IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1366

THOMAS KNIGHT, N/K/A
ASKARI ABDULLAH MUHAMMAD,

Petitioner,

vs.

JAMES V. CROSBY, JR., Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

SUPPLEMENTAL RESPONSE

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TABLE OF CONTENTS

INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols ARSR.@ and ARST.@ will refer to the record on appeal and transcript of proceedings from Defendant=s resentencing appeal.

STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant=s motion for post conviction relief. *Knight v. State*, FSC Case No. SC03-631. The State will therefore rely on its statements of the case and facts contained in its brief in that matter, with the following additions:

Prior to the beginning of the resentencing proceedings, the State moved to allow Det. Greg Smith to remain in the courtroom during the proceedings. (RSR. 1168-71) When the motion was heard, Defendant stated that he had no objection so long as Det. Smith would not be testifying. (RST. 123) The State responded that it did intend to have Det. Smith testify to a summary of the testimony of unavailable witnesses, including certain forensic experts. (RST. 123-26) Defendant expressly declined to address any issue regarding propriety of the proposed testimony. (RST. 126)

At resentencing, the State presented the testimony of Det. Greg Smith during its case in chief. (RST. 2341-2412) Det. Smith stated that he was assigned to this matter because the former lead detective, Julio Ojeda, was no longer a police officer. (RST. 2345-46)

Det. Smith stated that Milton Marinek, the former comptroller for Sidney Bag and Paper Co., was dead by the time of resentencing. (RST. 2350-51) When Det. Smith was asked if Mr. Marinek had been contacted from City National Bank and had conducted his own investigation, Defendant objected that having Det. Smith testified to other witnesses' statements violated his Confrontation Clause rights and that the best evidence rule required the admission of a transcript of Mr. Marinek's trial testimony. (RST. 2351-52) The trial court overruled the Confrontation Clause objection and found the best evidence rule inapplicable. (RST. 2353)

Det. Smith then testified that Mr. Marinek was contacted by Charles Gans from City National Bank and that Mr. Marinek went to the executive parking lot of Sidney Bag and Paper. (RST. 2353-54) There, Mr. Marinek found a hat that he recognized as Defendant's. (RST. 2354) Det. Smith identified the hat and hairs taken from it as items that had been admitted into evidence at the original trial. (RST. 2355-56) Det. Smith

stated that Mr. Marinek had described the separate employee and executive parking lots and identified Mr. Gans's reserved parking space when he had testified and marked on a photograph of the area where he found the hat. (RST. 2356-58)

Det. Smith stated that Mr. Marinek had testified that on the day of the crime, he had been asked to pull the records of employees who were absent from work and Defendant. (RST. 2359-60) Defendant's employment records indicated that a woman had call in sick for Defendant on the day of the crime. (RST. 2360) They also showed that Defendant, who had been employed as a bundler at Sidney Bag and Paper, had worked 8 hours on the Friday before the murders and had been paid $42.96 for that work, had started work at 7:42 a.m. on the Monday before the murders and had been paid $42.75 for that day's work and had worked approximately 2½ hours on the day before the murders and had been paid $11.85 for that day's work. (RST. 2367-70) The records did not indicate why Defendant left work early the day before the murders. (RST. 2370)

After the murders, Mr. Marinek went to the medical examiner's office. (RST. 2396) He identified Mr. & Mrs. Gans's bodies. (RST. 2397)

When Det. Smith was asked about Howard Perry, Defendant again objected. (RST. 2361) Defendant asserted that the State

had not shown that Mr. Perry was dead or a police witness and admission of his prior testimony through Det. Smith violated the Confrontation Clause. (RST. 2362-63) The trial court overruled the objection and informed Defendant he was free to admit the transcript of the prior testimony if he wanted to do so. (RST. 2363-64)

Det. Smith then testified that Mr. Perry had stated that he was working across the street from the Gans's home on the day of the murders. (RST. 2370-71) Mr. Perry had seen Mr. Gans's Mercedes pull up to the home and honk three times. (RST. 2371-73) Mr. Perry had observed a white man driving the car and a black man sitting in the back seat. (RST. 2371)

Det. Smith testified that Det. Ojeda's prior testimony indicated that he and his partner were out of the office when they heard of the kidnapping. (RST. 2373) They then traveled to southern Dade County by going down US1 to Kendall Drive, out Kendall Drive to SW 117th Avenue, and south on 117th Avenue until they came to the embankment of the canal, arriving about 11:37 a.m. (RST. 2373-75) As they were driving, Det. Ojeda and his partner listened to their radio dispatcher, who was relaying information from the FBI dispatcher because Miami-Dade Police and the FBI used different radio frequencies. (RST. 2375)

