IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2071

THOMAS M. OVERTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTEENTH JUDICIAL CIRCUIT,
IN AND FOR MONROE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Overton's motion for post-conviction DNA testing pursuant to Fla. R. Crim. P. 3.853. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on appeal to this Court;

"T" -- transcript of original trial proceedings

"DNA-R" -- record on instant 3.853 appeal to this Court

REQUEST FOR ORAL ARGUMENT

Mr. Overton has been sentenced to death. This Court has not hesitated to allow oral argument in other capital 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 and the stakes at issue.

Mr. Overton, through counsel, accordingly urges that the Court permit oral argument.

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PROCEDURAL HISTORY

Mr. Overton was sentenced to death in the Circuit Court of Monroe County. Mr. Overton was found guilty of two counts of first degree murder (§782.04(1)(a)), the killing of an unborn child (§782.09), burglary of a dwelling with an assault or battery upon a person (§810.02), and sexual battery involving physical force likely to cause serious personal injury (§794.011(3)). (R. 8-15, T. 4882). The trial court followed the jury's recommendation and sentenced Mr. Overton to death on each of the counts of first degree murder. (R. 1190-1199).

Mr. Overton has filed a Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend pursuant to Fla. R. Crim. P. 3.851. Mr. Overton has presented evidence during an evidentiary hearing in support of the claims made in his Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend pursuant to Fla. R. Crim. P. 3.851 and is currently awaiting a ruling from the trial court.

On April 3, 2003, Mr. Overton filed a Motion for DNA Testing, pursuant to Fla. R. Crim. P. 3.853, requesting testing of several items in evidence, including but not limited to: rope cuttings obtained from several locations at the crime scene, vacuuming from around the female victim’s body, tape cuttings from both victim’s bodies, hair from the mattress pad, hair found in the tape on shoulder of man’s T-shirt, fingernail scrapings from the victims, a sexual assault kit and a swab potentially containing a DNA specimen

from fluid found on the leg of the female victim. (DNA-R. 20-25). All evidence which Mr. Overton's DNA expert informed him would lead to evidence likely to either exonerate Mr. Overton or implicate additional perpetrators and affect the proportionality of his sentence.

On April 23, 2004, the State filed its Response to Petitioner's Motion for DNA Testing. (DNA-R. 15-19). On April 30, 2004, the trial court conducted a hearing on the defendant's motion. (DNA-R. 35-57). At this hearing, the trial court entertained the arguments of counsel. (DNA-R. 35-57). However, the trial court did not listen to the testimony of any scientific experts. (DNA-R. 35-57).

On May 17, 2004, an Order was entered denying in part and granting in part the Defendant's Motion for Post-Conviction DNA testing, allowing for testing only of the sexual assault kit and the fingernail scrapings. (DNA-R. 26-33).

On June 18, 2004, the trial court conducted a status conference at which time the State moved to continue the evidentiary hearing for two days because the scheduled time conflicted with the election of the State Attorney in Monroe County. (DNA-R. 152-172).

On June 23, 2004, Mr. Overton filed a Motion for Clarification of Postconviction DNA Order and Continuation of Evidentiary Hearing. (DNA-R. 67-70). Mr. Overton was concerned that the all of the swabs be tested, and particularly those taken from The female victim's body at the scene, since these swabs, in particular, had been lost and later

found. . (DNA-R. 67-70). Further, on June 27, 2004, Mr. Overton filed an Objection to FDLE Conducting DNA Testing and/or Request to Have Independent Lab Test for DNA. (DNA-R. 71-73). On August 10, 2004, a Second Motion for DNA Testing was submitted, specifically requesting that the hairs found in the tape bindings of the female victim be tested for DNA. (DNA-R. 74-7).

On July 28, 2004, the trial court held a hearing on Mr. Overton's Motion for Clarification of Postconviction DNA Order and Continuation of Evidentiary Hearing. (DNA-R. 91-112). Mr. Overton submitted in the motion that the evidentiary hearing on his claims raised in his Rule 3.851 motion be post-poned until the results from the post-conviction DNA tests were available. (DNA-R. 94). Part of this hearing was continued to August 6, 2004, because the trial court wanted information regarding how quickly FDLE would be able to complete the DNA testing that was ordered. (DNA-R. 113-133).

On August 18, 2004, the trial court held a hearing on the Defendant's Second Motion for DNA Testing. (DNA-R. 139-151). Again, the trial court heard the arguments of counsel, but did not solicit or permit any testimony from scientific experts regarding the evidence an the type of results that could be obtained through DNA testing. (DNA-R. 139-151).

