Skinner 402, referred to in a note to *Rex v. Foster, Holt,* Judge, permitted the statements of the wife made recently after being wounded by her husband, and "before she had time to devise any thing for her own advantage," to be given as part of the *res gesta.*

***5** All that is necessary, according to these cases, to make the declaration part of the *res gesta,* is that it should be made recently after receiving the injury, and before he had time to make up a story, "or to devise any thing for his own advantage." Tested by this rule, the statement referred to is clearly admissible.

The other statements of the deceased, and which were allowed to go in evidence, and to which as yet there has been no reference, were substantially as follows: "I was sitting in the porch, and *Hunter Hill* came up, and asked me to walk out with him. I accompanied him as far as the house where *Bailey* formerly lived. When opposite the steps of the piazza, I proposed to take a seat; he said no, let us go a little further down. I said no, here is a good place, let us sit down here. They seated themselves, and entered into a conversation. After a short time *Hill* brought up the old patrol affair. I explained to him, and thought I had satisfied him on that subject. He insulted me, and called me a damned scoundrel. I arose, and as I arose he stabbed me. He turned off to run. I let him have it some where about the nose. At first, I thought I was not stabbed, but merely punched with a stick. I tried to get back; I fell, and then I rose again." And upon being interrogated whether he had any notice of *Hill's* intention to stab, he replied, "None whatever." The foregoing constitutes a summary of his statements, made at various times during the night; and were permitted to go to the jury on the ground that they were made under the consciousness of approaching death. These dying declarations, taken in connection with the other evidence upon which we have commented, and which we supposed to be sufficient to have justified the verdict, without the aid of the dying declarations, establishes, fully, every ingredient of murder in the first degree. Taken together, they prove that the stab preceded the blow given by the decedent; and that the stab was inflicted as the deceased was rising from his seat. But were it otherwise, the prisoner cannot take shelter under that which is the natural and probable consequence of his own deliberate and premeditated act. Nay more, we are of opinion, that a mortal wound given with a deadly weapon, in the previous possession of the slayer, without any, or upon very slight provocation, is, *prima facie,* wilful, deliberate, and premeditated killing; and throws upon the accused the necessity of proving extenuating circumstances. We do not mean to say that there may not be other circumstances besides the previous possession of a deadly weapon, which would manifest that premeditation, and deliberation, required by the statute to constitute murder in the first degree; as in the case of mulatto *Bob,* cited in a note to the *Commonwealth v. King,* 2 Virg. Ca. 85.

We come now, to the exceptions to the admissions of the declarations of the deceased as evidence.

*6 1st. Is such evidence contrary to the bill of rights? If this question is to be answered affirmatively, then for nearly 70 years past, the Courts of this Commonwealth have been in the constant practice of violating the bill of rights in a most important particular. We admit that the practice of the Courts, however long, and uniform, is not of itself a valid answer to the objection; and that

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this Court is bound to decide it now; not upon practice, but upon principle. How does this question stand? One of the learned counsel for the prisoner maintained, in the argument, that the provision in the bill of rights, that the accused had a right to be confronted with the witnesses against him, was a new principle; the offspring of American liberty: and that it had no existence in the great charter of English liberty. In this respect, we think the learned counsel is in error. *Magna Charta* provides that a subject accused of crime, should be tried by his peers; and according to the principles of the common law; and it is a well established principle of the common law, that an accused should be tried by a jury of the vicinage: that the trial should be public; and the witnesses against him examined in his presence. This was no new principle. It was familiar to *Virginia* in her colonial condition. The question then arises, what was the doctrine of the common law as it regarded this rule of evidence? Without attempting to ascertain the antiquity of the earliest decisions of the British Courts affirming the rule, it is sufficient to state, that long anterior to the year 1776, the period of the declaration of the bill of rights, the rule of evidence was well established. And it is remarkable, that in all the commentaries it underwent in *England,* it was never supposed that the rule was a violation of the rights of the subject as secured by *Magna Charta.* The rule is one of necessity. It is analogous to that which authorizes the admissions of the prisoner to be given in evidence against him. In that case, he is not the witness; neither is the dead man. His declarations are facts to be proved by witnesses, who must be confronted with the accused. We are therefore of opinion, that the admission of dying declarations as evidence, is not repugnant to the bill of rights.

Without referring in detail to the numerous adjudications that have taken place in *England,* and in this country, upon the question, we consider it settled, that declarations *in articulo mortis* by one who is conscious of his condition, are admissible evidence; and that the fact of such consciousness may be established otherwise than by the statements of the decedent: as by the character and nature of the wound, his appearance and conduct, &c. For this we refer to Roscoe's Crim. Evi. 29, and the authorities there referred to. The decedent is proved to have been a brave man, and his whole deportment shews him to have been a man of no ordinary firmness. He never said in terms that he was about to die. He made no disposition of his property. He sought no religious or spiritual comforter. He died calmly and firmly. And yet it seems to us impossible that any one can read the evidence in this cause without a thorough conviction that from the moment after he received the stab, he knew it to be fatal. It penetrated the heart. It made him reel and stagger like a drunken man; fall and faint. His limbs became cold. He was seized with vomiting. His eyes were sunken; his countenance pale and death-like. A clammy sweat exuded from him. The action of the heart, pierced as it was, and surrounded with clotted blood, was so feeble that it could not send the blood to the extremities, or even the surface of the body. In a warm night in September, with hot bricks at his feet, and covered with half a dozen quilts and blankets, he complained of cold. There was no pulse in the wrist. The supply of blood to the head was so scant, that when it was raised much above a horizontal position, he fainted. His removal up stairs brought on convulsions; and there is good reason to believe that had he, at any time after his revival from the state of insensibility which followed the infliction of the wound, been placed in a perpendicular position, he would have instantly expired. Is it possible that all this could exist and he not know that death was grappling with him. The spectators all saw that death was upon him.

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The physicians, it is true, for a brief time deceived by their probe, supposed that the wound was superficial, and that he might recover; but *he* was not deceived. Upon being told that the physicians said the wound was slight, and that he would soon recover, he replied it is deep! deep! deep! His sensations told him it was deep, fatally deep. And how could it be otherwise, when it produced the effects above detailed. Upon one occasion, when the attendants were rubbing him with camphor, he told them to desist; "that it was the way of all flesh." On another, he remarked, "it will soon be over." Or, according to another witness, (whose testimony, if there was any conflict between the witnesses, it was the province of the Judge below to weigh, upon the question of admitting the declarations, and of the jury to weigh after they were admitted,) "it will soon be over *with me.*" When asked why he wished his wife sent for, he said, he was "growing very weak." He repeatedly said he was "very weak"--"I feel no better." He expressed his own fears that it was worse with him than the doctors thought it. He was heard frequently to be uttering ejaculations devoutly to the Lord; such as "O Lord," "poor fellow;" and was heard to exclaim, "what will become of my poor family." All these manifestations of his feelings strongly indicate, taken in connexion with the attendant circumstances, that he was sensible of the hopelessness of his condition; which had been, from the first, constantly growing worse. All of them had preceded the last statement he made a little after 4 o'clock in the morning of the 14th; and this last statement was the exact repetition of all the statements he had uniformly made before. Upon carrying him up stairs about daybreak, he remarked, "doctors, look out for me." From this expression, it was argued that he yet entertained hopes of recovery. The expression "look out," is equivalent to "take care," and most probably referred to the necessity of extreme care and caution to avoid consequences similar to those which had been occasioned by raising his head from a horizontal position. This construction is strengthened by the fact, that as soon as he was laid down, he was seized with spasms. It is to be remarked, that during the whole time from the infliction of the wound until his death, he never expressed or indicated the belief that he would survive. It is true, that he manifested during the night at intervals, something like feelings of revenge towards the prisoner. But are such feelings inconsistent with the knowledge of the approach of death? Men of different temperaments are differently affected upon such an occasion.

*7 The next objection is, that the Judge who tried the cause, permitted the dying declarations to be heard by the jury before he decided upon the sufficiency of the grounds upon which they were admitted. The rule is now established, although for a time it was vibratory in the English Courts, that the fact of the dying condition of the party must be determined by the Court, and not the jury. Regularly therefore, the evidence of that fact should be first laid before, and passed upon by the Court. That course was not pursued in this case. The preliminary evidence necessary to authorize the dying declarations to be used, and the declarations themselves were heard together; the Judge reserving to himself the right, after hearing all the evidence, to determine upon the admissibility of the declarations. This was an irregularity, so far as the declarations indicating his condition can be separated from the rest, and if any injury could have resulted from it to the prisoner, it would have been error. But the only case in which the irregularity could work an injury, would be where the testimony, after being heard by the jury, was rejected by the Court as inadmissible. The declarations were decided by the Court to be admissible; and if so, then no possible injury was done the prisoner. On the contrary, had the declarations been rejected by the Court,

after having been heard by the jury, and the prisoner had still been found guilty by the jury, impressions might have been produced on the minds of the jury; and tinge or colouring given to the case by it, prejudicial to the prisoner: in such a case the irregularity would probably have been error. Such, however, is not the present case.

The last question is, was the judgment in this case *coram non judice,* by reason of the alleged expiration of the term of the *Nansemond* Court?

The regular time prescribed by law for holding the Circuit Superior Court of *Nansemond,* was on the 12th day of October. The next Court of that circuit was that of *Isle of Wight* county, which by law was directed to be holden on Saturday, the 18th day of October. The verdict of the jury in this case was rendered on the 20th of October, and judgment of death was pronounced at 9 o'clock A. M. on the 21st. The distance from the courthouse of *Nansemond* to that of *Isle of Wight,* is 17 miles, and is three hours travel. In looking into the statutes regulating the times for holding the respective Courts of this Commonwealth, we find that the County Courts shall continue six days, unless the business is sooner determined. Here is an express statutory limitation of the duration of the terms of the County Courts. But there is no such limitation in the Circuit Court law. By the statute, each of these Courts "shall sit until the business thereof shall be dispatched, unless the Judge holding the same shall be *compelled* to leave the Court in order to arrive in time at the next succeeding Court of the circuit." And the statute further provides, "that if the Judge shall not attend on the first day of the term of any of the said Courts, such Court shall stand adjourned from day to day, until a Court shall be formed; if that shall happen before 4 o'clock of the third day." By operation of law, the Court of *Isle of Wight* county stood adjourned until 4 o'clock of Tuesday; Sunday being *dies non;* and sentence being pronounced at the *Nansemond* Court at 9 o'clock A. M. of the same day, the Judge had time to travel 18 miles, and arrive at the courthouse of *Isle of Wight* before 4 o'clock P. M.