Once at the canal, Det. Ojeda had testified that he turned

and followed the canal for .3 of a mile before parking. (RST. 2375-76) Once on foot, Det. Ojeda had described walking along the embankment to a break in a ridge, where Det. Ojeda stated that he saw Agt. Terry Nelson running, and then down a dirt road to where he saw the Ganses's Mercedes. (RST. 2376-77) The trunk and both passenger side doors of the Mercedes were open. (RST. 2377) A white female was slumped toward the driver's door in the driver's seat of the car. (RST. 2378) As Det. Ojeda and his partner approached the car, Det. Ojeda had testified that he had seen a black man running east away from the car, carrying what appeared to be a machine gun. (RST. 2378-79) When the black man started to point the gun in their direction, Det. Ojeda and his partner took cover and lost sight of the man. (RST. 2379) As he took cover, Det. Ojeda motioned for a helicopter to follow the man. (RST. 2380)

When he was able to take a closer look at the car, Det. Ojeda described a hole in the front windshield, surrounded on the inside of the window by blood spatter. (RST. 2380-81) He also found pieces of dentures next to the front passenger's door, by the back of the car and next to Mr. Gans's head. (RST. 2381) Det. Ojeda also observed a trail of blood from the front passenger's door, along the side and back of the car to where Mr. Gans's body was found. (RST. 2382-84) The plant growth in

the area had been pushed down. (RST. 2408)

When Det. Smith was asked about items found between the car and where Defendant was found, Defendant again objected, claiming that his due process rights were violated because Det. Smith was combining the testimony of several witnesses. (RST. 2386-88) The trial court overruled the objection. (RST. 2388)

Det. Smith then testified that between the car and the place that Defendant was found, two sandals (in two different places) and a pair of glasses were found. (RST. 2388-89) After his arrest, Defendant was found to have injured the bottoms of his feet. (RST. 2388) The glasses were identified as Defendant's because he was wearing the glasses in his driver's license photograph. (RST. 2389-90)

Det. Smith stated that Det. Ojeda had identified Defendant as the man he saw running away from the Mercedes. (RST. 2393) Defendant was later placed in a lineup and identified by nine people. (RST. 2394-96)

Det. Smith stated that a serial number was found on the gun recovered with Defendant. (RST. 2397) The police traced the gun and determined that it had been purchased by Defendant, who had falsely stated that he was not a convicted felon. (RST. 2397-2401) In fact, the signatures on the firearms forms were matched to Defendant's signature on fingerprint cards prepared

at the time of Defendant's arrest. (RST. 2401-03) In addition, Defendant's fingerprints had been identified as matching fingerprints found in the Mercedes. (RST. 2403-05) The hairs found in the hat found by Mr. Marinek were also consistent with Defendant's hair. (RST. 2405-07) Det. Smith stated that Ms. Gans's shirt had been examined for powder burns and that an expert had determined that the gun was at least 4 feet from Ms. Gans when she was killed. (RST. 2408-10)

Defendant's pants were seized from him at the time of his arrest because they appeared to have blood on them. (RST. 2410-11) The blood on the pants matched Mr. & Mrs. Gans's blood types. (RST. 2411-12) Defendant did not appear to be bleeding at the time of his arrest. (RST. 2412)

On cross, Det. Smith stated that hairs cannot be precisely matched to an individual. (RST. 2455) Det. Smith stated that the helicopter and airplane pilots saw Defendant run from the Mercedes and that two other cars were present at that time. (RST. 2458) Det. Smith stated that he had not read the entire trial transcript. (RST. 2458-59)

During its rebuttal case, the State recalled Det. Smith. (RST. 3550-62) Det. Smith stated that his review of the prior testimony and reports did not show that any uniformed officers were involved in the surveillance of Defendant. (RST. 3551) No

marked cars were used in following Defendant. (RST. 3551) Mr. Gill had testified that he saw a marked car in front of the bank but Defendant did not go to that side of the bank. (RST. 3551-52) Moreover, it did not reveal any statements by Defendant's former coworkers at Sidney Bag and Paper that Defendant ever behaved strangely. (RST. 3559)

Det. Smith stated that he had personally been in the airplane and knew it was quiet. (RST. 3553) He stated that the airplane pilot had testified that he was asked to assist around 11:10 a.m. and that he first saw the car after it stopped and Defendant was outside it. (RST. 3554, 3562) The helicopter pilot testified that he had not been called until around 11:00 a.m. (RST. 3555) When he first arrived, the pursuing officers had lost sight of the car and had him land a mile away from where the car was found. (RST. 3556-57) He returned to the air only after the car was found and Defendant was outside it. (RST. 3558, 3562)

