IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-__________

ANGEL NIEVES DIAZ,
Petitioner,

v.

JAMES McDONOUGH, Secretary,
Department of Corrections, State of Florida,
Respondent.

DEATH WARRANT SIGNED, EXECUTION SET FOR December 13, 2006 AT 6:00 P.M.

PETITION FOR WRIT OF HABEAS CORPUS AND/OR MOTION TO REOPEN THE DIRECT APPEAL

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INTRODUCTION

Petitioner, Angel Nieves Diaz, is a death-sentenced inmate. This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Additionally, this petition also presents important questions that the United States Supreme Court is currently judiciously deliberating.

The Petition initially presents Mr. Diaz's claim that his death sentence is disproportional in light of newly discovered evidence, and the evidence at trial. Additionally, the Petition presents a compelling claim for relief predicated upon the Court's announcement in Crawford v. Washington, 541 U.S. 36 (2004), that the Confrontation Clause cannot be satisfied where the rules of evidence permit the introduction of testimonial hearsay.[1] As a result, the proceedings that resulted in Mr. Diaz's conviction

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[1] While Mr. Diaz concedes that this Court ruled in Chandler v. State, 916 So. 2d 728 (Fla. 2005), that Crawford is not retroactive in collateral proceedings, Mr. Diaz asserts that the issue of retroactivity and Crawford is still an open question. In Bockting v. Bayer, 399 F. 3d 1010 (9th Cir. 2005), the Ninth Circuit Court of Appeals ruled that Crawford was retroactive based the reasoning outlined in Teague v. Lane, 489 U.S. 288 (1988) and Schriro v. Summerlin, 542 U.S. 348 (2004). Most recently, the United States Supreme Court granted *certiori* in Bockting and heard oral argument on the merits on November 1, 2006. A ruling by the United States Supreme Court that Crawford is retroactive would override this Court's decision in Chandler.

and death sentence violated fundamental constitutional guarantees.

JURISDICTION

This is an original action pursuant to Fla. R. App. P. 9.100(a). See also Art. I, § 13, Fla. Const. The Court's jurisdiction is invoked pursuant to Art. V, § 3(b)(9), Fla. Const., and Fla. R. App. P. 9.030(a)(3). The Court also has jurisdiction to reopen Mr. Diaz's previous habeas and appeal proceedings, as well as to reconsider his motion for rehearing. Parker v. State, 643 So. 2d 1032, 1033 (Fla. 1994). The Court also has jurisdiction to correct failings in the review process under Art. V, §§ (3)(b)(7) and (9).

REQUEST FOR ORAL ARGUMENT

Mr. Diaz is presently under a death warrant with an execution scheduled for December 13, 2006, at 6:00 p.m. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Diaz's pending execution date. Mr. Diaz, through counsel, urges that the Court permit oral argument.

PROCEDURAL HISTORY[2]

On December 21, 1985, Mr. Diaz was convicted of first-degree murder and related offenses in the Circuit Court of the Eleventh Judicial Circuit, Dade County (R.) and on January 24, 1986, he was sentenced to death (R.). The judge's sentencing order, drafted by the state prosecutor was entered on February 14, 1986.

On October 8, 1987 Mr. Diaz's convictions and sentence of death were affirmed on direct appeal. Diaz v. State, 513 So. 2d 1045 (Fla. 1987). *cert. denied*, 484 U.S. 1079 (1988).

Mr. Diaz applied for executive clemency on June 23, 1988. On August 28, 1989, clemency was denied by the signing of a death warrant and Mr. Diaz's execution was scheduled for October 27, 1989.

Mr. Diaz thereafter simultaneously filed an emergency motion for post conviction relief and an application for stay of execution on October 24, 1989. On October 25, 1989, the circuit court temporarily stayed Mr. Diaz's execution and the Florida Supreme Court subsequently granted an indefinite stay of execution on October 26, 1989.

An evidentiary hearing was held in circuit court on December 4,5 and

[2] The following symbols will be used to designate references to the record in this petition: "R" – record on direct appeal to this Court; "PC-R" – record on first 3.850 appeal to this Court.

6, 1991 on Mr. Diaz's claim relating to ineffective assistance of counsel at penalty phase. However, the circuit court summarily denied the remainder of Mr. Diaz's claims without attaching any files or records demonstrating that the claims were conclusively refuted by the record and denied all relief (Supp. R. 1) in an order written by the State after ex parte contact between the court and State (PC-R. 301-20). Mr. Diaz timely filed a notice of appeal to the Florida Supreme Court (PC-R. 347).

On July, 3 1996, Mr. Diaz filed a petition for state habeas corpus and appealed the circuit court's denial of post conviction relief. On June 11, 1998, the Florida Supreme Court affirmed the circuit court's denial of post conviction relief and denied Mr. Diaz's petition for a writ of state habeas corpus. Diaz v. Dugger, 719 So. 2d 865 (Fla. 1998), *cert. denied*, 526 U.S. 1100 (1999). Rehearing was denied, over a dissenting vote, on November 30, 1998.

Mr. Diaz timely filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida on November 24, 1999. The federal proceedings were thereafter held in abeyance while Mr. Diaz sought state habeas corpus relief when the Florida Supreme Court acknowledged applying incorrect legal standards in reviewing Mr. Diaz's post conviction appeal. Mr. Diaz filed the petition to reopen state habeas

corpus proceedings on June 20, 2000. On July 5, 2001, the Florida Supreme Court denied relief in an unpublished order. Diaz v. Moore, 797 So. 2d. 588 (Fla. 2001).

