

IN THE SUPREME COURT OF FLORIDA

JOEL DIAZ,

Petitioner,

v.

KENNETH S. TUCKER, ETC.,

Respondents.

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CASE NO. SC12-289  
L.T. No. 97-3305CF  
DEATH PENALTY CASE

**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS  
AND MEMORANDUM OF LAW**

COME NOW, Respondents, KENNETH S. TUCKER, Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds therefore:

**FACTS AND PROCEDURAL HISTORY**

This Court summarized the relevant facts in its opinion affirming Petitioner's judgment and sentence of death:

Diaz and Lissa Shaw dated for about two years. During the second year of their relationship, they lived in Diaz's home with Lissa's young daughter. The relationship proved "rocky," however, and around August 1997 Lissa moved in with her parents, Charles and Barbara Shaw. After she moved out, Diaz tried to see her, but she refused all contact. The two last spoke to each other in September 1997.

On October 6, Diaz purchased a Rossi .38 special revolver from a local pawn shop. He was eager to buy the gun, but because of a mandatory three-day waiting period, could not take it with him. Three days later, Diaz returned to the pawn shop to retrieve the gun, but it could not be released to him because his background check remained pending. Diaz was irritated, and continued to call the shop nearly every day until he was cleared. On October 16, Diaz finally was allowed to take the gun.

On October 27, Diaz asked his brother Jose, who was living with him at the time, for a ride to a friend's house the next morning. Sometime that night or early the next morning, Diaz wrote a letter to his brother, which the police later discovered in his bedroom. It reads:

Jose [f]irst I want to apologize for using you or to lieing to you to take me where you did I felt so bad but there was no other way. Theres no way to explain what I have to do but I have to confront the woman who betrayed me and ask her why because not knowing is literly [sic] killing me. What happens then is up to her.

If what happen is what I predict than I want you to tell our family that I love them so much. Believe me I regret having to do this and dieing knowing I broke my moms heart and my makes it even harder but I cant go on like this it's to much pain. Well I guess that all theres to say I love you all.

Joel

P.S. Someone let my dad know just because we werent close doesn't mean I don't love him because I do.

At 5:30 a.m. on October 28, Diaz's brother and his brother's girlfriend drove him to the entrance of the Cross Creek Estates subdivision, where the Shaws lived. Diaz carried his new gun, which was loaded, and replacement ammunition in his pocket. Diaz walked to the Shaws' house and waited outside for about ten

minutes.

At 6:30 a.m., Lissa Shaw left for work. She entered her car, which was parked in the garage, started the engine, and remotely opened the garage door. She saw someone slip under the garage door, and when she turned, Diaz stood at her window, pointing the gun at her head. He told her to get out of the car. She pleaded with him not to hurt her. When she saw that "the situation was not going anywhere," she told him, "Okay, okay, hold on a second, let me get my stuff," and leaned down as if retrieving personal items. She then shoved the gear into reverse and stepped on the gas pedal. Diaz started shooting. Lissa heard three shots, but did not realize she had been hit. As she continued backing out, the car struck an island behind the driveway. She then put the car into forward drive. As she drove away, she saw Diaz in the front yard pointing the gun at her father, Charles Shaw. Charles was about five feet from Diaz, pointing and walking toward him. Lissa drove herself to the hospital where it was discovered she had been shot in the neck and shoulder.

Charles and Diaz then had some sort of confrontation in the front yard and an altercation in the garage, resulting in Diaz chasing Charles into the master bedroom where Barbara was lying in bed. A quadriplegic, Barbara could not move from the bed.

As the two men moved through the house, Barbara heard Charles saying, "Calm down, put it down, come on, calm down, take it easy." Barbara was able to roll back to see Diaz standing in the bedroom with a gun. He was standing on one side of a chest of drawers, closer to the door, while Charles was standing on the other side of the chest, closer to the bathroom. Charles talked to Diaz, telling him to calm down and put down the gun. Diaz held the gun with two hands, pointing it straight at Charles, about six to eight inches from Charles's chest. Diaz pulled the trigger, but the gun, out of ammunition, only clicked. Charles visibly relaxed, but Diaz reloaded the gun. When Charles realized Diaz was reloading, he ran into the bathroom. Diaz followed. As Charles turned to face him, Diaz fired three shots. Charles's knees buckled,

and he grabbed his midsection and fell face first to the floor.

