IN THE SUPREME COURT OF FLORIDA

MCARTHUR BREEDLOVE,

Petitioner,

v. **CASE NO. SC04-686**

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

Respondent;

JIM ERIC CHANDLER,

Petitioner,

v. **CASE NO. SC04-518**

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

Respondent.
_____/

CONSOLIDATED REPLY TO RESPONSE TO PETITIONS FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

Mr. Breedlove and Mr. Chandler each filed habeas corpus petitions raising claims under Crawford v. Washington, 124 S. Ct. 1354 (2004). This Court first ordered briefing on Respondent's motions to dismiss the petitions as untimely and successive. After that briefing was completed, the Court consolidated the cases and directed Respondent to respond to the petitions and to address whether Crawford should be applied retroactively. Respondent has filed his response, and the Petitioners now reply to that response.[1]

ARGUMENT IN REPLY

Respondent argues that Mr. Breedlove's and Mr. Chandler's Crawford claims are procedurally barred, that Crawford is not retroactive, and that the claims lack merit (Response at 1). Petitioners reply to these arguments in turn.

A. PETITIONERS' CLAIMS ARE BEFORE THE COURT ON THE MERITS.

Mr. Breedlove's petition contends that testimonial hearsay was admitted at both the guilt phase and penalty phase of his trial in violation of the Confrontation Clause. Mr. Chandler's petition contends that testimonial hearsay was

[1]Relying upon his previous brief, Respondent maintains his position that the petitions should be dismissed as untimely and successive (Response at 1). Petitioners likewise rely upon their previous briefs and maintain that the petitions are properly before the Court.

admitted at his resentencing in violation of the Confrontation Clause. Respondent contends, "these claims should be denied because they are procedurally barred" (Response at 1).

Despite this blanket assertion, Respondent does not mention Mr. Breedlove's guilt phase claim, much less specifically contend that this claim is procedurally barred(*see* Response at 1-2). As Mr. Breedlove's petition conclusively establishes, the guilt phase Confrontation Clause violations were repeatedly objected to at trial, and the issue was raised on direct appeal. There is no procedural bar.

Respondent makes the same bald assertion that Mr. Chandler's claim is procedurally barred, but then concedes that the issue was objected to at the resentencing and raised on direct appeal (Response at 2-3). Mr. Chandler's petition thoroughly documents the objections made at the resentencing and the issue raised on direct appeal. There is no procedural bar.

B. CRAWFORD APPLIES RETROACTIVELY.

Respondent first argues that Crawford does not apply retroactively under Witt v. State, 387 So. 2d 922 (Fla. 1980) (Response at 3-4). Respondent's main justification for nonretroactivity is that "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"(Response at 3). Respondent provides no citations supporting this contention, nor any discussion of Crawford itself.

Contrary to Respondent's bald assertion of Crawford's insignificance, Crawford implicates a fundamental right essential to a reliable and accurate trial. Crawford itself describes the Confrontation Clause as a "bedrock procedural guarantee," 124 S. Ct. at 1359, and explains, "the Clause's ultimate goal is to ensure reliability of evidence." Id. at 1370. In Pointer v. Texas, 380 U.S. 400, 403-04 (1965), the Supreme Court ruled that the Sixth Amendment's Confrontation Clause applied to state criminal prosecutions precisely because it is a "fundamental right" essential to a fair trial. The Supreme Court recognized "the value of cross-examination in exposing falsehood and bringing out the truth in a criminal case." Id. The Supreme Court has held that cross-examination is important because it is "the greatest legal engine ever invented for the discovery of truth," White v. Illinois, 502 U.S. 346, 356 (1992), *quoting* California v. Green, 399 U.S. 149, 158 (1970), and has explained that the "basic purpose" of the Confrontation Clause is the "promotion of the integrity of

the fact finding process." White v. Illinois, 502 U.S. at 356, *quoting* Coy v. Iowa, 487 U.S. 1012 (1988). Clearly, Crawford "constitutes a development of fundamental significance." Witt, 387 So. 2d at 931.