Mr. Diaz thereupon, moved to reopen his federal habeas proceedings, and thereafter filed an amended federal petition for habeas corpus on February 19, 2002.

On February 11, 2003, Mr. Diaz filed another petition for state habeas corpus relief in the Florida Supreme Court based on the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). The Florida Supreme Court denied the petition on October 20. 2003. Diaz v. State, 869 So. 2d 538 (Fla. 2003), *cert. denied* Diaz v. Crosby, 543 U.S. 854 (U.S., Oct. 4, 2004).

The federal habeas petition was denied on January 23, 2004 by the United States District Court. A timely notice of appeal was entered and a Certificate of Appealability was granted. On August 11, 2004, Mr. Diaz filed an initial brief in the United States Court of Appeals for the Eleventh Circuit. On March 15, 2005, the Eleventh Circuit Court of Appeals affirmed the United States District Court's denial. Diaz v. Secretary of Department of Corrections, 402 F. 3d 1136 (11th Cir. 2005) *cert. denied* Diaz v. Crosby, 126 S. Ct. 803 (U.S., Dec. 5, 2005).

Mr. Diaz filed a 3.851 motion in the circuit court on September 25, 2006 challenging the constitutionality of Florida's lethal injection statute and procedure. At a November 1, 2006 case management conference/Huff hearing, Mr. Diaz through counsel requested leave to orally amend the 3.851 motion to address a new lethal injection protocol that was promulgated by the Florida Department of Corrections on August 16, 2006 but not revealed to the public and CCRC attorneys until October 17, 2006. The circuit court denied the request to orally amend but granted leave to file a written amended 3.851 motion.

On November 1, 2006, Mr. Diaz also filed Demands for Additional Public Records pursuant to Fla. R. Crim. P. 3.852(i). On November 9, 2006, Mr. Diaz filed an amended Rule 3.851 motion.

On November 14, 2006, the Governor's Office signed a death warrant for Mr. Diaz setting the execution for December 13, 2006.

This Court issued an Order directing that "Matters pending in the trial court shall be acted on and orders disposing of those matters entered on November 22, 2006. A Notice of Appeal, if any, shall be filed by November 27, 2006."

On November 16, 2006 the circuit court issued an order setting Mr. Diaz's case for a hearing on November 17, 2006 and directing that all

emergency motions be filed with the circuit court by 4:00 pm on November 16th, the same day of it's order.

On November 16, 2006, Mr. Diaz filed a Motion for Leave to File Amendment to Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 with the attached Amendment to Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 in addition to an Application for Stay of Execution.

The circuit court held a hearing on November 17, 2006 and addressed Mr. Diaz's amended 3.851 motion filed on November 9th, 3.852 (i) public records demands filed on November 1st, and Mr. Diaz's Motion for Leave to Amend with attached Amendment to Amended Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 filed on November 16th. Mr. Diaz filed additional Demands for Additional Public Records pursuant to Rule 3.852(h)(3) and 3.852(i) in open court.

On November 20, 2006, Mr. Diaz filed a Motion to Compel Production of Co-Defendant's Motion to Vacate Judgment and Sentence Pursuant to Rule 3.850. Also, the State filed a response to Mr. Diaz's Motion to Compel Production of Co-Defendant's Motion to Vacate and a "global" objection to Mr. Diaz's Demands for Additional Public Records where the Attorney General asserted that it represented all the agencies for which Mr.

Diaz served with a Demand for Additional Public Records on November 17, 2006.

On November 21, 2006, the circuit court held a hearing on all outstanding motions before the court and issued its ruling as to each one. As to the matter pending before the circuit court at the time the warrant was signed, the circuit court denied Mr. Diaz's Amended Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 filed on November 9, 2006 as well as the Demands for Additional Public Records pursuant to Rule 3.852(i) filed on November 1, 2006. In addition, the circuit court denied Mr. Diaz's Motion to Compel Defendant's Motion to Vacate Judgment and Sentence, Application for Stay of Execution, and the Second Amended Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851 filed on November 16, 2006. Both Amended Motions to Vacate Judgment and Sentence filed on November 9 and 16, 2006 were summarily denied without attaching any files or records demonstrating that the claims were conclusively refuted by the record.

On November 21, 2006, the circuit court also heard very limited argument on Mr. Diaz's Demands for Additional Public Records pursuant to Rule 3.852(h)(3) and 3.852(i) filed on November 17, 2006. The circuit court denied all of Mr. Diaz's Demands for Additional Public Records as untimely

for failing to meet the circuit court's deadline for filing emergency motions.

On November 22, 2006, Mr. Diaz timely filed his appeal.

On November 27, 2006, Mr. Diaz filed a successive Motion to Vacate Judgments of Conviction and Sentence Pursuant to 3.851 together with a Motion to Relinquish Jurisdiction to this Court.

On November 29, 2006, this Court granted the Motion to Relinquish Jurisdiction for the Circuit Court to consider the 3.851 motion, indicating that the circuit court must rule on the motion by December 3, 2006 at 5:00 p.m.; a notice of appeal was to be filed by December 4, 2006 by 9:00 a.m. and the briefs were due by 3:00 p.m. on the same date. On the same date, Mr. Diaz filed two Demands for Additional Public Records and a Renewed Application for Stay. The circuit conducted a hearing on November 30, 2006.