On August 19, 2004, the lower court entered an Order Denying Defendant's Objection to FDLE Conducting Testing and/or Request to Have Independent Lab for

DNA and Clarifying May 17, 2004 Order for Postconviction DNA Testing. (DNA-R. 79-83). This order clarified that the swabs potentially containing a DNA specimen from the leg of the female victim were included for DNA testing as part of the sexual assault kit, in other words that the *entire* sexual assault kit containing both the crime scene swabs and the autopsy swabs could be tested. (DNA-R. 79-83). However, the trial court denied Mr. Overton's request to have an independent lab test the evidence. (DNA-R. 79-83). This Order specifically incorporated by reference the Order entered on May 17, 2004. (DNA-R. 79-83). The trial Court also entered a separate order on August 19, 2004 which specifically denied Mr. Overton's Second Motion For DNA Testing. (DNA-R. 84-87)

Mr. Overton timely filed his Notice of Appeal.

STATEMENT OF THE FACTS

Mr. Overton has always maintained his innocence. However, he was convicted for the murders of Micheal MacIvor and his eight and a half months pregnant wife Susan MacIvor who were found strangled in their home in Tavernier Key on August 22, 1991. (R. 1). The female victim's ankles and hands were bound. (DNA-R. 78). The female victim's eyes were also taped. *Inside* those tapes were found several *dark black* hairs which were pulled and separated from the tape and sent to FDLE for processing, but were never subject to DNA testing[1]. (DNA-R. 78). FDLE comparison of Mr. Overton's head and pubic hair did not produce a match. (T. 3852-3, 3856-7). Mr. Overton's protestations of innocence are reasonable given the ongoing mishandling of evidence in this case, including storage for long periods of time in *unlocked* facilities.

Dr. Donald "Doc" Pope[2] was responsible for the collection, handling and testing of all serological evidence, such as blood, saliva, sweat, or semen found at the scene. (T. 3284, 3338). Pope used an instrument known as a luma light to detect potential serological evidence by causing it to luminesce. (T. 3339-40). The luma light instrument was new to the Monroe County Sheriff's Department in 1991 and had

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1 The hairs were visually excluded as coming from either the victims or Mr. Overton, as they all have hair color much lighter than the hairs found. (T. 3856).

2 Pope was a veterinarian by training, but took the job with Monroe County as a serologist. (T. 3338).

never been used before. (T. 3224-6). Prior to this investigation, Pope had attended a one-week workshop offered by the manufacturer of the instrument, and had practiced with it on his own. (T. 3435-7).

Using the luma light, Pope identified possible semen evidence both on the body of the female victim, which was collected on cotton swabs, and on the couple's bed sheets. (T. 3347, 3351). Although we know for a fact that Pope made clippings from the bed sheets, where they were made and for what purposes are unclear. He first stated that he made the clippings at the lab. (T. 3379). He then stated that he made some at the scene and some at the lab. (T. 3381). Also, although it would appear that the clippings were made to process the evidence in this case, Pope also testified that he took a tiny cutting from the luminescing areas for his "own purposes"[3], obviously diminishing the amount of genetic available for testing . (T. 3351).

Pope did not take the swabs and clippings to a certified storage facility. (T. 3480). Instead, he took them to his home, where he "air dried" them and placed them in his personal refrigerator. (T. 3481, 3393). Pope hung the bed sheets in the "guest room, office, catch all" area of his home, using clotheslines to hang the sheets in a horizontal "dipped" position, without placing paper underneath the sheets to preserve

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3 Pope cut a small piece of the stained bed sheet evidence for his "own purposes," with the intent to test this evidence "not through the laborious process of

possible trace evidence. (T. 3393-4, 3505, 3535). Pope stated that the reason he took the evidence home was so that it could dry, however, Petrick, the crime scene investigator testified that the sheets appeared very dry at the crime scene. (T. 3224).

On August 26, 1991, Pope took the bed sheets to the police property room. (T. 3395-6). However, he checked the evidence out of the property room the same day, and took it to his lab in Key West, where he tested the small bed sheet cutting he made at the crime scene for "his own purposes." (T. 3395-6, 3427, 3432). Poe claimed this cutting tested positive for semen, but was consumed during testing, and therefore never submitted for DNA analysis. (T. 3432, 3518, 3552).

