IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-686 & SC04-518

MCARTHUR BREEDLOVE and
JIM ERIC CHANDLER,
Petitioners,

vs.

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

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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I. PROCEDURAL HISTORY

The State relies upon the procedural histories outlined in the briefs it previously filed in these matters.

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

The State continues to assert that these petitions should be dismissed as because they are untimely and successive. In support of this assertion, the State relies upon the arguments advanced in its briefs previously filed in these matters.

III. CLAIMS ON HABEAS

A. THE *CRAWFORD* CLAIMS SHOULD BE DENIED BECAUSE THEY ARE PROCEDURALLY BARRED, *CRAWFORD* IS NOT RETROACTIVE AND THE CLAIM LACKS MERIT.

Defendants assert that they are entitled to relief because the State allegedly violated *Crawford v. Washington*, 124 S. Ct. 1354 (2004), by allegedly admitting testimonial hearsay. In *Breedlove*, Defendant claims that *Crawford* was violated by the alleged admission of testimonial hearsay at the guilt and penalty phases. In *Chandler*, Defendant claims that testimonial hearsay was admitted at the resentencing proceeding. However, these claims should be denied because they are procedurally barred, *Crawford* does not apply retroactively and the claims are without merit.

The claim regarding the admission of hearsay testimony in

Breedlove's penalty phase is procedurally barred. While Breedlove objected to the introduction of hearsay statements at his penalty phase, he did not raise any issue about the use of hearsay testimony in the penalty phase on direct appeal. Instead, he raised this issue as a claim of ineffective assistance of counsel in his state habeas petition and this Court found that appellate counsel was not ineffective because the issue was without merit. *Breedlove v. Singletary*, 595 So. 2d 8, 10-11 (Fla. 1992). This Court has held that in order for a defendant to be entitled to post conviction relief based on new case law, the defendant must have objected on the issue at trial and raised the issue on appeal. *See Waterhouse v. State*, 792 So. 2d 1176, 1196 (Fla. 2001). As Breedlove did not do so regarding the penalty phase, this claim is procedurally barred and should be denied.

With respect to Chandler, there was an objection at trial regarding the admissibility of three specific hearsay statements. Chandler raised the issue on appeal. Initial brief at 16-17. Therein he unsuccessfully alleged that §921.141(1), Fla. Stat. was unconstitutional on its face and as applied because he was precluded from exercising his right to confront and cross-examine three witnesses. *Chandler v. State*, 534 So. 2d 701, 702 (Fla. 1988). Consequently, to the extent Chandler

is re-asserting his claim that 921.141 is unconstitutional for permitting hearsay evidence at a penalty phase, the issue has been preserved.

Moreover, Defendants are not entitled to relief regarding any of their claims because *Crawford* does not apply retroactively. In *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980), this Court set forth the test for retroactivity. Pursuant to *Witt*, *Crawford* is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001).

In this case, the purpose served by *Crawford* was to return the United States Supreme Court's Confrontation Clause case law to the intent of the framers regarding testimonial hearsay and not to ensure the reliability of evidence presented at trial. The old rule has been extensively relied upon. The cases in which hearsay was admitted at trial are legion. This is

particularly true of capital sentencing hearings, given that this Court encouraged the State to present evidence of prior convictions through hearsay. *Rodriguez v. State*, 753 So. 2d 29, 44-45 (Fla. 2000)(noting that the Court considered it preferable to have evidence of prior convictions through neutral police witnesses). Moreover, the effect on the administration of justice would be overwhelming. If *Crawford* is ruled retroactive, defendants who had hearsay admitted at their trial will file post conviction motions. Many will be untimely and successive. The courts of this State would be required to review stale records to make determination of whether the hearsay was testimonial in nature, whether there was a showing of unavailability, whether the defendants had a prior opportunity for cross examination and whether any error in the admission of the evidence was harmful. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990)(refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively). Given the limited purpose served by the new rule in *Crawford*, the extensive reliance on pre-*Crawford* law and the devastating effect on the administration of justice, *Crawford* should not apply retroactively. *New*; *Ferguson*; *Witt*.

