

IN THE SUPREME COURT OF FLORIDA

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No. SC04-1241

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**KENNETH ALLEN STEWART** ,  
*Petitioner*

**versus,**

**JAMES V. CROSBY,**  
**Secretary, Florida Department of Corrections,**  
*Respondent.*

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PETITION FOR WRIT OF HABEAS CORPUS

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

INTRODUCTION ..... 1

PROCEDURAL HISTORY ..... 2

GROUND FOR HABEAS CORPUS RELIEF ..... 5

MR. STEWART’S RIGHTS OF CONFRONTATION WERE VIOLATED  
AT HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH,  
AND FOURTEENTH AMENDMENTS TO THE UNITED STATES  
CONSTITUTION. .... 6

CONCLUSION AND RELIEF SOUGHT ..... 20

CERTIFICATE OF SERVICE ..... 21-22

CERTIFICATE OF COMPLIANCE ..... 22

## TABLE OF AUTHORITIES

Crawford v. Washington, 124 S.Ct. 1354, 1364 (2004) 6-8, 10, 12, 15, 16, 17, 18, 19	
Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991) . . . . .	17
Dudley v. State, 545 So.2d 857 (Fla.1989) . . . . .	17
Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991) . . . . .	17
Linkletter v. Walker, 381 U.S. 618 (1965) . . . . .	18, 19
Morton v. State, 689 So.2d 259, 262-65 (Fla.1997) . . . . .	17
Ohio v. Roberts, 100 S.Ct. 2531 (1980) . . . . .	6, 7, 19, 20
State v. Gunsby, 670 So.2d 920 (Fla.1996) . . . . .	17
Stewart v. State, 549 So.2d 171 (Fla. 1989) . . . . .	3
Stewart v. State, 588 So.2d 972 (Fla. 1991) . . . . .	4
Stewart v. State, 801 So.2d 59 (Fla. 2001) . . . . .	5
Stovall v. Denno, 388 U.S. 293 (1967) . . . . .	18, 19
Strazzulla v. Hendrick, 177 So.2d 1, 5 (Fla.1965) . . . . .	2
Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) . . . . .	17
Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987) . . . . .	19
Witt v. State, 387 So.2d 922 (1980) . . . . .	18-19

## **PRELIMINARY STATEMENT**

This is Mr. Stewart's second habeas corpus petition in this Court. Article 1, Section 13, of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that the proceedings resulting in Mr. Stewart's convictions and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings will be referred to as "R. \_\_\_" followed by the appropriate page number. The record on appeal concerning the re-sentencing hearing after remand will be referred to as "RS\_\_\_" followed by the appropriate page number. The post-conviction record on appeal will be referred to as "PC-R. \_\_\_" followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

## **INTRODUCTION**

Significant errors which occurred at Mr. Stewart's capital trial and sentencing were not presented to this Court on direct appeal. Subsequent case law reveals that fundamental error occurred during Mr. Stewart's trial which prejudiced

him both at the guilt and penalty phases. Mr. Stewart respectfully asks this Court, as a matter of grace, to reconsider the fundamental fairness of his convictions and sentences. Strazzulla v. Hendrick, 177 So.2d 1, 5 (Fla.1965).

### **PROCEDURAL HISTORY**

Kenneth Allen Stewart was charged by information in the 13<sup>th</sup> Judicial Circuit, Hillsborough County Florida, on May 13, 1985, with two counts of attempted first degree murder, armed robbery and arson as to Michelle Acosta and Mark Harris. The victim, Mark Harris, developed pneumonia and subsequently died on May 12, 1985. Stewart was indicted by the grand jury on May 22, 1985, for first degree murder. The charges regarding both victims were consolidated for trial.

Stewart was tried before the Honorable John P. Griffin on August 25-27, 1986, in Hillsborough County, Florida. On August 27, 1986, the jury found Stewart guilty of first-degree murder, with a special verdict of felony murder, attempted second-degree murder with a firearm, robbery with a firearm, and second-degree arson.

The case proceeded immediately to the penalty phase hearing on August 27, 1986, in which the jury recommended that Mr. Stewart be sentenced to death by a vote of 10 to 2. The court followed the recommendation of the jury; however, it

failed to make written findings in support of the death sentence. This Court remanded the case for written findings in support of the death sentence and its departure sentence on the armed robbery conviction. Stewart v. State, 549 So.2d 171 (Fla. 1989).