Det. Smith stated that he drove from the location of Sidney Bag and Paper to the Ganses' home then to City National Bank and finally to the canal where the Ganses were killed. (RST. 3559-62) From the company to the bank was 22.6 miles, and from the bank to the murder scene was 21.9 miles. *Id.*

On appeal, Defendant claimed that the trial court had erred

in allowing Det. Smith to testify regarding Det. Ojeda and the pilots' former testimony because the admission of this testimony violated his right to confrontation. Initial Brief of Appellant, FSC Case No. 87.783, at 33-44. Defendant also complained about Det. Smith's statement that Defendant's former coworkers had reported no strange behavior by Defendant. *Id.* at 45-46.

This Court rejected the claim as procedurally barred:

> In his first claim, [Defendant] contends that Detective Smith's hearsay testimony violated his right to confrontation, due process, and a reliable sentencing proceeding. The gravamen of [Defendant's] claim is that Detective Smith's recounting, on rebuttal, of the helicopter pilot's prior sworn statement violated his Confrontation Clause right to confront and cross-examine witnesses because, unlike Smith's earlier testimony summarizing prior trial testimony, the pilot's statement had never been subjected to adversarial testing and lacked the reliability accorded former testimony. However, because [Defendant] never specifically objected to Smith's testifying as to the contents of the pilot's statement, we find this claim procedurally barred. [FN8]
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> [FN8] We also note that the trial court, in considering [Defendant's] objection to Smith presenting a summary of former trial testimony, offered [Defendant] the opportunity to have that testimony read to the jury as an alternative to Smith's presentation. In addition, Nelson's nonhearsay testimony covered much of the same ground and he participated throughout the surveillance, while the helicopter pilot only became involved at the end. Moreover, while Smith admittedly was called to the

> stand to rebut the defense's theory that the air surveillance caused [Defendant’s] loss of mental faculties, his recitation of Detective Ojeda's trial testimony recounted the same subject matter as that presented by Nelson.

Knight v. State, 721 So. 2d 287, 293 (Fla. 1998).

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED AS UNTIMELY AND PROCEDURALLY BARRED.

Defendant's convictions became final on December 29, 1976, when time for seeking certiorari in the United States Supreme Court from this Court's affirmance on direct appeal expired. *See Knight v.* State, 338 So. 2d 201 (Fla. 1976). Defendant's death sentences became final on November 8, 1999, when the United States Supreme Court denied certiorari review after resentencing appeal. *Knight v. Florida*, 528 U.S. 990 (1999). Defendant filed his initial brief from the denial of his motion for post conviction relief on June 21, 2004. Defendant filed his first petition for writ of habeas corpus on July 14, 2004. He did not serve the instant pleading until March 7, 2005.

Pursuant to Fla. R. Crim. P. 3.851(d)(3):

> All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the rule 3.850 motion.

Moreover, Fla. R. App. P. 9.142(a)(5), provides:

> In death penalty cases, all petitions for extraordinary relief over which the supreme court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal for the lower court's order on the defendant's application for relief under

Florida Rule of Criminal Procedure 3.851.

In *Mann v. Moore*, 794 So. 2d 595, 598-99 (Fla. 2001), this Court analyzed these rules and found that they required all death sentenced defendants, especially those like Defendant whose sentences became final after January 1, 1994, to file their extraordinary writ petitions by the time they filed their initial briefs from the lower court's order denying post conviction relief. For those defendants who may have been mislead by the date restriction originally contained in Fla. R. Crim. P. 3.851, this Court granted all death sentenced defendant who had not previously filed their petitions until January 1, 2002 to file such petitions. As previously noted, Defendant's sentences became final after January 1, 1994. He filed his initial brief in the appeal from the denial of his motion for post conviction relief on June 21, 2004. He did not file his first petition until July 14, 2004. He did not serve the instant pleading until March 8, 2005. As such, this pleading is untimely and should be dismissed.

Moreover, this petition should be dismissed because it is successive. Defendant filed his first state habeas petition on July 12, 2004. Defendant did not serve the instant pleading until March 7, 2005. This Court has held that "[s]uccessive habeas corpus petitions seeking the same relief are not

permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed." *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994). This Court has applied the rules regarding successive post conviction pleadings to attempts to amend pleadings. *See Vining v. State*, 827 So. 2d 210, 210-12 (Fla. 2002). Here, Defendant seeks to add a claim based on *Crawford v. Washington*, 541 U.S. 36 (2004).[1] *Crawford* was decided on March 8, 2004. Defendant did not file his initial state habeas petition until July 12, 2004. As such, this claim was available at the time Petitioner initially filed his state habeas petition. This claim is not properly before this Court under *Johnson*. The pleading should be dismissed.