Respondent also argues that Crawford should not apply retroactively under Witt because "[t]he cases in which hearsay was admitted at trial are legion" and "the effect on the administration of justice would be overwhelming" (Response at 3-4). Again, Respondent makes these broad assertions with no supporting citations or specifics. Further, Witt itself explains that the doctrine of finality must give way when fairness requires retroactive application. 387 So. 2d at 925.

As is explained in the petitions, Crawford should be applied retroactively under Witt. Prior to Crawford, a radical defect in the trial process intended by the Framers had been permitted which necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." Witt, 387 So. 2d at 929. Crawford has restored the right to confrontation as a "fundamental" guarantee of the United States Constitution.

Respondent also argues that Crawford should not apply retroactively under the federal retroactivity analysis of

Teague v. Lane, 489 U.S. 288 (1989) (Response at 4-7). First, Florida law is clear that Florida courts decide questions of retroactivity under Florida's standards, not federal standards.

> We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart . . . . [T]he concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post-conviction relief machinery.

Witt v. State, 387 So. 2d at 928. After the United States Supreme Court decided Teague, Florida courts continued to follow state retroactivity standards. See House v. State, 696 So. 2d 515, 518 n.8 (Fla. 4th DCA 1997); Gantorius v. State, 693 So. 2d 1040, 1042 n.2 (Fla. 3d DCA 1997), *approved in* State v. Gantorius, 708 So. 2d 276 (Fla. 1998).

Second, even under a Teague analysis, Crawford applies retroactively. Respondent agrees that Crawford should apply retroactively under Teague if it is "a watershed rule of criminal procedure" (Response at 5). Such a rule, as Respondent agrees (Response at 6), must "alter our understanding of [a] bedrock procedural element," and must also "implicate the fundamental fairness of the trial" and the accuracy of the conviction. Teague, 489 U.S. at 312.

Crawford meets these requirements. As explained above,

Crawford describes the Confrontation Clause as a "bedrock procedural guarantee," 124 S. Ct. at 1359, and earlier Supreme Court cases explain that confrontation is a "fundamental right" essential for the discovery of truth and for promoting the integrity of the fact-finding process. Crawford emphasizes that cross-examination is fundamental to the fact-finding process. 124 S. Ct. at 1363 ("nothing can be more essential" to the fact-finding process "than the cross-examination of witnesses"); Id. at 1370 (the Confrontation Clause "commands that [the] reliability of [statements] be assessed in a particular manner: by testing in the crucible of cross-examination").[2]

Crawford has "alter[ed] our understanding," Teague, 489 U.S. at 312, of this "bedrock procedural guarantee." Crawford, 124 S. Ct. at 1359. Prior to Crawford, the Supreme Court had allowed the admission of hearsay under certain circumstances demonstrating the "reliablity" of the hearsay. Ohio v. Roberts, 448 U.S. 56 (1980). In Crawford, the Supreme Court overruled Roberts, thereby "alter[ing] our understanding," Teague, 489 U.S. at 312, of the Confrontation

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[2]Prior to Teague, the Supreme Court applied the Confrontation Clause holding of Bruton v. United States, 391 U.S. 123 (1968), retroactively. Roberts v. Russell, 392 U.S. 293 (1968).

Clause. The Supreme Court overruled Roberts because 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." Crawford, 124 S. Ct. at 1369 (emphasis in original). The Roberts standard had replaced "the constitutionally proscribed method of assessing reliability." 124 S. Ct. at 1363. In other words, reliability is again to be measured in the manner prescribed by the Confrontation Clause, through cross-examination of the witness.

