IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-__

JOEL DIAZ,

Petitioner,

v.

KENNETH S. TUCKER,
Secretary, Florida Department of Corrections

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. Diaz's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; claims demonstrating that Mr. Diaz was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentences violated fundamental constitutional guarantees.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Article I, Section 13, Florida Constitution. This petition presents issues which directly concern the constitutionality of Mr. Diaz's convictions and sentences of death.

Jurisdiction in this action lies in this Court, *see, e.g., Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged

herein arise in the context of a capital case in which this Court heard and denied Mr. Diaz's direct appeal. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Diaz requests oral argument on this petition.

STATEMENT OF CASE AND FACTS

Joel Diaz was indicted on November 18, 1997 in Lee County, Florida for attempted first-degree murder of his ex-girlfriend, Lissa Shaw, capital first-degree murder of her father, Charles Shaw, and aggravated assault on a neighbor. (R. 7-8).

Trial counsel presented a quasi-insanity/self-defense theory of defense. At the trial, defense counsel put Mr. Diaz on that stand to explain what happened and how he perceived the events that led him shooting Charles Shaw.

Joel Diaz and Lissa Shaw had lived together in an on-again, off-again relationship until August 1997. After the August separation they did not see other at first. Since he was not allowed to call over to her house when he wanted to, they had a system where he would page her using 247 instead of his own phone number. (T. 580-81). Lissa called him right back; he told her he missed her and she said she missed him too. (T. 580-81). After that they started being friends, and for a while they saw

each other often during her lunch breaks and such, although she did not spend the night with him. (T. 581-82). Mr. Diaz felt like they were both trying to work things out, and then some time in October "all of a sudden she just cut communication with me and I was left with no answers because I was not allowed to call her house. She changed her beeper number. So, yes, I was very depressed." (T. 582; 607). He had no idea why she had broken off all communication with him and he did not know whether their relationship was over; she had "done that before but then she would always call back. So I was left hanging." (T. 582-83).

On October 27, 1997, Mr. Diaz came home very late at night, started drinking some Crown Royale his sister had given him, and got depressed. (T. 584). He doesn't usually drink, and he got no sleep that night. (T. 584-85). Around 1:00 or 2:00 a.m., before his brother went to bed, Mr. Diaz asked him for a ride to a friend's house the next morning. (T. 585-86). Mr. Diaz then wrote a letter to his brother:

> 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.

He was drinking and emotional when he wrote the letter, but he was not planning on killing himself, nor was he planning or killing or shooting anyone else. (T. 632, 637-38). He just wanted to confront Lissa to find out answers. (T. 587, 592).

Jose Diaz dropped his brother off at Cross Creek Estates where the Shaws lived at 5:30 the next morning. Joel Diaz waited for Lissa Shaw to leave for work so he could talk to her about the relationship. (T. 591). Lissa refused to talk to him and she put her car in reverse and backed out of the garage. Mr. Diaz fired his gun at her as she sped away; she was hit in the neck and the shoulder. (T. 591-92). The last thing Lissa saw as she was driving away was her dad, in his underwear, coming out of the garage area and walking toward Mr. Diaz until they were facing each other in the front yard. (T. 303, 310, 316). Mr. Diaz was holding the gun in both hands and pointing it at Charles Shaw. (T. 303, 310). Charles Shaw, with his left hand swinging and his right hand pointing at Mr. Diaz, continued to walk toward Mr. Diaz until there were about five feet between them. (T. 303, 311). Lissa Shaw said that her father appeared to be yelling at Mr. Diaz. (T. 303, 311).

Deborah Wilson, a neighbor, was returning from her morning walk when she heard the gunshots. (T. 344-46). She heard tires squealing and saw a car come around the corner, hit the curb, and spin its wheels before heading out of the subdivision. (T.

347-48). A minute or two later, Wilson saw a man in dark pants and shirt walking backwards into the street with his hands behind his back. (T. 348-49, 355). Then Charles Shaw, clad in his briefs, came into her vantage point. (T. 349). Wilson saw the man in dark clothing standing in the street and Charles Shaw was pointing a finger at him. (T. 349-50). At some point, Charles Shaw left and she could not see him. She saw a motion that led her to believe that the other man was loading a gun and she left to find a phone. (T. 352-53).

