IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

WILLIAM EARL SWEET

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.: **SC05-1374**
L.T. Court No.: 16-1991-CF-2899 AXXX

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APPELLANT'S INITIAL BRIEF, PURSUANT TO FLA. R. APP. PRO. RULE 9.210

On Appeal from the Circuit Court, Fourth Judicial Circuit, and and For Duval County, Florida

Honorable Fredrick B. Tygart
Judge of the Circuit court, Division B

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

Florida Rules of Criminal Procedure and Statutes

PRELIMINARY STATEMENT

At the onset, Appellant states that in the interim of filing the instant appeal with the Florida Supreme Court, this Honorable Court decided *Chandler v. Crosby*, 2005 Fla. LEXIS 1988, whereby the Court ruled that the decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004.) was not retroactive to collateral cases. Therefore, Appellant acknowledges said *Chandler* opinion as precedent to the instant appeal, and reincorporates and re-alleges verbatim the argument posed at the trial level.

Appellant, WILLIAM EARL SWEET, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorney(s) Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the "undersigned counsel."

References to the Record on Appeal will be designated "R." followed by the page number indicated on the Index to the Record on Appeal.

STATEMENTS OF THE CASE AND FACT

Appellant was indicted by the grand jury in Duval County, Florida on March 31, 1991. (R. 182-186). He was charged with one count of first degree murder, three counts of attempted murder, and one count of burglary with an assault or battery.

The jury trial commenced on May 20, 1991. The jury found Appellant guilty on all counts. (R. 1169-1171). The penalty phase of the trial began on June 4, 1991, whereby the jury rendered an advisory sentence recommending death by a vote of ten to two. (R. 1277-1278).

On August 30, 1991, The Circuit Court, Fourth Judicial Circuit, in an for Duval County, Florida, sentenced Mr. Sweet to death as to the first degree murder conviction and consecutive life sentences as to all other counts. (R. 1311) The trial court entered its written findings at the sentencing hearing. (R. 391-411).

Appellant appealed his conviction to the Florida Supreme Court. The Florida Supreme Court found that the trial court erred in failing to instruct the jury that they had to consider the individual circumstances of a prior conviction in order to determine if it was violent before weighing it as a prior violent felony.

However, this error was found harmless. *Sweet v. State*, 624 So.2d 1138 (Fla. 1993) Furthermore, the Court held that the trial court erred in imposing four consecutive fifteen-year minimum mandatory sentences for the burglary and

attempted murder convictions. Id. at 1143 The Supreme Court upheld Appellant's convictions and sentences. Appellant filed a petition for writ of certiorari in the United States Supreme Court, which was denied on February 28, 1994. *Sweet v. Florida*, 510 U.S. 1170 (1994)

On August 1, 1995, Appellant filed a Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend. (PCR. 1-129). His Amended Motion to Vacate Judgments of Convictions and Sentences was filed on June 30, 1997 (PCR. 210-336). Said amended motion raised twenty eight claims.

On May 13, 1998, the Court granted an evidentiary hearing as to four claims, and also ruled that nineteen claims were procedurally barred and that five claims were facially insufficient and/or otherwise not a proper basis for relief. (PCR. 605-607)

The evidentiary hearing was held on January 25-26, 1999 in Duval County, Florida. On March 30, 2000, the Court issued an order denying Appellant's motion to vacate conviction and sentence. (PCR. 1075-1097).

Appellant appealed the trial court's order and simultaneously filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court. Defendant raised six claims in his appeal of the trial court's ruling on his Amended Motion to Vacate Judgment and Sentence to the Florida Supreme Court.

The Florida Supreme Court denied all claims asserting ineffective assistance of counsel based upon trial counsel's alleged failure to investigate and present mitigation evidence. Appellant's claim regarding ineffective assistance of counsel during the penalty phase was denied based on his failure to meet the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). The background testimony presented was found cumulative of what was presented at trial.