The same result would obtain if this Court were to adopt the United States Supreme Court's test for retroactivity. Under

Teague v. Lane, 489 U.S. 288 (1989), new rules are not retroactive unless they are substantive, place beyond the State's power the ability to punish certain conduct or to impose certain punishments on a class of defendants or are watershed rules of criminal procedure. Here, the Court acknowledged in *Crawford* itself that the rule it was announcing was procedural. *See id.* at 1370. As such, *Crawford* is not a substantive rule. Moreover, *Crawford* did not affect the State's ability to punish conduct or impose penalties. As such, *Crawford* would only be retroactive under *Teague* if it was a watershed rule of criminal procedure. *See also Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001)

> Moreover, we conclude that there is no Confrontation Clause violation because we agree with the Seventh Circuit that hearsay evidence is admissible at a capital sentencing. *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1387-88 (7th Cir. 1994). This proposition does contain one caveat: that the state statute protect a defendant's rights by giving him/her the opportunity to rebut any hearsay information. If the statute grants this protection, then it comports with the Sixth Amendment's Confrontation Clause. We note, however, that if we determined that hearsay evidence is per se inadmissible in a capital sentencing, we would be announcing a new rule of law. Therefore, the new rule's application to this case would be barred by the retroactivity principles of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).
>
> The United States Supreme Court has recently emphasized that

the class of watershed rules is extremely narrow. *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004). To qualify, the rule must implicate the fundamental fairness and accuracy of the criminal proceeding and seriously diminish the likelihood of an accurate conviction. *Id.* The Court issued *Crawford* based not on any belief that it produced fairer or more accurate convictions and instead because it was attempting to be faithful to the intent of the Framers. *Crawford*, 124 S. Ct. at 1369-71. As such, *Crawford* does not implicate the fundamental fairness and accuracy of the criminal proceeding and is not a watershed rule of criminal procedure. Thus, it is not retroactive under *Teague* or *Witt*. The claims should be denied. *Cf. Monlyn v. State*, 2004 WL 2797191 (Fla. December 2, 2004) (Cantero J. concurring)(recognizing that because *Ring* involves a procedural rule it is not entitled to retroactive application under *Witt* or *Teague*).

In fact, courts that have addressed the issue of the retroactivity of *Crawford* to post conviction cases have determined that it is not retroactive. *Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004); *Haymon v. New York*, 332 F. Supp. 2d 550, 557 (W.D.N.Y. 2004); *Garcia v. United States*, 2004 U.S. Dist. LEXIS 14984, *4-*10 (N.D.N.Y. Aug. 4, 2004);

Hutzenlaub v. Portuondo, 325 F. Supp. 2d 236, 237-38 (E.D.N.Y. 2004); *Wheeler v. Dretke*, 2004 U.S. Dist. LEXIS 12809, *2 n.1 (N.D. Tex. Jul. 6, 2004); *Dorchy v. Jones*, 320 F. Supp. 2d 564, 572-73 (E.D. Mich. 2004); *Murillo v. Frank*, 316 F. Supp. 2d 744, 749-50 (E.D. Wis. 2004); *People v. Edwards*, 2004 Colo. App. LEXIS 1259, *7-*20 (Colo. Ct. App. Jul. 15, 2004); *see also Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004)(expressing doubt that *Crawford* is retroactive). As such, these claims should be denied.

Even if the claims were not barred and *Crawford* did apply retroactively, Defendants would still be entitled to no relief. The holding in *Crawford* merely changed the test for the admissibility of testimonial hearsay under the Confrontation Clause. *Id.* at 1374. In allowing for the admission of the taped statement below, the lower courts applied "indicia of reliability" test of *Ohio v. Roberts*, 448 U.S. 56 (1980). The United States Supreme Court reversed this ruling and overruled *Roberts*. Because this statement did not fall within a "firmly rooted hearsay exception," and it involved a testimonial *ex parte* communication, it became apparent that the *Roberts* test did not offer the appropriate or effective safeguards envisioned under the Confrontation Clause. On that point the Court

concluded, "[t]his malleable standard often fails to protect against paradigmatic confrontations violations." *Crawford,* 124 S. Ct. at 1369.

