IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2313

ANGEL NIEVES DIAZ,

Petitioner,

vs.

JAMES MCDONOUGH, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbol "DAR." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal.

STATEMENT OF THE CASE AND FACTS

This petition is being pursued concurrently with the appeal from the orders denying Defendant's second and third motions for post conviction relief. *Diaz v. State*, SC06-2259 & SC06-2305. The State will therefore rely on its statement of the case and facts contained in its brief in that matter, with the following additions:

At the sentencing hearing, the trial court orally pronounced its findings. (DAR. 1468-69) When the issue of the State drafting the sentencing order and presenting its reasons for entering into a plea agreement with Toro was raised, Defendant did not object and in fact affirmatively agreed to having the reasons for the plea provided in a written proffer. (DAR. 1470-71) On direct appeal, Defendant raised no issue regarding the authorship of the sentencing order.

Instead, Defendant raised a claim regarding the fact that the State had written the sentencing order for the first time in his initial motion for post conviction relief. (PCR. 207-13) In

presenting the claim, Defendant included a few conclusory lines that counsel was ineffective for failing to object. *Id.* The lower court denied the claim as procedurally barred. (PCR-SR. 1) Defendant raised the claim again in his first state habeas petition and included conclusory assertions of ineffective assistance of appellate counsel. Petition, FSC Case No. 74,927, at 74-80. This Court affirmed the denial of post conviction relief and denied the state habeas petition, finding that the claim raised in the post conviction appeal was barred and the habeas claim was without merit. *Diaz v. Dugger*, 719 So. 2d 865, 868 & n.6 (Fla. 1998).

ARGUMENT

I. THE CLAIM THAT DEFENDANT'S SENTENCE IS DISPROPORTIONATE SHOULD BE DENIED.

Defendant first asserts that he is entitled to relief because his sentence is disproportionate to the sentence of Angel Toro, his codefendant. Defendant relies on the evidence presented in his third motion for post conviction relief to assert that the evidence showed that Toro was the shooter. However, Defendant is entitled to no relief, as this claim is barred and without merit.

This Court has repeatedly stated that habeas is not to be used as an attempt to obtain a second appeal of an issue that was raised and rejected on direct appeal. *Patton v. State*, 878 So. 2d 368, 377 (Fla. 2004). As such, this Court considers arguments that appellate counsel was ineffective for failing to brief a claim he raised "adequately" as procedurally barred in habeas petitions. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). This is particularly true of proportionality claims as this Court has recognized that it has an independent duty to review the sufficiency of the evidence and proportionality. *Jennings v. State*, 718 So. 2d 144, 154 (Fla. 1998)(Court will independently review the sufficiency of the evidence and the proportionality of the sentence). This Court has also stated that habeas is not appropriate to raise a claim that is properly

presented in a post conviction proceeding. *Parker v. State*, 550 So. 2d 459, 460 (Fla. 1989). This Court has also held that claims cannot be asserted in a successive habeas petition when they were available at the time of a prior proceeding. *See Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994).

Here, Defendant argued on direct appeal that his death sentence should be vacated because the jury was not instructed that it had to make findings pursuant to *Enmund/Tison* and because there was evidence that Toro was the triggerman but he received a life sentence. Initial Brief of Appellant, FSC Case No. SC68493, at 33-39. This Court rejected these claims and in doing so refused to determine whether Appellant was actually the triggerman:

> Diaz next argues that we must vacate his death sentence because the court failed to instruct the jury on the intent necessary to support a sentence of death under *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). As we recently noted in *Jackson v. State*, 502 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920, 107 S. Ct. 3198, 96 L. Ed. 2d 686 (1987), the United States Constitution does not require a specific jury finding of the requisite intent. Such findings may be made in an "adequate proceeding before some appropriate tribunal -- be it an appellate court, a trial judge, or a jury." *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 700, 88 L. Ed. 2d 704 (1986) (footnote omitted).
>
> The United States Supreme Court recently revisited *Enmund* in *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 1688, 95 L. Ed. 2d 127 (1987), stating
>
> > *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence -- the taking of human life -- the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances.

> Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

The court concluded that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* (footnote omitted).

Turning to the instant case, Candice Braun testified that on the night of December 29, 1979, Diaz returned to their home and told her that Angel Toro shot a man during the robbery. Gajus, however, who occupied the neighboring cell during Diaz's pre-trial incarceration, provided evidence that Diaz shot the victim. He testified as follows:

> [Diaz] indicated that he shot the man.
>
> Q. Where did he indicate he shot the man?
>
> A. In the chest.
>
> Q. Did he ever come out and say to you in the words, "I shot the man in the chest"?
>
> A. No, he did not.
>
> Q. You were inferring that from his indications?
>
> A. Yes.

We need not determine, however, whether this evidence supports a finding of intent to kill. As in *Tison*, Diaz was actively involved in and present during the commission of the crimes. He and his fellow robbers each discharged a gun during the robbery. There is evidence that Diaz's gun had a silencer. Eight to twelve persons occupied the bar at the time of the robbery. Based on our review of the record, we find that Diaz was a major participant in the felonies and at the very least was

> **recklessly indifferent to human life. The Enmund/Tison culpability requirement is thus satisfied.**
>
> * * * *
>
> Diaz contends, however, that his death sentence is disproportionate to his crimes because there is insufficient evidence that he shot the victim and his codefendant received a life sentence. We disagree. **We have already determined that death is appropriate under *Enmund* and *Tison*, even assuming insufficient evidence that Diaz shot the victim.** Further, although a codefendant's sentence may be relevant to proportionality where, for instance, one defendant, as the dominant force, is more culpable than a codefendant follower, *see Marek v. State*, 492 So.2d 1055 (Fla. 1986), **"prosecutorial discretion in plea bargaining with accomplices . . . does not violate the principle of proportionality."** *Garcia v. State*, 492 So.2d 360, 368 (Fla.), *cert. denied*, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986). We have conducted a review of similar cases and find that the death sentence is not comparatively disproportionate. *See, e.g., Jackson*; *Blanco v. State*, 452 So.2d 520 (Fla. 1984), *cert. denied*, 469 U.S. 1181, 83 L. Ed. 2d 953, 105 S. Ct. 940 (1985).