***8** There being no limitation of the *Nansemond* Court, except that arising from the necessity of holding the *Isle of Wight* Court, when did that necessity arise? Was it on the first day appointed by the statute for holding that Court; that is on Saturday; or was it at any time before 4 o'clock of the Tuesday following? The Legislature supposed causes might supervene to prevent a Court from being holden on the first day appointed for it; and as every county was entitled to a Court, it provided that if the Court was not opened on the first day appointed, it should stand over from day to day, until the close of the third day. The Judge, therefore knows, when holding any of his Courts, that a time is appointed to hold another Court in another county of his circuit; and that if he does not hold that Court before 4 o'clock of the third day appointed for it, his failure will deprive that county of its Court. But if he does hold the Court before 4 o'clock of the third day, the county will have its Court; and the requisitions of the statute will be satisfied. And as there is no express limitation of the term he is holding, except that arising from the necessity of holding a Court in another county, and as that necessity does not become absolute until 4 o'clock of the third day, he will exercise his discretion, resting upon his responsibility to the public; and if in his judgment, the ends of public justice will be best subserved by continuing the Court which he is holding until the time shall arrive when he must depart, to hold the Court of the next county,

so as not to deprive that county of its Court, he ought to do so; especially when by doing so, he retains to a citizen accused of crime, his right to a speedy trial. In this case, the Judge who tried the prisoner, had to decide between breaking off in the midst of the trial, and retaining the prisoner for trial at another term, in order to get to *Isle of Wight* Court on Saturday, or of finishing the trial, and still holding the Court of that county. He chose the latter, and we think he exercised his discretion properly. And for this view of the case, the Court feels that it is sustained by the reasoning of the Judges, and the judgment pronounced by the General Court in *Mendum's* Case, 6 Rand. 704.

On the whole, therefore, the majority of the Court decides not to award the writ of error applied for in this case.

Note by the Judge.--Some of the Judges composing the majority, doubt the correctness of that part of the foregoing opinion which declares the declarations of the deceased made in the porch proper evidence as part of the *res gesta;* regarding them at the same time as clearly admissible as dying declarations.

BAKER, *J.*

This is a prosecution in which the prisoner has been convicted of murder in the first degree, and in which an objection, for the first time in this Court, has been raised to the admissibility of dying declarations in consequence of the 9th section of the bill of rights, which declares that in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with his accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.

***9** I think that it would not be a very difficult matter to shew from the mere phraseology of this portion of the organic law, that the peculiar circumstances of the case in question, that is to say, of the admissibility of declarations made in *articulo mortis,* could not have been in the contemplation of its framers; or intended thereby to be in any manner affected or controlled. The propriety of admitting such declarations has, for a long period of time, been recognized by the English Courts, and is now established by a series of incontrovertible adjudications. These decisions have been made in a country from which we have borrowed the most of our laws; a country in which, doubtless, a high regard for the security and liberty of its citizens, has, on proper occasions, been hitherto manifested; and in which is to be found a constitutional provision almost identical with our bill of rights. Delolme on the English constitution, page 122, when treating of criminal justice and enumerating the many guards provided by *magna charta* for the protection and security of the accused, says: "When at length the jury is formed, and they have taken their oath, the indictment is opened, and the prosecutor produces the proofs of his accusation. But, unlike the rules of the civil law, the witnesses deliver their evidence in the presence of the prisoner: the latter may put questions to them: he may also produce witnesses in his behalf and have them examined on oath. At page 130, of the same work, the author is still more distinct and emphatic in relation to the same subject. He says, that they do not permit that a man should be made to run the risk of a trial, but upon the declaration of twelve persons at least, (the grand jury.) Whether he be

in prison, or on his trial, they never for an instant refuse free access to those who have either advice or comfort to give him. They even allow him to summon all who have any thing to say in his favour. And lastly, what is of very great importance, the witnesses against him must deliver their testimony in his presence. Notwithstanding this clear and decided language of the English constitution or bill of rights, the Courts there, during a long series of years, and on many occasions, as before intimated, have sanctioned the competency of dying declarations. And I have found no case in which the right has been questioned as an infraction of the constitutional liberty of the accused.

In ***Virginia*** the same principle of law has been repeatedly adopted; and if the point now presented was never before brought distinctly to the consideration of this Court, intimately connected as the principle involved has been and is now with the criminal administration of justice, it must be, I suppose, because the doctrine was considered too incontrovertibly established as a necessary element in our judicial administration, to be altered or disturbed. The bill of rights of ***Virginia*** was first adopted in the year 1776, and again adopted in January 1830. After the first, and before the latter period, several cases which have been referred to in the argument, have been decided by the General Court; in which the propriety of admitting dying declarations, under certain circumstances, has been sanctioned and approved; and the decisions so made by the highest Criminal Court of the Commonwealth, have been distributed and made known in every county of the State. Now, under these circumstances, is it not remarkable, if the principle of admitting declarations in *articulo mortis* be justly liable to the objections which have been urged upon the Court, that the people of the Commonwealth should have acquiesced so long without complaint? And is it not still more remarkable, that the members of the late convention, composed as it was of many of the most pure and enlightened men of the State, including many of the Judges and others belonging to the legal profession, should have failed to provide a remedy for the supposed mischievous consequences, which, by the decisions of the General Court, had been introduced and repeatedly established as one of the settled doctrines of the law. It seems to me, therefore, upon every principle of legal propriety, that the Courts of ***Virginia*** cannot and ought not to do otherwise than adhere to the doctrine fully and often established by the decisions of this Court, before referred to.

***10** Upon the motion for the new trial, made in the Court below, I do not think much need be said. As I understand the law in *England,* in cases of felony, a new trial cannot be granted, even on the application of the prisoner, upon the ground that the verdict is contrary to evidence. In that country as in this, in criminal cases, the jury are the exclusive judges both of law and fact; liable, however, to be advised or instructed as to the law by the Court, whenever the Court deems it right to do so; or whenever called on by the attorney for the Commonwealth, or the counsel of the accused, or by the jury. A verdict under the English law, both as to the fact, and the degree of the offence charged, is so far obligatory upon the Court that it cannot be set aside because the Judge may believe it not warranted by the evidence; but the prisoner, if entitled to redress, may seek it by an application for a pardon.

The same rule, I understand, has been adopted in *New York;* but in ***Virginia*** and other States, a

different practice prevails. In *Ball's* Case, 8 Leigh 726, the question as to the propriety of adopting the rule of the English Courts on this subject, was for the first time brought to the consideration of the General Court, and the Court being unwilling, for reasons stated in that case, to sanction the English rule in this respect, decided that that rule was not applicable in ***Virginia;*** and accordingly awarded a new trial. But that authority distinctly shews the circumstances under which the doctrines of the English Courts in this respect, may be departed from. The principle settled in that case is, that the Court, as a preliminary to its interposition, must be satisfied that a clear and palpable error has been committed by the jury. And in *M'Cune's* Case, 2 Rob. R. 771, this limitation is imposed, and in language still more clear and decided; thereby establishing, as I consider, that the indisputable right of the jury in criminal cases is to pass, *finally* and *absolutely* upon cases in which doubt is involved, either as to the fact charged, or as to the degree of the offence.

Nor is there any just reason to apprehend any violation or infringement of the rights of the citizens of the Commonwealth, charged with crime, from the strict and faithful application of this rule.

I know, and many of the members of this Court, I presume, know, that the juries called and sworn in criminal cases are too often inclined to favour the accused, either because of the want of firmness to meet with promptness and decision the responsibility devolved upon them by their high and important duties, or because of a sense of mercy and humanity unwarranted by the facts.

With these views, and under these circumstances, then, I will now proceed briefly to examine the facts of this case; leaving many of its minute circumstances to be investigated by other members of the Court now present. I shall not attempt to shew what character or description of homicide is necessary to constitute murder in the first degree under our statute; nor what should or ought to be the precise extent, or duration of that deliberation, or premeditation, which is required by the statute, when the prisoner is sought to be convicted of a "wilful, deliberate and premeditated killing." This subject, on several occasions, has been before the General Court; and in the cases here referred to, principles have been settled and established, bearing materially, I think, upon this case; but in my view of this case, it will not be necessary to invite particular attention to them. On the 13th of September, then, as the record shews, the prisoner and the deceased met at an early period of the night at the Washington hotel in the town of *Suffolk.* The prisoner shortly afterwards, asked the deceased to take a walk, stating in substance that he wished to have a talk with him. They walked out together; and took seats on the steps of *Bailey's* store; a distance not less than fifty feet from the hotel. In five or ten minutes afterwards, the deceased was seen staggering and falling near the door of the hotel; and when taken up, and put on the floor of the porch, was unable to speak, and in a state of perfect insensibility, cold, pulseless, and having a death-like appearance; but after the application of stimulating remedies, and other means which were resorted to, in a short time his reason returned, and he stated that the prisoner had stabbed him. He soon afterwards, gave a more detailed account of the matter, in which he represented that when he and the prisoner arrived at the steps of *Bailey's* store, the prisoner expressed a wish

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to go further; but upon objection being made by the deceased, they both sat down on the steps: that immediately afterwards the prisoner brought up the old patrol affair, and insulted the deceased; and that as he was in the act of rising from his seat the prisoner stabbed him.

*11 In relation to the patrol affair of which the deceased had spoken, two witnesses, *Parker* and *Drewry,* give evidence, in which they speak of conversations held with the prisoner about the last of May, or the first of June previous to the death of *Smith.* It appears that the deceased, as major of the county of *Nansemond,* was authorized when necessary to appoint patrols; and the witnesses *Parker* and *Drewry,* having heard that the deceased had given some offence, and probably to the prisoner, in relation to that matter, they had the conversations referred to with the prisoner, in which the prisoner used towards the deceased language somewhat of menace and threat; and certainly evinced a state of feeling towards the deceased, of a decidedly hostile character: and we have no satisfactory evidence in the record to shew that that state of feeling was changed or removed; or if changed at all, to what extent the prisoner's umbrage had subsided. The deceased was killed by a stab in the heart; and I assume it as a fact, that the mortal blow was given without provocation, by the prisoner, with the dirk or sword cane which the prisoner had in his possession a short time before the death. It also appears, that the prisoner escaped immediately, or without much loss of time: that in about days he was arrested in the City of *New York;* and brought back to the place from which he had fled. The foregoing facts, I think, are sustained by the record; and although in the many depositions which are annexed as a part of it, there are many facts and circumstances referred to, bearing somewhat, in respect to the guilt of the prisoner, an equivocal import, yet I am satisfied that the details of the case above briefly stated, are legitimate deductions from the whole subject presented by the record.