In discussing the scope of the Confrontation Clause, the Court defined witnesses who had to confront the accused as "those who 'bear testimony,'" and testimony within the meaning of that phrase as "'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 1364. The Court further notes that the Confrontation Clause did not prohibit "the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 1369 n.9. The Court further did not alter the test for the admission of hearsay that was not testimonial in nature. *Id.* at 1374. As a result, nontestimonial evidence such as business records may be admitted even under *Crawford*. *Id.* at 1367. Thus, contrary to Defendants' assertions, the characterization of evidence as nonhearsay (or nontestimonial hearsay) is still a valid approach to determining whether the Confrontation Clause was violated even in the wake of *Crawford*.

With regard to the guilt phase claim in *Breedlove*, this Court upheld the trial court's rulings regarding the admission of Det. Ojeda's testimony concerning statements he made to Breedlove about statements his mother and brother had made to

him because the statements were not hearsay since they were not admitted for the truth of the matter asserted. *Breedlove v. State*, 413 So. 2d 1, 6-7 (Fla. 1982). This ruling was entirely consistent with the manner in which the statements were admitted. When the State first attempted to have Det. Ojeda relate the substance of his conversation with Breedlove's mother, the trial court sustained a hearsay objection. (DAR. 908) Subsequently, Det. Ojeda stated that Breedlove initially denied having a blue, ten speed bike and claimed that he had been to a store around the time of the murder and stated that nothing unusual happened. (DAR. 923, 928)

Det. Ojeda then testified to his confrontation of Breedlove with statements allegedly made by his mother and brother. (DAR. 923-24, 927-28, 930, 931-32, 937) The trial court repeatedly overruled Breedlove's hearsay objections on the grounds that the statements were not being admitted for the truth of the matter asserted and merely to show what was said to Breedlove and how he reacted. (DAR. 923-24, 927-28, 930, 931-32, 937) After a sidebar conference at which Breedlove reiterated his objection and the trial court reiterated its ruling and the basis therefor, the trial court instructed the jury that it could not consider the statements for their truth:

> I have admitted that evidence in this case, and

> you should understand that as to the officers' testimony about statements made to him by someone 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 of their conversation took place.

(DAR. 932-36)

While Breedlove attempts to make it seem as if being confronted with these statements had no effect on him, this is untrue. As a result of the confrontations, Breedlove admitted to having stolen a bicycle from two door away from the scene of the murder on the night of the murder.[1] (DAR. 924-26, 929-30, 938) Breedlove admitted having had blood on his pants and having cut off bloody portion of the pants and disposed of it. (DAR. 928-30) He also inadvertently demonstrated his knowledge of the sex of the victim and stated that he had covered his hands while inside the crime scene. (DAR. 939-40, 941-42)

As can be seen from the foregoing, this Court has already ruled that the statements were not offered for their truth. That ruling is entirely appropriate on the record, which reveals that the trial court did not allow the statements to be admitted

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[1]A neighbor had testified to seeing a man pedaling away from the crime scene on a bike. (DAR. 591-94)

for their truth[2] and instructed the jury on the limited use of the statements. Moreover, the statements did have an effect on Breedlove, as he made inculpatory statements in response. *Crawford* itself states that it has no effect on the admission of statement for purposes other than their truth. *Id.* at 1364, 1369 n.9. As such, *Crawford* does not affect this Court's prior correct ruling. The claim should be denied.