Crawford implicates a "bedrock procedural guarantee" that was designed to insure reliability. By restoring the constitutionally prescribed measure of reliability, Crawford has "alter[ed] our understanding" of that guarantee as defined in Roberts. The Crawford rule must apply retroactively; it is what the drafters of the Confrontation Clause intended.[3]

C. PETITIONERS ARE ENTITLED TO RELIEF ON THE MERITS OF THEIR CLAIMS.

Respondent contends that the Petitioners are not entitled

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[3]In the midst of his Teague argument, Respondent quotes from the Eleventh Circuit's opinion in Mr. Chandler's federal habeas proceedings(Response at 5). This opinion predates Crawford, posits and rejects a different rule (i.e., that hearsay is *per se* inadmissible at a capital penalty phase), and is therefore not relevant to the issue here.

to relief because "[t]he holding in Crawford merely changed the test for the admissibility of testimonial hearsay under the Confrontation Clause" (Response at 7). Contrary to Respondent's contention, Crawford did not change a "test," but prohibits the introduction of *ex parte* testimonial statements unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination, regardless of the statement's classification as admissible hearsay. 124 S. Ct. at 1374. In this general argument and in his arguments specific to Mr. Breedlove's and Mr. Chandler's individual claims, Respondent exhibits a profound misunderstanding of Crawford.

As to the penalty phase claims in both cases, Respondent argues first that hearsay is admissible because the death penalty statutes of Florida and many other states, as well as the federal death penalty statute, allow its admission (Response at 12-13). Respondent is confused about the relationship between statutes and the federal Constitution. Statutory evidence rules are required to yield to the federal Constitution, not vice versa.

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or

> less than a codification of the rules of hearsay and their exceptions. . . . Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

California v. Green, 399 U.S. 149, 155 (1970).[4]

Respondent's argument rests upon this Court's cases allowing the State to present hearsay at a penalty phase (Response at 12). Despite recognizing that the Confrontation Clause applies at the penalty phase, Engle v. State, 438 So. 2d 803 (Fla. 1983), this Court has, for example, repeatedly held that the testimony of police officers regarding the facts of a prior conviction, including the statements of victims and other witnesses, is admissible at a penalty phase. Bowles v. State, 804 So. 2d 1173, 1184 (Fla. 2001); Rodriguez v. State, 753 So. 2d 29, 44-45 (Fla. 2000); Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998); Clark v. State, 613 So. 2d 412, 415 (Fla. 1992); Long v. State, 610 So. 2d 1268, 1274-75 (Fla. 1992); Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1993); Chandler v. State, 534 So. 2d 701, 702-03 (Fla. 1988); Tompkins v. State, 502 So. 2d 415, 419-20 (Fla. 1986); Perri

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[4]To be sure, Roberts coupled the right of confrontation to the common law hearsay rule. Under Roberts, admissibility pursuant to a common law hearsay exception satisfied the Confrontation Clause. However, that coupling is the defect in the reasoning of Roberts which led the Court in Crawford to overrule Roberts.

v. State, 441 So. 2d 606, 608 (Fla. 1983). The Court's reasoning in all of these cases, relied upon here by Respondent (Response at 12), is that such hearsay is admissible "provided the defendant has a fair opportunity to rebut it" and that this opportunity is provided because the defendant can cross-examine the police officer and/or present separate evidence rebutting the officer's testimony. See, e.g., Chandler, 534 So. 2d at 703.

However, this caselaw rests upon a misapprehension regarding the meanings of hearsay and confrontation under the federal Confrontation Clause. That is, exceptions to the hearsay rule satisfied the Confrontation Clause because Roberts said so. That misapprehension is clear in light of Crawford.

In Crawford, the Court examined the history of the Confrontation Clause and concluded, "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless." 124 S. Ct. at 1364. Thus, the Confrontation Clause "applies to 'witnesses' against the accused--in other words, those who 'bear testimony.'" Id. This definition of "*ex parte* testimony" encompasses "[s]tatements taken by police officers." Id. Respondent's reliance upon the fact that the Florida capital sentencing

statute allows the admission of hearsay at the penalty phase is erroneous under Crawford.[5] Under Crawford, any admission of "*ex parte* testimony" violates the Confrontation Clause.