View the case then in any aspect in which it can be properly considered, it is undoubtedly true that the prisoner has been guilty of a most atrocious offence. But the jury having found him guilty of murder in the first degree, the enquiry still is, can this Court undertake to annul their verdict upon the ground that it is not sustained by the law and the evidence. What is in this record to forbid the supposition that the prisoner, when he set out to walk with the deceased from the hotel, was smarting under a fancied sense of wrong, and mortified pride, growing out of the affair of the patrol commission to which I have before alluded? Why did the prisoner, if his object were merely to hold a friendly conversation with the deceased about a matter of business, walk so far from the company which they had left at the hotel; and even afterwards express a desire to go further? Why did the prisoner so quickly leave his home and his country after the mortal blow was given, that the officers of justice could not execute their commission, though sent in almost immediate pursuit of him? And finally, why did the prisoner resort to the use of so fatal an instrument as the dirk, under the shade of night, while removed from the observation of others? These questions present to the mind some of the important matters which the jury was bound, and no doubt did gravely consider. The result of that consideration, faithfully, honestly, and impartially exerted, as we are required to suppose, is the conviction of the prisoner, of murder in the first degree. And now this Court, acting in its appellate or supervisory character, is called on to set aside the verdict, and give the prisoner another trial; and I humbly conceive, that upon every consideration of justice, of law, and public policy, the Court has no right to disregard

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and set aside a verdict thus obtained.

***12** The next objection relied on by the counsel of the prisoner, is that the dying declarations of the deceased ought to have been excluded. Before I proceed to notice more particularly, however, the grounds on which this objection was placed, it will be proper briefly to advert to the argument on the part of the Commonwealth, touching the propriety of admitting a part of the declarations on the sole ground that they constituted a part of the *res gesta.* I understand the law, in restricting dying declarations to cases of trial for homicide, means merely to refer to declarations offered on the ground that they were made in *articulo mortis*; for where they constitute part of the *res gesta,* or come within the exception of declarations against interest, or the like, they are admissible, as in other cases, irrespective of the fact, that the declarant was under the impression of death. The authorities on this subject, I admit, (but upon what sound principle I have not been able to discover,) do seem to leave it doubtful whether declarations offered as a part of the *res gesta* should be received for the purpose of shewing merely the prostrate condition of the party, the nature or kind of instrument with which the wound was inflicted, and the dreadful outrage which may have been perpetrated; or whether such declarations ought not to be admitted as evidence to establish moreover the identity of the perpetrator.

In cases, other than in prosecutions for homicide, the authorities clearly establish, that acts or declarations constituting a part of the *res gesta* would be competent evidence without limitation or restriction; and as declarations constituting a part of the *res gesta,* in my opinion, are equally an infallible test of truth, as declarations made *in extremis,* I can see no good reason why the principle of reception should not be as broad in the one case as in the other. If the principle then, of receiving the declarations constituting a part of the *res gesta* be right and proper not only for the purpose of shewing the outrage committed, but also the identity of the perpetrator, I should have no difficulty in declaring from the facts clearly and distinctly shewn by the record in this case, that the first declarations of *Smith* made in the porch of the Washington hotel, ought to be received on that ground as evidence. But as my mind is not free from doubt on this point, I am disposed to consider it as a matter which should have no weight against the prisoner; and will proceed to notice the next branch of the same subject.

Were all the declarations of the deceased made *in extremis,* or no? It is essential to the admissibility of these declarations, and is a fact to be proved by the party offering them in evidence, that they were made under a sense of impending death. But it is not necessary that they should be stated, at the time, to be so made. It is enough if it satisfactorily appears, in any mode, that they were under that sanction: whether it be directly proved by the express language of the declarant, or be inferred by his evident danger, or from his conduct or other circumstances of his case. It is the *impression* of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. On the subject of declarations as evidence, many cases have been referred to, in some of which the declarations were excluded, because the facts established shewed that the deceased had hope of recovery; while in others the declarations were received, because of the total absence of such hope. In some of the cases also it was decided that the apprehension of death was made apparent by the declarations of the deceased; while others

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were decided against the accused, independently of and unaided by such declarations. Hence, every case of this description, it seems, must be settled mainly and essentially upon its own peculiar circumstances; and we ought not to consider this case as governed by another, which, in some important particulars, may be different from it. In truth, it is barely possible to suppose that any case has ever occurred, or ever will occur, in all respects like this. And I apprehend, that one great error in the argument of the prisoner's counsel, in opposition to the admissibility of the dying declarations of the deceased in this case, consists in the fact of their having considered the testimony in detached parcels, rather than as a continuous narrative, leaving one part to explain others. In this case, the deceased made no express declaration, that he felt the approach of death, and expected shortly to die; and yet the whole evidence shews that he was in a dying state, and was aware of it, from the moment at which the mortal blow was given, to the time of his death; which occurred only twelve or fourteen hours afterwards. He was stabbed in the heart; the instrument with which the injury was inflicted, having penetrated that vital organ, between one and two inches. In returning from the place at which he was wounded, he fell to the ground, then rose and fell again; and when found prostrate on the earth, he was unable to speak. He was then placed on the floor of the porch, apparently in a dying state; but the stimulating remedies which were soon applied, enabled him, after some minutes to make known his hopeless condition, by stating that the prisoner had stabbed him; and pointing to the wound near the region of the heart. During the remaining part of the night, and until the hour of nine o'clock next morning, when he died, no material change took place. His grievances were made known by one uniform mode and manner of conversation.

***13** There seems to have been throughout the whole time referred to, almost an entire suspension of his vital powers. His extremities were cold; his countenance had a deathlike appearance, and his pulse nearly gone; besides other indications usually given by a man struggling in the agonies of death. The deceased, however, during the whole period of his suffering, except a short time soon after he was struck down, was in his perfect senses, and talked but little; making but few allusions to matters unconnected with the cause of his afflictions; and even of those, generally speaking, with great decision, calmness and propriety. He could not probably have been more communicative, in consequence of the rapid decline of his physical powers, while the hand of death was upon him: for the evidence shews, that although his words were distinctly uttered, he yet spoke in a subdued tone of voice. The deceased is represented to have been a brave man; but still somewhat of a compromising disposition: by which I understand that he possessed courage, sufficiently tempered with justice and discretion.

He made no express declaration, as I have before remarked, of his apprehension of death; but on several occasions, and at different periods of the night on which he died, he made remarks strongly indicative of his belief, that death was near at hand; while on the other hand, he did not at any time during his extreme illness, express hope of recovery; or say any thing which, by fair construction, shewed he expected to get better; but seemed to submit to his fate with calmness and patience; and manifesting, generally, less irritation and excitement, and more propriety of conduct, than would be consistent with the infirmity of many others under similar circumstances.

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It is proper here, however, to notice otherwise, than by the foregoing general review of the evidence, one or two matters, upon which the counsel of the accused relied. The first is, that the deceased was informed that the physicians thought his wound only slight. In answer to that, it seems to me, that it is sufficient to say, the record shews that whenever that or similar matters, were communicated to him, either by words or signs, he instantly repelled the suggestions as unworthy of his confidence. The next ground above referred to, is founded on the fact that the deceased manifested a desire that the prisoner should not be permitted to escape. And upon the further fact, that on one occasion, as appears by the record, the deceased manifested towards the prisoner strong feelings of hostility. Considerations like these, in the absence of evidence to the contrary, owing to the natural feelings and constitution of some men, might well be considered sufficient to shew that for the time being, the party was unconscious of his dying condition, while in respect to others differently constituted, the contrary presumption would arise; and therefore the weight of the argument urged in this respect, must be greatly diminished.

***14** Besides, under the facts and circumstances before referred to, to my mind it is clear, that the objection here alluded to, if valid for any purpose whatever, was one which applied to the credibility of the evidence, upon which the jury alone was competent to decide.

After a due consideration, then, of all the foregoing facts and circumstances, I come to the opinion, that it would be both unreasonable and unnatural to suppose, that the deceased, when he made the declarations in question, was not fully and entirely conscious of impending death.

Upon the face of the record, a further question arises; and that is as to the form or manner in which the evidence was presented to the jury. It is urged as an objection, that the dying declarations were allowed to go as evidence to the jury, before the Court decided upon their competency. This, if true, is certainly a violation of the last rule of practice on the subject; though perfectly consistent with the course of proceeding in *England* at the time of the decision of *Woodcock's* Case; from which it appears at that period, the whole subject was left to the jury, as a mixed question of law and fact. Conceding, however, as is indicated by the recent decisions on this subject, that the regular and proper course of proceeding is, that the Court shall first decide as to the competency of the declarations, let us examine the record to see, if by any fair construction of it, the Court below has done any thing in violation of this rule; or any thing calculated to abridge the rights of the prisoner. The opinion of the Court, to which exception was taken, is, that it was proper to receive full proof of all the declarations, before determining upon their competency as evidence for the jury. Now, then, it seems to me, that the Court has done nothing more than to decide that before its judgment was expressed upon the competency of the declarations, it was necessary and proper to hear, not only a part, but all the declarations. The Court never intended, and such, I think, is the fair and proper construction of the record, that the jury should receive, or that the jury should be permitted to receive, the declarations of *Smith,* before the question of competency or admissibility was previously settled. Now, to decide upon the competency of dying declarations, would it not be often as necessary to hear the declarations themselves, as to hear proof of any other fact bearing materially upon the state of the deceased's mind. If the Court entertained doubt upon the question of admissibility, upon evidence applying

merely to the condition of the deceased, would not the Court be authorized to hear the declarations, even in the presence and hearing of the jury; and to weigh and consider the manner and character of such declarations, with the view to decide upon their competency? In some cases the declarations might be so inseparably united with the other facts in the case, that the witness could not speak of one, and omit the other, so as to give a true and faithful account of the affair; in which event, the prisoner himself might be the sufferer. All, I think, that was done by the Court below in respect to this matter, was, that which was done by the Court in the case of *Rex v. Van Butchell,* 14 Eng. Com. Law Rep. 493, in which the Judge, under similar circumstances, remarked, "I must hear all that the deceased said; and I must judge from what he said whether he had that impression on his mind which made his evidence admissible."