Moreover, this claim is not properly before this Court. Defendant seeks the retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004). However, Fla. R. Crim. P. 3.851

[1] In the course of making his argument, Defendant also asserts that trial counsel was ineffective for failing to attempt to introduce evidence of prior bad acts by Det. Ojeda when Det. Smith summarized his testimony. However, such a claim is not properly raised in this proceeding. *See, e.g., Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994)("We note that 'habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.'")(quoting *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla.1989)).

and Fla. R. App. P. 9.142, make no provision for the filing of successive petitions for writ of habeas corpus in this Court. Instead, Fla. R. Crim. P. 3.851(2)(B) permits the filing of untimely motion for post conviction relief in the trial court if the motion alleges:

> the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and **has been held to apply retroactively**.

(Emphasis added). Under this provision, Defendant may not seek out-of-time relief via a successive petition for writ of habeas corpus, and he may not file an out-of-time, successive motion for post conviction relief in the circuit court based upon alleged new law unless he can demonstrate *both* that the "fundamental constitutional right asserted was not established" previously, *and* that the newly-created right "has been held to apply retroactively." Rule 3.851 (d)(2)(B).[4] The pleading should dismissed.

[4]The rules contemplate that issues of retroactivity may be litigated in initial motions for post conviction relief, but may not be litigated in the first instance in out-of-time successive motions. *See Dixon v. State*, 730 So. 2d 265 (Fla. 1999)(noting that retroactive application of new law is a "relatively rare occurrence," and that time limit for filing successive 3.850 based on new law is calculated from the date of the mandate of the case determining that a new right is fundamental and retroactive).

II. THE *CRAWFORD* CLAIM SHOULD BE DENIED.

Defendant asserts that he is entitled to a new sentencing hearing because Det. Smith was permitted to testify to the statements of other witnesses in violation of *Crawford v. Washington*, 541 U.S. 36 (2004). However, Defendant is entitled to no relief because the claim is procedurally barred, *Crawford* does not apply retroactively, there was no *Crawford* error and an error was harmless.

The claim is procedurally barred. This Court routinely requires that a defendant object to the admission of testimony before the issue is cognizable on appeal. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, this Court has required that the objection be on the grounds that the defendant seeks to raise on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). This Court has also held that in order for a defendant to be entitled to post conviction relief based on new case law, the defendant must have objected on the issue at trial and raised the issue on appeal. *See Waterhouse v. State*, 792 So. 2d 1176, 1196 (Fla. 2001).

Here, Defendant asserts that it was violative of the Confrontation Clause to allow Det. Smith to testify regarding the prior statements of Milton Marinek, Howard Perry, Det. Ojeda

and several expert witnesses. Defendant claims that the State did not establish that these witnesses were unavailable.

However, when the State proposed that Det. Smith would testify regarding the statements of unavailable witnesses, Defendant did not challenge the State's assertions that the witnesses were unavailable. (RST. 123-26) Defendant did not challenge the testimony that Mr. Marinek was dead or that this rendered him unavailable. (RST. 2351-52) In fact, the only attempt Defendant made to contravene the State's assertions that its witnesses were unavailable was to claim that the State had not shown that Howard Perry was dead. (RST. 2363-63) Moreover, even in making this claim, Defendant drew a distinction between witnesses, such as Mr. Perry, and witnesses associated with the police. (RST. 2362) During Det. Smith's testimony about Det. Ojeda's statements, Defendant objected that Det. Smith was not identifying the source of the statements he was recounting. (RST. 2386-88) Defendant made no objection at all to Det. Smith summarizing the forensic testimony. (RST. 2397-2412)

On appeal, Defendant raised an issue regarding the admission of Det. Smith's testimony about other witnesses' statements being a violation of the Confrontation Clause. However, Defendant limited this issue to testimony of the pilots and Det. Ojeda's testimony. Since Defendant did not make the same

objections he presently presents at trial and did not raise this same issue on appeal, this claim is procedurally barred. It should be denied as such.