On December 1, 2006, the circuit court summarily denied Mr. Diaz's Motion to Vacate Judgments of Conviction and Sentence, denied his Demands for Additional Public Records and his Renewed Application for Stay.

Mr. Diaz timely filed his notice of appeal.

GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM I

MR. DIAZ IS ENTITLED TO A LIFE SENTENCE AS HIS SENTENCE IS DISPROPORTIONATE IN LIGHT OF NEWLY DISCOVERED EVIDENCE.

Since his direct appeal, Mr. Diaz has challenged the proportionality review conducted by this court. In his initial petition for writ of habeas corpus to this Court, Mr. Diaz argued that appellate counsel was ineffective for failing to bring to light the facts in the record showing that Mr. Diaz was not the triggerman. Diaz v. Dugger, 719 So. 2d 865 (Fla. 1998), *cert. denied*, 526 U.S. 1100 (1999). Although presenting a claim that Mr. Diaz's death sentence was disproportionate to that of co-defendant Angel Toro, who received a plea to second degree murder and a life sentence, direct appeal counsel never pointed this Court to the compelling facts in the record showing the injustice of Mr. Diaz's death sentence in comparison to Toro's life sentence. Mr. Diaz again raised the issue of proportionality in his federal habeas petition.

Without these facts, this Court rejected the proportionality argument although noting that a co-defendant's life sentence is a relevant proportionality consideration if the co-defendant is the more culpable actor. Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1989). It was clear from the

direct appeal opinion, in which this Court stated "One of three Spanish-speaking men shot and killed the bar manager during the December 29, 1979, holdup of a Miami bar" that the Court believed Mr. Diaz could have been the shooter. Id. at 1046. In a special concurrence, Justice Barkett noted, however, "if one believed that this defendant was not the actual triggerman, the proportionality argument would have merit." Id. The compelling facts which were not presented by direct appeal counsel, coupled with newly discovered evidence relating to the only witness who testified that Mr. Diaz was the shooter, compel this Court to revisit its previous proportionality review.

The only witness testifying for the state which claimed Mr. Diaz was the shooter was a jailhouse snitch named Ralph Gajus. Mr. Gajus testified that he was in the Dade County Jail at the same time as Mr. Diaz and their cells were located across from each other. During his testimony, Mr. Gajus indicated that Mr. Diaz was able to speak English and that Mr. Gajus "understand(s) very well." (R. 1115). Mr. Gajus went so far as to say that Mr. Diaz spoke English almost as well as himself and the prosecutor (Id.).

As Gajus testified:

> I don't recall the name of the bar, but [Mr. Diaz] was at a bar in the Southwest section, and I believe it was three of them, and he was sitting, he indicated, like in front of a stage at the bar, and

> they were committing a robbery, and that while committing the robbery, he, someone came from the back of the bar, and it was either he or him that would die so he went (indicating), and the guy - - he indicated that he shot the man.

(R. 1123). Mr. Gajus further indicated what Mr. Diaz told him:

> He said there was a robbery going on before the man came out. They were robbing the people before he came out. He indicated moving by the cash register. Then a man came out from behind, and he had a firearm, and, then that's what -- he indicated that he had to shoot or the other guy would shoot.

(R. 1124). Mr. Gajus' testimony left the jury to believe that Mr. Diaz had confessed to being the triggerman. In it's sentencing order the circuit court pointed out that the evidence was conflicting as to who was the actual triggerman, but confirmed that there was evidence from Ralph Gajus, "that the defendant was, in fact, the shooter." (R. 325).

Mr. Gajus has now provided a sworn affidavit that his testimony at Mr. Diaz's trial was untrue.[3] Mr. Gajus' now admits that Mr. Diaz never told him

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[3] I, Ralph Gajus, being first duly sworn, depose and say that:

1. In 1984 I was inmate in the Dade County Jail awaiting trial on a first degree murder charge. I was in the jail with Angel Diaz for 6 months. We were on the 6th floor on a wing with 6 cells. Angel Diaz was in the cell directly across from me and we would speak to each other across the hall from each other.

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2. Angel Diaz spoke English with a very thick accent and used simple words. I sometimes had a hard time understanding Angel Diaz. I did not speak any Spanish. We would communicate by using our hands and with Angel Diaz's broken English. We also would write notes to each other.

3. We would always talk about each other cases. I told him about mine and he always talked about his. Angel Diaz told me about a robbery at a bar with two other guys and amid the commotion a man was shot. Angel Diaz acted out the shooting using his hands. I do not know what really happened or whether Angel Diaz did the shooting. Angel Diaz never told me that he shot anyone.

4. During this time, Angel Diaz and I also talked about planning an escape. We passed notes among the inmates to plan the escape. Before the escape took place I read a note from Angel Diaz to another inmate and I believed I was going to be in danger during the escape. I asked the jail guards to move me and told the jail about the escape plan. I was angry with Angel Diaz because I found out they were not going to take me and I believed I was in danger.

5. After I was moved and told the jail about the escape Detective Smith and another officer came to talk to me about Angel Diaz. When the detective spoke to me about Angel Diaz's case I asked them to help me out with my case. They told me they would make a statement for me to the Judge.