Upon remand, a hearing was held before the Honorable John P. Griffin on December 5, 1989. Attorney Barbas was reappointed to represent Stewart in the re-sentencing hearing based upon the purported conflict of interest by the Public Defender's Office. The Court continued the case to allow Mr. Barbas an opportunity to research case law support for allowing the court to consider additional mitigation that was not presented during the trial proceedings. On December 8, 1989, Mr. Barbas requested a continuance to allow him an opportunity to obtain for the court's consideration additional mitigating circumstances from Mr. Stewart's Department of Corrections records since his conviction. The court declined to take further testimony on the death sentence and set a sentencing hearing for December 21, 1989. On December 21, 1989, Mr. Barbas announced to the Court that there was nothing in mitigation to present upon review of Mr. Stewart's Department of Corrections records. The Court proceeded to hear argument from the state and defense on sentencing as to the armed robbery conviction. Mr. Stewart notified the Court, through counsel, that he was requesting

additional time to present character witnesses on his behalf. Mr. Barbas acknowledged to the Court that this is the first time that he had heard of Mr. Stewart's desire to present character witnesses. Mr. Stewart responded that this is the first time that he had an opportunity to give this information to counsel because he had never seen him since being transported to Hillsborough County. The Court denied Mr. Stewart's request indicating that he had plenty of time in which to prepare for the hearing. On December 21, 1989, reading from a prepared sentencing order, the Court resentenced Mr. Stewart to death for the first degree murder conviction and to life on the armed robbery conviction. The court found two aggravating circumstances: previous conviction of a felony involving use of threat or violence and capital felony committed in commission of a robbery. The court found three statutory mitigating circumstances: extreme mental or emotional disturbance (slight weight), impaired capacity (little weight), and age (little weight). Although the court mentioned "catchall" mitigation related to "some sort of trauma" Defendant suffered at age 13, it was given no weight. On direct appeal, this Court affirmed Stewart's death sentence and remanded Stewart's armed robbery conviction to the lower court for imposition of a guideline sentence. Stewart v. State, 588 So.2d 972 (Fla. 1991).

On September 17, 1996, Mr. Stewart filed his Third Amended Motion to

Vacate Judgments of Conviction and Sentence raising 26 claims. On April 2, 1997, the circuit court held a Huff hearing. On August 4, 1997, the circuit court entered an order denying in part the majority of Mr. Stewart's claims for relief and granted an evidentiary hearing based upon ineffective assistance of counsel during the pretrial and guilty phase, the State's failure to produce jail records, inadequate mental health assistance, and ineffective assistance of counsel during the penalty phase hearing. On December 17, 1998, and March 19, 1999, an evidentiary hearing was held on the proceeding four claims. On June 25, 1999, the circuit court entered an order denying Mr. Stewart's claims for relief. On July 21, 1999, the defendant gave timely Notice of Appeal of the circuit court's denial of his 3.850 motion. On September 20, 2001, this Court affirmed the circuit court's denial of post-conviction relief. Stewart v. State, 801 So.2d 59 (Fla.2001)(rehearing denied November 26, 2001). On December 30, 2002, Mr. Stewart filed a Petition for Writ of Habeas Corpus with this Court. This Court denied the Petition on May 13, 2004. A motion for rehearing was filed on May 28, 2004 and is pending before this Court.

### **GROUND FOR HABEAS CORPUS RELIEF**

By his petition for a writ of habeas corpus, Mr. Stewart asserts that his conviction and sentence of death were obtained and then affirmed during the

Court's appellate review process in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Stewart's case, substantial and fundamental errors occurred in his capital trial and sentencing. These errors were uncorrected by the appellate review process as shown below, and therefore Mr. Stewart is entitled to relief.

**MR. STEWART'S RIGHTS OF CONFRONTATION WERE VIOLATED AT HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

In Crawford v. Washington, 124 S.Ct. 1354, 1364 (2004), the United States Supreme Court overruled Ohio v. Roberts, 100 S.Ct. 2531 (1980), to the extent it allowed "testimonial" evidence based on determinations of reliability and without a showing of unavailability and prior opportunity for cross examination. In Crawford, the police took a tape-recorded statement from the defendant's wife. During trial, the marital privilege precluded the state from presenting the wife's testimony, so she was not an available witness for the state. Over the defendant's objections that it would violate his right to confront the witnesses against him, the state introduced her taped statement. The trial court held that the statement bore "particularized guarantees of trustworthiness," and admitted the statement pursuant

to Ohio v. Roberts. The United States Supreme Court reversed. Noting that “the principle evil at which the Confrontation Clause was directed” was the use of *ex parte* testimony, the Court listed several types of evidence that fall within that category today. “Regardless of the precise articulation, some statements qualify under any definition –for example, . . . , *statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.*

Police interrogations bear a striking resemblance to examinations by justices of the peace in England.” Crawford v. Washington, 124 S.Ct. 1354, 1364

(2004)(emphasis added). After further examining the historical underpinnings of the Confrontation Clause and the Sixth Amendment, the Court concluded. “In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.” Crawford v. Washington, 124 S.Ct. 1354, 1364 (2004). The Court announced a new rule which categorically excludes all testimonial evidence in criminal prosecutions unless the state can prove both unavailability and that the accused had an opportunity for cross-examination.