The United States Supreme Court has recognized that a claim based on a change of law can still be procedurally barred when the claim was not raised earlier in the proceedings. *Bousley v. United States*, 523 U.S. 614, 622-23 (1998)(Even claim based on retroactive change in law barred where basis to raise claim was reasonably available); *see also Engle v. Isaac*, 456 U.S. 107, 130-34 (1982). Instead, the Court has focused on whether the defendant had the tools available to him to make the argument even if it would have been rejected. *Bousley*, 523 U.S. at 622-23; *Engle*, 456 U.S. at 130-34. In fact, the United States Supreme Court has directed the federal courts that they should ordinarily address the issue of procedural default before they even attempt to determine whether a new rule of constitutional law is retroactive. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). This Court has also required that a claim have been previously asserted to avoid a procedural bar when it was based on a change in law. *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003)(to claim retroactive application of *Espinosa v. Florida*, 505 U.S. 1079 (1992), issue must have been raised at trial and on direct appeal).

Here, the tools to raise a claim were obviously available as Defendant did raise Confrontation Clause objections to some of the testimony presented at the resentencing and did present an issue regarding different testimony based on the Confrontation Clause on appeal. Thus, it is clear that Defendant could have objected to the testimony he now claims was improperly admitted at the resentencing on the grounds he now claims and could have raised the claim on appeal. Thus, the claim is procedurally barred.

Even if the claim was not procedurally barred, Defendant would still be entitled to no relief because *Crawford* does not apply retroactively. In *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980), this Court set forth the test for retroactivity. Pursuant to *Witt*, *Crawford* is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). In this case, the purpose served by *Crawford* was

to return the United States Supreme Court's Confrontation Clause case law to the intent of the framers regarding testimonial hearsay and not to ensure the reliability of evidence presented at trial. The old rule has been extensively relied upon. The cases in which hearsay was admitted at trial are legion. This is particularly true of capital sentencing hearings, given that this Court encouraged the State to present evidence of prior convictions through hearsay. *Rodriguez v. State*, 753 So. 2d 29, 44-45 (Fla. 2000)(noting that the Court considered it preferable to have evidence of prior convictions through neutral police witnesses). Moreover, the effect on the administration of justice would be overwhelming. If *Crawford* is ruled retroactive, defendants who had hearsay admitted at their trial will file post conviction motions. Many will be untimely and successive. The courts of this State would be required to review stale records to make determinations of whether the evidence complained of was hearsay, whether the hearsay was testimonial in nature, whether there was a showing of unavailability, whether the defendants had a prior opportunity for cross examination and whether any error in the admission of the evidence was harmful. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990)(refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively). Given the limited purpose served

by the new rule in *Crawford*, the extensive reliance on pre-*Crawford* law and the devastating effect on the administration of justice, *Crawford* should not apply retroactively. *New*; *Ferguson*; *Witt*. As such, this claim should be denied.

The same result would obtain if this Court were to adopt the United States Supreme Court's test for retroactivity. Under *Teague v. Lane*, 489 U.S. 288 (1989), new rules are not retroactive unless they are substantive, place beyond the State's power the ability to punish certain conduct or to impose certain punishments on a class of defendants or are watershed rules of criminal procedure. Here, the Court acknowledged in *Crawford* itself that the rule it was announcing was procedural. *See id.* at 61. As such, *Crawford* is not a substantive rule. Moreover, *Crawford* did not affect the State's ability to punish conduct or impose penalties. As such, *Crawford* would only be retroactive under *Teague* if it was a watershed rule of criminal procedure.

The United States Supreme Court has recently emphasized that the class of watershed rules is extremely narrow. *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004). To qualify, the rule must implicate the fundamental fairness and accuracy of the criminal proceeding and seriously diminish the likelihood of an

accurate conviction. *Id.* The Court issued *Crawford* based not on any belief that it produced fairer or more accurate convictions and instead because it was attempting to be faithful to the intent of the Framers. *Crawford*, 541 U.S. at 60-62. As such, *Crawford* does not implicate the fundamental fairness and accuracy of the criminal proceeding and is not a watershed rule of criminal procedure. Thus, it is not retroactive under *Teague* or *Witt*. The claim should be denied.

In fact, most courts that have addressed the issue of the retroactivity of *Crawford* to post conviction cases have determined that it is not retroactive. *Bintz v. Bertrand*, 403 F.3d 859, 865-67 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004); *Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004); *Coleman v. United States*, 2005 U.S. Dist. LEXIS 13517, *9-*13 (E.D. Pa. Jul. 5, 2005); *Wheeler v. Dretke*, 2004 U.S. Dist. LEXIS 12809, *2 n.1 (N.D. Tex. Jul. 6, 2004); *People v. Edwards*, 101 P.3d 1118, 1121-24 (Colo. Ct. App. 2004); *State v. Tarver*, 2005 Ohio App. LEXIS 2910, *8-*9 (Ohio Ct. App. Jun. 20, 2005); *Commonwealth v. Brooks*,2005 Pa. Super. LEXIS 1312, *17 (Pa. Super. Ct. May 20, 2005); *In re Markell*, 119 P.3d 249, 251-54 (Wash. 2005); *see also Evans v. Luebbers*, 371 F.3d 438, 444

(8th Cir. 2004)(expressing doubt that *Crawford* is retroactive). As such, the claim should be denied.