6. I testified at Angel Diaz's trial that Angel Diaz acted out the shooting and that he shot the man. I testified that Angel Diaz was the shooter. At that time I testified I was unsure who really was the shooter because Angel Diaz never told me and when he acted out the shooting it was very unclear. I testified that I believed that Angel Diaz was the shooter because I was angry about the escape plan and I believed that the police were going to help me with my case.

7. I plead guilty to second degree murder in August or September 1985 and was sentenced in 1986. I recall that Detective Smith testified at my sentencing that I helped with the escape and that I helped in their case against Angel Diaz. I was sentenced to 20 years with a three year mandatory.

that he was the shooter. Mr. Gajus further states that at the time he testified he was unsure who the shooter in fact was, but testified that it was Mr. Diaz because he was angry with Mr. Diaz and wanted to gain favor from the State in his own case.

Additional facts showing that Mr. Diaz was not the shooter are prevalent in the record. For instance, the prosecution conceded at trial it could not establish that Mr. Diaz was the shooter. In opening statement, the prosecutor said, "there will be no evidence as to who the actual shooter of [the victim] was" (R. 788). The prosecutor reiterated this concession in closing argument, stating, "I do not believe the evidence has shown that this defendant went in there with the intention of killing anyone," and arguing that the jury should convict based solely on felony murder (R. 1257-58).

Further, the testimony implicating Mr. Diaz in the offense fell far short of showing that Mr. Diaz was the shooter. Indeed, Candace Braun's testimony established the opposite, i.e., that Angel Toro was the shooter, not Angel Diaz. Braun testified that on the evening of the shooting, she was present in her apartment along with Mr. Diaz, Angel "Sammy" Toro and two other men named Willie and Luisito (R. 880). Braun testified that "[h]e [Mr.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Ralph Gajus

Diaz] told me that Sammy thought somebody was reaching for a gun and shot a guy during a robbery" (R. 881). Braun also testified that Sammy Toro, Willie, and Luisito were arguing in the apartment (R. 880), and that the reason she eventually came forward to the police was because she "was under the impression that Angel Toro was blaming the actual murder on Angel Diaz, and from my -- from what I had heard, overheard, and from what Papo [Mr. Diaz] later explained to me, Papo did not shoot anyone" (R. 889-90). Braun later reiterated that she believed that Mr. Diaz "was being accused of doing the shooting in a robbery that I knew he did not do the shooting in" (R. 896). Braun also explained that "[e]verybody was yelling at Sammy" (R. 913), and went on to detail the conversation she overheard in her apartment:

> THE WITNESS: They were arguing. If they weren't arguing, I probably wouldn't have heard it. If they were talking in a normal voice, I probably wouldn't have heard anything, but they were definitely arguing.
>
> Papo--when I walked into the room at one point, Sammy made a motion like this (indicating). Okay. He said words like, "disparan, tipo panikiado." Disparan is shot, shoot. Tipo is another word for person, for a guy. Panicado is panic.
>
> When he said that, Papo said to him, yelling mad, that that wasn't necessary. That's all.

Q. That what was not necessary?

A. Whatever Sammy did.

Q. What did Sammy do?

A. Apparently he shot somebody.

(R. 912). It cannot be said in light of the facts known at trial and the newly discovered evidence now known, that Mr. Diaz's death sentence is proportionate.

All death sentences in Florida are reviewed for proportionality. In cases involving co-defendants, an enhanced review is warranted to include a determination of relative culpability. See e.g., Puccio v. State, 701 So. 2d 858 (Fla. 1997). As far back as 1975, this Court has recognized disproportionate sentences as unconstitutional. In Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), the Court noted, "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts." This Court reemphasized this holding more recently in Ray v. State, 755 So. 2d 604, 611 (Fla. 2000), noting that "equally culpable co-defendants should be treated alike in capital sentencing." See also, Shere v. Moore, 830 So. 2d 56, 65 n. 10 (Fla. 2002)(referencing over 70 published opinions applying proportionality sentencing principles for co-defendants). The evidence shows that Mr. Diaz

was not more culpable than his co-defendant. Even if it can be said that they are equally culpable, Mr. Diaz is entitled to a life sentence.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court reviewed the constitutionality of the death penalty as it then operated. This review came against a background of increasing concern that those being chosen to pay society's ultimate penalty were being chosen on a more or less random basis. The Court found these concerns to be well founded. Justice Douglas wrote:

> [W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges and juries the determination whether defendants committing these crimes should die or should be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man, or of twelve.

408 U.S. at 253. After noting the small number of executions carried out in the preceding years Justice Brennan wrote:

> When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No-one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.

408 U.S. at 294. The phrase which summed up the essence of the unconstitutional nature of the death penalty was written by Justice Stewart:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual....the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

408 U.S. at 309. The justices who agreed that the death penalty as then applied was unconstitutional recognized that inherent in the Eighth Amendment's prohibition of cruel and unusual punishment was a requirement that the penalty not be administered capriciously or arbitrarily.

More than twenty years after the Supreme Court decided Furman v. Georgia the conclusions reached by Justices Douglas, Brennan, and Stewart remain valid and have become the cornerstones of modern Eighth Amendment jurisprudence. Gregg v. Georgia, 428 U.S. 153 (1976). Statutes which provide for the death penalty must be structured in a way which prevents the penalty from being arbitrarily applied. California v. Brown, 107 S. Sc. 538 (1987).