Where testimonial evidence is at issue, however, the Sixth amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else

the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford v. Washington, 124 S.Ct. 1354, 1374 (2004).

This precise Sixth Amendment error occurred twice in Mr. Stewart's case.

During the guilt/innocence portion of Mr. Stewart's trial, the state questioned Detective Lease about a conversation he overheard between Mr. Stewart and his Grandmother, Estelle Berryhill:

Q. Did she live in a mobile home out there?

A. Yes, sir.

Q. Upon arrival at the mobile home, what occurred?

A. As I walked up to the mobile home, I heard the telephone ring. And Mr. Berryhill had answered the telephone. And he called for Estelle, which is his wife, Mrs. Berryhill. She was in the back.

About the same time as I am hearing this, I went up and knocked on the door. He looked out, saw it was me, told me to come on inside.

When I walked in, he was holding the telephone with his hands over the end of the receiver, and he told me that Kenny, Kenny Stewart, was on the telephone at that time.

About this same time, approximately this same time, Mrs. Berryhill came in from the bedroom, and she started, she started to take the telephone. And I asked if they had an extension anywhere in the trailer? And they told me that the extension was,

in the entranceway. I just passed it. It was, like, in a little covered entranceway that came in from one side of the trailer.

And I asked if they minded if I picked the telephone up, the extension up? And both of them gave me permission to pick it up, at which time I did so.

- Q. Did you participate in the conversation in any way?
- A. No, sir.
- Q. You didn't say a thing during the course of the conversation?
- A. No, sir.
- Q. Had you prompted Mrs. Berryhill as to what questions, if any, she should ask?
- A. No, sir.
- Q. When you picked up on the telephone, did you overhear a conversation between Mrs. Berryhill and someone else?
- Q. Did she ask him anything?
- A. Yes. She asked him, "Did you shoot that guy and the girl?"
- Q. What was his response?
- A. "Yes." Said, "Yes. I did it." He admitted doing it.
- Q. Did she ask him why he had done it?
- A. Yes.
- Q. What did he say?
- A. He said, "I guess to rob them." Then he told her that, "They are in the hospital. And they are going to be all right."

(R400-03).

Officer Lease's testimony regarding Ms. Berryhill's statements during her conversation with Mr. Stewart was testimonial evidence, and it violated Mr.

Stewart's rights under the Confrontation Clause. "Various formulations of this core class of "testimonial" statements exist: ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." Crawford, at 1364. The declarant was not unavailable; indeed, Mrs. Berryhill testified as a state witness. The state chose not to ask her to testify about the details of her conversation with Mr. Stewart and instead chose to elicit the information through inadmissible hearsay (R381-85).

The state's use of this testimonial hearsay evidence prejudiced Mr. Stewart. In closing the state argued that this testimonial hearsay evidence established that Mr. Stewart was guilty of first degree felony murder because his motive was robbery.

He tells you that Smith's testimony is directly in conflict with that of Michelle Acosta. It may be. Smith's testimony is based on what the defendant told him. Smith wasn't there. He doesn't know what happened. All he was doing was relating to you, as best he could recall, what had happened based upon conversations with the defendant.

**And, of course, then you have the conversation between the defendant and his grandmother, in which he told her he shot both of the people, shot the couple.**

**And when asked why, “I did it to rob them.” Can the proof be more convincing? Can the evidence be more overwhelming?**

Based upon the evidence that you have heard from that witness stand, not from what Mr. Barbas tells you, because Mr. Barbas’ interpretation is not evidence. What I tell you is not evidence. You heard all the evidence from the witness stand.