***15** But upon the supposition that the Court below did authorize the jury to receive the declarations of the deceased before the preliminary question as to their admissibility was settled, still it seems to me that nothing has been done, of which the prisoner has a right to complain. If it be true, that the admission of illegal evidence, however unimportant, be sufficient to set aside a verdict, that surely will not warrant the opinion that in a case where the jury received the testimony a short time before the Court was prepared to give it to them, the verdict should for that reason be also set aside: for the jury at last has only been permitted to hear such evidence as it was their province to receive and consider; and I know no principle of reason or law, which, apart from other considerations, will carry the doctrine above referred to, so far as to authorize the Court to treat the verdict in that case as a nullity.

The last objection urged against the judgment of the *Nansemond* Circuit Superior Court is, that there was no authority to pass sentence upon the prisoner, because the term of that Court, as the petition alleges, had lawfully expired. The case of the *Commonwealth v. Mendum,* decided by the General Court in the year 1828, settled the principle involved in this; and no contrary opinion has been given or intimated by that Court, and no subsequent act of the Legislature has in the slightest degree disturbed or altered it. It seems to me, therefore, that the Judge who decided this case in the Court below, could not upon the authority of *Mendum's* Case, without committing an obvious breach of duty, have refused to go on with, and finally decide the prisoner's case, after the expiration of the term, as he did; and moreover, if he had done otherwise the prisoner would have had just cause to complain of the action of the Court, as an infraction of his rights.

Brown, Fry, and *Christian,* J. dissented.
Writ of error refused.

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Summary of Key Findings

A major survey by the Pew Forum on Religion & Public Life finds that most Americans have a non-dogmatic approach to faith. A strong majority of those who are affiliated with a religion, including majorities of nearly every religious tradition, do not believe their religion is the only way to salvation. And almost the same number believes that there is more than one true way to interpret the teachings of their religion. This openness to a range of religious viewpoints is in line with the great diversity of religious affiliation, belief and practice that exists in the United States, as documented in a survey of more than 35,000 Americans that comprehensively examines the country's religious landscape.

This is not to suggest that Americans do not take religion seriously. The *U.S. Religious Landscape Survey* also shows that more than half of Americans say religion is very important in their lives, attend religious services regularly and pray daily. Furthermore, a plurality of adults who are affiliated with a religion want their religion to preserve its traditional beliefs and practices rather than either adjust to new circumstances or adopt modern beliefs and practices. Moreover, significant minorities across nearly all religious traditions see a conflict between being a devout person and living in a modern society.

The Landscape Survey confirms the close link between Americans' religious affiliation, beliefs and practices, on the one hand, and their social and political attitudes, on the other. Indeed, the survey demonstrates that the social and political fault lines in American society run through, as well as alongside, religious traditions. The relationship between religion and politics is particularly strong with respect to political ideology and views on social issues such as abortion and homosexuality, with the more religiously committed adherents across several religious traditions expressing more conservative political views. On other issues included in the survey, such as environmental protection, foreign affairs, and the proper size and role of government, differences based on religion tend to be smaller.

Religion in America: Non-Dogmatic, Diverse and Politically Relevant

Most Americans agree with the statement that many religions – not just their own – can lead to eternal life. Among those who are affiliated with a religious tradition, seven-in-ten say many religions can lead to eternal life. This view is shared by a majority of adherents in nearly all religious traditions, including more than half of members of evangelical Protestant churches (57%). Only among members of the Church of Jesus Christ of Latter-day Saints and other Mormon groups (57%) and Jehovah's Witnesses (80%), which together comprise roughly 2.4% of the U.S. adult population, do majorities say that their own religion is the one true faith leading to eternal life.

Most Americans also have a non-dogmatic approach when it comes to interpreting the tenets of their own religion. For instance, more than two-thirds of adults affiliated with a religious tradition agree that there is more than one true way to interpret the teachings of their faith, a pattern that occurs in nearly all traditions. The exceptions are Mormons and Jehovah's Witnesses, 54% and 77% of whom, respectively, say there is only one true way to interpret the teachings of their religion.

Americans Are Not Dogmatic About Religion

	% agreeing that...	
	Many religions can lead to eternal life	There is more than one true way to interpret the teachings of my religion
	%	%
Total affiliated	70	68
Protestant	66	64
Evangelical churches	*57*	*53*
Mainline churches	*83*	*82*
Historically black churches	*59*	*57*
Catholic	79	77
Mormon	39	43
Jehovah's Witness	16	18
Orthodox	72	68
Jewish	82	89
Muslim	56	60*
Buddhist	86	90
Hindu	89	85

*From "Muslim Americans: Middle Class and Mostly Mainstream," Pew Research Center, 2007.

Results based on those who are affiliated with a particular religion.

The lack of dogmatism in American religion may well reflect the great diversity of religious affiliation, beliefs and practices in the U.S. For example, while more than nine-in-ten Americans (92%) believe in the existence of God or a universal spirit, there is considerable variation in the nature and certainty of this belief. Six-in-ten adults believe that God is a person with whom people can have a relationship; but one-in-four – including about half of Jews and Hindus – see God as an impersonal force. And while roughly seven-in-ten Americans say they are absolutely certain of God's existence, more than one-in-five (22%) are less certain in their belief.

Conception of God

	NET believe in God	Personal God	Impersonal force	Other/Don't know
	%	%	%	%
Total population	92	60	25	7
Protestant	98	72	19	7
Evangelical churches	*99*	*79*	*13*	*7*
Mainline churches	*97*	*62*	*26*	*8*
Historically black churches	*99*	*71*	*19*	*8*
Catholic	97	60	29	8
Mormon	100	91	6	2
Jehovah's Witness	98	82	11	5
Orthodox	95	49	34	12
Jewish	83	25	50	8
Muslim	92	41	42	10
Buddhist	75	20	45	10
Hindu	92	31	53	7
Unaffiliated	70	28	35	6
Atheist	*21*	*6*	*12*	*3*
Agnostic	*55*	*14*	*36*	*5*
Secular unaffiliated	*66*	*20*	*40*	*7*
Religious unaffiliated	*94*	*49*	*35*	*9*

Throughout the report, figures may not add to 100 and nested figures may not add to the subtotal indicated due to rounding.

A similar pattern is evident in views of the Bible. Nearly two-thirds of the public (63%) takes the view that their faith's sacred texts are the word of God. But those who believe Scripture represents the word of God are roughly evenly divided between those who say it should be interpreted literally, word for word (33%), and those who say it should not be taken literally (27%). And more than a quarter of adults – including two-thirds of Buddhists (67%) and about half of Jews (53%) – say their faith's sacred texts are written by men and are not the word of God.

The diversity in religious beliefs and practices in the U.S. in part reflects the great variety of religious groups that populate the American religious landscape. The survey finds, for example, that some religious groups – including Mormons, Jehovah's Witnesses and members of historically black and evangelical Protestant churches – tend to be more likely to report high levels of religious engagement on questions such as the importance of religion in their lives, certainty of belief in God and frequency of attendance at religious services. Other Christian groups – notably members of mainline Protestant churches and Catholics – are less likely to report such attitudes, beliefs and practices. And still other faiths – including Jews, Buddhists, Hindus and Muslims – exhibit their own special mix of religious beliefs and practices.

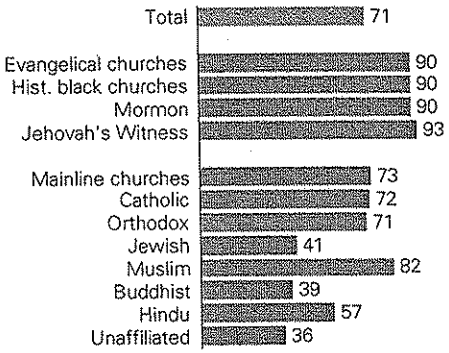
The Landscape Survey also reveals that people who are not affiliated with a particular religious tradition do not necessarily lack religious beliefs or practices. In fact, a large portion (41%) of the unaffiliated population says religion is at least somewhat important in their lives, seven-in-ten say they believe in God and more than a quarter (27%) say they attend religious services at least a few times a year.

The findings of the Landscape Survey underscore the importance of affiliation with a particular tradition for understanding not only people's religious beliefs and practices but also their basic social and political views. For instance, Mormons and members of evangelical churches tend to be more conservative in their political ideology, while Jews, Buddhists, Hindus and atheists tend to be more politically liberal than the population overall. But the survey shows that there are important differences *within* religious traditions as well, based on a number of factors, including the importance of religion in people's lives, the nature and certainty of their belief in God, and their frequency of prayer and attendance at worship services.

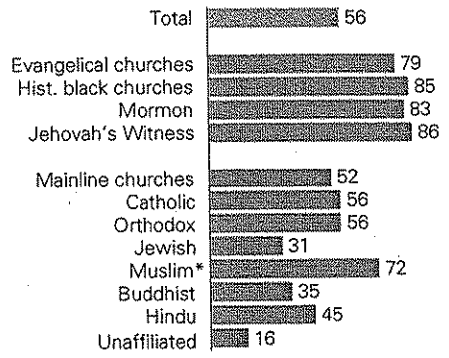
One of the realities of politics in the U.S. today is that people who regularly attend worship services and hold traditional religious views are much more likely to hold

Religious Beliefs and Practices Vary Across Groups

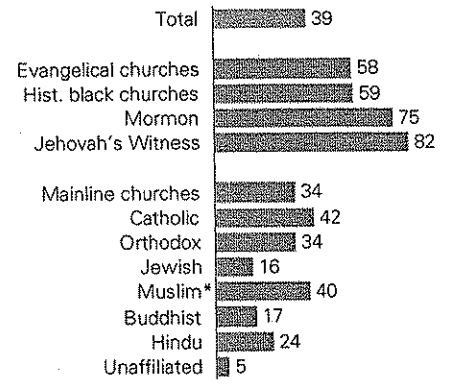
% believe in God - absolutely certain



% say religion is very important in their lives



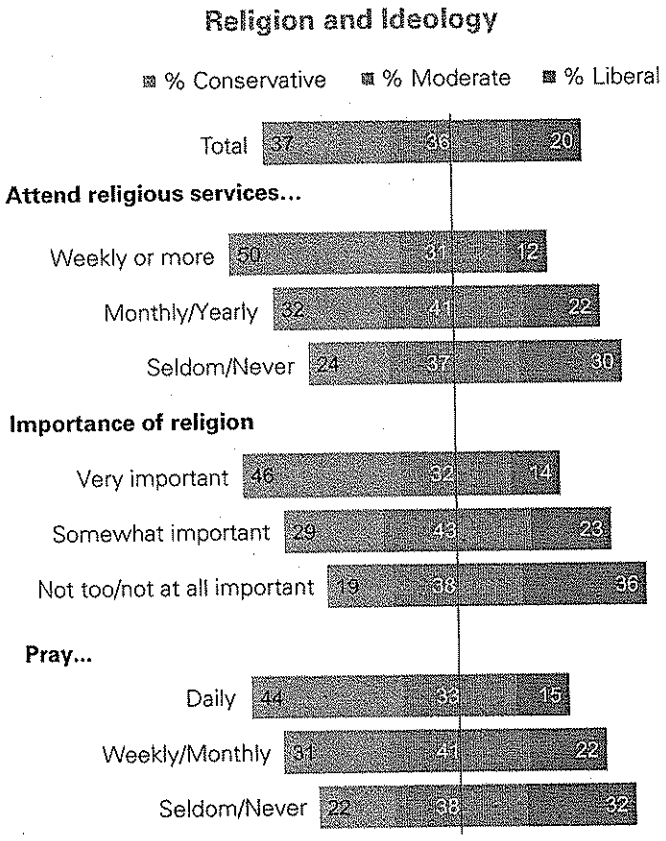
% attend religious services at least once a week



*From "Muslim Americans: Middle Class and Mostly Mainstream," Pew Research Center, 2007.

conservative political views while those who are less connected to religious institutions and more secular in their outlook are more likely to hold liberal political views.