Furthermore, the Florida Supreme Court denied Appellant's claim of ineffective assistance of counsel for inadequate mental health experts. The claims were found either legally insufficient or refuted by the record.

Additionally, the Florida Supreme Court ruled that Appellant's claim of cumulative errors depriving him of due process did not warrant an evidentiary hearing because the claim was either facially insufficient or procedurally barred. *Sweet v. State*, 810 So.2d 854 at 871 (Fla. 2002)

Moreover, Appellant raised four claims in his Petition for Writ of Habeas Corpus filed with the Florida Supreme Court, all of which were denied.

Appellant then filed a Successive 3.851 Motion for Postconviction Relief with the trial court, alleging numerous constitutional issues and predominately focusing on the applicability of the U.S. Supreme Court's ruling to Defendant as held in *Ring v. Arizona*, 536 U.S. 584. This Motion was denied by the trial court, whereby Appellant filed an appeal to the Florida Supreme Court. The Florida

Supreme Court affirmed the trial court's denial of Appellant's said Motion on December 30, 2004.

Appellant filed a second successive 3.851 Motion in light of the recent U.S. Supreme Court decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004.) on March 7, 2005, and the State filed a response to said motion on March 25, 2005. On July 5, 2005, pursuant to Fla. R. Crim. Pro. R. 3.851(f)(5), the lower court held a hearing on the motion, and on July 11, 2005, the Honorable Frederick D. Tygart denied said motion. Appellant filed a Notice of Appeal in regards to the 3.851 successive Motion with the Florida Supreme Court on July 21, 2005.

However, on October 6, 2005, the Florida Supreme Court decided *Chandler v. Crosby*, 2005 Fla. LEXIS 1988, whereby the Court ruled that the decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004.) was not retroactive to collateral cases.

STANDARD OF REVIEW

The Florida Supreme Court's standard of review for this case is *de novo* review, to-wit: whether the order of the lower tribunal departed from the essential requirements of law. Moreover, the Florida Supreme Court has held that the evidence presented to the trial court is not to be reweighed on appeal. *See Markham v. Fogg*, 458 So. 2d 1122 (Fla. 1984); *Sheppard & White v. City of Jacksonville,* 827 So. 2d 925 (Fla. 2002).

STATEMENT OF THE ISSUES INVOLVED

I. WHETHER THE DECISION IN CRAWFORD V. WASHINGTON APPLIES RETROACTIVELY TO CASES ALREADY FINAL

II. WHETHER ADMITTTED TESTIMONY IN APPELLANT'S PENALTY PHASE OF TRIAL WAS IN VIOLATION OF CRAWFORD V. WASHINGTON, THEREBY RENDERING ERROR THAT REQUIRES THIS COURT TO VACATE APPELANT'S SENTENCE OF DEATH

SUMMARY OF THE ARGUMENTS

I. THE HOLDING IN CRAWFORD V. WASHINGTON, PURSUANT TO THE TEST IN WITT V. STATE, APPLIES RETROACTIVELY TO APPELLANT'S CASE

II. THE TESTIMONY ADDUCED AT APPELLANT'S PENALTY PHASE OF TRIAL WAS VIOLATILE OF THE U.S. SUPREME COURT DECISION IN CRAWFORD V. WASHINGTON, THEREBY WARRANTING THAT APPELLANT'S SENTENCE OF DEATH BE VACATED

GROUNDS FOR POSTCONVICTION RELIEF

CLAIM ONE:

THE UNITED STATES SUPREME COURT'S DECISION IN CRAWFORD V. WASHINGTON WARRANTS RELIEF RETROACTIVELY TO DEATH-SENTENCED DEFENDANTS WHOSE CONVICTIONS HAVE ALREADY BECOME FINAL, BECAUSE THE DECISION IN CRAWFORD V. WASHINGTON MEETS THE TEST ENUMERATED IN WITT V. STATE

Appellant states that in applying the rule announced by the Florida Supreme Court in *Witt v. State*, the U.S. Supreme Court's recent decision in *Crawford v. Washington* applies retroactively to cases in which a defendant's convictions and sentences have become final. 387 So. 2d 922 (1980) Therefore, Appellant alleges that since the holding in *Crawford* applies retroactively under *Witt v. State*, said *Crawford* decision directly implicates Appellant's case, and affects Appellant's convictions and sentences in the subsequent ways, as explained in Claim Two.