But I submit to you, **based upon that evidence, we have proved beyond and to the exclusion of all reasonable doubt the elements of the offenses that we have charged the defendant with. You don’t even need to consider the lesser-included offenses.**

(R533-34)(emphasis added). As the prosecutor explained to the jury, the testimonial hearsay was the only reliable evidence that established robbery as a motive for the murder and attempted murder. As defense counsel emphasized in closing argument, there was no other evidence of robbery as a motive. No money or jewelry was taken from the victims, and Michelle Acosta testified that Mr. Stewart did or said nothing to indicate he intended to rob them (R309, 311, 518). Mr. Stewart had reason to become apprehensive when the victim stopped her car in a dark parking lot (R521). Only after the victims pulled their car into the dark parking lot, did Mr. Stewart threaten them, (R298, 312), and only after Acosta stepped on the accelerator, hoping to make Mr. Stewart lose his balance, did Mr. Stewart shoot (R299-300, 518). On the Acosta charge, the jury found Mr. Stewart guilty of the lesser crime of attempted second degree murder and not the attempted

first degree murder that the state charged (R1011). There is a reasonable likelihood that, had the jury not been confronted with testimonial hearsay regarding the conversation Mr. Stewart had with his grandmother, the jury would have likewise found Mr. Stewart guilty of the lesser crime of second degree murder for Mr. Harris' death.

The admission of this testimonial hearsay evidence likewise prejudiced Mr. Stewart at the penalty phase. As mentioned above, it was the only reliable evidence that established robbery as a motive for the murder and attempted murder, and the jury was instructed that they could recommend a death sentence if they found that the murder occurred during the course of a robbery (R747-48). There is a reasonable probability, in light of the numerous statutory and non-statutory mitigators presented, that this aggravator convinced at least one juror to recommend death.

The second Crawford error also occurred during the guilt/innocence portion of Mr. Stewart's trial. Michelle Acosta testified at trial and identified Mr. Stewart as her assailant. (R293-294). However, she was also allowed to testify to prior consistent statements of identification which amounted to hearsay under Crawford which was essentially an improper bolstering of her identification of Mr. Stewart. Specifically, she testified that she had identified Mr. Stewart previously when being

shown a group of five photos, (R294-295), and also had identified Mr. Stewart at a preliminary hearing. (R295).

The error in allowing the previous consistent statements was compounded when the trial court allowed Detective Lease to testify as to Ms. Acosta's previous testimonial out-of-court statements. Detective Lease told the jury that Ms. Acosta had been "called upon" to identify Mr. Stewart. (R407). Detective Lease explained:

A: Well, there was really, there was twice. There is two times in the courtroom that she made identification. She made identification to me at one point sitting in the back of the courtroom, and then she made an identification to the Court up here in front of the, the defendant was standing alongside of Terry Lynn Smith, up her in front of the bench.

\* \* \*

Q: [By the State] What did she say to you?

A: She told me, Kenneth Stewart was sitting among, at least, there was five of them, at least five, of which he was one of them. They were sitting along the wall, along the north side of the courtroom. And I recall Kenneth sitting in the second chair from the left, if I was facing them. They were all white males. They were all dressed in inmate clothes. And she and I were sitting, in the approximate location on that side of the courtroom, in approximately the center. The courtroom is laid out like this one here.

And she looked over and told me, "There he is." I said, "There who is?" She said, "The guy that, that shot me." I said, "Which one?" She pointed to one. I said, "Well, which one of the two?" And she described Kenneth Stewart, the second one from the defendant."

(R407-408). Immediately following Detective Lease's hearsay testimony of Ms. Acosta's identification of Mr. Stewart, defense counsel renewed his objection to this testimony based upon his previously filed motion which the court overruled (R409).

Detective Roo also repeated to the jury Ms. Acosta's testimonial hearsay identification of Mr. Stewart. Detective Roo described how a third detective, Detective Rockhill, showed the five photos to Ms. Acosta and Ms. Acosta told him, "That's him, I'm pretty sure." (R419-420).

The testimony by Detectives Lease and Crawford, and Ms. Acosta's own testimony of her prior consistent statement, violated Mr. Stewart's rights under the Confrontation Clause. The declarant was not unavailable, in fact, Ms. Acosta testified at trial. The damage of the testimony was not diminished, however, by the fact that Ms. Acosta was available and subject to cross-examination at the trial. A key question is whether her testimony at the preliminary hearing was subject to cross examination. The record is silent as to whether Ms. Stewart had an opportunity to cross-examine Ms. Acosta at the preliminary hearing on her identification of Mr. Stewart. Further, the testimony by the detectives cannot be justified under any theory. The Detectives testified after Ms. Acosta, and they testified to additional facts. In particular, they told the jurors that Ms. Acosta had

previously identified Mr. Stewart when “called upon” by the court, a fact which gave the appearance of an imprimatur by the trial court of Ms. Acosta’s identification of Mr. Stewart. No cross-examination could have remedied the prejudice of Detective Lease’s testimony of Ms. Acosta’s identification of Mr. Stewart allegedly elicited by the trial court.