Moreover, Breedlove's attempt to use the comments in closing to make *Crawford* applicable is unavailing. As *Crawford* itself acknowledges, it concerns the procedure for the admission of evidence. *See id.* at 1370. The permissibility of comments in closing is not the admission of evidence. Moreover, this Court determined that the comments were improper on direct appeal. *Breedlove*, 413 So. 2d at 7. However, this Court determined that they were not so prejudicial as to require a new trial. *Id.* Given that Breedlove had invited the comments by making allegations about his brother and mother in his initial closing argument and conceded the truth of the statements in his final

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[2]Contrary to Breedlove's suggestion, the State did not attempt to admit the sworn statements of his brother and mother. The State merely attempted to show that statements had been taken to counter Breedlove's suggestion during the cross examination of Det. Ojeda that no statements had been taken. (DAR. 1014-16) Moreover, the record reflects that the jury was not provided with materials that were offered as evidence but not admitted. (DAR. 1265)

closing argument (DAR. 1152-54, 1218-22), this ruling was proper. Since *Crawford* has nothing to do with the control of closing arguments and this Court has already properly address this claim, it should be denied.

With regard to the claims regarding the penalty phases, the Defendants are entitled to no relief. While this Court has noted that a defendant had a confrontation right at the penalty phase, this Court has held that the admission of hearsay testimony that a defendant had a fair opportunity to rebut did not violate this right. *Rodriguez*, 753 So. 2d at 44-46; *see also Hudson v. State*, 708 So. 2d 256 (Fla. 1998); *Lawrence v. State*, 691 So. 2d 1068 (Fla. 1997); *Clark v. State*, 613 So. 2d 412, 415 (Fla. 1992); *Long v. State*, 610 So. 2d 1268 (Fla. 1992); *Waterhouse v. State*, 596 So. 2d 1008, 1016 (Fla. 1992); *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990); *Lucas v. State*, 568 So. 2d 18 (Fla. 1990); *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989); *Tompkins v. State,* 502 So. 2d 415, 419 (Fla. 1986). This clearly established principle has also been codified in numerous state capital sentencing schemes[3] as well as the federal death penalty statute. *Windsor v. State*, 683 So. 2d

[3]This is not an exhaustive list of the States that allow for the admissibility of hearsay evidence at a capital sentencing proceeding.

1027, 1038-1039 (Ala. 1994); Ala. Code §13A-5-45(d) (1975); *People v. Edwards*, 819 P.2d 436, 457 (Cal. 1994); Cal. Evid. Code §190.4 (1992); *State v. Ross*, 849 A.2d 648 (Conn. 2004); *People v. Terrell*, 708 N.E. 2d 309, 329 (Ill. 1999); 720 Ill. Comp. Stat. 5/9-1(e) (1961); *Trueblood v. State*, 587 N.E.2d 105, 110 (Ind. 1992); Ind. Code §35-50-2-9; *Whittlesey v. State*, 665 A.2d 223, 242-243 (Md. 1995); Md. Code Ann., Crim. §2-303(e)(1)(v) (2003); *Leonard v. State*, 969 P. 2d 288, 299 (Nev. 1999); Nev. Rev. Stat. §175.552(3) (2004); *State v. Richmond*, 495 S.E.2d 677, 690 (N.C. 1998); N.C. Gen. Stat. §15A-2000(a)(3); *State v. Carter*, 888 P.2d 629, 653 (Utah 1995); Section76-3-207 (2)(b) (1953-2000); 18 U.S.C.A. §3593(c); *see also United States v. Moussaoiu*, 382 F. 3d 453 (4th Cir. 2004); *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998); *United States v. Chong*, 98 F. Supp. 2d 1110 (D. Haw. 1999); *United States v. Cooper*, 91 F. Supp. 2d 90 (U.S.D.C. 2000); *United States v. Frank*, 8 F. Supp. 2d 253 (S.D. N.Y. 1998); *United States v. Nyguyen*, 928 F. Supp. 1525 1546-1547 (D. Kan. 1996); *Jones v. Weldon*, 877 F. Supp. 1214 (S.D. Ill. 1994).