Mr. Diaz testified at the trial that Charles Shaw kept coming toward him and he was backing up, until he ended up on the road, and then in the yard. (T. 593-94). Mr. Diaz wanted to walk away and Charles Shaw kept yelling at him that the cops were coming over and he was in big trouble—he was not going to get away. (T. 594, 614-16). Mr. Diaz was keeping him off by holding the gun on him. (T. 634). At one point, Charles Shaw tried to grab Mr. Diaz and they scuffled. (T. 614-15). The confrontation moved to the garage. Mr. Diaz was holding the gun and walking backwards; Charles Shaw was trying to corner him. (T. 617). Inside the garage it was dark, and Charles Shaw kept being aggressive; yelling and screaming and trying to jump on him. (T. 316, 634). Mr. Diaz continued to try to fend him off as he was doing before, but then they fought and Charles Shaw tried to wrestle the gun away from him. (T. 594, 618-19). In so doing, Charles Shaw struck Mr. Diaz in the fact with something—he did not know if it was his fist or an object such as a tool—and that is when Mr. Diaz "lost it."

(T. 594, 596-97, 619-20). Mr. Diaz chased Charles Shaw into the home where he shot him.

During the charge conference, on the question of premeditation, the trial judge observed that the doctrine of transferred intent did not apply. (T. 680). Defense counsel agreed, but the prosecutor suggested it might even though there was a separation of time between the time that Lissa Shaw sped away in her car and the confrontation between Charles Shaw and Joel Diaz. (T. 680-81). After hearing argument, the trial court agreed not to instruct the jury on transferred intent.

In closing argument, defense counsel argued that "this was a shooting that resulted after there was a confrontation outside in the yard, in the street, in the garage. This was a shooting that resulted in death after there was anger, rage, passion." (T. 730). After noting that prosecution witnesses Lissa Shaw and Deborah Wilson had corroborated that outside on the lawn Charles Shaw was angry and advancing while Mr. Diaz was backing up (T. 731), defense counsel turned his attention to what took place in the garage: "Mr. Diaz told you without anyone to contradict this, none of these other witnesses told you anything about this, that the confrontation worked its way into the yard, Mr. Shaw said the police were on their way, don't leave. They went into the garage and while they were in the garage . . . Joel Diaz ends up with a gash on the left side of his face."

In rebuttal, the prosecutor argued:

> The photographs that they are showing you of the Defendant, he says well, he punched me. Well, that's an abrasion and you heard the testimony, that's an abrasion. That's not a punch. Where did he get that? Who knows? When did it happen? Who knows? . . .It was all dried up because it was an old injury, who knows.
>
> The deputies told you apparently nobody paid much attention. Apparently they thought it was some type of birth mark. It was all dried up already because it was an old injury, who knows.
>
> You heard the evidence that there were some blood drops in different areas of the home. Well, what we also know is that when Joel Diaz was in the garage shooting at Lissa Shaw that her windows broke and you saw in the pictures, that there's glass all over her seat. There was glass outside. There was glass everywhere. Did he cut himself and left little drops of blood in the home, we don't know.

(T. 750-52).

On July 28, 2000, Mr. Diaz was found guilty of one count of first-degree murder, one count of attempted first-degree murder, and one count of aggravated assault with a firearm. (T. 791). After the penalty phase, the jury rendered an advisory verdict, recommending the death penalty by a vote of nine-to-three. (T. 892-93). The trial court sentenced Mr. Diaz to death on January 29, 2001 after finding three aggravating factors—(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)—outweighed the mitigating factors of (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). (R. 210-14).

On direct appeal, Mr. Diaz raised three issues: (1) whether the trial court erred in finding and instructing the jury on the HAC aggravating factor; (2) whether the trial court erred in finding and instructing the jury on the CCP aggravating factor; and (3) whether the death sentence is disproportionate. A majority of this Court agreed that the trial court erred in finding that the HAC aggravator applied in this case; however, there was sharp disagreement regarding both the analysis of the harmless error standard with respect to the death sentence as well as the application of CCP based on "transferred intent." *Diaz v. State*, 860 So. 2d 960 (Fla. 2003). A majority of this Court upheld the CCP aggravator by

relying on a novel use of the transferred intent doctrine to transfer the heightened premeditation from Lissa Shaw to Charles Shaw. Justice Pariente concurred in affirming the convictions but dissented in a written opinion, joined by former Justices Anstead and Shaw, as to the death sentence. Justice Pariente did not agree with this Court's application of the doctrine of transferred intent in this case:

> I would also strike the CCP aggravator because the doctrine of transferred intent, relied on by the majority, is not applicable in this case. Diaz clearly acted with heightened premeditation in planning the killing of his former girlfriend, Lissa Shaw, and seriously wounded her in committing attempted murder as she fled from Diaz when he confronted her at her parents' home. The murder of her father, Charles Shaw, occurred some minutes later, after a confrontation that began in the yard and then moved to the garage and a bedroom of the Shaw home.