Any Motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within one year after the judgment and sentence come final. Fla. R. Crim. P. R. 3.851 (d)(1) For the purposes of the rule, a judgment is final: (1) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or (2) on the disposition

of the petition for writ of certiorari by the United States Supreme Court, if filed. However, motions to vacate may be filed beyond said time limitation provided in subsection (d)(1) if it alleges that: (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, (2) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or (3) postconviction counsel, through neglect, failed to file the motion. *Id.*

For the following reasons, Defendant's instant appeal fits under the exception laid out in Fla. R. Crim. P. R. 3851 (d)(1)(2), for the *Crawford* decision established a fundamental constitutional right that is retroactive in application.

First, to determine whether a U.S. Supreme Court case to applies retroactively to convictions and sentences that are already final, Florida courts must use the test to determine retroactivity set out in *Witt v. State*, 387 So. 2d 922 (1980)

In order for judicial decision to have retroactive application to a criminal case where the defendant's convictions are final prior to the release of high Court decision, the decision must: (1) emanate either from the

Florida Supreme Court or the United States Supreme Court, (2) be constitutional in nature, and (3) have fundamental significance. *Witt v. State*, 387 So. 2d 922 (1980) Said judicial decisions that are fundamentally significant typically fall into one of two categories: (1) those which remove from the State the authority or power to regulate certain conduct or impose certain penalties, or (2) those changes in the law which are of sufficient magnitude to require retroactive application as ascertained by the three-part test of *Stovall*, which requires consideration be given to: (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." *Id; Cook v. State*, 553 So.2d 1292 (1989); *Stovall v. Denno*, 388 U.S. 293 (1967). *Stovall's* final prong requires a balancing of the justice system's goals of fairness and finality: deciding whether a change in decisional law is a jurisprudential upheaval or merely an evolutionary refinement is reflective of the balancing process between these two important goals (fairness and finality) of the criminal justice system. *Ferguson v. State*, 789 So. 2d 306 (Fla. 2001)

WITT V. STATE RETROACTIVITY ANALYSIS

A. Prong One – The judicial decision in question derives from the Florida Supreme Court or the U.S. Supreme Court

The *Crawford* decision, without a doubt, satisfies this first prong in *Witt v. State*. The decision emanated from the U.S. Supreme Court on March 8, 2004. 124 S. Ct. 1354 (2004)

B. Prong Two – The judicial decision was constitutional in nature

Again, this prong is satisfied beyond a doubt. The decision in *Crawford* specifically dealt with a Defendant's constitutionally guaranteed Sixth Amendment right to confrontation. Further, the opinion explored the historical aspects of the Confrontation Clause, going back in time to the Roman Era, then transgressing to the English common law. Lastly, the Court specifically opined that its ruling was based on the Sixth Amendment's demands what the common law required unavailability and a prior opportunity to cross-examine. *Id.* Therefore, the *Crawford* holding's entire justification was based on constitutional issues, and what our Framers' intentions were with regard to a defendant's Sixth Amendment right to confront his accuser.

C. Prong Three – The judicial decision was a major constitutional change in the law that was fundamentally significant

As stated previously, there are two distinct ways or categories that may be used to satisfy this prong. In applying the first category, judicial decisions are a major constitutional change in the law that was fundamentally significant if said decisions are those which remove from the State the authority or power to regulate certain conflict or impose certain penalties. *Witt*, 387 So. 2d 922 To suffice this prong in the second category, the judicial decision will be a major constitutional change in the law that was fundamentally significant if those changes in the law which are of sufficient magnitude to require retroactive application as ascertained by the three-part test of *Stovall v. Denno*, 388 U.S. 293 (1967).