Indeed the United State Supreme Court has placed its imprimatur on such practices explaining as follows:

> Highly relevant--if not essential--to [a judge's] selection of an appropriate sentence is the possession

> of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Williams v. New York, 337 U.S. 241, 247 (1949). The Court reiterated that principle in two capital cases many years later. *Gregg v. Georgia*, 428 U.S. 153, 203-204 (1976)(explaining that strict evidentiary rules at trial should not preclude admissibility of relevant information at capital sentencing phase); *Jurek v. Texas*, 428 U.S. 262, 276 (1976)(same);[4] *see also United Sates v. Tucker*, 404 U.S. 443 (1972)(trial court may consider a broad range of information in sentencing regardless of its source). The United States Supreme Court did not invalidate these cases in *Crawford*, which concerned the admission of evidence during the guilt phase of a trial. *United States v. Leatch*, 2004 U.S. App. LEXIS 23273 (5th Cir. Nov. 5, 2004). As such, *Crawford* does not apply to this penalty phase claims. They should be denied.

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[4]Moreover any evidentiary rule precluding otherwise relevant evidence at a capital sentencing proceeding would run afoul of the Court's holdings which emphasize the importance of providing to the jury as much information as possible. *Lowenfield v. Phelps*, 484 U.S. 213 (1988); *Lockett v. Ohio*, 438 U.S. 586 (1978)(finding unconstitutional any state-imposed restriction on the admissibility at sentencing of any perceived mitigation).

Additionally with respect to Chandler, relief must also be denied because the admissibility of the hearsay statement in *Chandler* was predicated solely on *United States v. Owens,* 484 U.S. 554 (1988), making *Crawford* inapplicable. Cause for concern in *Crawford* centered on the confrontation issues surrounding the admissibility of a recorded statement, that was *ex parte* and testimonial in nature. Those concerns are not implicated herein when the hearsay statement is offered to a re-sentencing jury by an officer, who is cross-examined, and whose testimony is limited to a synopsis of testimony from witnesses who testified previously at trial and who were all vigorously cross-examined at that time. Therefore the testimonial communications recounted by Officer Redstone at re-sentencing were not received *ex parte* as they were in *Crawford*. *Chandler*, 534 So. 2d at 703. Because the statements were admitted at the penalty phase where the rules of evidence are relaxed, and because the statements were in essence not *ex parte*, the concerns expressed in *Crawford* are not present in the instant case.

Additionally, in upholding the admissibility of the hearsay statements in this case, this Court also noted that, "[m]oreover, Chandler's counsel conducted a vigorous and extensive cross-examination of the witnesses presented by the

state." *Chandler*, 534 So. 2d at 702. This Court's finding was also affirmed by the Eleventh Circuit Court of Appeals:

> At trial, Chandler's counsel vigorously cross-examined the State's witnesses to whom Officer Redstone referred at the re-sentencing when he gave his recitation of the evidence of guilt. The State did not do anything to prevent Chandler from rebutting this hearsay evidence. The fact that Chandler chose not to rebut any hearsay testimony does not make the admission of such testimony erroneous. Moreover, having reviewed both the trial and the re-sentencing transcript, we conclude that Officer Redstone's synopsis was consistent with the witnesses' trial testimony. Accordingly, we see no Confrontation Clause violation.

Chandler, 240 F.3d at 918. Consequently because Chandler was provided the opportunity to rebut the evidence the requirements of the Confrontation Clause have been met, and *Crawford* is inapplicable. *See Owens; Mercern v. United State*, 2004 D.C. App. Lexis 579 (Sept, 2, 2004)(noting that *Crawford* in no way limited the holding in *Owen*);*People* v. *Warner*, 2004 Cal. App. LEXIS 886 (Cal. Ct. App. Jun. 10, 2004)(finding hearsay to be admissible under *Owen* irrespective of Supreme Court's most recent opinion in *Crawford*); *Interest of I.A.*, 2004 Pa. D. & C. LEXIS 38 (May 11, 2004)(same); *People v. Candelaria*, 2004 Colo. App. LEXIS 1021 (Colo Ct. App. Jun. 17, 2004)(same); see *also Cooley v. State*, 157 Md. App. 101 (2004), *cert. granted*, 383 Md. 211 (Sept. 15, 2004)(determining that *Crawford*, "which involved