Even if the claim was not barred and *Crawford* did apply retroactively, Defendant would still be entitled to no relief. The holding in *Crawford* merely changed the test for the admissibility of testimonial hearsay under the Confrontation Clause. *Id.* at 68-69. However, Det. Smith's testimony was not admitted under the prior test for the admission of such hearsay. Instead, while this Court has noted that a defendant had a confrontation right at the penalty phase, this Court has held that the admission of hearsay testimony that a defendant had a fair opportunity to rebut did not violate this right. *Rodriguez*, 753 So. 2d at 44-46. This holding is entirely in accordance with United States Supreme Court precedent. *See Williams v. New York*, 337 U.S. 241 (1949); *see also Gregg v. Georgia*, 428 U.S. 153, 203-204 (1976)(explaining that strict evidentiary rules at trial should not preclude admissibility of relevant information at capital sentencing phase); *Jurek v. Texas*, 428 U.S. 262, 276 (1976)(same); *United States v. Tucker*, 404 U.S. 443 (1972)(trial court may consider a broad range of information in sentencing regardless of its source).[2] The United

[2] Moreover any evidentiary rule precluding otherwise relevant

States Supreme Court did not invalidate these cases in *Crawford*, which concerned the admission of evidence during the guilt phase of a trial. *United States v. Roche*, 2005 U.S. App. LEXIS 13947, *7-*8 (7th Cir. Jul. 11, 2005); *United States v. Luciano*, 2005 U.S. App. LEXIS 13574, *10-*14 (1st Cir. Jul. 8, 2005); *United States v. McGuffin*, 2005 U.S. App. LEXIS 13081, *10-*15 (10th Cir. Jun. 29, 2005); *United States v. Martinez*, 2005 U.S. App. LEXIS 12427, *6-*12(2d Cir. Jun. 24, 2005); *United States v. Mandhai*, 2005 U.S. App. LEXIS 11624, *2-*4 (11th Cir. Jun. 16, 2005); *United States v. Leatch*, 111 Fed. Appx. 770, 770 (5th Cir. 2004); *People v. West*, 823 N.W.2d 82, 41-42 (Ill. App. Ct. 2005); *State v. Stephenson*, 2005 Tenn. Crim. App. 208, *45-49 (Tenn. Crim. App. Mar. 9, 2005). As such, *Crawford* does not apply to this penalty phase claim. It should be denied.

Even if *Crawford* applied, Defendant would still be entitled to no relief. Under *Crawford*, only testimony hearsay is inadmissible as violative as the Confrontation Clause. *Id.* at 68. Moreover, testimonial hearsay is admissible under *Crawford* if the declarant was unavailable and the defendant has had a

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evidence at a capital sentencing proceeding would run afoul of the Court's holdings that emphasize the importance of providing to the jury as much information as possible. *Lowenfield v. Phelps*, 484 U.S. 213 (1988); *Lockett v. Ohio*, 438 U.S. 586 (1978)(finding unconstitutional any state-imposed restriction on

prior opportunity to cross examine the declarant. *Id.* Here, the witnesses whose testimony Defendant challenges testified at the original trial and were subject to cross examination. The testimony established that Mr. Marinek was dead at the time of the resentencing and thus unavailable. (RST. 2350-51) Moreover, Defendant did not challenge the State's assertion that the remaining witnesses other than Mr. Perry were unavailable.[3] *See Happ v. Moore*, 784 So. 2d 1091 (Fla. 2001). Thus, *Crawford* was satisfied, and the claim should be denied.

Moreover, Mr. Marinek's testimony concerning Defendant's work records regarded business record. The *Crawford* Court specifically classified testimony about business records as nontestimonial. *Id.* at 56. As such, *Crawford* would have no effect on the admissibility of this testimony. The claim should be denied.

Additionally, both the United States Supreme Court and this Court have determined that the introduction of hearsay evidence in violation of the Confrontation Clause is subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Hopkins v. State*, 632 So. 2d 1372, 1377 (Fla. 1994). Here, any

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the admissibility at sentencing of any perceived mitigation).

[3] Moreover, the record includes a letter from Mr. Perry, indicating that he was already living on social security at the time of Defendant's original trial in 1975. (RSR. 27)

error in the admission of Det. Smith's testimony was harmless because it concerned matters that were not at issue or was cumulative to other testimony.