In Parker v. Dugger, 111 S. Ct. 731 (1991), the Supreme Court overturned a Florida death sentence for reasons which amounted to an affirmation that the death sentence was arbitrary. Writing for the Court, Justice O'Connor stated:

> If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom

> death is an appropriate sanction and those for whom it is not.

Spaziano v. Florida, 468 U.S. 447, 460 (1984). The Constitution prohibits the arbitrary or irrational imposition of the death penalty. Id., at 466-467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.

This court recognized in State v. Dixon, 283 So. 2d 1 (1973), that Furman v. Georgia required that the discretion inherent at every stage of the criminal justice process be exercised in a manner that is reasonable and controlled. This requirement was not met in this case. According to the evidence, Angel Toro shot the victim, yet Mr. Diaz received death, and is facing imminent execution, while Toro received life[4]. It is difficult to imagine treatment which so clearly violates the Eighth Amendment's prohibition on arbitrary and capricious punishment.

Under the law of the case doctrine, "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." Arizona v. California, 103 S. Ct. 1382, 1391 n.8 (1983). Florida courts have lifted the "law of the case" and

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[4] In fact, the final disposition of Toro's case is still unsettled. Mr. Toro currently has an appeal from a summary denial of his Rule 3.850 motion pending before the Third District Court of Appeal.

corrected errors made in prior dispositions of issues where justice would be subverted if the court did not do so. See Massie v. University of Florida, 570 So. 2d 963, 974 (Fla. App. 1st DCA 1990); Brown v. Champeau, 537 So. 2d 1120, 1121 (Fla. 5th DCA 1989); Morales v. State, 580 So. 2d 788 (Fla. 3d DCA 1991).

This Court's jurisdiction over an appeal necessarily includes the "authority to change the law of the case previously set forth." Jones v. State, 559 So. 2d 204, 206 (Fla. 1990). See also Brunner Enterprises v. Department of Revenue, 452 So. 2d 550 (Fla. 1984) ("We are the only court that has the power to change the law of the case established by this Court"). In Preston v. State, 444 So. 2d 939, 942 (Fla. 1984), a capital case, the Court reaffirmed that "an appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case." The Court lifted application of the "law of the case" because "[t]he interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue." Id. Accord Porter v. State, 723 So. 2d 191 (Fla. 1998).

There is no reasoned basis for failing to lift application of the "law of the case" doctrine in this case. Mr. Diaz's unconstitutional execution would

classify as a manifest injustice sufficient to apply an exception to the "law of the case." But for the application of this admittedly "amorphous" doctrine, his death sentence would be reversed. Compare Preston, 442 So. 2d at 942 ("law of the case" lifted because "[t]he interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue"). The interest of justice and Florida's death penalty review were sufficient concerns in Preston and Porter to lift the law of the case, and should likewise be so in Mr. Diaz's case. Mr. Diaz is entitled to a life sentence.

CLAIM II

MR. DIAZ IS ENTITLED TO RELIEF UNDER THE SIXTH AMENDMENT RIGHT TO CONFRONTATION, AS DETAILED IN CRAWFORD V. WASHINGTON.

A. Testimonial Hearsay Was Presented At Mr. Diaz's Penalty Phase.

Mr. Diaz's trial was not conducted in conformity with the Sixth Amendment guarantee to a criminal defendant that he will have the opportunity to confront his accusers. Specifically, over the objection of Mr. Diaz's defense counsel, the trial court permitted the introduction of hearsay testimony through Detective Jose Pizzaro (hereinafter "Pizarro"), a homicide officer with the Puerto Rico Police. (R. 1375). During Pizarro's testimony, testimonial hearsay relating to a second-degree murder conviction that the

State was seeking to introduce as an aggravating circumstance was admitted during the penalty phase. (R. 1389-1384).

During Mr. Diaz's penalty phase, the State was able to elicit from Pizarro, detailed and inflammatory statements relating to the homicide for which Mr. Diaz was convicted. Pizarro's testimony was, admittedly, based on investigative witness statements. (R. 1389). Moreover, in their effort to secure a death sentence, the State relied exclusively on Mr. Diaz's criminal records and used this highly inflammatory testimonial hearsay to prove the aggravators presented during the penalty phase. Furthermore, in her sentencing order, the trial judge used this evidence as support for finding the aggravator that the defendant was previously convicted of a felony involving the use or threat of violence to the person (R. at 320). The admission of these out-of-court testimonial statements against Mr. Diaz denied Mr. Diaz his constitutional right to confront the witnesses and cross-examine their account of the homicide. As Crawford v. Washington, 541 U.S. 36 (2004), makes abundantly clear, this denial alone "is sufficient to make out a violation of the Sixth Amendment" because "[w]here testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford at 68-69.

The Supreme Court makes clear in Davis v. Washington, 126 S. Ct. 2266 (2006) that statements provided by witnesses to law enforcement during the course of an investigation are testimonial in nature In Davis, the Supreme Court addressed how to determine "which police interrogations produce testimony" and held as follows:

> 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. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 2273-2274.[5] As is discussed below, the statements provided by witnesses to Pizarro as an officer investigating a homicide, clearly meet the criteria for "testimonial" as prescribed by Crawford.[6]

1. Out-of-Court Testimonial Statements Introduced at the Penalty

[5] See also Id. at 2276 (stating, the result of the latter type of interrogation, "whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps the notes) of the interrogating officer, is testimonial").

