IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-686

McARTHUR BREEDLOVE,

Petitioner,

v.

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

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

TODD G. SCHER
Special Assistant CCRC-South
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, FL 33140
(305) 861-9252

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3RD Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

INTRODUCTION

This petition for habeas corpus relief is being filed in order to present Mr. Breedlove's claims arising under the recent decision from the United States Supreme Court in *Crawford v. Washington*, 158 L.Ed. 2d 177 (2004). Therein, the United States Supreme Court announced that:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does [*Ohio v.] Roberts*, [448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. **Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination**. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; **and to police interrogations**. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed
>
> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. **Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actual prescribes: confrontation**.

Crawford, 158 L. Ed. 2d at 203 (emphasis added). The significance of the Supreme Court's pronouncement was underscored when the Court concluded that

as to out-of-court testimonial statements, the Court's own rationale in *Ohio v. Roberts* deviated from "the historical principles" upon which the Confrontation Clause rested. *Id*. at 39. The Court further called into question its decision in *White v. Illinois*, 502 U.S. 346 (1992). *Id.* at 40 ("Although our analysis in the case casts doubt on that holding, we need not definitively resolve whether it survives our decision today"). Thus, the Supreme Court in *Crawford* discarded the notion that the Confrontation Clause could be satisfied where rules of evidence permitted the introduction of out-of-court testimony without confrontation by the defendant.[1]

In Mr. Breedlove's case, the State presented out-of-court testimonial evidence at both the guilt and penalty phases of his capital proceedings in contravention of Mr. Breedlove's constitutional right to confront his accusers, as *Crawford* now makes clear. In *Crawford*, the prosecution introduced a statement given to law enforcement by the defendant's wife, who did not testify at trial because of the marital privilege. At Mr. Breedlove's guilt phase, the State was permitted, through a police officer, to present testimony from Mr. Breedlove's mother and brother, testimony which was crucial to the State's case for guilt. At the penalty phase, the State was permitted to present the testimony of a police officer to testify as to what witnesses had told him about the facts and circumstances underlying prior convictions that the State was presenting as aggravating circumstances. These occurrences were in clear violation of the

[1]On the same day it issued *Crawford*, the Supreme Court granted *certiorari*, vacated, and remanded a Florida case arising out of the Fifth DCA, for further consideration in light of *Crawford*. *Corona v. Florida*, 158 L. Ed. 2d 352 (2004).

Confrontation Clause, as explained by the Supreme Court in *Crawford*.

JURISDICTION

This is an original proceeding under Fla. R. App. P. 9.100. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. This petition presents constitutional issues which directly challenge the judgment of conviction and sentence of death imposed upon Mr. Breedlove and this Court's review of his convictions and sentences of death during the appellate and post-conviction processes.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, *see Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1163, 1165 (Fla. 1985), and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This Court also has the inherent power to do justice.

REQUEST FOR ORAL ARGUMENT

Mr. Breedlove requests oral argument on this petition.

PROCEDURAL HISTORY

Mr. Breedlove was indicted for first-degree murder, attempted first-degree

murder, burglary, grand theft, and petit theft (R1-4A). [2] Trial commenced February 27, 1979, and on March 2, 1979, a jury found Mr. Breedlove guilty on all counts except the attempted first-degree murder charge, for which he was acquitted. By an unrecorded vote, the jury recommended death on March 5, 1979, and the trial judge imposed the death sentence (R 183-90). This Court affirmed. *Breedlove v. State*, 413 So. 2d 1 (Fla.), *cert. denied*, 459 So. 2d 882 (1982) [*Breedlove I*].

In 1982, Mr. Breedlove filed a motion for post conviction relief pursuant to Fla. R. Crimp. P. 3.850. The following year, a death warrant was signed, and the trial court stayed the execution. The 3.850 motion was denied on January 4, 1991, without ever affording Mr. Breedlove an evidentiary hearing. This Court affirmed the denial of this motion. *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991) [*Breedlove II*].

After the signing of a second death warrant, Mr. Breedlove filed a second Rule 3.850 motion. The trial court denied the motion without an evidentiary hearing, and this Court affirmed in part and reversed in part for an evidentiary hearing on the ineffective assistance of penalty phase counsel claim. *Breedlove v.*

---

[2]References in this petition are designated as follows: references to the trial transcript are (T. #), and the record on the direct appeal to the Florida Supreme Court is (R. #). The first state court post conviction record is cited as (R2. #), the second state court post conviction record is (2PC-R. #), and the third state post conviction record is (3PC-R. #). Citations to (A. #) refer to the appendix filed in the first state court post conviction appeal. Other references are self-explanatory or otherwise explained. All of these documents can be obtained with the Clerk of the Florida Supreme Court.

Singletary, 595 So. 2d 8 (Fla. 1992) [*Breedlove III*].[3] The hearing was conducted on May 5-7, 1992, and relief was denied on May 26, 1992. While Mr. Breedlove's appeal to this Court was pending, the Supreme Court decided *Espinosa v. Florida*, 505 U.S. 1079 (1992). Based on the *Espinosa* decision, this Court stayed Mr. Breedlove's appeal pending resolution of a third Rule 3.850 motion. The circuit court granted Mr. Breedlove *Espinosa* relief, and the State of Florida appealed. In a 4-3 decision, this Court reversed the grant of relief on harmlessness grounds. *State v. Breedlove*, 655 So. 2d 74 (Fla. 1995) [*Breedlove IV*]. Subsequently, the Court affirmed the denial of the remaining issues on appeal. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997) [*Breedlove V*].

Mr. Breedlove filed a petition for habeas corpus in federal court on April 28, 1998. The petition was denied with no evidentiary hearing on September 8, 1999. *Breedlove v. Moore*, 74 F. Supp. 2d 1226 (S.D. Fla. 1999) [*Breedlove VI*]. On January 17, 2002, the Eleventh Circuit Court of Appeals denied relief as to all issues (although addressing only one of them in its opinion). *Breedlove v. Moore*, 279 F. 3d 952 (11th Cir. 2002) [*Breedlove VII*]. Certiorari was denied by the United States Supreme Court. *Breedlove v. Crosby*, 537 U.S. 1204 (2003).

Mr. Breedlove subsequently filed a petition for a writ of habeas corpus in this Court raising issues regarding the application of *Ring v. Arizona*, 536 U.S. 584 (2002). That petition was denied. *Breedlove v. Crosby*, 2003 Fla. LEXIS 1982

---

[3]In *Breedlove III*, the Court also denied Mr. Breedlove's petition for state habeas corpus relief.

(Fla. Oct. 30, 2003). Rehearing was denied on February 4, 2004.

On March 8, 2004, the United States Supreme Court issued its decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). This petition follows.

STATEMENT OF FACTS ADDUCED AT TRIAL.