(1) Category One – Major constitutional change in the law which removes from the State the authority or power to regulate certain conduct or impose certain penalties

Appellant candidly admits that *Crawford v. Washington* does not satisfy the requirements set out in Category One. Therefore, Appellant is unable to prove the third prong of *Witt* under this category.

(2) Category Two – Changes in the law which are of sufficient magnitude to require retroactive application as ascertained by the three-part test of Stovall v. Denno

Appellant alleges that the decision in *Crawford* satisfies this category, and therefore Appellant states that said *Crawford* decision satisfies the three prongs established in *Witt v. State*, making *Crawford* retroactive to Appellant's convictions and sentences. To satisfy the three-part test announced in *Stovall v. Denno*, a Appellant must show: (a) the purpose of 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. *Callaway*, 658 So. 2d 983 (Fla. 1995)

(a) The purpose served by the new rule

First, Appellant states that the holding in *Crawford* announced a new rule of criminal procedure. A decision by the U.S. Supreme Court announces a new rule if "the result was not dictated by precedent existing at the time Appellant's conviction became final". *See* *Butler v. McKellar*, 494 U.S. 407 (1990)

The precedent existing at the time of the *Crawford* decision was from the case of *Ohio v. Roberts*, 448 U.S. 56 (1980). The *Crawford* case

essentially overruled this decision, showing that its result was not dictated by precedent existing at the time that defendant's conviction became final. In particular, the *Crawford* case's issue predominantly focused around the appropriate framework for determining whether the admission of certain hearsay evidence was in violation of the Confrontation clause. *Crawford*, 541 U.S. 36 (2004) Prior to *Crawford*, the test used to determine whether a hearsay admission was in violation of a defendant's Confrontation Clause was analyzed by using the test set out in *Ohio v. Roberts*, 448 U.S. 56 (1980) In *Roberts*, admissions of an unavailable witness's statements are admissible against a criminal defendant if the statement bears an "adequate 'indicia of reliability". *Id.* To meet this test of reliability, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Id.* *Crawford* essentially vacated this ruling in *Roberts*. In so holding, the *Crawford* Court stated that the logic of *Roberts* was inconsistent with the Court's conclusion in *Crawford* that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay may be admitted against the defendant. *Crawford*, 124 S. Ct. 1369

Thus, in plain meaning, the *Crawford* ruling and result was not dictated by then-existing precedent. To the contrary, the *Crawford* Court

specifically disavowed the existing precedent contained in the *Roberts* decision and thereby created a new test for determining the admissibility into evidence the statements of witnesses or persons who are unavailable at trial. Also, the majority in *Crawford* clearly stated that the test in *Roberts* "departs from the historical principles," in that it is both "too broad" and "too narrow." Therefore, by *Crawford's* ruling and its denouncement of the long-standing precedent in *Roberts*, the *Crawford* decision announced a new rule, for the result was not dictated by precedent existing at the time defendant's conviction became final.

Next, the purpose of the new rule in *Crawford* was to abide by the Framers' intentions when they wrote the U.S. Constitution, with regard to the determination of reliability of testimony in criminal trials and the correlating Confrontation Clause. In particular, this decision stated that the Framers would not approve of the large discretion the judicial community is currently being given to determine whether a statement is reliable and therefore admissible in a defendant's trial. Further, the "open-ended" balancing tests in *Roberts*, if continued to be utilized, would be volatile to a defendant's "categorical constitutional guarantees." *Id.* In sum, the U.S. Supreme Court's purpose in the *Crawford* decision was to provide protection to a defendant with regard to the Confrontation Clause under the