Diaz went back into the bedroom and stood beside Barbara, holding the gun. Barbara screamed, "Why did you do this?" Diaz answered that Charles deserved to die. He stood in the bedroom from 30 seconds to a minute, then returned to the bathroom, bent over Charles's body, extended his right arm, and shot Charles again. He then moved his arm left, which Barbara judged to be toward Charles's head, and shot again. Diaz returned to the bedroom and, according to Barbara, said, "If that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband."

Diaz remained in the house between 45 minutes and an hour. He spent some of this time talking to Barbara in the bedroom, where he passed the gun from hand to hand and unloaded and loaded the gun about three or four times. He remained in the house until the police arrived and arrested him.[FN1]

FN1. At some point during the incident, a neighbor walked up to the Shaws' house. When he approached, both the garage door and the door leading from the garage to the inside of the house were open. The man saw an individual pacing back and forth inside the home, and as he entered the garage, he called out for Charles. Diaz then stepped into the garage, pointed the gun at the man, and said, "Get the f--- out of here." The neighbor returned to his house and called police.

The jury found Diaz guilty of the first-degree murder of Charles Shaw, the attempted first-degree murder of Lissa Shaw, and aggravated assault with a firearm on the neighbor. After penalty phase proceedings, the jury recommended a sentence of death by a vote of nine to three. After a Spencer[FN2] hearing, the trial court found three aggravating circumstances [FN3] and five statutory mitigating circumstances,[FN4] and sentenced Diaz to death.

FN2. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

FN3. The aggravating factors were: (1) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight); (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); and (3) the defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person (great weight).

FN4. The mitigating factors were: (1) the defendant had no significant history of prior criminal activity (very little weight); (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate weight); (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (very little weight); (4) the age of the defendant at the time of the crime (moderate weight); and (5) the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty: (a) the defendant was remorseful (very little weight); and (b) the defendant's family history of violence (moderate weight).

Diaz v. State, 860 So. 2d 960, 963-64 (Fla. 2003). On direct appeal to this Court, Petitioner raised the following four issues:

ISSUE I: THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE AS WELL AS BY THE DEFENSE DID NOT DISPROVE, BUT INSTEAD STRONGLY TENDED TO CORROBORATE, APPELLANT'S TESTIMONY THAT HE WAS STRUCK IN THE FACE DURING AN ALTERCATION WITH MR. SHAW IN THE GARAGE JUST PRIOR TO THE HOMICIDE.

ISSUE II: THE TRIAL COURT ERRED IN FINDING, AND INSTRUCTING THE JURY ON, THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR; AND FURTHER

ERRED BY MAKING MATERIALLY INACCURATE FACTUAL FINDINGS IN SUPPORT OF THAT AGGRAVATOR.

ISSUE III: THE TRIAL COURT ERRED IN FINDING, AND INSTRUCTING THE JURY ON, THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR; AND FURTHER ERRED BY USING, AND ALLOWING THE PROSECUTOR TO ARGUE TO THE JURY, A LEGALLY INAPPLICABLE "TRANSFERRED INTENT" THEORY TO FIND THIS AGGRAVATOR.

A. The Elements of CCP

B. Standard of Review

C. The Attempted Murder of Lissa Shaw was not "Cold" Within the Meaning of the CCP Aggravator, Nor Was it Proven Beyond a Reasonable Doubt to be Preplanned

D. The Doctrine of Transferred Intent is Legally Inapplicable to the Facts of this Case

E. The Murder of Charles Shaw was Neither Cold nor Preplanned Within the Meaning of the CCP Aggravator, and There was No Proof of Heightened Premeditation

ISSUE IV: THE DEATH SENTENCE IS DISPROPORTIONATE

(Initial Brief of Appellant, Case No. SC01-278).

After this Court affirmed the conviction and sentence, Diaz filed a lengthy Motion for Rehearing raising a number of claims, including arguing for the first time that Florida's capital sentencing scheme was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) (decided after the briefs had been filed in Diaz's direct appeal). This Court denied the rehearing and issued its mandate. Thereafter, Diaz petitioned the United States Supreme Court for certiorari review, but on April 26,

2004, his petition was denied. Diaz v. Florida, 541 U.S. 1011 (2004).