The charges in this case arose from the burglary of a residence located at 1315 NW 146th Street in Miami during the early morning hours of November 6, 1978, and the death of one of the occupants of the house, Frank Budnick (R1 1-4; T1 716-31). The State proceeded at trial solely on a felony-murder theory (T1 466, 532-33, 1158-59, 119). The only issue was identity (T1 1121-1202, 1207-23).

The surviving occupant of the house, Carol Meoni, was the only eyewitness to the events inside the house. She did not observe the assault on Budnick, but was awakened as Budnick, having been wounded by the assailant, was leaving their bedroom (T1 716-18, 726-27). Meoni was unable to identify the assailant; she only observed "this, like, shadow or something going out of the door" before Budnick left the bedroom (T1 726). She followed Budnick out of the house and saw a knife in the doorway; she subsequently found Budnick lying on the ground near the street (T1 726-28).[4]

Joan Fournier, a neighbor, testified that she was awakened by a noise at

[4]Budnick died as the result of a stab wound to his chest (T1 766, 769). The medical examiner, Dr. Kessler, testified that he observed "defense wounds" on Bud nick's right hand consistent with an attempt to seize the knife from his assailant (T1 772-73). Kessler took photographs of Meoni, showing wounds to her head and "defense wounds" on her hands as well (T1 762-65). Meoni's injuries were the basis for the attempted murder charge (R1 1-2), a charge for which Mr. Breedlove was acquitted by the jury.

approximately 2:30 AM on November 6; when she looked out the window, she saw a man riding a bicycle on 146th Street approximately 30 feet away (T1 590-93). She saw the man for between 4 and 5 seconds; according to her testimony, she saw him stop, look back in the direction of her home, and then ride away (T1 593-95). She could not identify or describe the man except that he was "maybe five foot ten, and he looked husky, about 190, but I am not sure about that" (T1 593). She was also unable to say whether the person was black or white (*Id*.). She further testified that, as she was watching the man on the bicycle, "[t]he color blue stuck in my mind" but that she was not sure "if it was from the bicycle or from the clothing" (T1 594).

Police were summoned to the scene and arrive around 3:00 AM (T1 611-12). A knife and other physical evidence were recovered from the house, and numerous latent fingerprints were lifted from various surfaces (T1 632-33, 642, 669, 675-77, 678-91, 708-13).[5] None of these fingerprints matched Mr. Breedlove (T1 844-45). Meoni's purse was found in the back yard,[6] and officers found scratches on the

---

[5]Among the items unsuccessfully dusted for fingerprints was a partially full bottle of "Thunderbird" wine found on the front lawn (T 669, 711). No fingerprints were recovered from the knife (T1 711-12), which Meoni testified at trial as having been taken from her kitchen (T1 739).

[6]Meoni testified that the purse had been left on a chair in the living room when she went to bed that night (T1 722). She testified that money and a pocket watch had been taken from the purse and that several other items had been taken from the house: another pocket watch, a watch with rhinestones on the face, and two pair of earrings (T1 733-35).

latch plate of a utility room door as well as wood chips on the floor of the room (T1 615, 675-78). Three jalousie window panes were missing from the door to the room, which was open (T1 621).

The two Dade County detectives assigned to the case, Julio Ojeda and Charles Zatrepalek,[7] learned that a blue 10-speed bicycle had been taken from a

---

[7]Unbeknownst to Mr. Breedlove or his counsel, Ojeda and Zatrepalek were, at the time of the investigation and trial in Mr. Breedlove's case, engaged in extensive criminal activities, including the use of and trafficking in illicit narcotics. *See Breedlove VII* at 956 ("At the time of the investigation and trial in Breedlove's case, Detectives Ojeda and Zatrepalek were themselves involved in extensive and serious criminal activity"). The Eleventh Circuit succinctly explained the nature of the charges:

> A lengthy FBI investigation into the Miami-Dade Police Department's Homicide Division in the late 1970s and early 1980s revealed that some of the Division's detectives were regularly and repeatedly violating numerous federal laws. In July of 1981, a federal grand jury handed down a forty-one count indictment alleging (among other things) that Ojeda and others had run the Homicide Division as a racketeering enterprise in violation of the Racketeering Influenced and Corrupt Organizations ("RICO") Act, *18 U.S.C. Secs. 1961-1967*. Zatrepalek was not charged, as he had been cooperating with the government for over a year, and received immunity in exchange for his testimony against Ojeda and other detectives in the Homicide Division.

Id.. The Eleventh Circuit also briefly summarized the underlying criminal conduct of both Zatrepalek and Ojeda which was addressed at the federal trial:

> At Ojeda's federal trial, disturbing details concerning the extent of Ojeda's and Zatrepalek's criminal activities came to light. Zatrepalek testified that he and Ojeda used cocaine repeatedly, often at the Homicide Division's offices. Another detective cooperating with the State alleged that cocaine use among homicide detectives was rampant, and that he had used cocaine with Zatrepalek

home near Meoni's (T1 877-81, 1008).[8] Mr. Breedlove was arrested on unrelated offenses on the night of November 8, 1978 (T1 44-45, 67-81, 797-804), and the stolen bicycle was subsequently discovered at his home (T1 813, 890-93, 1010-11).

Detectives Ojeda and Zatrepalek questioned Mr. Breedlove's mother, Mary Gibson, and his brother, Elijah Gibson (T1 908-09, 1012).[9] Based upon information

---

> and Ojeda on a number of occasions. The evidence concerning Ojeda's and Zatrepalek's criminality went far beyond allegations of drug use. In September of 1978, Zatrepalek and another detective stole cocaine from a homicide scene and sold it, with each of them pocketing some six thousand dollars from the transaction. In January of 1979, Zatrepalek, Ojeda, and others entered a private home under the ruse of being involved in an official investigation, stole some ninety-eight thousand dollars from the home, and pocketed thirty-six thousand of that, placing the rest in police property room. Ojeda was eventually convicted of conspiracy to conduct and conducting a RICO enterprise, two counts of unlawful arrest under color of state law, two counts of possession of cocaine with intent to distribute, unlawful appropriation of property, conspiracy to defraud the government, and two counts of tax evasion. Ojeda received a fourteen year prison sentence, and the conviction and sentence were affirmed on appeal. *United States v. Alonso*, 740 F. 2d 862, 866 (11th Cir. 1984).

Id. at 956-57.

[8]Debbie Layton, the girl who owned the bicycle, testified that her brother had borrowed it on the night of November 5, 1978, and had left it leaning against the side of the house when he came home at approximately 10:00 PM (T1 786). The bicycle was not there the following morning (T1 787, 828).