Respondent also argues that the United States Supreme Court has endorsed the admission of hearsay at a capital penalty phase (Response at 13-14). All of the cases Respondent cites to support this proposition predate Crawford. One case--Williams v. New York, 337 U.S. 241 (1949)--predates post-Furman death penalty jurisprudence and involved judge-only sentencing. Another case--United States v. Tucker, 404 U.S. 443 (1972)--is not a capital sentencing case. Respondent cites two modern capital sentencing cases--Gregg v. Georgia, 428 U.S. 153, 203-204 (1976), and Jurek v. Texas, 428 U.S. 262, 276 (1976)--for the proposition that "strict evidentiary rules at trial should not preclude admissibility of relevant information at capital sentencing phase" (Response at 14). Nothing in these cases supports this broad proposition.[6]

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[5]Again, Roberts linked exceptions to the hearsay rule to exemptions from the right of confrontation. But Roberts has been overturned. The admissibility of a testimonial statement under the hearsay rule is now a matter completely divorced and separate from its admissibility under the Confrontation Clause. Crawford.

[6]On the pages of Gregg cited by Respondent, the opinion states:

> "The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence

Respondent concludes this section of his argument by stating that Crawford "concerned the admission of evidence during the guilt phase of a trial" and "does not apply to this [sic] penalty phase claims" (Response at 14). This Court has held that the Confrontation Clause applies at a capital penalty phase. Engle v. State, 438 So. 2d 803 (Fla. 1983).

As to Mr. Breedlove's guilt phase claim,[7] Respondent argues that the statements made by Mr. Breedlove's mother and brother were not hearsay because they were not admitted for the truth of the matter asserted (Response at 8-11).

> hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. See, *e.g.*, Brown v. State, 235 Ga. 644, 220 S.E. 2d 922 (1975). So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

Gregg, 428 U.S. at 203-04. Nothing in this statement permits the introduction of testimonial hearsay at a penalty phase. Rather, the statement refers to "evidence," which presumably means constitutionally-admitted evidence.

On the page of Jurek cited by Respondent, the opinion states: "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." Jurek, 428 U.S. at 276. Again, this statement does not endorse the admission of testimonial hearsay, but only refers to "evidence."

[7]Respondent makes no argument specific to Mr. Breedlove's penalty phase claim.

Respondent does not contest that these statements were clearly testimonial *ex parte* statements and were not subjected to cross-examination. Further, under Crawford, what matters is the use to which the statements were put, not the label placed upon them. Here, the prosecutor's closing clearly asked the jury to consider the truth of the statements, as this Court found on direct appeal. Breedlove v. State, 413 So. 2d 1, 6-7 (Fla. 1982). If the State is allowed to circumvent the Confrontation Clause in this manner, the Sixth Amendment has been rendered illusory.

Respondent also contends that the prosecutor's closing argument--which urged the jury to accept the truth of these statements--does not establish a Confrontation Clause violation because Crawford addresses the admission of evidence, not the propriety of closing arguments (Response at 11-12). This is nonsensical. The prosecutor's use of this evidence in closing argument establishes that the statements were improperly admitted because they were testimonial *ex parte* statements barred under the Confrontation Clause absent an opportunity to cross-examine.