Diaz, 860 So. 2d at 972 (Pariente, J., dissenting). With respect to the harmless error analysis, Justice Pariente wrote

> I do not agree that after striking the HAC aggravator, on which the jury was instructed and which the trial court found, this Court can state beyond a reasonable doubt that the error did not contribute to the imposition of the death penalty. . . In this case, there was a nine-to-three vote on the advisory sentence and substantial mitigation, including the finding that the murder was committed while the defendant was under the influence of extreme emotional disturbance, the age of the defendant at the time of the offense, and the defendant's lack of a significant history of prior criminal activity. . . Consequently, I believe that striking the HAC aggravator alone requires that we reverse Diaz's sentence and remand for a new penalty phase.

Diaz, 860 So. 2d at 972 (Pariente, J., dissenting). Justice Pariente also noted that under *Hess v. State*, 794 So. 2d 1249, 1266 (Fla. 2001), the prior violent felony aggravator in this case carries less weight. Id. at 1266 n. 10.

After the completion of briefing on direct appeal before this Court, but before Mr. Diaz's death sentence became final, the United States Supreme Court decided the seminal case of *Ring v. Arizona*, 536 U.S. 584 (2002). On September 24, 2003, Mr. Diaz filed a motion for rehearing in this Court in which he challenged the sentence based on *Ring*. The motion was denied and a petition for writ of certiorari in the United States Supreme Court challenging the convictions and death sentence.

At his postconviction evidentiary hearing, Mr. Diaz presented evidence in support of his ineffective assistance of counsel claim that further supports that a confrontation occurred between Charles Shaw and Mr. Diaz in which Mr. Diaz was injured. Mr. Diaz presented DNA evidence that his blood was found throughout the Shaw residence and his DNA was present in fingernail scrapings from the victim Charles Shaw. (PCR. 3426-28, DE 9). Through trial counsel's ineffectiveness and the efforts of the State, neither circuit court nor this Court on direct appeal were aware of this evidence that supports the defense theory at trial of an intervening confrontation between Charles Shaw and Mr. Diaz that renders the transferred intent doctrine inapplicable to this case.

This Petition is being filed simultaneously with Mr. Diaz's initial brief following the denial of his motion for postconviction relief. The Petitioner specifically incorporates the facts presented in his initial brief herein.

CLAIM I

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. DIAZ OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO NOTICE, A JURY TRIAL, AND HIS RIGHT TO DUE PROCESS.

After the completion of briefing on direct appeal before this Court, but before Mr. Diaz's death sentence became final, the United States Supreme Court decided the seminal case of *Ring v. Arizona*, 536 U.S. 584 (2002). There, the court held that under the Sixth Amendment, a sentencing court cannot make factual findings with respect to aggravating circumstances necessary for the imposition of the death penalty. *Id*. at 609. Rather, such findings are constitutionally required to be made by the jury. *Id*. Mr. Diaz's death sentence is unconstitutional under *Ring* because it was imposed by the trial court, which made factual findings as to the existence of aggravating factors.

This Court has acknowledged that the decision in *Ring* served to "cast doubt upon the constitutionality of the death penalty laws of many other states, including Florida, where judges are partially or entirely responsible for deciding whether to sentence defendants to death." *Johnson v. Florida*, 904 So. 2d 400, 406 (Fla. 2005). Nevertheless, Florida has continued to carry out executions without

resolving the question of how the dictates under *Ring* apply to Florida's death penalty scheme. *See Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002). In *State v. Steele*, 921 So. 2d 538 (Fla. 2005), this Court noted that it had not yet forged a majority view about whether *Ring* applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. In *Steele*, the Court dealt with the State's pretrial challenge to a trial judge's use of a special verdict form in the penalty phase. Although the Court found that the use of a special verdict form was a departure from the essential requirements of law, the Court urged the Florida legislature to revisit and correct the State's capital sentencing scheme in light of *Ring*:

> Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote.