[6] Additionally, the recent decision by the Florida Supreme Court in State v. Rodgers, 2006 WL 3025668 (Fla. October 26, 2006), reaffirms that Crawford applies to hearsay admitted in the penalty phase of a capital trial. Id. at *5. Similar to Mr. Diaz's case, the State in Rodgers presented a former police officer and prosecutor to testify to statements made in the investigation of a prior manslaughter conviction in order to establish the prior violent felony aggravator.

Phase.

During the penalty phase, the State called Detective Pizarro of the Puerto Rico Police to provide evidence on a prior conviction the State was attempting establish as an aggravating circumstance. Over defense counsel's objection, Pizarro testifies to details of the homicide he learned from statements made to him by investigative witnesses. Initially, when Pizarro begins to discuss the statements made by the witnesses, the trial court admits that Pizarro's testimony must exclude facts that were stated to him by the investigative witnesses:

> Q: And could you, please, explain to the members of the jury the circumstances of this murder as your investigation revealed them?
>
> A: My Investigation revealed around November 28th of 1977 I transported myself in the hours of the morning to the Cria Institution because there had been killed a person with nineteen stabs**. The investigation revealed, according to what the witnesses manifested**-
>
> MR. LAMONS: I object. This is soley based on hearsay.
>
> STATE: Judge, once again I would point out the case law that he is allowed to testify to that as—
>
> MR. LAMONS: To a certain extent. I think the case is clear it has to be limited.
>
> THE COURT: I will limit it to the extent that his investigation—what his investigation revealed and not what was said by any person.

(R. 1380) (emphasis added). However, Pizarro then went on to testify, over defense counsel's objection, to the details of the homicide that were, admittedly, derived from investigative witness statements:

Q: And how did Mr. Villegas—what circumstances led to him being killed?

A: Mr. Villegas one night called the attention to Mr. Nieves because it was his habit leaving that Cria Home.

Consequently, he made a report. Making the report, Neives was upset due to that. And that he was going to be taken out of the Cria Home and he would go back to the institution. That is why the—because of that report, that is why he killed him.

Q: How was Mr. Villegas killed?

A: Mr. Villegas was killed due to nineteen stabbings on several parts of the body using a knife.

Q: Where was Mr. Villegas during the time he was killed?

A: He was asleep on his bed.

Q: How many persons did your investigation reveal were involved in the murder of Mr. Villegas?

A: There were investigating witnesses.

Q: How many suspects—how many persons who actually killed Mr. Villegas were involved?

A: From the investigation, only Mr. Nieves Diaz.

***

Q: Do you know what sentence he received for that crime?

A: From ten to fifteen years in prison.

Q: When did he receive that sentence?

A: On the 6th day of September, 1978.

Q: Did he serve the entire term of his sentence in that case?

A: No, sir.

Q: What happened?

MR. LAMONS: I don't believe that that is within this officer's knowledge. This would be based solely on hearsay.

MR. SCOLA: They are allowed to rebut any hearsay.

THE COURT: The Court will allow the witness to answer the question.

Q: Did he complete his entire sentence?

A: No, sir.

Q: What happened?

A: He escaped from the penal institution.

(R. 1381-1382). Clearly, the information Pizarro testified to was well beyond the scope of his direct knowledge and included statements that were given to him by the investigative witnesses. Without question, these statements are testimonial as prescribed by both Crawford and Davis. As Pizarro admits, he collected statements from the investigative witnesses

throughout the investigation he conducted, which consequently resulted in Mr. Diaz's second-degree murder conviction.

2. The State's Case and Closing Argument.

The evidence at trial indicating that Mr. Diaz was the actual triggerman was tenuous at best. Thus, the State relies heavily on the prior violent felony and under sentence of imprisonment aggravators presented at Mr. Diaz's penalty phase to convince the jurors to sentence Mr. Diaz to death. To that end, the state utilizes the inflammatory testimonial hearsay elicited from Pizarro to prove the aggravators. (R. at 1415, 1417, 1419, 1436-1437). The testimonial hearsay was specifically used to establish the following aggravating factors:

> 1. That the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> 2. That the defendant committed this first degree murder while the defendant was under a sentence of imprisonment.

(R. at 1415-1417). For example, during the State's argument in favor of finding the prior violent felony aggravator, the state attorney states, "He stabs him to death nineteen times while sleeping in his bed. That is kind of person you are dealing with. (R. at 1417). Additionally, the state attorney emphasizes at a side bar conference during closing argument that the two aggravating factors that the testimonial hearsay was used to prove are most

important to convincing the jury to vote for death:

> I've commented on is the obvious recommendation that Mr. Lamons [defense counsel] is going to urge the jury, that is, life imprisonment; and **commenting on the aggravating factors which I feel are the most compelling in this case, the fact that he committed this murder while under a sentence and while also committing a murder with a prior record of violence**…

(R. at 1433) (emphasis added).

The State's use of out of court testimonial statements by investigative witnesses violated Mr. Diaz's Sixth Amendment right to confront his accuser. The witnesses relied upon by the State and Pizarro for the facts relating to the homicide were never disclosed. The State's argument in support of the death penalty against Mr. Diaz was based in large part on statements not subject to confrontation, and bolstered by State Attorney's own inappropriate comments. The effect is clear in the trial judge sentencing order where the court relies on the hearsay in finding the prior violent felony aggravator:

> The facts further reveal that the defendant sadistically and brutally stabbed the director of the aforesaid rehabilitation program some eighteen (18) times while the victim lay sleeping in his bed.