More that two weeks after the alleged positive test of the consumed cutting, Pope made 10 more cuttings from the stained areas of the MacIvor's bottom sheet and mattress pad, and placed those cuttings in *unsealed* envelopes. (T. 3406-7), 3419-21, 3520, 3818). Over the next year and a half, Pope kept these unsealed envelopes initially in the *unlocked* refrigerator of his Key West lab[4], then later in a refrigerator-freezer in his Marathon lab. (T. 3416, 3420, 3523-5). There are no notes that document how, when or by whom the cuttings in the unsealed envelopes were

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case notes" but for his "Own particular interest". (T. 3351).

4 Pope testified the lab was locked but the refrigerator was not. (T. 3420). There was no evidence showing that Pope was the only person with access to the lab.

transferred to Marathon. (T. 3523-5, 3549). Pope testified that mattress pad had gone on a trip to Orlando to assist with a psychic consultation. (T. 3512). During his testimony, Pope did not recognize any of his handwriting on the package, nor could he explain how the bar codes were used. (T. 3513). The property receipt showed that a sealed package containing the sheet was sent to the psychic on 12/17/92 and returning on 1/13/93. (T. 3514). However, the package was not put back into property when it was returned. (T. 3514). The clippings he made were not included on the property receipt until 6/10/94 (T. 3514).

Six months later, in April of 1993, Pope resigned from the Monroe County Sheriff's Office. (T. 3417).

All of the evidence in his possession was then transferred to the crime laboratory supervisor in Key West, who delivered about six containers full of envelopes to the property room custodian. (T. 3417, 3693, 3695, 3831-2). It was not until then that the envelopes were finally sealed, and property receipts created documenting the existence of this evidence. (T. 3494, 3818, 3836). Two months later the envelopes were finally sent to the FDLE for DNA testing. (T. 3890-1). Thus, the evidentiary sample ultimately sent to FDLE by Doc Pope had sat around in his home refrigerator for months before it was sent to the FDLE Crime Lab. (T. 3393, 3416-3417).

Dr. James Pollack, an FDLE serologist, received the bed sheet clippings in June of 1993. (T. 3890-1). Using a method of analysis known as RFLP (restriction fragment length polymorphism), Pollack extracted DNA from two of the ten cuttings, and developed a DNA profile from five DNA locations or loci that were compared to the DNA from Mr. Overton's blood sample. (T. 3876-7, 3942, 3953-4). Pollack concluded that the profile from the bed sheets and cuttings "matched" the profile from Mr. Overton's blood sample. (T. 949-50, 3955-6).

At trial, aside from not having an independent recollection of what he had done all those years ago (T. 3220), Detective Petrick, who was primarily responsible for processing the scene[5], admits that he at first put all the evidence in his van which is not refrigerated. (T. 3281). The evidence shown to him at trial had been repackaged from when he first impounded it. (T. 3199). Furthermore, he also admitted that the signatures on the evidence bags that said "Detective R. Petrick" were not his hand writing or signature. (T. 3221). Petrick further testified that he handed over the physical evidence to Pope on August 24, 1991. (T. 3223). However, the property receipts read "8/26". (T. 3223). To compound matters, the initials on the bags were not those of Detective Petrick. (T. 3223). Thus, he could not identify the bags as being the bags of evidence that he had handed over to Doc Pope. (T.

5 Other than the serological matter processed by Pope.

3223).

Nonoxynol-9 is a well-known spermicide commonly found in condoms. (T. 4437, 4493). Phillip Trager, an expert in the analytical testing of pharmaceutical products, tested samples of the bed sheet clippings made by Pope and found that they contained 53 micrograms of nonoxynol-9. (T. 696, 4436-9). Forensic crime scene expert Dr. Ronald Wright testified that in sexual assault crimes it is possible, but "highly unusual," for the perpetrator to use a condom. (T. 4494-5). Thus, Dr. Wright concluded that the presence of nonoxynol-9 on the MacIvor bed sheet clippings, along with semen, suggested that the semen was obtained from a condom and planted on the bedsheet evidence. (T. 4493).

There were 22-caliber firearm casings on the bedroom floor, about one foot from the doorway. (T. 3186, 3261), and a bullet hole in the wall near the bedroom curtain that appeared as though it were shot at close range. (T.3309, 4510). Dr. Wright testified that the gunshot hole did not match the 22-caliber cartridge case found at the scene, indicating that two different firearms were used in the bedroom, and that it would be "outrageously unusual" for one perpetrator to use two different firearms during a crime. (T. 4491, 4506, 4510). Dr. Nelms, the Monroe County medical examiner who performed the autopsies, testified that Mr. MacIvor's size (six foot one and 200 pounds) and the fact that he and The female victim's were in separate rooms

suggest that more than one perpetrator committed this crime. (T. 3636, 3672-3).