[9]The Gibson's did not testify at trial, and their statements were introduced through Ojeda, who testified that they had told him that Mr. Breedlove had a blue bicycle on the morning of November 6, that he had blood on his trousers when he returned home the night before, and that he had been in possession of a rhinestone watch at that time (T1 923-24, 927-31, 937, 939-41). The trial court permitted the

obtained from the Gibsons and the discovery of the bicycle, they questioned Mr. Breedlove, who was then incarcerated in the local jail on unrelated charges (T1 961-62).[10] Mr. Breedlove denied involvement in the offenses during the first interrogation session on November 9 (T1 921-40), but was placed under arrest for the homicide at the conclusion of the questioning (T1 943-44). In a second interrogation on November 21, Mr. Breedlove made inculpatory statements to Zatrepalek,[11] which statements were introduced into evidence (T1 1030; R1 130-34).[12]

---

prosecutor to elicit these hearsay statements before the jury (T1 923-37, 938-41), ruling that they were being introduced only to show "what the defendant heard during the course" of the interrogation with Ojeda and Zatrepalek (T1 933), and so instructed the jury (T1 936). Mr. Breedlove's repeated objections were overruled (T1 923-24, 927-32), and his motion for a mistrial was denied (T. 934).

[10]Prior to trial, Mr. Breedlove had moved to suppress the statements that were obtained from him on November 9, 1978, and a second interrogation on November 21 (R1 69-70).

[11]Ojeda, who injured his back between the two interrogation sessions, was not present at the November 21 interrogation of Mr. Breedlove (T1 945).

[12]Prior to trial, Mr. Breedlove moved to suppress the November 9th and November 21st statements (R1 69-70). He testified at the motion to suppress hearing that he had been physically abused by the detectives during the November 9 interrogation (T1 309, 321-33). Zatrepalek denied having abused Mr. Breedlove (T1 348). Mr. Breedlove also testified that, on November 21st, he had told the officers who brought him from the Dade County Jail to the police station that he did not want to be questioned (T1 312). This decision was based on the advice of his appointed counsel, who had interviewed him after the November 9th interrogation and his subsequent arrest, and had told him not the make any statements to police in the absence of counsel (T1 285-88, 295). Mr. Breedlove testified that his refusal to be questioned had been heard by the corrections officer who had taken him from his cell; Mr. Breedlove's testimony in this regard was corroborated by the officer himself (T1 273-77, 300-02; R1 89-91).

In his stenographically-recorded statement,[13] Mr. Breedlove told Zatrepalek that he had entered the house through the unlocked back door between 1:30 and 2:00 AM (T1 131). He took a purse which he found on a couch in the living room and "dumped it" in the backyard, taking a watch and money from the purse (T1

According to Zatrepalek, Mr. Breedlove had been brought to the homicide office for interrogation by a Hallandale officer, Detective Nagle, who suspected Mr. Breedlove of involvement in a 1974 case in his jurisdiction (T1 112-16, 223). Upon his arrival at the station, Mr. Breedlove asked for and was given permission to speak with his mother, Mary Gibson (T1 229-30). Zatrepalek testified that Ms. Gibson thereafter told him that Mr. Breedlove would speak with him, and he then obtained an inculpatory statement (T1 229-40). Nagle questioned Mr. Breedlove on the following day (T1 220, 242), and Zatrepalek testified that Mr. Breedlove had asked for him to be present during the interrogations (T1 351). Mr. Breedlove denied having asked Zatrepalek (whom he called "Charlie" at the officer's suggestion because he "couldn't remember his last name") to be present at this interrogation (T1 324, 331), and testified that Zatrepalek had ignored his requests to see his lawyer, telling him that it would be a "waste of time" because "they was [sic] going to get a confession" (T1 313). Mr. Breedlove further testified that he had made the November 21st statement "because I was threatened that I would be beaten again" (T1 315).

According to Ojeda, Mr. Breedlove made certain statements on November 9th (while Zatrepalek was out of the room) which were deemed significant (T1 988). Specifically, Ojeda testified that Mr. Breedlove had stated that he had taken the blue bicycle "two doors down from the murder," and that no fingerprints would be found inside the house because he was "not in that house" or because he had been wearing socks on his hands (T1 938, 940-42). Additionally, Mr. Breedlove told the officers that he had blood on his trousers when he had returned home that night, but that the blood had been from a fight at a convenience store; Ojeda testified that Mr. Breedlove, during the course of accusing the officers of framing him, said "I suppose the blood on my pants, you are going to say comes from the man inside the house?" (T1 939-40). Ojeda believed this admission was important because neither he nor Zatrepalek had told Mr. Breedlove the sex of the victim prior to that time (T1 941).

[13]The stenographer was named Janet Meister. As discovered during Mr. Breedlove's postconviction proceedings and discussed later in this petition, Meister was Ojeda's girlfriend and partner in crime.

132). Mr. Breedlove then went back into the house "to look for more jewelry and money" and obtained a knife from a table in the living room (R1 132-33). He described the fatal encounter as follows:

> A . . . I started going through . . . a jewelry box, the dresser drawers, and I made some noise, and the guy woke up and grabbed m[e] by my shirt, and I swung back with the knife, and I ran.
>
> * * *
>
> I jumped, panicked. He just grabbed my shirt. I swung back with the knife, and then he turned loose of my shirt and I ran.

(R1 133-34). Under questioning, Mr. Breedlove denied having stabbed or otherwise injured Meoni (R1 134).

At the penalty phase, the State presented a sergeant from the Los Angeles Police Department, who gave testimony with regard to two sexual assaults for which Mr. Breedlove previously had been convicted; Dr. Ronald Wright, a medical examiner, who testified regarding the pain suffered by the victim prior to his death, and two psychiatrists (T1 1291-1323, 1392-1417). In mitigation, Mr. Breedlove presented the testimony of three mental health experts (T1 1324-86, 1442-54).

GROUNDS FOR HABEAS CORPUS RELIEF

I

MR. BREEDLOVE'S RIGHT OF CONFRONTATION WAS VIOLATED AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Out-of-Court Testimonial Statements At The Guilt Phase.

Mr. Breedlove's mother, Mary Gibson, and his brother, Elijah Gibson, were questioned by police officers at their home on November 9, 1978, and subsequently gave formal statements to the Public Safety Department (T. 908-09, 1012-14). The Gibsons did not testify at trial. However, the substance of their statements was introduced at trial through the testimony of one of the investigating officers, Detective Ojeda (T. 923-37).

The mechanism employed by the prosecutor to bring the statements of the Gibsons before the jury was the introduction of Mr. Breedlove's oral statement given at the police station on November 9. Mr. Breedlove continued to deny his involvement in the offenses in this case throughout the interrogation on that date (T. 921-32, 937-42). Ojeda testified that he had, during the course of the interrogation, "confronted" Mr. Breedlove with statements of the Gibsons which circumstantially implicated him in the homicide in this case (T. 923-37). The trial court permitted the prosecutor to elicit these statements before the jury (T. 923-37, 938-41). Mr. Breedlove's counsel repeatedly objected to the introduction of these statements on

hearsay and confrontation grounds; after the objections were overruled, counsel moved for a mistrial (T. 923-24, 927-32, 934).[14] The motion for mistrial was denied (T. 934).