(R. at 639) (emphasis added).

The circumstances and details of the homicide testified to by Pizarro

were not subject to cross-examination because the sources of the testimonial hearsay were not called as witnesses or ever made available to the defense. In fact, the State never makes any representation that the investigative witnesses were unavailable at the time of the trial. Defense counsel's opportunity to cross examine Pizarro during the penalty phase did not rise to the level of a prior, proper opportunity to cross-examine, as required by Crawford. As a result, Mr. Diaz's right to confrontation was subverted.

3. Defense Counsel's Objections.

Defense counsel Robert Lamons objected twice to the introduction of and the denial of the opportunity to confront the witnesses against Mr. Diaz. (R. at 1380, 1383). In response to the defense objection, the State argued that the hearsay evidence was admissible. (Id.) (noting, "They [the defense] are allowed to rebut any hearsay."). Though the trial court agreed to limit Pizarro's testimony to only what his investigation revealed, Pizarro was permitted to testify to the specific facts of the homicide that were provided by witness statements. When the court agreed to limit Pizarro's testimony (R. 1380), the court implicitly acknowledged the serious Sixth Amendment problems arising from the lack of confrontation inherent to the testimony used against Mr. Diaz.

B. Crawford v. Washington Establishes A Confrontation Clause Violation In This Case.

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court considered the contours of the right guaranteed by the Confrontation Clause of the Sixth Amendment. In Crawford, the defendant's wife had provided law enforcement officers with a tape-recorded statement. Due to the marital privilege, she was not an available witness at her husband's trial for assault and attempted murder. The State sought to introduce the taped statement, and the defendant argued that the tape's admission would violate his right to confrontation. Based on Ohio v. Roberts, 448 U.S. 56 (1980), the trial court found that the statement bore "particularized guarantees of trustworthiness." The defendant was convicted of assault. The United States Supreme Court reversed this ruling, announcing that the test in Ohio v. Roberts departed from "historical principles" underlying the Confrontation Clause.[7] See Crawford, 541 U.S. 36 at 60. The Supreme Court in explaining its ruling noted:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does Ohio v. Roberts, 448 U.S. 56 (1980), and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands

[7] Ohio v. Roberts allowed the introduction of evidence that falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."

> what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial". Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford v. Washington, 541 U.S. 36 at 68 (emphasis added).

The Supreme Court reached this conclusion after exploring at length the original meaning and development of the Confrontation Clause. Id. at 43-50. In examining the historical context of the Confrontation Clause, the Court concluded that "leaving the regulation of out of court statements to the law of evidence would render the Confrontation Clause powerless." Id. at 51. Thus, the Confrontation Clause "applies to 'witnesses' against the accused - in other words, those who 'bear testimony.'" Id. at 51. In discussing statements to which the Confrontation Clause would potentially apply[8], the Court noted:

> Various formulations of this core class of testimonial statements exist: "ex-parte in-court testimony or its functional equivalent--that is,

[8] The Court actually refused to define what a testimonial statement would be, but ruled that, "… it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Crawford, at 68.

> 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;" "extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "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, (citations omitted)(emphasis added).

In reviewing the history of the Confrontation Clause, the Supreme Court reached a second conclusion: "the 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 a prior opportunity for cross-examination." Id. at 53-54. This is the only exception to the Confrontation Clause, and there are no "open-ended exceptions from the confrontation requirement to be developed by the courts." Id.

The Supreme Court concluded that the hearsay exceptions and the trustworthiness test described in Ohio v. Roberts, 448 U.S. 56 (1980), "depart[s] from the historical principles identified above" because Roberts was both "too broad" and "too narrow." Crawford, 541 U.S. 36, 60. In its "too narrow" application, the Roberts test "admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable

standard often fails to protect against paradigmatic confrontation violations." Id. (emphasis in original). In addressing the problem of applying Roberts broadly, the Court notes: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception." Crawford, 541 U.S. 36, at n7. (emphasis added).

Thus, the Court held that when a State admits an out-of-court testimonial statement against a criminal defendant and the defendant has no opportunity to cross-examine the witness who made the statement in front of the trier of fact, "[t]hat alone is sufficient to make out a violation of the Sixth Amendment" because "[w]here testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford at 68-69.

Mr. Diaz was sentenced to death based upon the accusations stemming from a prior violent felony that were not tested by the only constitutionally reliable test that is acceptable by the United States Supreme Court. There is no question that statements given to Detective Pizarro were testimonial in nature. There is no question that if Mr. Diaz were tried today

the testimonial hearsay would not have been allowed. The testimony of Pizarro presented in Diaz's trial does not comport with the requirements of Crawford. For such statements to be admitted, "unavailability and a prior opportunity for cross examination" are required. Id. at 68. In the instant case, the State neither argued nor demonstrated that the investigative witnesses were unavailable to testify.