The connection between religious intensity and political attitudes appears to be especially strong when it comes to issues such as abortion and homosexuality. About six-in-ten Americans who attend religious services at least once a week say abortion should be illegal in most or all cases, while only about three-in-ten who attend less often share this view. This pattern holds across a variety of religious traditions. For instance, nearly three-in-four (73%) members of evangelical churches who attend church at least once a week say abortion should be illegal in most or all cases, compared with only 45% of members of evangelical churches who attend church less frequently.



These are among the key findings of a major survey on religion and American life conducted by the Pew Forum on Religion & Public Life between May 8 and Aug. 13, 2007, among a representative sample of more than 35,000 Americans. The first report based on the *U.S. Religious Landscape Survey* was issued in February 2008 and focused on the religious affiliation of the American people, including the impact of immigration and changes in affiliation. This report provides information on the core religious beliefs and practices as well as the basic social and political views of the various religious traditions in the U.S. as well as people who are not affiliated with a particular religion.

The report includes information on members of many religious groups – such as Mormons, Jehovah's Witnesses, Jews, Buddhists, Muslims, Hindus, atheists and agnostics – that are too small to be analyzed in most public opinion surveys. More detailed tables, provided in Appendix 2, also summarize the basic beliefs, practices, and social and political attitudes of a dozen Protestant denominational families and 25 of the largest Protestant denominations in the U.S. These detailed tables also include information on what the survey classifies as "other Christians," which includes such smaller groups as Spiritualists and other Metaphysical Christians, as well as on members of a variety of other faiths, including Unitarians and New Age groups.

Major Religious Traditions in the U.S.

	Among all adults %
Christian	**78.4**
Protestant	51.3
Evangelical churches	*26.3*
Mainline churches	*18.1*
Hist. black churches	*6.9*
Catholic	23.9
Mormon	1.7
Jehovah's Witness	0.7
Orthodox	0.6
Other Christian	0.3
Other religions	**4.7**
Jewish	1.7
Buddhist	0.7
Muslim*	0.6
Hindu	0.4
Other world religions	<0.3
Other faiths	1.2
Unaffiliated	**16.1**
Don't know/Refused	**0.8**
	100

*From "Muslim Americans: Middle Class and Mostly Mainstream," Pew Research Center, 2007.

Due to rounding, figures may not add to 100 and nested figures may not add to the subtotal indicated.

Great Diversity in Core Religious Beliefs

Americans display a high degree of similarity on some basic religious beliefs. For instance, Americans are nearly unanimous in saying they believe in God (92%), and large majorities believe in life after death (74%) and believe that Scripture is the word of God (63%).

But a closer look reveals considerable diversity with respect to both the certainty and the nature of these beliefs. Americans' beliefs about God are a good example of this diversity. Nearly all adults (92%) say they believe in God or a universal spirit, including seven-in-ten of the unaffiliated. Indeed, one-in-five people who identify themselves as atheist (21%) and a majority of those who identify themselves as agnostic (55%) express a belief in God or a universal spirit.

Both the certainty and nature of belief in God, however, vary widely across religious groups. Overwhelming majorities of some groups – including Jehovah's Witnesses (93%), members of evangelical (90%) and historically black (90%) Protestant churches, and Mormons (90%) – say they are absolutely certain that God exists. Although a large percentage of members of other religious groups also express absolute certainty about God's existence, they exhibit comparatively less unanimity; for instance, roughly seven-in-ten members of mainline Protestant churches (73%), Catholics (72%) and Orthodox Christians (71%) are absolutely certain that God exists.

Like their Christian counterparts, majorities of Jews (83%), Buddhists (75%), Hindus (92%) and the unaffiliated (70%) express a belief in God, but these groups tend to be less certain in their belief; only 57% of Hindus, and fewer than half of Jews (41%), Buddhists (39%) and the unaffiliated (36%) say they are absolutely certain of God's existence.

Certainty of Belief in God or Universal Spirit

	NET believe in God	Absolutely certain	Less certain
	%	%	%
Total population	92	71	22
Protestant	98	84	13
Evangelical churches	*99*	*90*	*9*
Mainline churches	*97*	*73*	*25*
Historically black churches	*99*	*90*	*8*
Catholic	97	72	25
Mormon	100	90	9
Jehovah's Witness	98	93	5
Orthodox	95	71	24
Jewish	83	41	42
Muslim	92	82	10
Buddhist	75	39	36
Hindu	92	57	35
Unaffiliated	70	36	34
Atheist	*21*	*8*	*13*
Agnostic	*55*	*17*	*38*
Secular unaffiliated	*66*	*24*	*42*
Religious unaffiliated	*94*	*65*	*30*

A similar diversity is apparent when it comes to the nature of the beliefs about God that members of different religious groups hold. For instance, the vast majority of Mormons (91%), Jehovah's Witnesses (82%) and members of evangelical (79%) and historically black (71%) Protestant churches say they view God as a person with whom they can have a relationship. Smaller majorities of members of mainline Protestant churches (62%) and Catholics (60%) also hold this view. By contrast, a majority of Hindus (53%), along with half of Jews (50%) and pluralities of Buddhists (45%) and the unaffiliated (35%), say they view God not as a person but rather as an impersonal force.

Authority of Scripture and Tradition. More than six-in-ten Americans (63%), including majorities of many religious traditions, view their religion's sacred texts as the word of God. This belief tends to be most common among Christians. More than eight-in-ten Jehovah's Witnesses (92%), Mormons (91%) and members of evangelical (88%) and historically black (84%) Protestant churches view the Bible as the word of God, as do majorities of Catholics (62%), mainline Protestants (61%) and Orthodox Christians (59%). Muslims, too, hold a high view of Scripture, with 86% viewing the Koran as the word of God. By contrast, Buddhists (67%), the unaffiliated (64%), Jews (53%) and Hindus (47%) are more likely to view the Scripture as the work of men than as the word of God.

While a large majority of Christians believe that the Bible is the word of God, the various Christian traditions are divided over whether or not the Bible should be interpreted literally, word for word. For example, a majority of members of historically black (62%) and evangelical (59%) Protestant churches say the Bible should be interpreted literally. By comparison, mainline Protestants, Catholics and Mormons are more likely to say the Bible, though the word of God, should not be interpreted literally.

A plurality of adults (44%) who are affiliated with a particular faith say their religion should preserve its traditional beliefs and practices. Roughly one-third (35%) say their religion should adjust to new circumstances, and one-eighth (12%) say their religion should adopt modern beliefs and practices. Majorities of Mormons, Jehovah's Witnesses and members of evangelical churches, along with nearly half of members of historically black churches, say their religion should preserve its traditional beliefs and practices. By contrast, majorities of members of mainline churches and Catholics, as well as Jews, Muslims, Buddhists and Hindus, favor adjusting to new circumstances or adopting modern beliefs and practices.

Belief in an Afterlife. Most Americans (74%) believe in life after death, with an equal number saying they believe in the existence of heaven as a place where people who have led good lives are eternally rewarded. Belief in the afterlife tends to be particularly common among the Christian traditions. But the survey also finds that roughly six-in-ten Buddhists (62%) believe in nirvana, the ultimate state transcending pain and desire in which individual consciousness ends, and about the same number of Hindus (61%) believe in reincarnation, that people will be reborn in this world again and again. By contrast, fewer than half of the unaffiliated (48%) and only about four-in-ten Jews (39%) say they believe in an afterlife.

Belief in hell, where people who have led bad lives and die without repenting are eternally punished, is less common than is belief in life after death or heaven, with about six-in-ten Americans (59%) expressing belief in hell. In every religious tradition, including all the Christian traditions, belief in hell is at least slightly less prevalent than belief in heaven. Belief in hell tends to be most common among members of the various Christian traditions, with relatively few Hindus (35%), Buddhists (26%), unaffiliated (30%) and Jews (22%) saying they believe in hell.

Belief in Heaven and Hell

	Believe in...	
	Heaven	Hell
	%	%
Total population	74	59
Protestant	84	73
Evangelical churches	*86*	*82*
Mainline churches	*77*	*56*
Historically black churches	*91*	*82*
Catholic	82	60
Mormon	95	59
Jehovah's Witness	46	9
Orthodox	74	56
Jewish	38	22
Muslim	85	80
Buddhist	36	26
Hindu	51	35
Unaffiliated	41	30
Atheist	*12*	*10*
Agnostic	*18*	*12*
Secular unaffiliated	*32*	*23*
Religious unaffiliated	*68*	*51*

Belief in the Supernatural. As with belief in life after death, belief in the supernatural is also quite common. Nearly eight-in-ten American adults (79%), for instance, agree that miracles still occur today as in ancient times. But here again, the intensity with which people hold these beliefs varies considerably across religious groups. For instance, eight-in-ten Mormons *completely* agree that miracles still occur today, as do large majorities of members of evangelical (61%) and historically black (58%) Protestant churches. Members of other religious groups, on the other hand, are less certain, with fewer than half saying they completely agree that miracles still occur today.

Similar patterns exist with respect to beliefs about the existence of angels and demons. Nearly seven-in-ten Americans (68%) believe that angels and demons are active in the world. Majorities of Jehovah's Witnesses (78%), members of evangelical (61%) and historically black (59%) Protestant churches, and Mormons (59%) are *completely* convinced of the existence of angels and demons. In stark contrast, majorities of Jews (73%), Buddhists (56%), Hindus (55%) and the unaffiliated (54%) do not believe that angels and demons are active in the world.