As to Mr. Chandler's claim regarding the admission of testimonial *ex parte* statements at his resentencing, Respondent argues that no Confrontation Clause violation

occurred because these out-of-court statements introduced at Mr. Chandler's resentencing were "not received *ex parte*," but was presented "by an officer, who [was] cross-examined, and whose testimony [was] limited to a synopsis of testimony from witnesses who testified previously at trial and who were all vigorously cross-examined at that time" (Response at 15).[8]

Respondent misunderstands the Supreme Court's use of "*ex parte.*" In the context of Crawford, it is clear that the Supreme Court uses "*ex parte*" to mean statements which were obtained by one party outside the proceeding at which they are offered, not statements obtained outside of court. In fact, the Supreme Court includes prior testimony in its definition of "testimonial":

> 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, 124 S. Ct. at 1374 (footnote omitted) (emphasis

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[8]The witness at issue under the Confrontation Clause is the person who made the testimonial statement being offered for its truth, i.e. the person whose testimony was being summarized by the police officer on the witness stand. It is the right to confront that witness, the original source, that is guaranteed by the Confrontation Clause.

added).

Moreover, Respondent has totally missed the holding of Crawford. Reviewing the history of the Confrontation Clause led the Supreme Court to conclude: "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 had a prior opportunity for cross-examination." Crawford, 124 S. Ct. at 1365 (emphasis added). 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.

Thus, the facts that Mr. Chandler cross-examined witnesses at trial and cross-examined Officer Redstone at resentencing does not vitiate the confrontation violation. As is recounted in Mr. Chandler's petition, the State did not establish the unavailability of the witnesses whose testimony Officer Redstone related. As is also recounted in the petition, Officer Redstone testified regarding some matters about which the declarants had not testified at all and even testified to statements made by unidentified "people."

For some reason, Respondent believes that the presentation of *ex parte* testimonial statements to the police at Mr. Chandler's resentencing is constitutional under United

States v. Owens, 484 U.S. 554 (1988) (Response at 15-17). In Owens, the defendant was charged with assaulting a correctional counselor, whose skull was fractured with a metal pipe. About three weeks after the attack, the counselor was able to describe the attack and identify Owens as the attacker. At trial, the counselor testified he had identified Owens as his attacker, but was unable to recall the basis for this identification and was unable to identify Owens in court. The Supreme Court held that the counselor's lack of memory did not violate the Confrontation Clause because the counselor testified at trial and was cross-examined about the basis for the identification, including his lack of memory. 484 U.S. at 559-60. In Owens, the declarant was on the witness stand and was cross-examined. This case has no application to the situation at Mr. Chandler's resentencing, where testimonial statements from witnesses not in the courtroom and not subject to cross-examination before the factfinder were presented through the mouth of a third party.

Finally, Respondent argues that any confrontation errors in Petitioners' cases were harmless (Response at 17-22). Respondent does not set forth the harmless error standard, which places the burden on Respondent to show beyond a reasonable doubt that any error was harmless. State v.

DiGuilio, 491 So. 2d 1129 (Fla. 1986). Respondent has not satisfied this burden.

As to Mr. Breedlove's penalty phase claim,[9] Respondent argues that the State presented certified copies of the prior convictions, that Officer Blishak provided his own eye-witness account of the prior crime, and that Officer Blishak only briefly related what the victim had told him (Response at 18-19). First, Officer Blishak's testimony regarding what the victim told him contained details which the officer had not personally observed such as how the attacker entered the home and pushed the victim down and the victim's fear for her life (T. 1296-97).

Second, a certified copy of a prior conviction sets forth only the bare fact of conviction, not the details contained in the testimony. Respondent relies upon Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998), to support the argument that introduction of a certified copy of a conviction renders the introduction of testimonial statements about that conviction harmless. In Hudson, this Court stated:

> [Hudson] argues that the trial court erred during the resentencing proceeding by not allowing Hudson's counsel to cross-examine Linda Benjamin, the victim of the prior violent felony for which Hudson had

[9]Respondent makes no harmless error argument as to Mr. Breedlove's guilt phase claim.

been convicted. Although Benjamin did not testify at the resentencing, the details of Hudson's sexual assault upon her were presented to the jury by Tampa police officer Keith Bush, who had worked the Benjamin case in 1982. Bush testified that he responded to a complaint by Benjamin, who told Bush that she was awakened during the night in her home by a man standing at the foot of her bed and wearing a T-shirt and underwear. Bush testified at the resentencing:

> At that time the subject pushed back on the bed, inserted his finger into her vagina and then attempted to insert his penis. Subject stated person by the name of B.J. hired him to kill her.
>
> [Benjamin] fought with the black male and screamed and the children also screamed and the suspect ran out of the house through the back door.