Id. The Florida legislature has yet to take action. More recently, a federal district court has held in another capital case that Florida's death penalty scheme violates *Ring* because of the lack of meaningful factfinding by the jury. *Evans v. McNeil*, No. 2:08-cv-14402 (S.D. Fla. filed June 21, 2011).

> As the Florida sentencing statute currently operates in practice, the Court finds that the process completed

> before the imposition of the death penalty is in violation of *Ring* in that the jury's recommendation is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge.

Id. at *89.

Florida's capital sentencing scheme is unconstitutional and deprived Mr. Diaz of his rights to notice, to a jury trial, and of his right to due process under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Florida law provides that a person convicted of first-degree murder must be sentenced to life in prison "unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 result in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death." Fla. Stat. § 775.082. Because Florida's death penalty statute makes imposing a death sentence contingent upon findings of "sufficient aggravating circumstances," and "insufficient mitigating circumstances," and gives sole responsibility for those findings to the judge, it violates the Sixth Amendment. Florida law provides for the jury to hear evidence and "render an advisory sentence." Fla. Stat. § 921.141(2). However, the jury's role does not satisfy the Sixth Amendment under *Ring*. Section 921.141(2) does not require a jury verdict,

but an "advisory sentence." A Florida penalty phase jury does not make findings of fact.

The jurors in Mr. Diaz's case were clearly instructed by the trial court judge that they were not the ultimate sentencer and that their role was limited to issuing a recommendation and advisory opinion to the judge, who was solely responsible for sentencing. (*See, e.g.,* T. 84-85)("Now, if an only if a verdict of guilty of murder in the first degree is rendered by the jury in this case, as soon as practical, after the verdict is reached, the jury will reconvene for the purposes of **rendering an advisory recommendation** as to what sentence should be imposed. …The final determination of a sentence is up to [the court].") (emphasis added). It remains unknown upon which aggravators the nine jurors who recommended the death sentence relied. The trial court, however, found three aggravating circumstances to exist, and accorded them all great weight.[1] *Diaz v. State*, 860 So. 2d 960, 964 (Fla. 2003). The circuit court also found six statutory mitigating circumstances to exist,

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

to which it accorded varying weight, before concluding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances.[2] *Id*.

Florida law does not permit the imposition of the death penalty unless the trial court finds that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. § 921.141(3), Fla. Stat. (2009). To uphold a death sentence based in part on any aggravating circumstance not based on a specific jury finding is contrary to the dictates of *Ring*. In other words, the *Ring* Court's exception of the prior violent felony aggravator from the jury finding requirement does not compel the conclusion that findings concerning other aggravators may also be made by the judge alone. Since there have been few, if any, cases in which the death penalty has been upheld solely upon the basis of the prior violent felony aggravator, the trial court's reliance upon the HAC and CCP aggravators in sentencing Mr. Diaz to death, without a jury finding on those aggravator, constitutes a violation of the Sixth Amendment that cannot be harmless error. *See Duest v. State*, 855 So. 2d 33,

[2] 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).

52 (Fla. 2003) (Anstead, J., concurring in part and dissenting in part) (explaining that the Court's decision in effect "adopts a per se harmlessness rule as to *Apprendi* and *Ring* claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty" and stating that "this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.").

Ring cannot be satisfied in this way. Mr. Diaz is entitled to a new penalty phase hearing.

CLAIM II

MR. DIAZ'S DEATH SENTENCE IS DISPROPORTIONATE AND THIS COURT'S FAILURE TO UNDERTAKE A MEANINGFUL PROPORTIONALITY REVIEW ON DIRECT APPEAL VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST ARBITRARY AND CAPRICIOUS DEATH SENTENCES.