the testimonial hearsay statement made by a declarant who was unavailable to testify at trial, is in no way inconsistent with *Owens, Fensterer*, *Green, Nance, Md.* Rule 5-802.1, or *Md*. Rule 5-616(c). We therefore hold that the Confrontation Clause does not require the exclusion of any out-of-court statement made by a person who actually testifies at trial and is therefore subject to cross-examination concerning the statement."); *State v. Duanyai*, 2004 Ut. App. 349 (Utah Ct. App. Oct. 7, 2004)(recognizing that *Crawford* offers more protection than that offered by *Roberts*, however relief was still properly denied as the defendant had an opportunity to cross-examine the witness, which is all that is required under *Owens*). Consequently, because this evidence was introduced at the penalty phase and because Chandler was given the opportunity to cross-examine witnesses or rebut the evidence if he so chose, Chandler's right to confront the evidence against him were honored. *Crawford* is inapplicable.

Moreover, both the United States Supreme Court and this Court have determined that the introduction of hearsay evidence in violation of the Confrontation Clause is subject to harmless error analysis.[5] *Delaware v. Van Arsdall*, 475 U.S. 673 (1986);

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[5]As such, Defendant's argument that *Crawford* is structural error is specious.

Hopkins v. State, 632 So. 2d 1372, 1377 (Fla. 1994); *Cf. United States v. Cotton*, 535 U.S. 625 (2002)(finding Apprendi error to be subject to harmless error analysis given that the rule in *Appredi* is procedural in nature). Here, any error in the admission of the hearsay statements was harmless.

In Breedlove, the State introduced a certified copy of Defendant's prior conviction. (DAR. 1300-01) Under *Crawford*, only testimony hearsay is inadmissible as violative as the confrontation clause. *Id.* at 1374. The certified copy of the conviction was not testimonial hearsay. *Id.* at 1364. This Court has previously held that admission of certified copies of convictions renders the admission of hearsay testimony about them harmless. *Hudson v. State*, 708 So. 2d 256, 261 (Fla. 1998); *Tompkins v. State*, 502 So. 2d 415, 420 (Fla. 1986). Moreover, Off. Blishak testified that he was a witness to the crime. He described responding to a prowler call, hearing the victim's cries and finding Breedlove straddling the victim with his penis exposed. (DAR. 1293-96) He stated that Breedlove was choking the victim with one hand while he attempted to smother the victim with a pillow with the other. (DAR. 1296) After having fully related what he saw, Officer Blishak was briefly permitted to state that the victim had told him that she had heard a prowler, called the police and been attacked and choked

by Breedlove. (DAR. 1297) Given his eyewitness testimony, his statements about what the victim told him was cumulative. Given the certified copies of the prior convictions and the cumulative nature of the hearsay testimony, any error in the admission of the testimony about which Breedlove complains would be harmless. The claim should be denied.

Nor would Chandler be entitled to relief should this Court find that it was error to introduce the hearsay statements. The statements in question that were admitted at re-sentencing are an accurate synopsis of statements admitted at the guilt phase. Indeed this Court stated, "[t]he currently objected-to testimony came from a police detective and concerned statements made by a police chief, another detective, and a state expert. Those individuals had testified, consistent with what the detective stated they said, during the guilt phase." *Chandler*, 534 So. 2d at 704. And the Eleventh Circuit Court of Appeals found:

> Moreover, having reviewed both the trial and the re-sentencing transcript, we conclude that Officer Redstone's synopsis was consistent with the witnesses' trial testimony. Accordingly, we see no Confrontation Clause violation.