Diaz v. State, 513 So. 2d 1045, 1048, 1049 (Fla. 1987)(emphasis added).

Moreover, Defendant claimed in his first motion for post conviction relief as part of a *Brady* claim that Gajus had lied about Defendant admitting "complicity" to him and Defendant's ability to speak English. This Court rejected this claim as meritless. *Diaz v. Dugger*, 719 So. 2d 865, 868 & n.7 (Fla. 1998). Defendant again raised this claim as a newly discovered evidence claim in his third motion for post conviction relief. The lower court denied the claim and that denial is the subject of the concurrent post conviction appeal.

Since the claim was raised on direct appeal, was available at the time of Defendant's first habeas petition and is properly raised in a motion for post conviction relief, it is barred in this proceeding. The claim should be denied.

II. THE *CRAWFORD* CLAIM SHOULD BE DENIED.

Defendant next asserts that he is entitled to habeas relief because *Crawford v. Washington*, 541 So. 2d 36 (2004), was allegedly violated at his penalty phase through the admission of testimony regarding the facts of his prior conviction. However, Defendant is entitled to no relief.

Initially, the State would note that this Court has already determined that *Crawford* does not apply retroactively to cases that were final at the time it was issued. *Chandler v. State*, 916 So. 2d 728 (Fla. 2005), *cert. denied*, 127 S. Ct. 382 (2006); *Breedlove v. State*, 916 So. 2d 726 (Fla. 2005), *cert. denied*, 127 S. Ct. 238 (2006). Here, Defendant's conviction has been final since the United States Supreme Court denied certiorari from direct appeal on February 22, 1988. *Diaz v. Florida*, 484 U.S. 1079 (1988). *Crawford* was not decided until March 8, 2004. As such, Defendant is entitled to no relief.

Moreover, even if *Crawford* was retroactive, Defendant would still be entitled to no relief, as the claim is procedurally barred. No issue regarding the allegedly improper admission of hearsay at the penalty phase was raised on direct appeal. 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

Defendant did not raise any issue regarding the admission of hearsay on appeal, this claim is barred.

Even if the claim was not barred and the United States Supreme Court were to hold that *Crawford* were retroactive, Defendant would still be entitled to no relief. While this Court held in *Rodgers v. State*, 31 Fla. L. Weekly S705 (Fla. Oct. 26, 2006), that the Confrontation Clause and *Crawford*'s interpretation of the clause applies to the penalty phase, the United States Supreme Court has never held that the Confrontation Clause applies to the penalty phase. Instead, in *Williams v. New York*, 337 U.S. 241 (1949), the United States Supreme Court held that trial courts were permitted to consider evidence in making a sentencing decision that was "obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine." *Id.* at 245; *see also United States v. Grayson*, 438 U.S. 41, 45-50 (1978); *United States v. Tucker*, 404 U.S. 443, 446-47 (1972); *Williams v. Oklahoma*, 358 U.S. 576, 583-84 (1959). As late as 1999, Justice Scalia, the author of *Crawford*, noted that the Sixth Amendment right to confront witnesses did not apply at penalty phase proceedings. *Mitchell v. United States*, 526 U.S. 314, 337 (1999)(Scalia, J., dissenting). Nothing in *Crawford* suggests that these cases have been overruled by it. *Crawford* concerned the admission of testimonial hearsay during a trial on guilt and did not even address the applicability of its new rule to the admission

of hearsay at a sentencing hearing. Under these circumstances, any decision by the United States Supreme Court that *Crawford* applied retroactively would not automatically entitle Defendant to relief. Instead, Defendant would need to show that *Rodgers* applied retroactively. However, for the same reasons that this Court already determined that *Crawford* would not apply retroactively, there is no reason to apply *Rodgers* retroactively. The claim should be denied.

Even if Defendant was entitled to application of *Crawford*, he would still be entitled to no relief as any error would be harmless. 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. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Hopkins v. State*, 632 So. 2d 1372, 1377 (Fla. 1994). At trial, the State presented certified copies of Defendant's convictions for armed robbery and the murder of the director of the drug treatment facility. (DAR. 270-78, 1382-85) The State also introduced a certified copy of a warrant for Defendant's arrest on escape charges. (DAR. 280-83) This Court has previously held that admission of certified copies of convictions renders the admission of hearsay testimony about them harmless. *Rodgers*, 31 Fla. L. Weekly at S707; *Hudson v. State*, 708 So. 2d 256, 261 (Fla. 1998); *Tompkins v. State*, 502 So. 2d 415, 420 (Fla. 1986). As such, any error is harmless. The

claim should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Suzanne Myers Keffer, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this ___ day of December, 2006.

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SANDRA S. JAGGARD
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CERTIFICATE OF COMPLIANCE

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

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SANDRA S. JAGGARD
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