Sixth Amendment, the protection that the original Framers of our U.S. Constitution intended. This protection could only be guaranteed by utilizing the following test: "Where testimonial evidence is at issue, the Sixth Amendment demands what the common law required, and that is unavailability and a prior opportunity for cross-examination." *Id.*

In conclusion, said purpose of the holding in *Crawford* was vastly important in the area of criminal law and its admissibility of hearsay evidence in criminal trials. In fact, analyzing the Court's opinion, the decision encompasses a principle of law that existed and should have been implemented for hundreds of years. *Id.* [*Stating that, "where testimonial statements are involved, we do not thing the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"]*. Therefore, the purpose of the holding is was to disavow of twenty years of procedures used to determine the admissibility of testimony in criminal trials, and to revamp the meaning and applicability of a long-standing constitutionally-guaranteed right that a defendant has to confront his accuser, a right that remains supreme to a defendant's Sixth Amendment rights.

(b) The reliance by the courts on the old rule

As mentioned in the previous section, the old rule in *Roberts*, which the U.S. Supreme Court denounced in *Crawford*, was in existence and used throughout the courts in the United States for the last quarter of a century. However, the holding in *Roberts* was only applicable if an inculpatory witness is unavailable at trial, and the statement wants to be admitted as evidence. Therefore, only cases and situations where a defendant contested the admission of an unavailable witness's statement to be used at trial, *Roberts'* test of "indicia of reliability" were applied.[1] *Ohio v. Roberts*, 448 U.S. 56 (1980)

Moreover, the reliance by the courts on the old rule in *Roberts*, though used frequently when an unavailable witness's statement(s) were sought to be introduced as evidence at trial, was law that was not in accordance with the original Framers of the U.S. Constitution, and therefore a misapplication of the Framers' original intention as to the Sixth Amendment's Confrontation Clause. For instance, the *Crawford* decision stated that the historical record supports the fact that the Framers of the Constitution would "not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had

1 To meet the test of "adequate indicia of reliability," evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Id.*

had a prior opportunity for cross-examination." 124 S. Ct. 1354 (2004); *See also Mattox v. United States*, 156 U.S. 237 (1985)[*Holding that, "the right…to be confronted with the witnesses against him," is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.].*

In conclusion, the reliance on the old rule in *Roberts*, though used frequently by the various Courts in the United States, was used only when certain situations presented themselves with regard to statements sought to be introduced at trial that were made by an unavailable witness. Moreover, the Courts throughout the United States apparently had great difficultly in applying said rule, for its elements and subsequent application yielded great deference to the judicial system's interpretation, which further yielded to inconsistent results. *See Crawford v. Washington*, 124 S. Ct. 1354 (2004) [*Stating that, "Roberts' failings were on full display in the proceedings below…and this "case is thus a self-contained demonstration of Roberts' unpredictable and inconsistent application."].*

Therefore, the old rule was used only if certain situations arose at a Appellant's trial. Also, the old rule was applied in an unpredictable and inconsistent manner throughout the country. In conclusion, the old rule's reliance by the courts was significant, but not significant enough to state that

the reliance was all-encompassing, given the narrow applicability of said rule and the inconsistent manner in which it was applied.

(c) The effect on the administration of justice of a retroactive application of the new rule

Lastly, *Stovall's* third prong to determine whether a decision warrants retroactive application encompasses a determination of what effect the decision will have on the administration of justice. *Stovall*, 388 U.S. 293 (1967). To establish this prong, the Florida Supreme Court had stated that "this final consideration in the retroactivity equation requires a balancing of the justice system's goals of fairness and finality: deciding whether a change in decisional law is a major constitutional change/jurisprudential upheaval, or merely an evolutionary refinement is reflective of the balancing process between these two important goals (fairness and finality) of the criminal justice system." *Ferguson v. State*, 789 So. 2d 306 (Fla. 2001)

(i) The change in the decisional law was a major constitutional change and/or a "jurisprudential upheaval," and not a mere evolutionary refinement