Mr. Diaz's record establishes that his defense counsel could not have anticipated the unavailability of the investigative witnesses relied upon by Pizarro. As a result, there was no opportunity for proper cross-examination, and therefore no adversarial testing occurred. When the trial court acknowledged that Pizarro could not testify to statements given to him by investigative witnesses, the trial court recognized the incomplete nature of the testimonial statements being used by the State against Mr. Diaz due to lack of proper cross-examination. The trial court did not adhere to its duty to limit Pizarro's testimony, sustain defense counsel's objection, and exclude any testimony that was beyond the direct knowledge of the detective.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. Amend. VI. The historical analysis of this right, as explained in Crawford, 541 U.S. 36, at 43-50 (2004), highlights the

Confrontation Clause's importance in criminal proceedings. The Supreme Court clearly concludes that the admission of testimonial hearsay statements "alone is sufficient to make out a violation of the Sixth Amendment." Crawford, at 68. The Court further explained, "[d]ispensing with confrontation because testimony is obviously reliable is asking to dispense with jury trial because a defendant is obviously guilty." Id. at 62.

With this violation of his constitutional right to confront his accusers, Mr. Diaz was prejudiced in the type of evidence he could present in his defense to the jury. The Supreme Court has held that the Constitution reflects the Founders' insistence that the fairness and accuracy of criminal prosecutions (and imposition of the death penalty) are best guaranteed by giving the defendant the ability to insist that relevant facts be decided by a jury. See Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (noting that jury fact-finding is necessary "to guard against a spirit of oppression and tyranny on the part of rulers.") Despite these Constitutional safeguards inherent within the criminal justice system, they were not applied in Mr. Diaz's case. Mr. Diaz was denied the right to confront and adequately cross-examine the investigative witnesses providing the main evidence the State used to argue for Mr. Diaz's death sentence. The evidence presented against Mr. Diaz was tenuous at best, thereby making such testimony even more

essential to convince the jury that Mr. Diaz was an individual deserving of the death penalty. To not be able to fully explore the parameters of this testimony by confrontation and extensive cross-examination, undermines the intent of the Framers of the Constitution and the rights thereby prescribed.

C. Crawford v. Washington Applies Retroactively In Mr. Diaz's Case

Crawford meets the criteria for retroactive application set forth in Teague v. Lane, 489 U.S. 288 (1988). In Teague and its progeny, the United States Supreme Court held that, in most instances, new rules do not apply retroactively to cases on collateral review. However, this bar is not absolute and is inapplicable for new, substantive rules (see, e.g., Bousley v. United States, 523 U.S. 614, 620-21 (1998); Saffle v. Parks, 494 U.S. 484, 494 (1990)), and new procedural rules when the rule is one without which the likelihood of an accurate conviction is seriously diminished. Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 2523 (2004)(citing, Teague, 489 U.S. at 313). Crawford's impact on the accuracy of criminal proceedings is unequivocal. As the United States Supreme Court states, "Nothing can be more essential than the cross examining [of] witnesses. . ." Crawford, 124 S. Ct. at 1362.

Following this reasoning, the Ninth Circuit recently upheld Crawford's retroactivity in Bockting v. Bayer, 399 F. 3d 1010 (2005). In

reviewing Crawford though the lens of Summerlin, the Ninth Circuit found that Summerlin actually underscores why the Crawford rule implicates the fundamental fairness and accuracy of the criminal proceeding. Bockting, 399 F. 3d at 1016. While the Ninth Circuit stands alone in upholding the Sixth Amendment and finding Crawford applicable to collateral proceedings, other circuits remain undecided as to Crawford's retroactive application.[9]

Moreover, this issue is not moot, as the United States Supreme Court recently granted *certiorari* to specifically determine the retroactivity of Crawford to collateral proceedings. See Bockting v. Bayer, 399 F. 3d 1010 (9th Cir. 2005), cert. granted, Whorton v. Bockting, 2006 U.S. LEXIS 3934 (U.S. May 15, 2006) (No. 05-595). Certainly, the issue of the retroactivity of Crawford is an open question and while this Court has ruled in Chandler that Crawford is not retroactive, a ruling by the United States Supreme Court to the contrary would render that ruling moot. Wherefore, Mr. Diaz urges this Court to follow the rulings of the Ninth Circuit and overrule its decision in Chandler, or, at a minimum, grant a stay of execution and refrain from ruling on Mr. Diaz's claim pending resolution of this issue with the United States Supreme Court. Additionally, Mr. Diaz reserves the right to amend

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9 See e.g., McGonagle v. U.S., 137 Fed. Appx. 373 (1st Cir. 2005); Evans v. Luebbers, 371 F. 3d 438, 444-45 (8th Cir. 2004).

this petition based on said ruling.

D. Conclusion.

By virtue of Crawford and its application to Florida law, the Constitutional error that occurred in the proceedings against Mr. Diaz is now exposed. Mr. Diaz's sentence of death must be vacated, and a new penalty phase ordered at which Mr. Diaz's right of confrontation shall be honored. To do anything less would undermine confidence in the entire judicial process and the Constitution as a whole.

CONCLUSION AND RELIEF REQUESTED

In light of the foregoing discussion, Mr. Diaz requests:

1. That Respondent be ordered to show cause why this petition should not be granted;

2. That Mr. Diaz be permitted to file a Reply to the Respondent's Response;

3. That oral argument be scheduled on this petition;

4. That Mr. Diaz's death sentence be vacated;

5. That any other relief that is just and proper issue from the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail and United States Mail to Sandra Jaggard, Assistant Attorney General, 444 Brickell Ave., Suite 650 Miami, Florida 33131, this _____ day of ______________________ 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is typed in Times New Roman 14 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

____
SUZANNE MYERS KEFFER