On April 15, 2005, Diaz timely filed a Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend with the trial court. The State filed "State's Response to Defendant's 'Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend'" (hereinafter "Response"). After years of public records litigation, Diaz received permission to file an amended 3.851 motion raising fifteen claims and numerous sub-claims which were ultimately denied by the trial court: 1) Defendant argues that Fla. Stat. §119.19 and Fla. R. Crim. P. 3.852 are unconstitutional, both facially and as applied to Defendant, because defense access to public records in the possession of state agencies has been withheld; 2) Defendant argues that the Rule 3.851 requirement that he file his postconviction motion one year after his conviction and sentence become final violates due process and equal protection guarantees; 3) Defendant argues that juror misconduct rendered the outcome of his trial, and his sentence, unreliable, and violated his due process rights; 4) Defendant argues that Florida Rule of Professional Responsibility 4-3.5(d)(4) is unconstitutional because it prohibits defense counsel from interviewing jurors in violation

of Defendant's equal protection rights; 5) Defendant argues that his death sentence is the result of "a pattern and practice of Florida prosecuting authorities, courts and juries to discriminate on the basis of race" in violation of the equal protection clause and eighth amendment; 6) Defendant argues that Defendant was unconstitutionally denied a jury of his peers drawn from a fair cross-section of the community. Defendant also argues that trial counsel was ineffective for failing to challenge the jury panel before voir dire began, to adequately investigate and question the jurors during voir dire about their racial biases, and for failing to challenge jurors for cause and using only six peremptory challenges; 7) Defendant argues that trial counsel was ineffective during the guilt phase, and that the State failed to disclose exculpatory evidence; 7(a) Defendant argues that the State failed to disclose exculpatory evidence, in the form of evidence of blood droplets in the Shaw home containing his DNA, which would have supported his contention that the shooting was a result of a confrontation with the victim rather than premeditation; 7(b) Defendant argues that trial counsel was ineffective for failing to adequately question the jury panel about their views on mental health, the insanity defense, and racial bias; 7(c) Defendant argues that trial counsel was ineffective for failing to strike jurors



Clark, Vinnedge and Markley for cause due to their exposure to pre-trial publicity, and for failing to use a peremptory challenge on juror Williams; 7(d) Defendant argues in a jumbled list of reasons that trial counsel was ineffective for failing to adequately investigate and prepare; 7(e) Defendant argues that trial counsel was ineffective for failing to present mental health evidence; 8) Defendant argues that he was denied a fair trial due to prosecutorial misconduct, including suppression of impeachment evidence in violation of Brady, and that trial counsel failed to object to the prosecutorial misconduct; 9) Defendant argues that he was denied the right to expert psychiatric assistance pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985); 10) Defendant argues that trial counsel was ineffective for failing to adequately investigate and prepare for the penalty phase and failing to introduce adequate mitigation evidence; 10(a) Defendant argues that trial counsel failed to present mitigation evidence during the penalty phase. Defendant argues that counsel did not present any testimony from a competent mental health expert at the penalty phase; 10(b) Defendant argues that trial counsel was ineffective for twice misstating the law to the jury during the penalty phase by informing them that the defense had to prove mitigators by a preponderance of the evidence; 10(c) Defendant argues that trial

counsel failed to challenge the aggravating factors; 10(d) Defendant argues that trial counsel failed to file a motion to recuse the trial judge; 11) Defendant argues that he is innocent of first-degree murder and cannot receive the death penalty. Defendant argues that his mental state and lack of intent makes him innocent of first-degree murder. He further argues that his history of severe mental illness places him within the class of defendants, like those under the age of 18 and those with mental retardation, who are categorically excluded from being eligible for the death penalty; 12) Defendant argues that counsel was ineffective and the trial court erred in allowing the jury to improperly consider nonstatutory aggravators; 13) Defendant argues that his death sentence is unconstitutional because (a) the law and instructions given shifted the burden to Defendant to prove that death was inappropriate, (b) the trial court employed a presumption of death in sentencing Defendant, and (c) the standard jury instructions unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing; 14) Defendant argues that lethal injection constitutes cruel and unusual punishment; the DOC unconstitutionally delegated its authority to create and implement lethal injection procedures to the AG's Office in violation of Article II section 3 of the Florida Constitution;

and the denial of court appointed counsel to represent Defendant in the federal courts on his Eighth Amendment claim (section 1983 civil rights action) is a violation of the Equal Protection Clause; and 15) Defendant argues that he is insane and cannot be executed. (PCR V84:13387-426).