Given all the mishandling and improper storage that the evidence samples were subjected to in this case, the most reliable piece of evidence that is still available for DNA testing are the hairs which were separated from *inside* the binding The female victim's eyes since this evidence was never subject to Pope's mishandling. Furthermore, although FDLE claims that they excluded both the victims and Mr. Overton as a source of the hairs, by what method was never determined. Nor, was the identity of the source of those hairs determined.

SUMMARY OF THE ARGUMENTS

The trial court should have ordered DNA testing of the dark black hairs which were stuck in the female victim's bindings because the results are likely to exonerate Mr. Overton or at least help mitigate his sentence. The trial court in this case did order DNA testing of the victims' fingernail scrapings and the swabs taken from the female body both at the scene and the autopsy, but denied testing of the hair. Although, these hairs were visually excluded as coming from either the victims or Mr. Overton prior to trial, they were never tested for DNA. If the hairs do not match either Mr. Overton of either of the victims, they should indicate the identity of the person who bound the female victim. Moreover, Mr. Overton's protestations of innocence are reasonable given the ongoing mishandling of evidence in this case, including storage for long periods of time in *unlocked* facilities. As such, the hair evidence, which was never subject to Pope's mishandling, is the most reliable piece of evidence to determine who the perpetrators were.

Further, the trial court's reasoning for ordering testing of some items of evidence is equally applicable to the items for which the trial court denied testing. As such, this Court should reverse the lower court's order and order testing of the dark hairs.

THE TRIAL COURT ERRED IN NOT ORDERING DNA TESTING OF BIOLOGICAL MATERIALS LIKELY TO EXONERATE MR. OVERTON OR MITIGATE HIS SENTENCE.

The trial court should have ordered DNA testing of the dark black hairs which were stuck in the female victim's bindings because the results are likely to exonerate Mr. Overton or at least help mitigate his sentence. The trial court in this case did order DNA testing of the victims' fingernail scrapings and the swabs taken from the female body both at the scene and the autopsy, but denied testing of the hair. Although, these hairs were visually excluded as coming from either the victims or Mr. Overton prior to trial, they were never tested for DNA. If the hairs do not match either Mr. Overton of either of the victims, they should indicate the identity of the person who bound the female victim. Moreover, Mr. Overton's protestations of innocence are reasonable given the ongoing mishandling of evidence in this case, including storage for long periods of time in *unlocked* facilities. As such, the hair evidence, which was never subject to Pope's mishandling, is the most reliable piece of evidence to determine who the perpetrators were.

Rule 3.853, Fla. R. Crim. P., requires that,

> (b) *Contents of Motion* . The motion for postconviction DNA testing must be under oath and must include the following:
> (1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present

> location or last known location of the evidence and how it originally was obtained;
> (2) a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
> (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;
> (5) a statement of any other facts relevant to the motion; and
> (6) a certificate that a copy of the motion has been served on the prosecuting authority.

Rule 3.853, Fla. R. Crim. Pro. (2004). Mr. Overton has met each of these requirements.

In this case, Mr. Overton addressed the dark black hairs stuck in The female victim's bindings in his Second Motion for DNA testing. (DNA-R. 74-7). That motion comported with all the requirements of Rule 3.853.[6]

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6 Paragraph numbers 4 and 5 of Mr. Overton's Second Motion for DNA Testing read,

> This crucial piece of evidence are hairs found in the tape bindings of the female victim, The female victim. These

However, the trial court erroneously denied testing of this crucial piece of evidence. In it's order the trial court reasoned,

> However, in terms of relevance, unless the results showed the hairs to be those of the Defendant, the results would not be relevant and hence not admissible.

(DNA-R. 85).

Florida law is clear, "Relevant evidence is evidence tending to prove *or disprove* a material fact." §90.401, Fla. Stat. (2004)(emphasis added). Here, regardless of who the hair belongs to, the evidence is relevant to either prove or disprove a material fact in this case, the identity of the perpetrator. The hairs were found stuck in between the bindings over the female victim's eyes and hands. As such, it is likely that the hair came form the perpetrator who bound

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> hairs were visually inspected and determined not to belong to either the victims or Mr. Overton. This piece of evidence was pertinent to the crime were not subject to DNA testing. Mr. Overton seeks to have such items tested. These items are located at the Plantation Key Clerk of Courts Office:
>
> A. Property Receipt Item 15530
>
> Item # 24 Tape cuttings from both bodies.
>
> Future Testing: This tape has been processed with Nihydrin it is a purple color. In the tape, are black hairs that Ms. M. Roehner, MCSO Supervisor, found when re-processing some of the evidence. (See MCSO report 9/21/91, attached). These hairs can be subjected to mitochondrial DNA testing to determine who bound the victims. They have never been previously subject to DNA testing. (DNA-R. 75).

the female victim. Armed with such information, Mr. Overton's trial attorney's would buttressed Mr. Overton's theory of defense that he was not at the crime scene by showing that it was not Mr. Overton's hair stuck in the victim's bindings. Thus, someone else was involved in the crime.