Much of the testimony about which Defendant complains, and the portion of the State's closing to which Defendant refers, concerned identifying Defendant as the person who kidnapped and killed the Ganses. However, this was a resentencing. As such, identification of Defendant as the murderer was not an issue in the proceeding. In fact, Defendant conceded that he was convicted of the murders of both of the Ganses. (RST. 1949) Further, the jury was instructed that it was required to accept that Defendant had been so convicted. (RST. 1904) Thus, any error in the admission of testimony, such as the forensic evidence and the evidence concerning the hat, which identified Defendant as the murderer of the Ganses was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The claim should be denied.

Moreover, the allegedly improperly admitted testimony of Det. Smith was cumulative to other testimony that was presented. Crime Scene Technician Melvin Zahn testified regarding his observations of the scene where the Ganses were murdered. (RST. 1956-62, 1964-68, 1978-92) In doing so, he described the bullet hole in the windshield of the Ganses' car, the open doors and

trunk and the condition of Ms. Gans's body. (RST. 1965-67) He also described the blood trail that he observed, leading from the car to Mr. Gans's body. (RST. 1978-82) He described recovering Defendant's glasses, shoes and gun and a bag containing $50,000. (RST. 1985-92) He also identified the gun he recovered after Defendant was captured. (RST. 1970-72) He also identified a picture taken of Defendant at the time of his arrest. (RST. 1989)

Robert Hart, a firearms examiner, testified that he examined the gun recovered from Defendant and determined that it was probably the murder weapon. (RST. 1998-2006) He also explained how gunshot residue was deposited on objects near the gun when fired. (RST. 2007-08)

FBI Agent Terry Nelson[4] testified that he responded to City National Bank in downtown Miami and saw Ms. Gans driving her Mercedes and Defendant sitting in the back seat with a gun. (RST. 2029-35, 2045) He later saw Mr. Gans enter the car with a bag in his hands and the car drive away. (RST. 2035-36, 2066) He was part of the team that followed the Mercedes as it drove

[4] Contrary to Defendant's assertion, this Court mention of Agt. Nelson's testimony in the opinion on resentencing appeal does not illustrate that this Court was applying the old test for the admission of testimonial hearsay. Instead, it shows that this Court considered the admission of hearsay harmless because it was cumulative to evidence that had been properly admitted.

from downtown to the southern portion of Dade County. (RST. 2037-39) He described his observations of the car traveling from the bank until it stopped in the area of SW 112th Avenue and 128th Street. (RST. 2037-44) At this location, Defendant and the Ganses exited the car and re-entered it about three minutes later. (RST. 2045-46) The car then proceeded to go south and west to a canal behind a berm. (RST. 2046-47)

Agt. Nelson climbed the berm and observed Det. Ojeda follow the Mercedes to the area where the chase stopped. (RST. 2048-50) Until that time, the windshield of the Mercedes was intact. (RST. 2050)

Agt. Nelson stated that it took the police between four and five hours to find where Defendant was hidden and arrest him. (RST. 2053-54) He described the search for Defendant, including the use of pepper spray. (RST. 2057-61) He identified where Defendant was eventually found. (RST. 2061) He stated that the gun and money bag was found under Defendant. (RST. 2061-64) He described how he identified Defendant during a lineup. (RST. 2067-70)

Lt. Russ Kubic testified regarding bringing the tear gas fogger and participating in the physical search of the area for Defendant. (RST. 2107-27) He described how he found Defendant, who was lying in an area of tall sawgrass and who had covered

himself with dirt and grass. (RST. 2127-29) He described finding the gun and bag of money on the ground under Defendant. (RST. 2129-30)

Dr. Joseph Davis, the Medical Examiner, testified that he personally when to the crime scene to examine the bodies. (RST. 2156-58) He described the condition of the bodies and the wounds found on them. (RST. 2158-) He stated that Ms. Gans had an injury to her neck and shoulder that was consistent with a gunshot wound being inflicted by a person seated behind her in a car. (RST. 2169) The damage inflicted by the gunshot immediately severed Ms. Gans's spinal cord and rendered her motionless. (RST. 2171-73) Mr. Gans also had a bullet wound to his neck, which showed signs of stippling and indicated that the bullet had entered from his back and been fired at close range. (RST. 2175-78) However, this wound would not have been immediately fatal and would not have caused immediate unconsciousness. (RST. 2193) These wounds were consistent with being caused by the same shots that damaged the windshield of the car. (RST. 2178)

Daniel Gill testified that he was president of City National Bank at the time of the crime. (RST. 2202-05) Through that position, he knew Mr. Gans. (RST. 2205-06) The morning of the crimes, Mr. Gans came to the bank and was visibly shaken. (RST.