Although the prosecutor never advanced this as a basis for allowing the Gibsons' statements into evidence, the court ruled that the statements were not being introduced for "the truth of the matter to be asserted" but rather to show "what the defendant heard during the course" of the interrogation (T. 933).[15] In this guise, the prosecutor was allowed to avoid the constraints of the Sixth Amendment and proceeded to elicit numerous statements of the Gibsons despite their unavailability:

! Ojeda testified that after Mr. Breedlove denied owning a blue ten-speed bicycle, he was confronted with the fact that his brother Elijah had told the police that he (Elijah) had seen Mr. Breedlove with a bicycle that he brought over to the

---

[14]Specifically, counsel argued that the statements of the Gibsons were hearsay statement from witnesses who were available and had been listed on the prosecution's witness list. Counsel also argued that even were the court to consider the statements not to be hearsay, when Mr. Breedlove was "confronted" with the statements he denied them and nothing further was done with some of them (T. 932). The court responded "I know" but ruled that the jury would nonetheless be allowed to hear "what the defendant heard during the course of these conversations" (T. 933). Thus, although the court fully recognized that the majority of the out-of-court statements did *not* produce admissions, it allowed the statements into evidence.

[15]That the prosecutor had very different intentions is shown by his closing argument to the jury, in which he argued that the Gibsons' statements were true (T. 1185-88). It is also shown by his subsequent attempt to actually bring before the jury the sworn statements given by the Gibsons (T. 1014-16).

residence (T. 923-24). An objection on hearsay grounds was overruled (T. 924);

! Ojeda testified that Mr. Breedlove was then confronted with the fact that "his mother had advised Detective Zatrepalek of the same thing that Elijah had" (T. 924). An objection on hearsay grounds was overruled (T. 924);

! Ojeda testified that after Mr. Breedlove indicated he did not remember what he was wearing that night, he was confronted with the fact that Elijah had told police that he had been wearing long pants and a T-shirt, and that when he returned in the early morning hours, these pants had been cut off (T. 927). A hearsay objection and an objection based on the fact that "[t]hese witnesses are available" were overruled, the court ruling that "[i]t is not a question of their availability at all" (T. 927);

! Ojeda testified that after Mr. Breedlove denied that his pants had been cut off, Mr. Breedlove was confronted with the fact that Ojeda "had information that he had arrived at his residence with some type of stain on his pants" (T. 928). A hearsay objection was overruled (T. 928);

! Ojeda testified that Mr. Breedlove told him that his brother was not telling the truth, after which Ojeda confronted him with the fact that Elijah had told police that Mr. Breedlove had "a red substance" on his pants (T. 928-29). A hearsay objection was overruled (T. 928);

! Ojeda testified that after Mr. Breedlove again denied the facts from his mother and brother, Ojeda again confronted him about where he got the bicycle and with "Elijah's statement about the blood on his pants" and "the fact that his

pants had been cut off" (T. 930). Hearsay objections were overruled (T. 930);

! Ojeda testified that just prior to discussing with Mr. Breedlove "about the blood on [his] pants," Ojeda told Mr. Breedlove that "we had received information" from Elijah that Mr. Breedlove had shown Elijah a watch with rhinestones around the face (T. 931-32). Following this testimony, the following legal arguments at sidebar occurred:

> THE COURT: What is the basis of your side bar, please, Mr. Zenobi?
>
> MR. ZENOBI: First of all, the basis is that not only is everything he had been testifying to hearsay, but also, all of these witnesses are available. They are on the State's witness list.
>
> Secondly, the fact that even if the Court considers them not to be hearsay, when he was confronted with these statements, he denied them and nothing further was done with some of them.
>
> THE COURT: I know.
>
> That is something that can be covered on cross.
>
> The point is, as relates to your continued objection as to hearsay, which I have continued to rule on, the matter does not go to the truth of the matter to be asserted. It is not hearsay, and it is admissible even though said by someone else at some other time.
>
> The jury has a right, in evaluating the defendant's confession, to hear what he was told to him by these officers, and they are not to take–and I will instruct them on that–what he said to the defendant as being truthful or not, but the jury is entitled to know what the defendant heard during the course of these conversations, and my rulings will continue to be the same.

MR. LEVINE: May I make a brief response?

THE COURT: If you feel it is necessary.

MR. LEVINE: In brief response, what the detective is saying is that Elijah told the detectives that the defendant had a watch, a gold watch with rhinestones on it.

So far there has been absolutely no physical evidence to link the defendant with the scene.

No property was ever recovered. This provides a direct link to the scene.

Now, for the Court to go ahead and instruct them that this is only to be considered in relation to the defendant's response and not for the truth, I do not think it is possible for them to disregard the probative value. It is analogous to him saying "Well, the Pope told us he witnessed you killing Mr. Budnick" and the defendant says, "that is a lie.

Can the jury disregard the fact that the Pope told the officers that he witnessed a murder? Can they disregard that?

I think it is exactly analogous, and we move for a mistrial at this time.

THE COURT: Denied at this time.

MR. LEVINE: We ask the Court to give a cautionary instruction then that they should disregard any statements that relates to the watch, for any purpose.

THE COURT: That motion is also denied.

MR. LEVINE: Then we will ask that they disregard the statements as relates to the truth.

THE COURT: I will instruct the jury that the statements made by the officer are not made by the

officer for the purpose of proving the truth of the matter, but only to know what the defendant was confronted with by these officers, which is exactly the basis on which it is admitted.

MR. LEVINE: We reiterate that it is impossible for them not to consider it in any way.

MR. ZENOBI: We ask that the prosecutor do it the correct way, which is to bring in the witnesses.

THE COURT: You keep saying that.

I feel quite confident, Mr. Zenobi, my rulings are correct, and the only thing I can do is be patient, you can state your objections, and I will rule on them.

If I am in error, then the appellate courts will review it.

I am satisfied I am handling it in the proper fashion, and I trust you are making an objection at side bar rather than in front of the jury–

MR. ZENOBI: I am not doing it as a dilatory tactic.

THE COURT: I did not think you did.

If you are not satisfied with my rulings and think I should be further educated, the best way to do it is to try to further educate me.

MR. LEVINE: The record is bare of any evidence linking the defendant tot he crime absent any hearsay statements by the defendant's brother that he was in possession of the property that was described as being taken from the scene of the crime.

THE COURT: Your summary, whether it is accurate or not, is in the record.

(T. 932-35).[16]

! Ojeda testified again that he mentioned to Mr. Breedlove that Elijah had told the detectives that Mr. Breedlove "had shown him a watch on the early morning hours of Monday, and that this watch was described as having rhinestones

---

[16]The following instruction was subsequently given to the jury:

> I have admitted that evidence in this case, and you should understand that as to the officers' testimony about statements made to him by somebody else, you are not to accept the statements that somebody else told the officer as the truth of that issue at all. It is simply to give you the opportunity to evaluate, for the purposes of your decision, what this officer may have told the defendant at the time their conversation took place.