Great Diversity of Religious Practices As Well

The great diversity of religion in the U.S. is also reflected in religious practices. For instance, most Americans (54%) say they attend religious services fairly regularly (at least once or twice per month), with about four-in-ten (39%) saying they attend worship services every week. Frequent church attendance is particularly common among Jehovah's Witnesses (82% of whom attend church at least once a week), Mormons (75%) and members of historically black (59%) and evangelical (58%) Protestant churches. By comparison, attendance at religious services is a less common practice among Catholics (42% of whom say they attend church at least once a week) and members of mainline Protestant churches (34%). Even smaller numbers of Hindus (24%), Buddhists (17%), Jews (16%) and the unaffiliated (5%) say they attend religious services at least once a week.

The Landscape Survey reveals similar patterns in congregational involvement outside of worship services. Majorities of Mormons (77%), Jehovah's Witnesses (76%) and members of historically black (60%) and evangelical (54%) Protestant churches, for example, participate at least once or twice a month in congregational activities such as musical programs, volunteering, working with children or social activities. Members of these religious traditions also tend to be most likely to participate regularly in prayer groups, Scripture study groups or religious education programs. Catholics and members of mainline Protestant churches, by comparison, tend to be less connected to their congregations in these ways, as are Jews, Buddhists and Hindus.

Private Devotional Activities. Americans also engage in a wide variety of private devotional activities. Nearly six-in-ten (58%), for instance, say they pray every day, with majorities of most religious traditions saying they pray daily. Daily prayer is most common among Jehovah's Witnesses (89%), Mormons (82%) and members of historically black (80%) and evangelical (78%) Protestant churches. A smaller number of Catholics and members of mainline Protestant churches, though still a majority (58% and 53%, respectively), say they pray daily. By contrast, only 45% of Buddhists, 26% of Jews and 22% of the unaffiliated say they pray daily. Roughly six-in-ten Hindus (62%) say they pray at a shrine or other religious symbol in their home at least once a week, as do one-third of Buddhists (33%).

Meditation is a less common practice than is prayer, with four-in-ten adults (39%) saying they meditate at least once a week, compared with three-quarters of Americans who say they pray at least once a week. But meditation is a regular practice among most Buddhists (61% meditate at least once a week) and is also practiced on a weekly basis by majorities of Jehovah's Witnesses (72%), Mormons (56%) and members of historically black churches (55%). Fewer members of other religious traditions meditate on a weekly basis, including just 26% of the unaffiliated and 23% of Jews.

Prayer and Meditation

	Pray at least weekly*	Meditate at least weekly**
	%	%
Total population	75	39
Protestant	86	44
Evangelical churches	*92*	*46*
Mainline churches	*76*	*35*
Historically black churches	*92*	*55*
Catholic	79	36
Mormon	92	56
Jehovah's Witness	95	72
Orthodox	77	32
Jewish	44	23
Muslim	82	46
Buddhist	58	61
Hindu	76	44
Unaffiliated	35	26
Atheist	*10*	*18*
Agnostic	*18*	*25*
Secular unaffiliated	*19*	*22*
Religious unaffiliated	*65*	*34*

*Question: People practice their religion in different ways. Outside of attending religious services, do you pray several times a day, once a day, a few times a week, once a week, a few times a month, seldom, or never?

**Question: Please tell me how often you do each of the following. First, how often do you [INSERT] – would you say at least once a week, once or twice a month, several times a year, seldom, or never? And how often do you [INSERT NEXT ITEM]?
(c) Meditate.

Receiving Answers to Prayers. A significant minority of Americans say their prayers result in definite and specific answers from God at least once a month (31%), with nearly one-in-five adults (19%) saying they receive direct answers to specific prayer requests at least once a week. More than half of Mormons (54%) say they receive responses to prayer at least once or twice

a month, as do half or nearly half of members of historically black churches (50%), Jehovah's Witnesses (49%) and members of evangelical Protestant churches (46%). These are largely the same groups – Jehovah's Witnesses are the exception – that also are most likely to say they have experienced or witnessed a divine healing of an illness or injury. By contrast, members of most other religious traditions tend to be less likely to report familiarity with this kind of direct interaction with the divine.

Religious Practices with Children. Most parents in the U.S. report engaging in a variety of religious activities with their children. More than six-in-ten parents (63%) with children at home, for instance, say they pray or read Scripture with their children, while nearly as many (60%) send their children to religious education programs. Mormons and members of historically black and evangelical churches stand out as particularly likely to pursue these activities with their children, though many parents in other religious groups also engage in these activities. Two-thirds of Hindus, for instance, pray or read Scripture with their children, and roughly six-in-ten members of mainline churches (62%), Jews (56%) and Orthodox Christians (58%) send their children to religious education programs. Far fewer parents (15%) choose either to send their children to religious schools instead of public schools or to home school them. Interestingly, though, this practice is most common among Jews (27%) and Orthodox Christians (30%), two groups that do not tend to stand out for high levels of religious involvement on many other measures.

Sharing Faith With Others. About one-in-three affiliated adults (36%) say they share their faith with others at least once a month. Nearly half (47%) say they seldom or never share their faith or views on God with people from other religious backgrounds, and an additional 14% say this is something they do only once or twice a year. Here again, however, certain groups stand out for the emphasis they place on sharing their faith. More than eight-in-ten Jehovah's Witnesses (84%) share their faith with others every month, as do 55% of members of historically black churches, 52% of members of evangelical churches and 47% of Mormons. This practice is less common among most other religious traditions.

Religion, Moral Values and Modern Society

More than three-quarters of American adults (78%) believe there are absolute standards of right and wrong, with a majority (52%) saying they rely primarily on practical experience and common sense for guidance regarding right and wrong. Far fewer say they rely mainly on their religious beliefs (29%), and fewer still say they rely on philosophy and reason (9%) or scientific information (5%). Only among Jehovah's Witnesses (73%), Mormons (58%) and members of evangelical churches (52%) do majorities say they rely primarily on their religion for guidance about right and wrong.

Religion and Society. A solid majority of Americans (62%) reject the idea that religion causes more problems in society than it solves. This figure includes majorities of most Christian traditions and more than two-thirds of Muslims (68%). In contrast, nearly half of Jews (49%) and more than half of Buddhists (56%), Hindus (57%) and the unaffiliated (59%) say religion causes more problems than it solves. Indeed, more than three-quarters of atheists (77%) believe religion causes more problems than it solves, with nearly half (49%) of atheists *completely* agreeing with this statement.

Although a majority of Americans (54%) who have a particular religious affiliation say they do not see a conflict between being a devout person and living in a modern society, a substantial minority across nearly all religious traditions believe that such a tension exists. This view is particularly prevalent among Jehovah's Witnesses (59% say there is a conflict between being devout and living in a modern society) as well as members of evangelical and historically black Protestant churches, among whom 49% and 46%, respectively, share this view. Overall, those who attend religious services at least once a week (44%) or who say religion is very important in their lives (44%) are more likely to say there is a conflict than those who attend worship services less often (35%) or who say religion is less important in their lives (31%).

Interestingly, a substantial number of adults who are not affiliated with a religion also sense that there is a conflict between religion and modern society – except for them the conflict involves being non-religious in a society where most people *are* religious. For instance, more than four-in-ten atheists and agnostics (44% and 41%, respectively) believe that such a tension exists.

Religion and Popular Culture. Many Americans also see a conflict between their values and popular culture, as is evident in people's views of Hollywood and the entertainment industry. Although a majority of adults (56%) reject the idea that Hollywood poses a threat to their values, a significant minority (42%) perceives such a threat. Among adults who are affiliated with a particular religious tradition, nearly half (45%) say Hollywood threatens their values. Concern with the values of the entertainment industry is particularly high among Mormons (67%), Jehovah's Witnesses (54%) and members of evangelical Protestant churches (53%). The level of concern tends to be strongest among the most religiously active adults, as measured by such factors as frequency of prayer and attendance at worship services.

Tensions Between Religion and Modernity

	% who... See conflict between religion and modern society	Say values are threatened by Hollywood
	%	%
Total	40*	42
Protestant	43	46
Evangelical churches	*49*	*53*
Mainline churches	*32*	*41*
Historically black churches	*46*	*35*
Catholic	34	43
Mormon	36	67
Jehovah's Witness	59	54
Orthodox	35	42
Jewish	29	25
Muslim	32**	41
Buddhist	30	31
Hindu	31	39
Unaffiliated	34***	28
Atheist	*44*	*19*
Agnostic	*41*	*21*
Secular unaffiliated	*28*	*27*
Religious unaffiliated	*34*	*35*

*Based on those who are affiliated with a particular religion.

**From "Muslim Americans: Middle Class and Mostly Mainstream," Pew Research Center, 2007.

***Those who are affiliated with a particular religion were asked whether there is a "conflict between being a devout religious person and living in a modern society," while the unaffiliated (including atheists, agnostics, the secular unaffiliated and the religious unaffiliated) were asked whether there is a "conflict between being a non-religious person and living in a society where most people are religious."

Personal Satisfaction. A majority of Americans (59%) are very satisfied with their personal lives. Those who are affiliated with a religious tradition are somewhat more satisfied with their lives than those who are not (60% to 54%). And people who attend worship services at least once a week report higher levels of satisfaction with their personal lives (65%) compared with those who attend religious services less often (55%).

Despite their overall feelings of satisfaction with their personal lives, and even higher levels of satisfaction with their family lives, only about a quarter of U.S. adults (27%) say they are satisfied with the way things are going in the country (as of the summer of 2007 when the survey was conducted). Members of historically black churches (17%) and Jehovah's Witnesses (10%) are among the least satisfied with the overall direction of the country. The Landscape Survey also

finds that about one-quarter of the public (27%) is satisfied with the way the political system is working. No more than a third of any religious group expresses overall satisfaction with the way the political system is working, with the exception of Mormons (36% of whom are very or somewhat satisfied).

Religion Helps Shape Political Views

Relatively few adults (14%) cite their religious beliefs as the main influence on their political thinking – about the same number as cite their education as being most important (13%). Far more cite their personal experience (34%) as being most important in shaping their political views. An additional 19% identify what they see or read in the media as the most important influence in shaping their political views.

But despite Americans' general reliance on practical experience in shaping their political thinking, the Landscape Survey confirms that there are strong links between Americans' views on political issues and their religious affiliation, beliefs and practices. In fact, religion may be playing a more powerful, albeit indirect, role in shaping people's thinking than most Americans recognize.