The Florida Supreme Court has defined a "jurisdictional upheaval" as a "major constitutional change in the law." *Id.* Major constitutional changes

in the law have been found in various cases in the U.S. Supreme Court. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) [*Imposing upon the states the requirement to provide counsel for all indigent defendants criminally charged]; Coker v. Georgia*, 433 U.S. 584 (1977) *[Divesting all states of the authority to impose the death penalty for the rape of an adult woman.].*

Moreover, there are numerous Florida court decisions that have been considered a jurisprudential upheaval and/or major constitutional change and therefore have been applied retroactively to cases that are final prior to said judicial decision. *See State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995)(*Holding that enhanced penalties for attempted second and third degree murder of a law enforcement officer were not authorized by statute*; *Hale v. State*, 630 So. 2d 521 (Fla. 1993)(*Holding that consecutive habitual offender sentences for crimes arising from a single criminal episode were not authorized by statute); Palmer v. State*, 438 So. 2d 1 (Fla. 1983)(*Holding that consecutive mandatory minimum sentences for use of a firearm in crimes arising from a single criminal episode were not authorized by statute);); Bass v. State*, 530 So. 2d 282 (Fla. 1988) (*Holding that prohibiting consecutive three-year mandatory minimum sentences for offenses arising from a single criminal episode should be applied retroactively); State v. Stevens*, 714 So. 2d 347 (Fla. 1998)(*Apply*

retroactively State v. Iacovone, which held that enhanced penalties for attempted second and third degree murder of a law enforcement officer were not authorized by statute); State v. Callaway, 658 So. 2d 983 (Fla. 1995) (*Applying retroactively Hale v. State, which held that consecutive habitual offender sentences for crimes arising from a single criminal episode were not authorized by statute);* Cook v. State, 553 So. 2d 1292 (1st DCA 1989) (*Holding that imposition of an illegal sentence is fundamental error, which would be retroactively).*

In contrast, an evolutionary refinement has been defined as a change in the law that merely "fine-tunes" existing law. *See* Curtis v. State, 805 So. 2d 995 (1st DCA 2001) (*Holding that the admissibility of blood-alcohol tests in Miles is an evolutionary refinement in the law rather than a jurisprudential upheaval that requires retroactive treatment under Witt.).*

Given the aforementioned case law, Appellant argues that the holding in *Crawford v. Washington* was not a mere evolutionary refinement, but rather a fundamentally significant constitutional decision that systematically revolutionized a defendant's rights under the Confrontation Clause. For instance, the *Crawford* decision was a major constitutional change in the law for the following reasons:

(1) *The Crawford decision was explicitly opined a major and fundamental decision to the United States legal regime*

As noted by Chief Justice Rehnquist in his concurring opinion in *Crawford*, a defendant's Sixth Amendment right to confront his accuser is, in and of itself, one of the most important constitutional guarantees a defendant can be afforded. In particular, Chief Justice Rehnquist cites to Former Chief Justice Marshall's statement of the Confrontation Clause, whereby he stated: "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *See Burr*, 25 F. Cas. 193.

Further, as explained in the *Crawford* opinion by Justice Scalia, said decision was largely fundamental to the American legal system. Justice Scalia, in his opinion, recitated the "history, purpose, and place of the Confrontation Clause" under the Sixth Amendment. *See Bockting v. Bayer*, 2005 U.S. App. LEXIS 3012 (2005). Moreover, Justice Scalia points out that *Crawford's* right to confront an accuser stems from the Roman times, and said right to Confrontation was firmly implanted in the jurisprudence of various European countries. *Id.* Further, Justice Scalia went on to state that

the *Crawford* decision rests on the fact that the Framers of the United States Constitution "would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Id.* Moreover, in describing the fundamental significance this case, Justice Scalia goes on to state that, "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." *Id.* Continuing, the court also noted that the protections of the Confrontation Clause as a "bedrock procedural guarantee."