(T. 936). The efficacy of such an instruction is highly doubtful: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." *Briklod v. State*, 365 So. 2d 1023, 1026 (Fla. 1978) (citing *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citations omitted). "A judge's corrective statement will rarely completely cure the prejudicial damage created when improper information reaches the ears of the jury." *United States v. Semesohn*, 421 F. 2d 1206, 1208 (2d Cir. 1970). And such instructions are "impotent to overcome those situations in which there is a great risk that the jury will not or cannot abide by the judge's instructions to the detriment of the defendant's vital interests." *United States v. Levinson*, 405 F. 2d 971, 988 (6th Cir. 1968), *cert. denied*, 295 U.S 906 (1969). Where, as here, improper evidence is heard by the jury, a reviewing court must be "entirely satisfied that the instruction of the trial court to disregard such evidence completely removed its evil effect" in order to uphold a conviction. *Hartman v. State*, 121 Fla. 627, 164 So. 354, 355 (1935). The vague and confusing instruction given by the court in this case cannot possibly pass muster under this standard. Rather, "[t]he judge's words were here at most a mild antiseptic with no prognostic or retrospective assurance that they eliminated the sepsis." *Odom v. United States*, 377 F. 2d 853, 859 (5th Cir. 1967). Moreover, whatever effect this instruction may have had on the jury was completely eviscerated when the prosecutor argued, in closing argument, that the Gibsons were telling the truth to the police, as later explained in this petition and as determined by the dissenting opinion on direct appeal. *See Breedlove I*, 413 So. 2d at 10.

around the face of the watch" (T. 937). A hearsay objection was overruled (T. 937).

! Ojeda testified that Mr. Breedlove continued to deny the truth of what Elijah had told them, and Ojeda continued to confront Mr. Breedlove on the issue of the bicycle, the blood on the pants, and the rhinestone watch (T. 937-42).

During the State's closing argument at the guilt phase, the out-of-court testimonial evidence from Mr. Breedlove's mother and brother, introduced through the testimony of Detective Ojeda, was highlighted. However, the pretext that the statements of the Gibsons had not been introduced for their truth was abandoned when the prosecutor explicitly put in issue the truth of the Gibsons's statements, thus eviscerating whatever efficacy the cautionary instruction had had on the jury and demonstrating the true intention of the State with respect to the purpose of introducing the Gibsons' statements.[17] The prosecutor argued:

> There were some questions raised about Mary Gibson and Elijah Gibson. Questions have been raised by Mr. Zenobi about the statements that Mary Gibson made to the police on November the 9th and that Elijah Gibson made to the police on November the 9th.
>
> He asked questions about those statements, and that is proper. That is a fair issue for him to raise, and then he said, "Why didn't the State produce them as witnesses?"
>
> I am going to answer both of those questions for you right now. The State Attorney's Office is not in the

[17]It must be remembered that it was not the State who argued that the Gibsons' statements were admissible as non-hearsay, but rather this was something the court on its own determined.

business, ladies and gentlemen, of compelling a mother to come in and testify against her son, and in a first degree murder case, when we are seeking the electric chair. We are not in the business of doing that, if we can avoid it. We are not in the business of compelling a brother to testify against his own brother in a first degree murder case, where we are seeking the death penalty.

What would you expect these people to say if they came in here: "I don't know. I forgot. It's been a long time."

MR. LEVINE: Objection.

THE COURT: Overruled, counsel.

MR. GODWIN: What you expect the mother of the defendant to say as a State's witness, or what would you expect the brother of the defendant to say?

I will tell you this, and you heard the testimony, both the mother and the brother gave sworn statements to the police on November the 9th, 1978. Detective Ojeda had the sworn statements in his report. We took them out, and they are marked as evidence.[18]

They gave their statements back on November the 9th. At that time, Mr. Breedlove was being interviewed by Ojeda and Zatrepalek. They gave their statements to another detective.

They did not know he was being charged at that point with first degree murder. They told the truth at that point.

---

[18]Close to the end of the trial, the State attempted to move the Gibson's police statements into evidence over ardent defense objection (T. 1014-16). The court ultimately denied the State the right to introduce the actual statements into evidence, but they were clearly marked and the jury was clearly informed of the statements' physical existence during the prosecutor's closing argument. The record does not establish one way or the other whether the statements were actually sent into the jury room.

You can rest assured of one thing; you can be as certain of this as you can that you are sitting in those seats right now: If the statements of Mary Gibson and if the statements of Elijah Gibson did not say exactly what Detective Ojeda and Detective Zatrepalek told you they said, Mr. Zenobi would have brought it out to you. He would have brought Mary Gibson in here and Elijah Gibson in here, and they would have told you, "We did not say those things."

MR. LEVINE: Objection. I reserve the right to make a motion after the State's argument.

THE COURT: I will charge the jury on that, counsel.

MR. GODWIN: I believe His Honor, Judge Fuller, is going to instruct you that the State and the defense have the right to compel any person to appear in this Court and testify concerning any case, and I will repeat it. The State and the defense have the right to compel any person to appear in this Court and testify concerning any case. It is not the duty of either the State or the defense to call every person who might seem likely to have some knowledge about this case and have them testify on the witness stand.

Let me just finish with the instruction, if I may: I believe His Honor will instruct you that it is the right of all parties in the case to call those witnesses whom the respective parties feel will contribute something material to the issues, and any omission to produce other witnesses does not raise any presumption that they would, if produced, testify adversely to either side in the case. You cannot assume that anyone who has not testified in this case would have testified one way or another.

Basically that instruction says that either side has the right to call witnesses.

> *Now, with respect to Mary Gibson and Elijah Gibson, who would be in a better position to testify for the defendant than his own mother and his own brother, if they had anything helpful to say, and that is why I would ask you to use your common sense and your ordinary good judgment. Do not–*
>
> MR. LEVINE: Objection to that line of argument and reserve the right to make motions.
>
> THE COURT: All right, counsel. Overruled. Go ahead.
>
> MR. GODWIN: *Do not have any doubt whatsoever about what Mary Gibson and what Elijah Gibson told the police, because if there was a conflict, they would be in here telling you about it.*

(T. 1184-88) (emphasis added).

B. Out-of-Court Testimonial Statements At The Penalty Phase.

During the penalty phase, the State called Sergeant George Blishak of the Los Angeles Police Department to provide evidence on two prior convictions the State was attempting to establish as aggravating circumstances. During Blishak's testimony, he explained first the circumstances of an incident involving Mr. Breedlove which Blishak himself witnessed (T. 1295-96). After testifying to what he actually observed, Blishak was asked, over defense hearsay objection, to what the victim of that crime had told police about what happened. Blishak then testified to what the victim told him:

A. She said she heard a noise by her window which was on the west side of her apartment building, and she felt a prowler was there, someone was trying to get it.