See Chandler v. Moore, 240 F.3d 907, 918 (11th Cir. 2001). Consequently this re-sentencing jury was given an <u>accurate</u> account of what evidence was presented during the guilt phase of

Chandler's trial five years prior to these proceedings.[6]

In addition to accurately informing the re-sentencing jury of prior guilt phase evidence, the statements at issue were not critical to any of the penalty phase issues. For instance, the fact that Chief Cummings opined that the victims' bodies had not been moved, or that Chandler had pointed a gun at Detective Hamilton prior to the high speed chase culminating in his arrest, were not argued in closing by the state in support of any aggravating factor. Likewise Redstone's opinion regarding whether the knife used to stab the victims came from the victims' kitchen was also not mentioned by the state in closing argument. (ROA#2 825-843).

It was the direct testimony of the medical examiner Dr. Cox

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[6]Redstone recounted accurately the substance of the following guilt phase testimony of Chief Cummings, (ROA 2319-2331), Dan Nippes (ROA 2974-3015), and Detective Hamilton. (ROA 3126-3139). Chief Cummings, testified at the guilt phase that upon arriving at the scene he did not touch either of the victims. (ROA 2326). Cummings was cross-examined regarding exactly where he saw the bodies, in what condition had he found them and how far from the public view could they be seen. (ROA 2326-2331). Dan Nippes testified at the guilt phase that the knife used to stab the victims was a single-edge. (ROA 3001). On cross-examination he was asked about the size of knife wounds in clothing and how they can be accurately measured. (ROA 3003-3004). Detective Hamilton testified at the guilt phase that when he approached Chandler in his police car, Chandler pointed a rifle at Hamilton. A high speed chase ensued and Chandler was ultimately arrested. (ROA 3128-3131). Hamilton was asked several questions on cross-examination regarding the incident. (ROA 3134-3137).

and Chandler's own mother Mrs. Messener at re-sentencing who provided the relevant testimony that the knife used in the homicides did not come from the victims' home but was brought to the scene by Chandler. (ROA#2 395-414 840–841). That evidence was relied on in part by the state in support of the aggravating factor of "cold, calculated, and premeditated."[7] Consequently any error resulting from the improper admission of Redstone's testimony on those insignificant points was harmless. *Lawrence v. State*, 691 So. 2d 1098 (Fla. 1997)(denying relief for allowing hearsay at re-sentencing proceedings where state was allowed to read prior guilt phase testimony and defendant had cross-examined witness at guilt phase; defendant had opportunity to introduce that cross-examination or presented rebuttal; and re-sentencing jury would have heard this in the guilt phase at the original trial).

It was the brutal beatings of this elderly couple with a baseball bat, while they were each forced to witness the horrible slaying of the other that led the jury to unanimously recommend death for both murders. (ROA#2 297-298). Indeed this Court upheld the existence of six of the seven aggravating factors. *Chandler*, 534 So. 2d at 704. Consequently the

[7]Moreover the fact that Chandler may have brought the knife with him to the scene was not a factor relied upon by the court anywhere in its sentencing order. (ROA#2 327-330).

erroneous admission of Redstone's hearsay testimony in no way contributed to Chandler's death sentences. The error was harmless beyond a reasonable doubt. *See Rodriguez v. State*, 753 So. 2d 29, 46 (Fla. 2000)(finding double hearsay testimony of Officer that defendant was faking mental illness was harmless error given the strength of the aggravating factors and along with testimony that defendant was a malinger).

CONCLUSION

WHEREFORE, the State respectfully request that this Court deny these petitions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to **Todd G. Scher**, 5600 Collins Avenue, #15-B, Miami Beach, Florida 33140, and **Martin J. McClain**, 141 N.E. 30th Street, Wilton Manors, Florida, 33334, this 15TH day of December, 2004.

CELIA A. TERENZIO
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

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Assistant Attorney General