Notwithstanding Florida Rule of Evidence 90.801(2)(c)<sup>1</sup>, Detective Lease’s and Detective Roo’s testimony of Ms. Acosta’s identification, and Ms. Acosta’s recounting of her previous consistent statements of identification to law enforcement, was hearsay which violated Mr. Stewart’s right to confront his accuser. Crawford makes clear that the Confrontation Clause is not mollified by simply re-characterizing testimonial statements as non-hearsay.

The text of the Confrontation Clause reflects this focus. It applied to ‘witnesses’ against the accused—in other words, those who bear testimony. . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

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<sup>1</sup> The Rule states that “A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . One of identification of a person made after perceiving the person.”

Crawford v. Washington, 124 S. Ct. 1354, at 1365. Further, the prior preliminary hearing testimony is admissible only if the Mr. Stewart had an “adequate opportunity to cross-examine.” Id. at 1367. “Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence . . . ” Id. at 1370. “[T]here were always exceptions to the general rule of exclusion” of hearsay evidence . . . But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.” Crawford, at 1367(emphasis supplied). “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” Crawford v. Washington, 124 S.Ct. 1354, 1371 (2004).

The danger upon which the Confrontation Clause was based was realized in Mr. Stewart’s case:

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

Crawford, at 1367 n.7. In light of Crawford, it is clear that fundamental constitutional error occurred numerous times during Mr. Stewart’s capital trial, and that this fundamental error cannot be harmless.<sup>2</sup> “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” Crawford v. Washington, 124 S.Ct. 1354, 1371 (2004). See e.g. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993)(holding that fundamental constitutional error that cannot be harmless occurs when the Sixth Amendment is violated)(“the jury verdict required by the Sixth Amendment is a jury verdict beyond a reasonable doubt.”).

**Crawford applies retroactively under Witt v. State, 387 So.2d 922 (Fla.1980)**

In Witt v. State, 387 So.2d 922 (1980), the Florida Supreme Court announced a three-part test for determining retroactivity of Supreme Court law in Florida courts. Under Witt, a change in law supports postconviction relief in a

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<sup>2</sup>Even if this error were subject to harmless error analysis, the state could not prove that these two errors were harmless. See State v. Gunsby, 670 So.2d 920 (Fla.1996); Morton v. State, 689 So.2d 259, 262-65 (Fla.1997); Dudley v. State, 545 So.2d 857 (Fla.1989). Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

capital case when “the change: (a) emanates from [the Florida Supreme Court] or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.” Witt at 931. The first two criteria are obviously met here. The third criterion presents the crucial inquiry. In elaborating what “constitutes a development of fundamental significance,” the Witt opinion includes in that category “changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the threefold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)],” adding that “*Gideon v. Wainwright* . . . is the prime example of a law change included within this category.” Witt at 929.

The threefold Stovall-Linkletter test considers: “(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” Witt, at 926. It is not an easy test to use, either generally or in the present case, because there is a tension at the heart of it. Any *change* of law which “constitutes a development of fundamental significance” is *bound* to have a broadly unsettling “effect on the administration of justice” and to upset a good measure of “reliance on the old rule.” The example of Gideon – a profoundly unsettling and upsetting change of constitutional law – makes the tension obvious, and the Witt Court was aware of

it.<sup>3</sup> How the tension is resolved ordinarily depends mostly on the first prong of the Stovall-Linkletter test – the purpose to be served by the new rule – and whether an analysis of that purpose reflects that the new rule is a “fundamental and constitutional law change[ ] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding.” Witt at 929. Cf. Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987).

Crawford meets this test. The purpose to be served by the new rule is to apply the Confrontation Clause as the Framers intended it to apply and ensure fairness and accuracy in the fact-finding process. Regarding the second and third prongs, Florida courts did not admit every instance of *ex parte* testimonial hearsay that the state sought to admit. The Ohio v. Roberts test admitted only that hearsay that fell under a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” Ohio v. Roberts, 448 U.S. at 66. The few remaining instances are those like the *ex parte* testimonial evidence admitted in Mr. Stewart’ case, testimony admitted by re-characterizing the testimony as non-hearsay or a hearsay exception. Thus, since the admission of such testimony was

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<sup>3</sup> See Witt at 924-925: “The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post- conviction relief from a sentence of death.”

previously limited by law, the extent of reliance on the old rule and the effect of retroactive application on the administration of justice should be minimal. Surely, the minimal administrative bothers of retroactive application must bend to a fundamental guarantee upon which the Framers based the United States Constitution.

### **CONCLUSION AND RELIEF SOUGHT**

For all of the reasons stated herein, Mr. Stewart asks that his convictions and sentences, including his sentence of death, be vacated.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this \_\_\_\_\_ day of June, 2004.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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