So she called the police. She then said that a few minutes after that, she heard a tap at her door. She thought the police had arrived and were at the door, so she opened it. It wasn't the police, thought. It was the defendant. She told me that he pushed her down on the bed and began choking her and that he was falling unconscious.

She told me she was convinced she was going to die, and that he was awakened by the sound of the shot.

Q Did she mention whether she had ever seen this person before?

A She told me she had not seen him before.

(T. 1196-97).

Blishak was then questioned about another occasion when he conversed with detectives regarding another incident involving Mr. Breedlove:

Q During the course of your investigation of this incident involving Miss Schuhbaum, did you also have occasion to converse with other detectives, and as part of your investigation, come into contact with information relating to an incident that had occurred a short time before the Schuhbaum incident at 1021 South Albany Street, in Los Angeles, California?

A Yes.

Q How far is 1021 South Albany Street from 1431 West Olympic Boulevard, where this incident with Miss Schuhbaum took place?

A It's about a block away.

MR. LEVINE: Renew our objections as stated previously and note a continuing objection.

THE COURT: All right.

Q Did your investigation reveal, in terms of when before or after the Schuhbaum incident, this incident took place?

A I was told by an investigator that it was shortly before. I can't recall exactly. I believe a half-hour, something like that.

Q Based upon your investigation, sir, would you tell the members of the jury exactly what this incident was that occurred at 1021 South Albany Street, in Los Angeles, California, a short time before the incident at Miss Schuhbaum's house. What did that incident entail, if you would tell the jury, please.

A 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). Following Blishak's testimony, defense counsel again objected based on hearsay, an objection again overruled (T. 1800-01).

During its penalty phase closing argument, the State relied exclusively on the

hearsay testimony adduced during Blishak's testimony to support the aggravating circumstance of prior violent felony convictions:

> No. 2. "At the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.
>
> That applies clearly to this case. You heard testimony from Sergeant George Blishak, a sergeant with the police department of Los Angeles, California. Sergeant Blishak testified that back in 1968, he had occasion to respond to 1341 West Olympic Boulevard, in Los Angeles, California.
>
> A person there had called the police, a person by the name of Hedda Schuhbaum, who had heard a noise and tried–
>
> MR. LEVINE: Objection and we would like to make objections at the end of his argument rather than to keep interrupting and reserve our right to make motions at a later time.
>
> THE COURT: All right. Thank you.
>
> MR. STELZER: Ms. Schuhbaum opened the door and instead of the police, the defendant entered and grabber her with his hands, grabbed her around the throat, threw her back, and placed a pillow over her face and it was in the act of trying to strangle her at the same time as committing the act of rape that the police arrived and the defendant lunged at the police and the police took appropriate action.
>
> You heard the testimony that prior to that, thirty minutes earlier, approximately three or four blocks away, the defendant had entered an apartment or a house at 1021 South Albany Street, Los Angeles, the home of

> Mrs. Angie Meza. She heard a noise in her child's bedroom, and when she walked in the bedroom to see what was going on, she was knocked over by the defendant. The defendant knocked her onto the floor, stuck his hand over her mouth, and the defendant heard a noise and ultimately ran away.
>
> The defendant was charged with assault with intent to commit rape on Mrs. Meza, assault with intent to commit rape of Ms. Schuhbaum, and of course the burglary of Ms. Schuhbaum's apartment.
>
> Clearly No. 2 applies because the defendant has been convicted of two, maybe three crimes involving the use and threat of violence to these people in California back in 1969.

(T. 1424-26).

C. On Appeal, The Use Of Unconfronted Testimonial Evidence Was Approved.

On direct appeal, Mr. Breedlove asserted that his Sixth Amendment right of confrontation had been violated by the admission of hearsay evidence through the lead detective, Ojeda. Mr. Breedlove also asserted that the prosecutor's closing argument was improper, having put the truth of the Gibsons' statements at issue. For example, Mr. Breedlove argued:

> "[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Pointer v. Texas*, 380 U.S. 400, 406-7 (1965) (citations omitted). The purpose of this function of the Sixth Amendment is "to guarantee that the fact finder had an adequate opportunity to assess the

credibility of witnesses." *Berger v. California*, 393 U.S. 314, 315 (1969) (citation omitted). Although an "adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation," *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), the Confrontation Clause contemplates that, absent compelling reasons to the contrary, "the `evidence developed' against the defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

The issue presented in this case stands at the crossroads of the common-law hearsay rule and the Confrontation Clause. Although both the clause and the rule "stem from the same roots," *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (footnote omitted), "it is quite a different thing to suggest that the overlap is complete." *California v. Green*, 399 U.S. 149, 155 (1970). Rather, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that `the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans, supra*, at 89 (citation omitted). Thus, regardless of whether a third-party statement is admissible under the hearsay rule, the Confrontation Clause requires a separate inquiry to determine its admissibility; if the statement reflects sufficient "indicia of reliability," its introduction may be permissible under the Clause, even absent physical confrontation of the witness. *Dutton v. Evans, supra*, at 89-90; *California v. Green*, 399 U.S. 149, 161-64 (1970); *Hoover v. Beto*, 467 F. 2d 516, 533 (5th Cir. 1972), *cert. denied*, 409 U.S. 1086 (1972).

* * *

This requirement was not satisfied in this case, and the introduction of the Gibson statements through the

> testimony of an officer consequently violated the Sixth Amendment. The State made no showing of the unavailability of the Gibsons; indeed, in closing argument, the prosecutor stated to the jury that he *could* have produced them (Tr. 1184-86). The failure of the State to produce the Gibsons or, in the alternative, to demonstrate that they were unavailable, rendered the introduction of their testimony violative of the Confrontation Clause. *Barber v. Page*, 390 U.S. 719 (1968); *Harris v. Spears*, 606 F. 2d 639 (5th Cir. 1979).

(Initial Brief of Appellant on Direct Appeal at 27-28; 30-31) (footnotes omitted).

Mr. Breedlove's direct appeal brief also urged the court to find error because of the prosecutor's closing argument, which put the truth of the Gibsons' hearsay statements at issue in the case:

> But reversal in this case is need not be predicated upon the introduction of this evidence alone. For the prosecutor, after allowing the trial court to admit the Gibson statements as ostensible non-hearsay, proceeded in his closing argument to vigorously claim that the statements were true and should be considered as *substantive* evidence:
>
> They gave their statements back on November the 9th. At that time, Mr. Breedlove was being interviewed by Ojeda and Zatrepalek. They gave their statements to another detective.
>
> They did not know he was being charged at that point with first degree murder. *They told the truth at that point* (Tr. 1186).
>
> * * *
>
> Do not have any doubt whatsoever

> about what Mary Gibson and what Elijah Gibson told the police . . . (Tr. 1188).
>
> Objections to this argument were overruled by the trial court and a subsequent motion for mistrial was denied (Tr. 1186-88, 1203-04, 1206).