On May 12, 2010, Petitioner filed a motion pursuant to Florida Rule of Criminal Procedure 3.203, alleging that he is mentally retarded. (PCR V26:3114-54). The trial court conducted evidentiary hearings on Diaz's motions on June 21-24, 2010 (PCR V93:1-V96:758) and on September 20-24, 2010. (PCR V97:1-V102:1219). Separate closing memoranda were filed on ineffective assistance of counsel claims and Diaz's mental retardation claim. (PCR V82:13087-123, 13181-216; V82:13124-144, 13145-180). On April 8, 2011, the court filed its order denying postconviction relief (PCR V84:13384-V85:13714) and a separate order finding Diaz not mentally retarded. (PCR V85:13715-V86:13938). The appeal from the denial of postconviction relief is currently pending before this Court in Diaz v. State, SC11-949.

**ARGUMENT IN OPPOSITION TO CLAIMS RAISED**

Petitioner raises three claims in the instant petition for habeas corpus, but each of these claims is procedurally barred. This Court has consistently recognized that a petition for habeas corpus "is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal." See Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992).

**CLAIM I**

**PETITIONER'S CLAIM BASED ON RING V. ARIZONA, 536 U.S. 584 (2002), IS PROCEDURALLY BARRED.**

In his first claim, Petitioner argues that Florida's capital sentencing scheme is unconstitutional based on Ring V. Arizona, 536 U.S. 584 (2002). After the briefs were filed in Diaz's direct appeal, but prior to the oral arguments being conducted, the United States Supreme Court issued its opinion in Ring. Diaz's appellate counsel filed a notice of supplemental authority with a copy of the Ring decision, and after this Court issued its opinion affirming Diaz's judgment and conviction, filed a motion for rehearing arguing the identical issue presented in the instant habeas petition. This Court denied his motion for rehearing, and Petitioner now raises the same claim for a second time.

The instant claim is procedurally barred as Petitioner did not preserve this issue by challenging the constitutionality of Florida's sentencing scheme both at trial and on direct appeal. See Evans v. State, 946 So. 2d 1, 15-16 (Fla. 2006). Furthermore, even if Diaz had properly preserved this issue, he was not entitled to relief based on Ring because of his prior violent felony convictions. In the instant case, in addition to being convicted of the first degree murder of Charles Shaw, Diaz was also simultaneously convicted by the jury of the attempted first degree murder of Lissa Shaw and aggravated assault with a firearm on a neighbor. This Court has consistently rejected Ring claims where the defendant has been convicted by a jury of contemporaneous violent felonies. See Walls v. State, 926 So. 2d 1156, 1174-75 (Fla. 2006) (stating that "[a] unanimous jury found Walls guilty beyond a reasonable doubt of [a contemporaneous murder, and that the murder was committed during the course of a burglary and a kidnapping], thereby satisfying the mandates of the United States and Florida Constitutions); see also Kimbrough v. State, 886 So. 2d 965, 984 (Fla. 2004); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003).

Accordingly, because the instant claim is procedurally barred and without merit, this Court should deny Petitioner's claim.

CLAIM II

PETITIONER'S CLAIM THAT HIS DEATH SENTENCE IS DISPROPORTIONATE AND THIS COURT FAILED TO UNDERTAKE A MEANINGFUL PROPORTIONALITY REVIEW ON DIRECT APPEAL IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner next argues that this Court failed to perform a proper proportionality review of his case on direct appeal, but Petitioner does not raise any allegation of ineffective assistance of appellate counsel. As this Court has repeatedly held, a "[h]abeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other postconviction motions." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). Petitioner's complaint regarding this Court's proportionality review is not properly raised in the instant habeas petition and should be denied. See Krawczuk v. State, \_\_\_ So. 3d \_\_\_, 2012 WL 1207215 (Fla. Apr. 12, 2012).