The State then introduced into evidence a certified copy of the prior conviction, establishing that Hudson pled guilty to charges of burglary and sexual battery in connection with the Benjamin case.

We find no merit in Hudson's argument as to the prior felony evidence because we have held that it is appropriate during penalty proceedings to introduce details of a prior violent felony conviction rather than the bare admission of the conviction in order to assist the jury in evaluating the character of the defendant and the circumstances of the crime. Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989). In such circumstances, hearsay testimony is admissible, provided the defendant has a fair opportunity to rebut it. [Sec.] 921.141(1), Fla. Stat. (1985). In Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), we found no error in the trial court's allowing a police officer to testify about details of a prior murder for which Waterhouse had been convicted. Id. at 1016. Similarly, we find no error by the trial court in connection with the testimony of Officer Bush, who described the circumstances of the sexual assault for which Hudson

> had previously been convicted. Furthermore, any confrontation error is harmless in this case because introduction of the certified copy of the judgment reflecting Hudson's guilty plea to the prior felony established beyond a reasonable doubt the aggravating circumstance of prior conviction of a felony involving the use or threat of violence. Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1986).

Hudson, 708 So. 2d at 261.

Respondent relies upon the last sentence of this discussion (Response at 18). However, the Court first found the evidence to be admissible because hearsay was admissible under Florida law. Such a conclusion had some support in Ohio v. Roberts, but is no longer valid after Crawford. Thus, in Hudson, this Court did not find confrontation error; it merely stated as dicta, "any confrontation error is harmless." Hudson also recognized that testimony about a prior conviction reveals more than the bare fact of conviction: "it is appropriate during penalty proceedings to introduce details of a prior violent felony conviction rather than the bare admission of the conviction in order to assist the jury in evaluating the character of the defendant and the circumstances of the crime." 708 So. 2d at 261. The weight of an aggravating circumstance is significant, as the capital sentencing statute makes clear. Sec. 921.141(2), (3) (Fla. Stat.). Details about a prior conviction unquestionably add weight to the aggravating circumstance. In light of these

circumstances, Hudson's final sentence is erroneous dicta.

Most significantly, Respondent entirely ignores the fact that Officer Blishak testified about two offenses. In the offense which Respondent discusses, the victim was named Schuhbaum (T. 1298-99). Officer Blishak testified about another offense involving a victim named Angie Meza (T. 1298-99). Blishak had not investigated this offense, but only received information about it from other officers (Id.). However, Blishak was allowed to testify about what the officers told him and about what the victim had told these other officers:

> A woman named Angie Meza lived at this address with her children or child–I can't remember if she had one or two–and she said she had heard a noise in the child's room, and she left her bedroom to investigate, and when she got into the hallway of her room, that she was attacked by a person she later identified as the defendant here, and that she was grabbed and thrown to the floor, and the defendant stuffed a handkerchief in her mouth and got on top of her, but then some other noise took place somewhere in the vicinity, and the defendant jumped up and ran away.

(T. 1298-99). Respondent does not mention the testimony about this second offense in his harmless error argument (*See* Response at 18-19).