This Court reviews all cases in which a death sentence is imposed to determine whether death is a proportionate penalty. "The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is 'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper." *Tillman v. State*,

591 So. 2d 167, 169 (Fla. 1991). Yet this Court's narrow definition of "cases in which death previously was deemed improper" renders proportionality review in Florida—and in Mr. Diaz's case, specifically—meaningless. Other than cases involving codefendants, the Court only considers other cases in which the defendant was sentenced to death and in which the death sentence was upheld on appeal. *See England v. State*, 940 So. 2d 389, 408 (Fla. 2006) ("the Court looks at the totality of the circumstances to determine if death is warranted in comparison to other cases where the sentence of death has been upheld."). It does not consider factually similar cases or similarly situated defendants for which the death penalty was not sought, or for which the death penalty was sought but not imposed.

In 2006, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team issued a report containing its conclusions from its study of Florida's death penalty. *See* American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006 (hereinafter "ABA Report on Florida"). The report made clear that Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable, or accurate. Among the concerns detailed in the report was this Court's skewed version of proportionality review, whereby this Court only reviews cases "where the death penalty was not imposed

in cases involving multiple codefendants." ABA Report on Florida at xxii. But in addition to this, the ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report on Florida at 212. The ABA Report noted "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 213. The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. It is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

In 2008, the U.S. Supreme Court denied certiorari in a Georgia capital case where the question presented was "whether Georgia's current administration of its death penalty violates the Eighth Amendment's guarantee against arbitrariness and discrimination in capital sentencing." *Walker v. Georgia*, 129 S. Ct. 453 (2008) (Stevens, J., statement concerning the denial of certiorari). Although the Georgia Supreme Court had previously stated that in conducting the statutorily required

proportionality review it "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed," *Stephens v. State*, 227 S.E.2d 261, 262 (Ga. 1976), the court had moved away from that practice. In his statement concerning the denial of certiorari in *Walker v. Georgia*, Justice Stevens stated that including these cases in which death was not imposed in the inquiry is "an essential part of any meaningful proportionality review … because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Walker v. Georgia*, 129 S. Ct. 453 (2008) (Stevens, J., statement concerning the denial of certiorari).

On direct appeal, this Court failed to consider cases in which the death penalty was not sought or not imposed in its proportionality review of Mr. Diaz's death sentence. Rather, the Court conducted a perfunctory tally of the aggravation versus the mitigation presented at trial and rejected the contention that Mr. Diaz's case falls into the category of killings arising from domestic disputes in which this Court has frequently found the death penalty to be disproportionate:

> Although we have rejected the trial court's finding of HAC, two valid aggravators remain: (1) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (2) the defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person. As we noted in *Dixon*, "When one or more of the aggravating

circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . . .” 283 So. 2d at 9. CCP is one of the “most serious aggravators set out in the statutory sentencing scheme.” *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999). The trial court also found five statutory mitigating circumstances. *See supra* note 4.

Diaz argues that this Court has consistently found death sentences disproportionate when the heated and emotional nature of the case negates cold calculation. Diaz cites cases holding that, in some circumstances, “the fact that the . . . killing arose from a domestic dispute tends to negate cold, calculated premeditation.” *Santos v. State*, 591 So. 2d 160, 162 (Fla. 1991). We already have found, however, that this murder was cold and calculated. This case is not properly characterized as a “heated, domestic confrontation,” or even as an incident resulting from a domestic dispute. At the time of the murder, Diaz and Lissa Shaw no longer lived together, were not involved in a relationship, and in fact, had not spoken for over a month. Moreover, Diaz planned to murder Lissa with no purported domestic provocation, such as a new love interest in Lissa’s life. Simply because Diaz and Lissa Shaw once had a domestic relationship does not transform this case into a “domestic dispute.”

Even if this case were properly characterized as a domestic dispute, we have upheld the imposition of the death penalty in such circumstances. *See, e.g., Pope v. State*, 679 So. 2d 710 (Fla. 1996) (finding defendant’s death sentence proportionate for beating and stabbing death of girlfriend where there were two aggravators, both statutory mental mitigators, and several nonstatutory mitigators).

Diaz v. State, 860 So. 2d 960, 971 (Fla. 2003). The Court ultimately concluded that Mr. Diaz's death sentence was proportionate when compared to other death sentences previously affirmed by the Court. *Id*.