Affiliation Helps Shape Views

When it comes to religious affiliation and basic political outlook, for instance, Mormons and members of evangelical churches are much more likely than other religious groups to describe their political ideology as conservative. Not surprisingly given these ideological leanings, Mormons and members of evangelical churches are also by far the most Republican religious groups in the population; roughly two-thirds of Mormons and half of members of evangelical churches describe themselves as Republican or leaning toward the Republican Party.

At the other end of the political spectrum, Jews, Buddhists, Hindus and the unaffiliated are much more likely than members of most other religious groups to describe their political beliefs as liberal. When it comes to partisanship, more than three-quarters of members of historically black churches favor the Democratic Party, as do two-thirds of Jews and Buddhists and majorities of Muslims (63%), Hindus (63%) and the unaffiliated (55%).

The connection between religious affiliation and politics appears to be especially strong when it comes to certain issues, particularly those that have been at the forefront of the "culture war" controversies of recent years. Some religious traditions, for instance, are overwhelmingly opposed to abortion; seven-in-ten Mormons and six-in-ten members of evangelical churches (61%) say abortion should be illegal in most or all circumstances. On the other side of the issue, six-in-ten members of mainline churches (62%) and seven-in-ten of the unaffiliated say abortion should be legal in most or all instances. A similar divide exists on the question of whether homosexuality is a way of life that should be discouraged or accepted by society.

Religion and Views on Cultural Issues

	% who say that...	
	Abortion should be illegal in all or most cases	Homosexuality is a way of life that should be discouraged by society
	%	%
Total population	43	40
Protestant	49	51
Evangelical churches	*61*	*64*
Mainline churches	*32*	*34*
Historically black churches	*46*	*46*
Catholic	45	30
Mormon	70	68
Orthodox	30	37
Jehovah's Witness	77	76
Jewish	14	15
Muslim	48	61*
Buddhist	13	12
Hindu	24	37
Total affiliated with a religion	46	44
Total unaffiliated	24	20
Atheist	*13*	*14*
Agnostic	*14*	*10*
Secular unaffiliated	*19*	*17*
Religious unaffiliated	*36*	*29*

*From "Muslim Americans: Middle Class and Mostly Mainstream," Pew Research Center, 2007.

But there are other political issues on which there is more agreement across religious traditions. On the question of government's role in providing aid to the needy, for instance, large majorities of most religious traditions agree that the government should do more to help needy Americans, even if it means going deeper into debt. A similar consensus exists across the board with respect to basic views on the environment, with majorities of most religious groups saying that stricter environmental laws and regulations are worth the cost. And majorities within most religious traditions say that diplomacy rather than military strength is the best way to ensure peace.

Religious Beliefs and Practices Also Help Shape Views

The survey also confirms the connection that exists between religious intensity and social and political views. Across a variety of religious traditions, those who say that religion is very important in their lives, express a more certain belief in God, or pray or attend worship services more frequently tend to be much more conservative in their political outlook and more Republican in their party affiliation.

As with affiliation, the connection between religious engagement and political attitudes appears to be especially strong when it comes to social issues such as abortion and homosexuality. For instance, nearly three-in-four (73%) members of evangelical churches who attend church at least once a week say abortion should be illegal in most or all cases, compared with only 45% of members of evangelical churches who attend church less frequently. The survey finds a similar pattern among several religious traditions, including members of mainline and historically black Protestant churches, Catholics, Mormons, Orthodox Christians and Jews; the more active members of these traditions tend to be more likely to oppose legalized abortion compared with members of the same traditions who attend worship services less frequently. Views of whether homosexuality is a way of life that should be discouraged or accepted by society follow a similar pattern. But the survey also finds that views on other political issues, such as environmental regulations and the role of government, tend to vary less based on level of religious involvement.

U.S. Remains Highly Religious, Though Some Secularization

The U.S. has largely avoided the secularizing trends that have reshaped the religious scene in recent decades in European and other economically developed nations – but not entirely. The Landscape Survey documents, for example, that the number of Americans who are not affiliated with a religion has grown significantly in recent decades, with the number of people who today say they are unaffiliated with a religious tradition (16% of U.S. adults) more than double the number who say they were not affiliated with a religion as children (7%).

It remains to be seen how this trend toward secularization will ultimately impact religion in the U.S. But what is clear is that religion remains a powerful force in the private and public lives of most Americans, a fact amply illustrated by the findings of the *U.S. Religious Landscape Survey* discussed in this report.

About the Report

The chapters that follow amount to a topic-by-topic reference source on Americans' religious beliefs and practices as well as the social and political views of the numerous religious traditions. Interactive online tools available at *www.pewforum.org* allow users to delve deeper into many of the survey findings, including religious affiliation and newly added data on religious beliefs and practices as well as social and political views.

STATE OF WISCONSIN
IN SUPREME COURT

CASE NO. 2009AP000806 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN L. BEAUCHAMP,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ON PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDMENT OF CONVICTION AND SENTENCE AND AN ORDER DENYING THE MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER PRESIDING

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Defendant-Appellant-Petitioner Marvin Beauchamp (Beauchamp) hereby provides the following in reply to the brief of Plaintiff-Respondent, State of Wisconsin (State):

ARGUMENT

I. THE STATE INCORRECTLY SUMMARIZES BEAUCHAMP'S DYING DECLARATIONS ARGUMENTS

In addressing Beauchamp's arguments challenging the continuing constitutional validity of the admission of testimonial dying declarations, the State erroneously summarizes Beauchamp's argument. Contrary to the State's response, Beauchamp has not argued that unconfronted dying declarations are inadmissible because they are based on antiquated religious beliefs and are unreliable. (State's Brief at 22).

First, Beauchamp did not contend that testimonial dying declarations offend the Confrontation Clause because their admission was originally based on antiquated religious beliefs. The State expends a great deal of effort addressing the religious background and attempting to show that Americans do believe in God and the afterlife. (State's Brief at 14-19). This discussion, however, is little more than a distraction from the issue.

Beauchamp discussed the religious underpinnings of the rule at the time of the founding only in terms of the history of dying declarations, and how the case law shows an evolution of the basis for admission of these statements from a religious rationale to a necessity rationale. (Petitioner's Brief at 10-12). This Court need not and should not get caught-up in determining whether a religious rationale can serve as the policy basis for upholding an exception to the Federal or Wisconsin Constitutions. As Beauchamp has shown, the religious rationale was

simply the justification given at the time of the founding for treating this class of statements as inherently reliable and admitting them without cross-examination. Neither the State nor Beauchamp argue that current societal views on religiosity are relevant to the question of whether testimonial dying declarations are an exception to the Confrontation Clauses of the Federal and State Constitutions.

Second, Beauchamp has not argued that dying declarations are unreliable. State's Brief at 19-22. Beauchamp does not contend that dying declarations as a class are reliable or unreliable; rather, Beauchamp has argued that the idea of any type of statement being admissible based on inherent reliability is inconsistent with *Crawford* and its rejection of the hearsay paradigm of *Ohio v. Roberts*. Petitioner's Brief at 12-15.

The State takes issue with several examples from case law and commentators cited by Beauchamp as reasons why dying declarations generally may not be worthy of the inherent reliability bestowed upon them. The State argues that Beauchamp could have impeached Somerville's dying declarations on these bases at trial. (State's Brief at 19-22). The State misses the point. These issues undermine the rationale that such statements are inherently reliable. In addition, the fact that Wis. Stats. §908.06, would allow a defendant to attack the credibility of the dying declarant is not sufficient to protect the admission of the declaration from Constitutional scrutiny. The credibility of any hearsay declarant can be attacked under this rule, yet every other form of testimonial hearsay (such as excited utterances, statements of recent perception, etc.) is barred by the Confrontation Clause where the declarant is unavailable and there has been no prior opportunity for cross-examination. In short, if the ability to attack the credibility of the hearsay declarant were sufficient to satisfy the Confrontation Clause, *Crawford* would have been unnecessary.

Beauchamp identified two policies behind the admission of dying declarations: (1) that such statements were reliable beyond question; and (2) that such statements were often the best or only evidence concerning the circumstances of the death. (Petitioner's Brief at 17). Beauchamp argues that these considerations no longer support the admission of testimonial dying declarations. (Petitioner's Brief at 17-18). Beauchamp has not argued that testimonial dying declarations are inadmissible because of antiquated religious beliefs or inherent unreliability. The State's responses to Beauchamp's actual arguments are not persuasive.

II. THE STATE'S HISTORICAL ARGUMENT FOR ADMISSION BASED ON *CRAWFORD* IS UNCONVINCING

The State's central argument follows the reasoning employed by nearly every post-*Crawford* court to address the question of dying declarations and confrontation: such statements were admitted at the time of the founding, so they are not barred by confrontation clause. In sum, the State's argument is this: It was, and so it should be.

The State provides a lengthy string-cite to post-*Crawford* cases holding that the confrontation clause incorporates the common law exception for dying declarations. (State's Brief at 9). Each of these cases, however, merely undertakes a superficial historical analysis that fails to go beyond the simple question of whether the exception was recognized at the founding.

Crawford did not simply hold, as the State suggests, that interpretation and application of the Confrontation Clause today is strictly limited to the same interpretation and application of the Clause over 200 years ago. (State's Brief at 12-13). *Crawford* was a repudiation of the hearsay paradigm of *Ohio v. Roberts*, which permitted the admission of unconfronted hearsay statements against the accused so long as the statements were deemed to be

sufficiently reliable in nature. *Crawford* at 61-62. *Crawford* undertook a historical approach to resolve the textual ambiguity in the phrase "witnesses against" within the Clause, and to demonstrate how far evidentiary hearsay rules had strayed from core principles. *Id* at 42; 61-62. ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'")

According to the State, "[t]he teaching of *Crawford* is this: unconfronted hearsay exceptions to the Confrontation Clause are based on history, not reliability." (State's Brief at 14). From there, the State argues: "Thus, if dying declarations are admissible, they are admissible on the basis of history, not reliability." Id. History and reliability, however, are inextricably linked here.

From a historical perspective, dying declarations were admitted at the time of the founding precisely because they were deemed to be inherently reliable based on religious considerations. *See King v. Woodcock*, 1 Leach 500, 502-03, 168 Eng. Rep. 352 (1789) (a situation so solemn…is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice…[d]eclarations so made are certainly entitled to credit); *Anthony v. State*, 19 Tenn. 265 (Tenn. 1839) (such consciousness [of impending death] be equivalent to the sanction of an oath); EDWARD HYDE, PLEAS OF THE CROWN, § 124 at 353-54 (same); *and* (State's Brief at 6; R-Ap. 7, 113). The State concedes this point, acknowledging that "the foundation for the Founding era's dying-declaration exception appears to be the presumption that, because of her belief in divine accountability, a dying victim would not knowingly make a false accusation." (State's Brief at 16).