(*2) The Crawford decision effectively overruled a previous U.S. Supreme Court holding, which existed and was utilized by the U.S. Courts for the past quarter-of-a-century.*

In 1980, the U.S. Supreme Court decided *Ohio v. Roberts*, which was a decision that created a test for admitting an unavailable witness's statement against a criminal defendant, if said statement bears an "adequate indicia of reliability." 448 U.S. 56 (1980) The *Roberts* decision, though inconsistently applied throughout the United States, was a decision that applied to every State, both federally and statewide, when said issue at a criminal trial arises. The *Crawford* decision essentially vacated the holding in *Roberts*, thereby

revamping decades of law with regard to the admissibility of unavailable witness statements at trial.

(3) The Crawford decision implicitly and explicitly abolished sections and statutes of both state and federal law with regard to admitting unavailable witnesses' testimony and criminal trials.

As described in *Crawford*, the effects of the decision would be felt throughout the United States, both in State and Federal Courts. For instance, Chief Justice Rehnquist's concurring opinion states that, "its [Crawford] decision casts a mantle of uncertainty over future criminal trials in both federal and state courts." *See Crawford v. Washington*, 124 S. Ct. 1354 (2004) (Chief Justice Rehnquist Concurring Opinion). Further, Chief Justice Rehnquist stated that (based on the *Crawford* decisions refusal to spell out the comprehensive definition of testimonial), "thousands of federal prosecutions and tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists […] is covered by the new rule." *Id.*

Moreover, as of this date, March 7, 2005, and upon a brief review of all the cases that have discussed or utilized the *Crawford* decision, the following figures show the importance of this decision. For instance: (1) One-hundred-and-thirty-seven appellate decisions have distinguished their

holdings from *Crawford*, (2) One-hundred-and-ninety-one appellate decisions have following the holdings from *Crawford*, (3) Sixty-seven appellate decisions have tried to explain the holding in *Crawford*, (4) Forty-four law review articles have been written on the holding in *Crawford*, and (5) Seven-hundred-and-sixty-eight citing decisions have been made with regard to the holding in *Crawford*. In short, within the span of less than a year, the *Crawford* decision has created quite a stir in the American legal system. Further, with the normal delays of the appellate process, Defendant contends that the aforementioned cases that utilize *Crawford* will vastly increase during the instant year of 2005.

The influx of state and federal cases that have either had to restructure or reconfigure their laws and statutes in response to *Crawford* cannot be ignored. The U.S. Supreme Court, as stated previously, was well aware that its holding would create a transformation of certain laws and statutes throughout the country. However, despite this knowledge, the Court acted on its belief that the Framers of the U.S. Constitution would have been discouraged by the current system, which was essentially denying a defendant's right under the Sixth Amendment to confront his accuser.

Further, the court's vacation of *Roberts* went against the command of *stare decisis*, which has been labeled the "preferred course, because it

promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *See* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991). In ruling in contrary to established precedent, the U.S. Supreme Court acknowledges the fact that a defendant's Sixth Amendment right would continue to be violated under the Confrontation Clause if *Roberts* were to remain the norm.

In conclusion, the U.S. Supreme Court's self-proclaimed "new interpretation" of the Confrontation Clause has caused numerous laws and statutes throughout the United States to become outdated, and thus in conflict with *Crawford*. Moreover, hundreds of appellate decisions have already been decided either utilizing said holding or citing and/or referencing said holding. Further, these appellate courts, given the necessary time it takes to hear an appeal, will continue to employ and reformulate their laws and statutes for years to come.

Therefore, *Crawford* is nothing short of a major constitutional change in the law, for it: abolished long standing precedent, vacated numerous rules and laws with regard to a defendant's Sixth Amendment Right to confront his accuser, went against the doctrine of *stare decisis*, created a new interpretation to a fundamental right in that of the Confrontation Clause, and

well as implied, both implicitly and explicitly, that said decision was a major constitutional decision from the U.S. Supreme Court. In conclusion, Defendant states the *Crawford* decision was a "jurisdictional upheaval," rather than an evolutionary refinement, as it was a major constitutional decision and a change in the long-existing law with regard to a defendant's rights under the Sixth Amendment's Confrontation Clause.