2206-07) Mr. Gill approached Mr. Gans, who stated that he had been kidnapped and that Ms. Gans was being held for $50,000 in ransom.[5] (RST. 2209-10) Once they were alone, Mr. Gans explained that he had arrived at work and been confronted in the parking lot before he could even exit his car by a person with a submachine gun. (RST. 2212) The person forced Mr. Gans to drive to his home, honk his horn and summon Ms. Gans to the car. (RST. 2212-23) Once Ms. Gans was in the car, the person demanded $50,000 in ransom. (RST. 2213) As a result, Mr. Gans had driven to the bank and come inside to get the ransom money. (RST. 2213) Mr. Gans eventually left the bank with $50,000 in a bag. (RST. 2223)

Additionally, the State presented the testimony of Captain Billy Jarvis and Sgt. Harry Owens regarding Defendant's murder of Off. Richard Burke while in prison. (RST. 2233-2340) A certified copy of the judgment and sentence regarding that murder were also admitted. (RSR. 1354-62)

As can be seen from the foregoing, the subject matter of the statements introduced through Det. Smith's testimony was cumulative to the testimony presented through the State's other

[5] To the extent that Defendant may assert that the admission of Mr. Gans's statements violated his right to confrontation, Defendant forfeited his right to confront Mr. Gans by killing him. *See Crawford*, 541 U.S. at 62; *see also Reynolds v. United*

witnesses. Moreover, the State presented evidence that Defendant had also been convicted of the murder of Off. Burke in support of the prior violent felony aggravator. Since the statements were cumulative to other evidence presented, any error in there admission was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The claim should be denied.

In an attempt to show the harm allegedly caused by the failure to call Det. Ojeda, Petitioner complains that he was unable to present evidence of bad acts committed by Det. Ojeda because he was not called. However, this is untrue. Florida law has long provided that a person against whom hearsay is admitted could attack the credibility of the declarant as if he had been a witness. §90.806, Fla. Stat. As such, it was not the fact that Det. Ojeda was not called as a witness that prevented that prevent the admission of the alleged impeachment materials.

Instead, the reason why Det. Ojeda's statements were not impeached in the manner that Defendant presently claims they should have been is that the alleged impeachment materials were inadmissible. Under Florida law, evidence of prior bad acts of a witness that have not led to a conviction or of the facts underlying a witness's convictions is generally not admissible.

States, 98 U.S. 145, 158-59 (1879).

Fernandez v. State, 730 So. 2d 277, 282-83 (Fla. 1999); *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990). Instead, a party is limited to impeachment of a witness with the fact that the witness has been convicted of a felony or crime involving dishonesty and the number of such convictions. *Rodriguez v. State*, 761 So. 2d 381 (Fla. 2d DCA 2000). While a defendant is allowed to question a State witness about charges or criminal investigations that were pending or threatened at or near the time of trial, the incident must not be too remote and must bear some relationship to the charges against the defendant. *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991).[6] Moreover, this Court has held that it is proper to exclude evidence of criminal conduct entirely at a resentencing, where the conduct occurred after the witness had testified at the original trial. *Foster v. State*, 614 So. 2d 455, 460 (Fla. 1992).

Here, Defendant committed the murders on July 17, 1974. Defendant was tried in 1975. The earliest any of the events about which Defendant asserts Det. Ojeda should have been impeached did not occur until August 1978. Given that the acts were not even allegedly being committed before the time of

[6] *Breedlove* involved the same impeachment of Det. Ojeda, which this Court found inadmissible despite the fact that Breedlove committed his crime in 1978 and was tried in 1979, in part because there was no evidence of the officers' knowledge of an

trial, there is no possibility that Det. Ojeda was even under investigation at the time he testified. Moreover, other than alleging that Det. Ojeda had 11 prior convictions,[7] Defendant merely recites bad acts by Det. Ojeda and others. Given the timing and the nature of the information, none of it would have been properly used to impeach Det. Ojeda or his statements. Thus, it does not show that Defendant was harmed by having Det. Smith testify about his statements.[8]

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investigation into their activities until late in 1979.

[7] Defendant does even allege that all of the convictions were for felonies or crimes involving dishonesty.

[8] Since the information could not have been used as impeachment, trial counsel could not be deemed ineffective for failing to so use the information. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Thus, the claim of ineffective assistance of trial counsel would properly be denied even if it were properly asserted in this proceeding.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to D. Todd Doss, 725 S.E. Baya Drive, Suite 102, Lake City, Florida 32025, this ____ day of July, 2005.

_____

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CERTIFICATE OF COMPLIANCE

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

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