The vastly different picture of the case painted in postconviction warrants this Court's reconsideration of proportionality in Mr. Diaz's case. Neither the jury, trial court, nor this Court on direct appeal knew that Mr. Diaz was seriously ill as a baby, exposed to toxic pesticides as a toddler, worked in the harsh conditions of farmwork before reaching adolescence, and grew up surrounded by violence and abject poverty. In considering whether Mr. Diaz's death sentence was proportionate, this Court did not take into account that Mr. Diaz was sexually abused and that he had cognitive deficits that colored both how he saw the world and the decisions that he made. Neuropsychological testing performed during the postconviction proceedings revealed deficits in the subcortical structures of his brain that are known to be vulnerable to toxic trauma and memory impairment. IQ testing showed that Mr. Diaz's IQ is anywhere from 57 (in the low range of mild mental retardation) and 86 (representing the lowest 15% of the population). There is no competent evidence that would support a finding that he is of "average intelligence." In any event, this Court never considered that Mr. Diaz's IQ was extraordinarily low based on the results of the WAIS–the "gold" standard for IQ testing.

In rejecting Mr. Diaz's argument on direct appeal that the heated and

emotional nature of his case negates the cold, calculated, and premeditated aggravator, this Court was unable to consider the full dynamics of the case as presented in postconviction. Mr. Diaz presented evidence at the evidentiary hearing in support of his mental retardation claim that showed that he never lived independently. He went from living with his family to moving in with Lissa Shaw. (Vol. 98, 309). Most household chores were taken care of by others. (Vol. 98, 308). While he obtained a driver's license at one point, he was unable to keep it valid. (Vol. 98, 312). Mr. Diaz had never gone on his own to see a healthcare provider and in fact had never seen a dentist until he got to death row. (Vol. 98, 335). Mr. Diaz never had a checking account or a credit card. (Vol. 98, 308). He paid for everything with cash. *Id*. He bought several cars: one stopped working a month after he bought it; another turned out to have been stolen; and according to neuropsychologist Dr. Antonio Puente, "the best one that really just describes it all is the purchase of his first vehicle for $500 from a family friend, that happened to be a Pinto." (Vol. 98, 310; DE 144). As another example of Joel's naïveté and money management skills, Dr. Puente and sister Minerva Diaz both described a time when Joel made a substantial amount of money for a gold crucifix that turned out to be fake. (Vol. 97, 144).

Lissa Shaw was a few years older than Mr. Diaz and the dynamics of the relationship were such that he was intimidated because she had more life experience.

She had difficulty with her own family as they were prejudiced against Mr. Diaz because he was Hispanic. Joel had difficulty with intimate communication. (Vol. 99. 557-59). After Lissa moved back with her family, Mr. Diaz thought he saw her mother's van in his neighborhood and his trailer was burglarized. (Vol. 99, 560-61). During the weeks leading up to the crime, Mr. Diaz was distraught and depressed according to his friend, Melissa McKemy (Plourde). (Vol. 99, 189-92). The night before the crime, Mr. Diaz could not sleep and he stayed up drinking whiskey and smoking marijuana, further exacerbating his already limited ability to reason. In psychiatrist Dr. Richard Dudley's opinion, Mr. Diaz did not have the capacity for premeditated murder and he met the criteria for both statutory mitigators. (Vol. 99, 561-64).

The evidence presented in postconviction but not at trial that FDLE DNA reports—which the State actively sought to keep from the jury—corroborated Mr. Diaz's theory of defense that (1) he was retreating when Charles Shaw hit him, and (2) he went to the home to try to understand why Lissa Shaw broke up with him. The LCSO photographs showed blood droplets on papers and on the desk in Lissa Shaw's bedroom. The DNA found in the fingernail scrapings could corroborate that Charles Shaw hit Joel Diaz in the face. In other words, the information from the FDLE could have assisted the defense on two separate issues and Garber intended to call the analyst, Darren Esposito, as a witness. (Vol. 93, 46-58).

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam). Thereafter, Florida adopted a new scheme that was reviewed by the United States Supreme Court in *Proffitt v. Florida,* 428 U.S. 242 (1976). In *Proffitt,* the Supreme Court concluded:

> Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. **Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.** As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

428 U.S. at 259-60 (emphasis added). Mr. Diaz's death sentence does not meet the standard envisioned under *Proffitt.*

CLAIM III

THIS COURT FAILED TO CONDUCT A PROPER HARMLESS ERROR ANALYSIS ON DIRECT APPEAL.