Finally, Respondent neglects to mention several facts relevant to the harmless error analysis. The jury vote

recommending the death sentence was unrecorded, so the closeness of this vote is unknown. In post-conviction, this Court found that the jury was provided an unconstitutional instruction regarding "heinous, atrocious or cruel," although the Court found the error harmless. State v. Breedlove, 655 So. 2d 74 (Fla. 1995). Aside from "heinous, atrocious or cruel," the trial court found only two other aggravating circumstances: (1) prior violent felony--which was based in part upon the hearsay evidence--and (2) committed during a burglary. Breedlove v. State, 413 So. 2d at 9. On direct appeal, this Court found that the prosecutor's guilt phase closing argument was improper but harmless, id. at 6-7, and that the prosecutor's penalty phase closing "may have stretched the bounds of proper argument" by urging non-statutory aggravating factors, but found no prejudice. Id. at 9. In light of these facts, as well as those discussed above, Respondent has not met the burden of showing that the confrontation violations "did not contribute to" the outcome. DiGuilio, 491 So. 2d at 1135.

As to Mr. Chandler's claim, Respondent first argues that any error was harmless because the testimony summarizing *ex parte* statements to police officers was accurate (Response at 19-20). This is not a harmless error analysis, but equates to

saying that the testimony was reliable so there was no error. As Crawford explains, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 124 S. Ct. at 1371. Further, as Mr. Chandler's petition sets forth, Officer Redstone's testimony contained inaccuracies and statements which the declarants had not made (Petition, nn. 10, 12). Redstone also testified to statements made by unidentified "people" (RS. 341-42). Clearly, the accuracy of statements made by "people" cannot be determined.

Respondent also argues that any confrontation errors at Mr. Chandler's resentencing are harmless because "the statements at issue were not critical to any of the penalty phase issues" (Response at 20-22). Respondent points to a few *ex parte* testimonial statements which the State did not rely upon in arguing for a death sentence (Response at 20). However, Respondent does not discuss the many *ex parte* testimonial statements upon which the prosecutor did rely in closing argument, nor does Respondent discuss the fact that the sentencing order relies upon the *ex parte* testimonial statements in finding four aggravating circumstances (R. 327-30).

The prosecutor relied upon the *ex parte* testimonial statements in either establishing four of the aggravating circumstances or enhancing their weight (RS. 840-53).[10] Evidence of cold, calculated and premeditated was derived from the *ex parte* testimonial statements regarding Mr. Chandler's possession of knife prior to the murders (RS. 841). Evidence of pecuniary gain came from the *ex parte* testimonial statements regarding Mr. Chandler's possession of stolen property (RS. 341). The *ex parte* testimonial statements of the medical examiner were used to support the heinous, atrocious or cruel aggravator (RS. 225, 314). The *ex parte* testimonial statements regarding Mr. Chandler's possession of a .22 rifle which he picked up to use against the arresting officer was used to enhance the weight of the under sentence of imprisonment aggravator and rebut the defense's claim that

[10]Respondent's assertion that there was some other evidence to support some of the aggravating circumstances ignores the fact that it is the State's burden to prove the aggravators beyond a reasonable doubt. The erroneous admission of *ex parte* testimonial statements used to corroborate other evidence is not harmless beyond a reasonable doubt. Moreover, the issue is not just about establishing the presence of an aggravator, but is also about the weight of the aggravator. *Ex parte* testimonial statements used to enhance the weight of aggravators cannot be harmless beyond a reasonable doubt in a case such as this where the defense presented a mental health expert to identify mental mitigation and family members to establish mitigation in Mr. Chandler's background.

Mr. Chandler would not pose a threat in the future (RS. 853).

Further, Respondent entirely ignores the use of the *ex parte* testimonial statements to rebut Mr. Chandler's mitigating circumstances. In finding sufficient evidence supporting application of the aggravators and rejection of the mitigators, this Court, too, would have relied upon the record that included the *ex parte* testimonial statements not subject to the rigorous testing guaranteed by the Confrontation Clause as explained in Crawford. Respondent's burden under DiGuilio is to show that the error "did not contribute to" the outcome. 491 So. 2d at 1135. In light of the prosecutor's argument relying upon *ex parte* testimonial statements and the sentencing order's reliance upon *ex parte* testimonial statements, Respondent has not met this burden.