In the instant case, Petitioner's appellate counsel challenged the proportionality of his death sentence on direct appeal, and this Court rejected his claim. Diaz v. State, 860 So. 2d 960, 970-71 (Fla. 2003). Even if appellate counsel would have included an argument in his proportionality claim regarding observations made by the American Bar Association in a 2006 report, as Petitioner does in the instant habeas petition, such an argument would have been rejected by this Court. As this

Court noted in Smith v. State, 998 So. 2d 516, 528-29 (Fla. 2008), a claim that this Court's proportionality review is legally insufficient and unconstitutional because it does not include review of other factors, such as death cases from other states, is without merit. See also Rutherford v. State, 940 So. 2d 1112, 1118 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Diaz v. State, 945 So. 2d 1136, 1146 (Fla. 2006). Because Petitioner's challenge to this Court's proportionality review is procedurally barred and without merit, this Court should deny this aspect of Petitioner's claim.

### CLAIM III

#### **PETITIONER'S CLAIM THAT THIS COURT FAILED TO CONDUCT A PROPER HARMLESS ERROR ANALYSIS ON DIRECT APPEAL IS PROCEDURALLY BARRED AND WITHOUT MERIT.**

In his third claim, Petitioner asserts that this Court failed to conduct a proper harmless error analysis on direct appeal when the court struck the trial court's finding of the heinous, atrocious or cruel (HAC) aggravating factor, but affirmed the death sentence because the error was harmless given the two remaining aggravators (CCP and prior violent felony conviction) and the five mitigating circumstances. See Diaz v. State, 860 So. 2d 960, 965-68 (Fla. 2003). After this Court issued its opinion, Diaz's appellate counsel filed a motion for rehearing raising this exact same claim, and this Court denied the rehearing. Petitioner next filed a petition for writ of certiorari to the United States Supreme Court raising this claim, and the Court denied his petition. See Diaz v. Florida, 541 U.S. 1011 (2004).

The instant claim is procedurally barred in Petitioner's habeas petition. In Rodriguez v. State, 919 So. 2d 1252, 1287 (Fla. 2005), this Court addressed a similar claim and stated:

Rodriguez next argues that the Court failed to conduct a meaningful harmless error analysis when it considered the effect of improper prosecutorial argument and inadmissible hearsay testimony in its direct appeal review. This claim is procedurally barred. See Bottoson v. State, 813 So. 2d 31, 35 (Fla.



2002) ("This Court has consistently held that habeas claims wherein the defendant challenges this Court's previous standard of review in the case are procedurally barred."); see also Thompson v. State, 759 So. 2d 650, 657 n.6 (Fla. 2000) (stating that defendant's claim that this Court conducted improper harmless error analysis during direct appeal was improper "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on by this Court"). In addition, we note that Rodriguez questioned this Court's harmless error analysis in his motion for rehearing of his direct appeal, which the Court unanimously denied. Rodriguez is not entitled to relief on this claim.

Even if this Court were to address the merits of Petitioner's claim, this Court should find that it is meritless. In Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994), the defendant argued in his state habeas that this Court committed constitutional error when it failed to remand for resentencing after striking two aggravating circumstances on direct appeal. This Court rejected the merits of the claim and noted that the United States Supreme Court explained in Sochor v. Florida, 504 U.S. 527, 532, (1992), that federal law does not require a state appellate court to remand for resentencing when it determines that an invalid aggravating factor has been weighed by the sentencer, but the appellate court must "either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error." Hardwick, 648 So. 2d at 106; see also Geralds v. State, \_\_\_ So. 3d \_\_\_, 35 Fla. L. Weekly S503 (Fla. 2010).

Because the instant claim is procedurally barred as a claim that has previously been raised and rejected by this Court, and is also without merit, this Court should deny the instant habeas claim.

**CONCLUSION**

In conclusion, Respondents respectfully request that this Honorable Court DENY the instant petition for writ of habeas corpus.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Roseanne Eckert, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Southern Region, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida 33301, this 21st day of May, 2012.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

Respectfully submitted,

PAMELA JO BONDI  
ATTORNEY GENERAL

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STEPHEN D. AKE  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 14087  
Concourse Center 4  
3507 East Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
Telephone: (813) 287-7910  
Facsimile: (813) 281-5501  
Stephen.Ake@myfloridalegal.com

COUNSEL FOR RESPONDENTS