(Initial Brief of Appellant on Direct Appeal at 34-35).

In its direct appeal opinion, this Court rejected Mr. Breedlove's arguments, concluding that the Gibsons's statements were merely "informal statements" which were in fact "not hearsay" because they "came in to show the effect on Breedlove rather than for the truth of those comments." *Breedlove I*, 413 So. 2d at 7. The Court did find that the prosecutor's closing argument was error but harmless. *Id*. Then-Chief Justice Sundberg dissented, concluding that in light of the prosecutor's closing arguments, the statements by the Gibsons constituted prejudicial hearsay and a new trial should be ordered. *Id*. at 10.

In his petition for state habeas corpus, Mr. Breedlove asserted that appellate counsel was ineffective for failing to raise on appeal the introduction of the hearsay evidence at the penalty phase, in violation of the Sixth Amendment confrontation clause (Petition for State Habeas Corpus, Case Nos. SC79087, 79207). The Court rejected this argument, concluding that the Confrontation Clause was not violated because Mr. Breedlove had been provided an opportunity to cross-examine Sergeant Blishak. *Breedlove III*, 595 So. 2d at 10-11.

D. *Crawford v. Washington* Establishes A Confrontation Clause

Violation At Both The Guilt And Penalty Phases.

In *Crawford v. Washington*, the United States Supreme Court considered the contours of the right guaranteed by the Confrontation Clause. In that case, the defendant's wife had provided law enforcement with a tape-recorded statement. Because of the marital privilege, she was not an available witness at the defendant's trial for assault and attempted murder. The State sought to introduce the taped statement. The defendant argued that the statement's admission would violate his right to confrontation. On the basis of *Ohio v. Roberts*, 448 U.S. 56 (1980), the trial court found that the statement bore "particularized guarantees of trustworthiness." The defendant was convicted of assault. The United States Supreme Court reversed, announcing that the test in *Ohio v. Roberts* permitting the introduction of hearsay evidence that falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness" "departs from the historical principles" underlying the Confrontation Clause. *Crawford*, 158 L. Ed. 2d at 198. The Supreme Court explained:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does [*Ohio v.] Roberts*[, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. *Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.* We leave for another day any effort to

> spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations*. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 158 L.Ed. 2d at 203 (emphasis added).

The Supreme Court reached this conclusion after exploring at length "the original meaning of the Confrontation Clause." 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." *Id*. at 192. 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*. at 193.

Reviewing the history of the Confrontation Clause also led the Supreme Court to a second conclusion: "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 194. This is the only exception to the Confrontation Clause, and there are no "open-ended exceptions from the confrontation requirement to be developed by the courts." *Id*.

The Supreme Court concluded that the hearsay exceptions and the trustworthiness test described in *Ohio v. Roberts* "depart[] from the historical principles identified above" because *Roberts* was both "too broad" and "too narrow." *Id*. at 198. In its "too narrow" application--which is relevant to Mr. Breedlove's case--the *Roberts* test "admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations." *Id*. (emphasis in original). Thus, the Court held that when a State admits an out-of-court testimonial statement against a criminal defendant and the defendant has no opportunity to cross-examine the witness who made the statement in front of the trier of fact, "[t]hat alone is sufficient to make out a violation of the Sixth Amendment" because "[w]here testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 203.

Crawford now demonstrates several errors in this Court's analysis of Mr. Breedlove's confrontation issues both on direct appeal and in state habeas. As to the issue raised on direct appeal, *Crawford* makes clear that the Confrontation Clause is not satisfied by merely re-characterizing out-of-court testimonial statements as a hearsay exception or as non-hearsay, as this Court did on direct appeal. The Gibsons' statements were not merely "informal statements,"

Breedlove I, 413 So. 2d at 15; rather, they consisted of sworn statements to the police which are unquestionably covered by the Sixth Amendment Confrontation Clause guarantee. *Crawford*, 158 L. Ed. 2d at 203 ("[w]hatever else the term [testimonial evidence] 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"). Indeed, "interrogations by law enforcement officers fall squarely within that class" of testimonial evidence encompassed by the Sixth Amendment, *id*. at 194, and the Gibsons' statements to Ojeda and Zatrepalek, "knowingly given in response to structured police questioning, qualif[y] under any conceivable definition." *Id*. at 194 n.4.

That the Sixth Amendment right to confrontation is not satisfied by reclassifying evidence as a hearsay exception or non-hearsay was made clear by the *Crawford* Court's explicit acknowledgment that the *only* circumstances under which out-of-court testimonial evidence can be admitted were when the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the out-of-court testimonial statements. *Crawford*, 158 L.Ed. 2d at 194. The Court recognized that "[t]he text of the Sixth Amendment does not suggest *any* open-ended exceptions from the confrontation requirement to be developed by the courts." *Id*. The Court did note that "[t]his is not to deny . . . that `there were always exceptions to the general rule of exclusion' of hearsay evidence," but

"[m]ost of the hearsay exceptions [in historical sources underlying the original intent of the Framers in drafting the Sixth Amendment] covered statements that by their nature were not testimonial–for example, business records or statements in furtherance of a conspiracy." *Id*. at 195. There is "scant evidence," however, that any of these exceptions were ever "invoked to admit *testimonial* statements against the accused in a *criminal* case." *Id*. at 195 (emphasis in original).[19] Indeed, in rebuffing the argument made by Chief Justice Rehnquist in his concurring opinion, the majority noted that it could not agree with his proposition that the fact "that a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." *Id*. at 196 n.7. As the Court wrote in a passage particularly relevant to Mr. Breedlove's case:

> Involvement of government officers in the production of testimony with an eye toward the trial presents unique potential for prosecutorial abuse–a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Id.

In Mr. Breedlove's case, the State was permitted to present testimonial

---

[19]According to the Court, the only "deviation" from this involved dying declarations, the existence of which as a general rule of criminal hearsay law "cannot be disputed." *Crawford*, 158 L. Ed. 2d at 196 n.6.

statements from the Gibsons through the testimony of Ojeda without providing Mr. Breedlove the opportunity to confront the Gibsons or their statements. To make matters worse, the State then argued the truth of the Gibsons's statements during closing argument.[20] In light of *Crawford*, where the Supreme Court has officially eschewed any notion that testimonial evidence can be simply reclassified as a hearsay exception or non-hearsay in order to skirt the Sixth Amendment requirement of confrontation, Mr. Breedlove is entitled to a new trial.

With respect to the issue at Mr. Breedlove's penalty phase, *Crawford* also makes clear that constitutional error occurred when the State was permitted to present hearsay testimony to establish aggravating circumstances. It is not sufficient under the Sixth Amendment that Mr. Breedlove was permitted to cross-examine Sergeant Blishak, the mouthpiece through whom the hearsay statements of Miss Schuhbaum and Ms. Meza were admitted. According to *Crawford*, any admission of "*ex parte* testimony" violates the Confrontation Clause. The law enforcement officer's testimony at Mr. Breedlove's penalty phase falls within the definition of "*ex parte* testimony."