On direct appeal, Mr. Diaz challenged the circuit court's findings on the statutory aggravators of cold, calculated, and premeditated (CCP) and heinous,

atrocious, and cruel (HAC). A majority of this Court agreed that the trial court erred in finding that the HAC aggravator applied in this case; however, there was sharp disagreement regarding both the analysis of the harmless error standard to the death sentence as well as the application of CCP based on a "transferred intent." *Diaz v. State*, 860 So. 2d 960 (Fla. 2003).

Adopting the test set forth in *Chapman v. California*, 386 U.S. 18 (1967), this Court held:

> The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The test "is to be rigorously applied." *Id.* at 1137.

> **The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test**. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id. at 1139 (emphasis added). A proper harmless error analysis in the context of an improper aggravating factor being stricken on appeal requires that this Court determine whether there is a reasonable possibility that the error affected the sentence. *Cooper v. State*, 43 So. 3d 42, 43 (Fla. 2010); *Jennings v. State*, 782 So.

2d 853, 863 n. 9 (Fla. 2001). This Court has cautioned that "Regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weigh process in favor of death." *Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977).

In the instant case, Justice Pariente concurred in affirming the convictions but dissented in a written opinion, joined by former Justices Anstead and Shaw, as to the death sentence:

> I do not agree that after striking the HAC aggravator, on which the jury was instructed and which the trial court found, this Court can state beyond a reasonable doubt that the error did not contribute to the imposition of the death penalty. Under *Hill v. State,* 643 So.2d 1071, 1073 (Fla. 1994), which is cited by the majority, error in finding an impermissible aggravator can only be harmless beyond a reasonable doubt if there is "no reasonable possibility" that the evidence presented in mitigation is sufficient to outweigh the remaining aggravators.
>
> In this case, there was a nine-to-three vote on the advisory sentence and substantial mitigation, including the finding that the murder was committed while the defendant was under the influence of extreme emotional disturbance, the age of the defendant at the time of the offense, and the defendant's lack of a significant history of prior criminal activity. Thus, the erroneous submission of the weighty aggravator of HAC to the jury and the trial court's reliance on HAC in the sentencing order cannot be harmless beyond a reasonable doubt in their effect on the jury recommendation and imposition of the death penalty.

> Consequently, I believe that striking the HAC aggravator alone requires that we reverse Diaz's sentence and remand for a new penalty phase.

Diaz, 860 So. 2d at 972. Justice Pariente also noted that under *Hess v. State,* 794 So. 2d 1249, 1266 (Fla. 2001), the prior violent felony aggravator in this case carries less weight because it is not based on a significant history of violent crimes. *Id.* at 972 n. 10.

Additionally, the erroneous (at worst) or tenuous and ill-fitting (at best) application of the transferred intent doctrine to support the CCP aggravator in this case undoubtedly weakens the consideration due to that factor in the harmless error analysis. None of the cases relied upon by the majority to apply the doctrine of transferred intent to the CCP aggravator involved two separate incidents as in Mr. Diaz's case. As Justice Pariente acknowledged, "Diaz did not shoot Charles Shaw in the course of the attempted murder of Lissa." *Diaz v. State*, 860 So. 2d 960, 972 (Fla. 2003). Rather, the murder of Charles Shaw "occurred some minutes later, after a confrontation that began in the yard and then moved to the garage and a bedroom of the Shaw home. Diaz did not shoot Charles Shaw in the course of the attempted murder of Lissa." *Id*. In postconviction, Mr. Diaz has presented additional evidence that supports that the murder of Charles Shaw occurred after a physical confrontation between Mr. Diaz and Charles Shaw in which Mr. Diaz was injured and bleeding. This evidence was in the possession of the State at the time

of trial but, due to trial counsel's ineffectiveness and the State's active efforts to keep this evidence out, the jury never heard it.

As Justice Pariente explained, given the nine-to-three jury vote, the substantial mitigation found by the trial judge, the weightiness of the HAC aggravator, and the relative weakness of the remaining aggravators, it simply cannot be stated beyond a reasonable doubt that there is no reasonable possibility that the improper finding of HAC affected Mr. Diaz's death sentence.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons and in the interest of justice, Mr. Diaz respectfully urges this Court to grant habeas corpus relief.

Respectfully submitted,

_____
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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Stephen D. Ake, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, this _____ day of February, 2012. Counsel further certifies that this petition is typed in Times New Roman 14-point font.

_____
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