The trial court reasoned in it's order,

> Specifically, even assuming that the source of the hairs in question is a person other than the Defendant or one of the victims, that information is of no consequence. First of all, there is no way to determine where the tape itself came from, that is, was it in the MacIvor's residence before the break-in or was brought to the crime scene by the perpetrator? Secondly, the fact of the matter is that tape is a sticky substance which can easily pick-up a few strands of hairs in a variety of ways and from a variety of sources.

(DNA-R. 85). What the trial court ignores is the fact that at the scene was also found a roll of masking tape[7]. Here the trial court never heard evidence regarding the tape bindings found over the female victim's eyes and hands. The trial court never heard testimony from those familiar with the evidence regarding where it was found, and what condition the evidence was found in. The court summarily decided that because tape was a "sticky substance" that it had the potential to pick up trace evidence, but never considered testimony from the crime scene technicians involved or experts familiar with this type of

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7 This roll of tape can be found in the bag containing item #24 of Property recipt

evidence to see what exactly, if anything, the tape could have picked up. Further, the trial court addresses it's concern over whether the tape came from the victims' house or was brought unto the scene by the perpetrators, however, it never asks any party to present evidence to address these concerns. The trial court's conclusions are entirely speculative. In it's order, the trial court identifies nothing in the record to conclusively refute that Mr. Overton is entitled to no relief and the trial court never held a hearing where it could listen to testimony regarding the evidence, how it could be tested, and what information test results would yield.

The Fourth District Court of Appeal in Ortiz v. State stated,

> On appeal from the summary denial of a rule 3.853 motion, "unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief. Fla. R. App. P. 9.141(b)(2)(D)

Ortiz v. State, 884 So. 2d 70 (Fla. 4th DCA 2004). The requirements of Fla. R. App. Pro. 9.141(b)(2)(D) and Ortiz were entirely ignored by the trial court.

Moreover, the trial court granted testing of the victims' fingernail scrapings and the swabs taken from the female victim's body. The trial court reasoned,

> If DNA testing demonstrated that there was another active

#15530.

participant in the crime, there is a possibility that such a showing might mitigate the Defendant's sentence.

(DNA-R. 31). This same rationale is what entitles Mr. Overton to DNA testing of the hairs, i.e. if the hairs identify another perpetrator, then such a showing might mitigate Mr. Overtons' sentence.

Further, Rule 3.853 of the Florida Rules of Criminal Procedure in pertinent part further states:

> (7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement ***or its designee***, as provided by statute. However, the court, on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing. (Emphasis added).

Rule 3.853, Fla. Rule Crim. Procedure (2004).

Mr. Overton objected to having the FDLE laboratory perform any of the DNA testing on the materials still available for such. (DNA-R. 71-73). First, Mr. Overton has always maintained that his biological material was planted on the evidence samples, it would only seem fair and logical that the very laboratory which performed the initial DNA test not be involved in the testing of any additional materials. The original testing laboratory, FDLE, has an obvious stake in the outcome. Secondly, part of the materials which Mr. Overton requested be tested

involves hair samples. The laboratories at FLDE do not currently conduct mitochodrial DNA testing which is what is required of hair samples. This type of testing was not available in 1993 or 1998 when the original testing in this case occurred. Lastly, Mr. Overton indicated that his defense team would bear the cost of such testing. However, the trial court denied Mr. Overton's request. Mr. Overton requests that any testing ordered by this Court allow for the testing to be completed by a lab other than the FDLE lab, since it is Mr. Overton's belief that they are a party with a stake in the outcome.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing Thomas Overton respectfully requests that this court immediately grant him DNA testing of hairs found between MacIvor's bindings, and allow and independent laboratory to perform such tests.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler, Ninth Floor, West Palm Beach, FL 33401 on this 28th day of January, 2005.

____

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Times New Roman 14 point font.

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LUCRECIA R. DIAZ