Because dying declarations were admitted at the founding based on their inherent reliability, it is impossible today to claim that their admission on

historical grounds does not also invoke the inherent reliability of such statements. *Crawford* clearly and unequivocally repudiated inherent reliability as a basis for admitting statements without a prior opportunity for cross examination. Accordingly, the historical justification is inconsistent with *Crawford*'s rationale, and the State has offered no distinct policy or legal justification for treating testimonial dying declarations as the only exception to the Confrontation Clauses of the United States and Wisconsin Constitutions.

III. ADMISSION OF SOMERVILLE'S DYING DECLARATIONS WAS NOT HARMLESS

The State makes a brief and unconvincing argument that the admission of Somerville's statements was harmless error. This is simply not so. Where there is a reasonable probability that the error contributed to the conviction, the error was not harmless and a new trial must result. *State v. Alexander*, 214 Wis. 2d 628, 652, 571 N.W.2d 662 (1997). Stated another way, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. *State v. Stuart*, 2005 WI 47, ¶40, 279 Wis. 2d 659, 695 N.W.2d 259.

In this case the jury heard Somerville's declarations that "Big Head Marv" shot him. This was probably the most damning testimony against Beauchamp in the case. While the State notes that it called "15 witnesses to prove Beauchamp's guilt," most of them had nothing inculpatory to offer. The State points specifically to William Stone, the 15-time convict who testified that Beauchamp gave a jailhouse confession to him; the "prior inconsistent statements of Dominique Brown and Shainya Brookshire identified Beauchamp as the shooter;" and the testimony of Jerrod Logan, which it claims substantially corroborated Brown and Brookshire's statements. (State's Brief at 24).

Brown, Brookshire, and Stone, however, all had credibility problems. Brown and Brookshire were

confronted with prior statements that differed from their testimony, and Stone was there to testify seeking consideration for his testimony. Stone further claimed that he had spoken to his mother about Beauchamp's homicide case in May, weeks before it even occurred. Logan, the only untainted witness highlighted by the State, could not identify Beauchamp as the shooter even though he was close enough to hear the conversation between the shooter and victim.

The State certainly thought Somerville's statements were important. It had Stone tell the jury that he knew Beauchamp by his big head, in an obvious attempt to equate Somerville' statements with an identification of Beauchamp. (R.48: 63). And in closing arguments, the State highlighted Somerville's statements about "Big Headed Marvin." (Petitioner's Brief at 7). Somerville's statements were a key component of the State's case, and the State has not and cannot show beyond a reasonable doubt that they did not contribute to Beauchamp's conviction.

IV. THE STATE HAS WAIVED ANY ARGUMENT THAT SOMERVILLE'S STATEMENTS WERE NON-TESTIMONIAL

For the first time on appeal in this case, the State contends that Somerville's statements to Marvin Coleman, the EMT, were non-testimonial and thus free from the restrictions of the Confrontation Clause. (State's Brief at 24-28). The State, however, has waived this argument.

The State claims that in the court of appeals it "assumed, but did not concede," that Somerville's statement to Coleman was testimonial. (State's Brief at 24, n.10). This is incorrect. In the court of appeals, Beauchamp's brief argued that Somerville's statements to both Coleman and Officer Young were testimonial. (Appellant's Court of Appeals Brief at 21-22). In its response in the court of appeals, the State "assume[d]" that the statements at issue were testimonial. (State's

Court of Appeals Brief at 12, n.5).

While the State may wish to classify its position as an "assumption" as opposed to a "concession," the law sees it differently. *Charolais Breeding Ranches, Ltd. v. FPC Securities*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (Arguments not rebutted are deemed admitted). In the face of an explicit argument in the court of appeals that these statements were testimonial, the State did not simply ignore the argument, it stated its assumption that the argument was correct. This is a clear concession of the argument. In its opinion, the court of appeals "assumed" the statements were testimonial, noting that the parties did as well. *State v. Beauchamp*, 2010 WI App 42, ¶ 10, 324 Wis. 2d 162, 718 N.W.2d 254. Having conceded the argument in the court of appeals, the State should not be permitted to argue to this Court that Somerville's statements to Coleman were non-testimonial. *See A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W. 2d 285 (Ct. App. 1998) (Issues not argued are abandoned).

V. REGARDLESS OF WAIVER, SOMERVILLE'S STATEMENTS WERE TESTIMONIAL

Even if the State has not waived its argument, the State cites only non-binding and unpersuasive authority to support its claim that Somerville's statements to Coleman were non-testimonial. (State's Brief at 25-26). Under United States Supreme Court precedent, Somerville's statements to Coleman were clearly testimonial. According to *Davis v. Washington*, 547 U.S. 813, 822 (2006), "[s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency." In *Davis*, the Court held that statements made during a 911 call, describing an ongoing assault of the caller, were non-testimonial. *Id*. at 828. The non-testimonial statements made by the caller were:

"[the defendant]'s here jumpin' on me again"; "He's usin' his fists." *Id.* at 817.

The Court stated that "the emergency appears to have ended (when Davis [the defendant] drove away from the premises)." *Id.* at 828. In so stating, *Davis* distinguished "questions necessary to secure [police officers'] safety or the safety of the public" from "questions designed solely to elicit testimonial evidence . . .." *Id.* (quoting *New York v. Quarles*, 467 U.S. 649, 658-659 (1984)).

The *Davis* Court also distinguished the 911 caller's statements from the statement made by the defendant's wife[1] in *Crawford*. *Id*. at 827. First, the Court found that the statement in *Davis* described events "*as they were actually happening*, rather than describing past events." *Id.* at 827 (emphasis in original) (citation omitted). Second, any reasonable listener would have concluded that the statement in *Davis* was made during an ongoing emergency. *Id.* The Court noted that the 911 call was "plainly a call for help against a bona fide physical threat." *Id.* Third, in *Davis*, the questions asked of the 911 caller were required to resolve the ongoing threat, as opposed to the questions in *Crawford*, which sought to determine what happened in the past. *Id.* Lastly, the Court considered the formality of the two interrogations in *Davis* and *Crawford*. *Id.*

Beyond United States Supreme Court precedent, this Court has also provided guidance to determine whether statements are testimonial or non-testimonial. *State v. Jensen*, 2007 WI 26, ¶ 24, 299 Wis. 2d 267, 727 N.W. 2d 518. *Jensen* adopted a "broad definition" of "testimonial" to preserve the guaranteed right to confront one's accusers. *Id.* The definition adopted in *Jensen* holds that statements are testimonial when a reasonable person in the position of the declarant "would anticipate his statement being

[1] The statement at issue in *Crawford* was made by Crawford's wife, Sylvia. Sylvia made statements to police about a fight that had occurred hours before. *Crawford* at 38-39.

used against the accused in investigating and prosecuting the crime." *Id.* (quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)). This Court, using the foregoing definition, found that the defendant's wife's letter, which accused defendant of murder, was testimonial. *Id.* at ¶ 27.

Here, Coleman did not ask questions of Somerville that were necessary to protect the public or first responders. Rather, Coleman asked Somerville questions that were employed solely to elicit incriminating testimony. Instead of asking Somerville where Somerville was shot, or how many times Somerville had been shot, or if Somerville had any allergies, or if the person who shot Somerville was nearby, Coleman's first question to Somerville was "Who did this to you?" (R.44:7-8; Pet. App. 607-08). When Somerville said "Marvin," Coleman, whose name was also Marvin, asked for clarification. Coleman said: "Who me?" Somerville responded "Big Head Marvin." (Id.) Coleman testified that he then asked Somerville what happened, and Somerville responded by saying he was at the residence and was led outside and shot. (R.44: 8; Pet. App. 608).

As in *Davis*, these statements were not describing events as they were actually happening, but were explaining events that had already taken place. Somerville had already been wounded and there was no indication that the shooter posed any continuing hazard. Witnesses said the shooter fled around the house immediately after the shooting. (R.48: 31) Coleman's question was not for the purpose of providing Somerville with medical attention, it was obviously asked in an effort to identify a perpetrator. Additionally, Coleman was a member of the Milwaukee Fire Department, not simply a paramedic. Somerville was protected and he provided information to identify the shooter and describe what had occurred. The primary purpose was to establish past events potentially relevant to later court proceedings, not to meet an ongoing emergency. Therefore, under *Davis* and *Jensen*, Somerville's statements to Coleman were

testimonial.

VI. THE SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS VIOLATED BEAUCHAMP'S DUE PROCESS RIGHTS

Beauchamp largely relies on his brief-in-chief in reply to the State's application of the guidelines adopted in *Vogel v. Percy*, 691 F.2d 843, 846-47 (7th Cir. 1982); however, several issues require separate comment. First, the State claims that Beauchamp demands full corroboration of the prior inconsistent statements to satisfy the dictates of *Percy*. (State's Brief at 37). Such is not the case. Beauchamp's brief points out the marginal corroborative value of the evidence relied upon by the State. (Appellant's Brief at 21-23). Beauchamp does not argue that *Percy* demands full corroboration, but it does demand corroboration that is meaningful.

A look at the State's recitation of what it deems to be corroborative evidence shows there is scant such evidence in this case. (State's Brief at 37-38). The State cites, essentially, a list of hearsay statements and overstates the corroborative value of Logan's testimony, as pointed out in Beauchamp's brief. (Appellant's Brief at 22-23). The State also cites Brookshire's "probable sighting of Beauchamp" in the alley after the shooting, but Brookshire's testimony was only that she saw somebody that "she thought" was Beauchamp. Lastly, the State points to "the sheer implausibility" of the witness's recantation of their statements implicating Beauchamp. (State's Brief at 37.). The State's subjective interpretation of the witness's explanations for the differences between their sworn testimony and unsworn out-of-court statements has no value in assessing whether the prior inconsistent statements were corroborated. The evidence in this case, independent of the statements of Brookshire and Brown, does not sufficiently corroborate their prior inconsistent statements so as to satisfy Beauchamp's due process rights.

Beauchamp relies on his brief-in-chief in reply to the remainder of the State's arguments on the issue of the prior inconsistent statements.

CONCLUSION

In light of the foregoing, Beauchamp respectfully requests that the Court enter an Order vacating his conviction and ordering a new trial.

Dated at Milwaukee, Wisconsin this 23rd day of December, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19.(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,911 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

(1) I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

(2) This electronic brief is identical in content and form to the printed for of the brief filed as of this date.

(3) A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

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