> That inculpating statements are given in a
> testimonial setting is not an antidote to the confrontation

---

[20]Indeed, on direct appeal, then-Chief Justice Sunberg's dissent concluded that by putting the truth of the Gibsons' statements at issue in closing argument, the Gibsons' statements that were introduced through Ojeda constituted prejudicial hearsay. *Breedove I*, 413 So. 2d at 10.

> problem, but rather the trigger that makes the Clause's demand most urgent. *It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.*

Crawford, 158 L. Ed. 2d at 201 (emphasis added).

The Supreme Court clearly concluded that the admission of testimonial hearsay statements "alone is sufficient to make out a violation of the Sixth Amendment." *Id*. at 203. The Court explained, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id*. at 199. Yet, this is what happened here. Mr. Breedlove was denied the right to confront the actual witnesses against him, those people whose statements to Sergeant Blishak were provided to the jury through Blishak.

This Court has repeatedly acknowledged that the Confrontation Clause does apply in capital sentencing proceedings at both the penalty phase before the jury and at the judge sentencing hearing. In *Engle v. State*, 438 So. 2d 803 (Fla. 1983), this Court reversed a death sentence stating:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process clause of the fourteenth amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. *Pointer v. Texas*. This right of

> confrontation protected by cross-examination is a right that has been applied to the sentencing process. *Sprecht v. Patterson.*
>
> In *Bruton v. United States*, 391 U.S. 123 (1968), it was held that a statement or confession of a co-defendant which implicates an accused is not admissible against the accused unless he has an opportunity to confront and cross-examine the co-defendant. To admit such a statement is unquestioned error.

Engle, 438 So. 2d at 814.

Subsequently, this Court found a confrontation clause violation in *Walton v. State*, 481 So. 2d 1197 (Fla. 1985). There, this Court relied upon the decision in *Engle* when it ordered a new penalty phase proceeding:

> Appellant contends he was denied his right to confront witnesses against him in the penalty phase of his trial in violation of our decision in *Engle v. State*, 438 So. 2d 803 (Fla. 1983), *cert. denied* 465 U.S. 1074 (1984), because the confessions of the codefendants Cooper and McCoy were presented to the jury and considered by the judge in imposing sentence, without Cooper and McCoy being available for cross-examination. We agree with this contention and find that a new penalty trial before a new jury is required.

Walton, 481 So. 2d at 1200.

Similarly, a confrontation clause violation was found on the basis of *Engle* when the State introduced a taped statement of the victim in a prior felony conviction of the defendant during the penalty phase proceedings. *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989). For this constitutional error, this Court ordered

a new penalty phase proceeding.[21]

Most recently, this Court relied on *Engle* to find a confrontation violation when the trial court admitted the deposition testimony of a co-felon at a capital sentencing hearing. *Donaldson v. State*, 722 So. 2d 177, 186 (Fla. 1998). Since the penalty phase was reversed on other grounds, the Court addressed the Confrontation Clause issue to give the parties guidance on remand.

It is thus clear that though this Court has recognized that the Confrontation Clause indeed applies at capital sentencing proceedings in Florida, this Court in Mr. Breedlove's case simply failed to understand the intent of the Framers of the Constitution and correctly apply the Confrontation Clause in Mr. Breedlove's case. The Court's denial of Mr. Breedlove's direct appeal Confrontation Clause claim and his state habeas challenge as to the penalty phase were incorrect under *Crawford*. This Court must revisit that decision in light of *Crawford* and order a new trial and a penalty phase at which the Confrontation Clause will be honored.

In the unanimous opinion of the Supreme Court in *Sullivan v. Louisiana*, 508 US. 275 (1993), the Court said, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id*. at 278.

---

[21]This Court distinguished *Rhodes* when denying Mr. Breedlove's state habeas petition, concluding that in Mr. Breedlove's case, he was permitted cross-examination of the detective through whom the testimonial hearsay was introduced. *Breedlove III*, 595 So. 2d at 5. This conclusion is clearly no longer tenable under *Crawford*.

The Court explained that there must be a verdict that decides the factual issues in order to comply with the Sixth Amendment. In doing so, the Court explained:

> It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re] Winship[*, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. In other words the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 508 U.S. at 278. Given the analogy to the right to trial by jury provided by the United States Supreme Court in *Crawford*,[22] the principle of *Sullivan* should apply here.

E. *Crawford* Applies Retroactively Under *Witt v. State*.

Mr. Breedlove also submits that *Crawford* meets the criteria for retroactive application set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Crawford* issued from the United States Supreme Court. *Witt*, 387 So. 2d at 930. *Crawford*'s Sixth Amendment rule unquestionably "is constitutional in nature." *Witt*, 387 So. 2d at 931. *Crawford* "constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931.

As to what "constitutes a development of fundamental significance," *Witt*

---

[22]The Court explained, "[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." *Crawford*, 158 L. Ed. 2d at 199.

explains that this category includes "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall [v. Denno*, 388 U.S. 293 (1967),] and *Linkletter [v. Walker*, 381 U.S. 618 (1965)]," adding that "*Gideon v. Wainwright* . . . is the prime example of a law change included within this category." 387 So. 2d at 929.

The rule of *Crawford* is the kind of "sweeping change of law" described in *Witt*. In *Witt*, this Court explained that the doctrine of finality must give way when fairness requires retroactive application:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So. 2d at 925 (footnote omitted).

Crawford meets the *Witt* test. First, the purpose of the rule is to return to the intent of the Framers and restore to the law the core values of the Confrontation Clause. When a capital defendant has been subjected to a trial and sentencing proceeding in which he has been denied the right to confront the witnesses against him, the Confrontation clause is robbed of its purpose. "Dispensing 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." *Crawford*, 158 L. Ed. 2d at 199. A radical defect in the process intended by the Framers has been permitted which necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." *Witt*, 387 So. 2d at 929.

Second, "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*, 158 L. Ed. 2d at 194. Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the right of confrontation through its rulings in *Ohio v. Roberts*. The Court's retrenchment restored the right to confrontation as a "fundamental" guarantee of the United States Constitution. Therefore, *Crawford* should be applied retroactively.

CONCLUSION AND RELIEF REQUESTED

Mr. Breedlove, through counsel, respectfully urges that the Court issue its Writ of Habeas Corpus and vacate his unconstitutional conviction and capital sentence of death.

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, this 21st day of April, 2004.

TODD G. SCHER
Florida Bar No. 0899641
Special Assistant CCRC
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, FL 33140
Tel: 305-861-9252
Fax: 305-861-9253

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Attorney for Mr. Breedlove

CERTIFICATE OF COMPLIANCE

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

TODD G. SCHER
Attorney for Mr. Breedlove