Respondent cites Lawrence v. State, 691 So. 2d 1068 (Fla. 1997), to support the argument that the hearsay was "not critical to any of the penalty phase issues" (Response at 21). However, Lawrence says nothing about this proposition, but finds no error. At the resentencing in Lawrence, the trial court allowed the State to read the prior testimony of a witness.[11] The Court found that this was error because the

[11]At Mr. Chandler's resentencing, the testimony was not read to the jury. The statements that the witnesses had given

State had not established that the witness, Gardner, was unavailable. The Court then determined that the error was harmless:

> Although we find the trial judge erred in his determination as to Gardner's unavailability, we do not find that the error was harmful in this proceeding. Because Gardner was not unavailable her testimony amounted to hearsay. Lawrence's objection to Gardner's prior testimony was thus ultimately a hearsay objection. Section 921.141(1), Florida Statutes (1993), states that in the penalty proceeding
>
> > evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.
>
> Pursuant to this provision, the introduction of Gardner's prior trial testimony was harmless error because it was hearsay only if Lawrence was not given a fair opportunity to rebut the testimony. See Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994). On the basis of the record, we cannot conclude that Lawrence did not have a fair opportunity to rebut Gardner's testimony. Defense counsel cross-examined Gardner at the original trial. Lawrence could have offered the cross-examination during the instant sentencing proceeding but did not. Nor did he proffer any other rebuttal to the trial court. We therefore reject Lawrence's contention that the admission of Gardner's testimony requires that his

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to the police were summarized by a police officer.

death sentence be vacated.

> Furthermore, we conclude that any error in admitting this evidence did not prejudice Lawrence. Gardner's testimony recounted the events surrounding the murder for which Lawrence was convicted. Since this evidence was admitted before the guilt-phase jury, Lawrence can show no prejudice. But for this being a resentencing, the sentencing jury would have heard this testimony in the guilt phase.

Lawrence, 691 So. 2d at 1073-74 (footnote omitted). Although the opinion couches this as a harmless error discussion, the opinion actually says there was no error because the capital sentencing statute allows the introduction of hearsay and because Gardner had testified at trial.[12]

Respondent finally argues that any confrontation error at Mr. Chandler's resentencing was harmless because this Court affirmed six of the seven aggravating circumstances found by the trial court (Response at 21-22). This argument ignores the facts that the prosecutor's closing argument relied upon the *ex parte* testimonial statements to support or enhance the weight of aggravating factors, that the sentencing order relied upon the *ex parte* testimonial statements to support four of the aggravating circumstances, and that the *ex parte*

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[12]Again, under Roberts, a finding that hearsay was admissible pursuant to some exception to the general rule of exclusion could establish that the Confrontation Clause was satisfied. But again, it is precisely that rule of law which has been overruled.

testimonial statements were used to rebut mitigation, as is discussed above. In affirming Mr. Chandler's death sentence, this Court, too, would have relied upon the record that included the *ex parte* testimonial statements not subject the rigorous testing guaranteed by the Confrontation Clause as explained in Crawford.[13] Again, Respondent's burden under DiGuilio is to show that the error "did not contribute to" the outcome. 491 So. 2d at 1135. In light of the prosecutor's argument relying upon *ex parte* testimonial statements and the sentencing order's reliance upon *ex parte* testimonial statements, Respondent has not met this burden.

CONCLUSION

Based upon this reply, their petitions and their briefs, Petitioners respectfully urge the Court to grant relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, 9th Floor, Miami, Florida, 33131, and to

[13]Certainly this Court also relied upon the *ex parte* testimonial statements in affirming denial of Mr. Chandler's Rule 3.850 without the benefit of an evidentiary hearing.

Celia Terenzio, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive 9th Floor, West Palm Beach, Florida 33401-3432, this ___ day of January, 2005.

_____

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Courier New 12-point font.

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MARTIN J. MCCLAIN