(ii) Determining the effect on the administration of justice requires a balancing of the justice system's goals of fairness and finality

Appellant states that the *Crawford* decision's impact on the veracity or integrity of the original trial proceeding(s), thereby implicating the concern for fairness and uniformity in individual cases, would outweigh the concern with regard to the effect on the administration of justice and decisional finality. Therefore, Appellant states that the decision in *Crawford* should be applied retroactively, for said adverse impact on the decision would be greatly outweighed by the concern for fairness and uniformity in individual cases. *See* *Witt v. State*, 387 So. 2d 929 (1980)

Appellant first notes that said balancing process often weighs in favor of finality, however, the scales can often tip in favor of retroactivity if the change of fundamental and constitutional law cast serious doubt on the

veracity or integrity of the original trial proceedings. *Id.* As explained in the preceding section, the *Crawford* decision was a fundamental and constitutional law change. Further, Appellant contends that said decision creates major doubt as to the veracity or integrity of a defendant's original trial proceedings, and cites to the *Crawford* decision itself in support. In particular, the U.S. Supreme Court explained how previous trials, using the test set out in *Roberts*, could have been vastly unpredictable and inconsistent. For example, the *Crawford* decision stated the following: (1) *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one; (2) *Roberts'* test and framework is inherently unpredictable. Whether a statement is deemed reliable depends on which factor a judge considers and how much weight he accords each of them; and (3) the instant case is a self-contained demonstration of *Roberts'* unpredictable and inconsistent application. It also reveals *Roberts'* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising.

Moreover, Justice Scalia, writing the *Crawford* opinion, stated numerous times that the reliability and accuracy of the *Roberts* test was vastly insufficient to be in accordance with a defendant's Sixth Amendment right to Confrontation. For instance, Justice Scalia stated, "by replacing categorical constitutional guarantees with open-ended balancing test, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear." *Id.*

Further, Chief Justice Rehnquist's opinion supports the fact that *Crawford* casts serious doubt on the veracity and integrity of an original trial proceeding in which the test in *Roberts'* was used. For instance, Chief Justice Rehnquist stated that the "Confrontation Clause's very mission "is to advance the accuracy of the truth-determining process of criminal trials." (quoting *Tennessee v. Street*) 471 U.S. 409 (1985).

In sum, cross-examination is the crucible in determining the reliability, accuracy, and trustworthiness of certain out-of-court statements. Utilizing the test set out in *Roberts'*, statements were allowed to be introduced into evidence based on a myriad of inconsistent applications

made by a trial judge (as explained in the *Crawford* opinion), and without the defendant's constitutional Sixth Amendment right to confront his accuser by way of cross-examination. Therefore, as noted by the U.S. Supreme Court, cases that have applied the test in *Roberts'* have the distinct possibility of being *permanently* "unpredictable," unreliable, and inconsistent. *Id.* [2] As such, the recent holding in *Crawford* largely now guarantees that a defendant's right to Confrontation is satisfied, thereby ensuring that his or her trials are increasingly more reliable and accurate, unlike the past trials dictated by the ruling in *Roberts.*

Further, the aforementioned discussion of the applicability of *Crawford* to cast serious doubt on the veracity or integrity of the original trial proceedings greatly outweighs the impact of the administration of justice and decisional finality. In particular, *Crawford's* effect on the administration of justice in Florida would be minimal. For example, the Court noted that *Crawford* is subject to a harmless error analysis. *Id.* Therefore, holding a brief evidentiary hearing on cases to determine whether *Crawford* error was harmless error is all that is necessary.

2 Without the combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact-serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial tests that is the norm of Anglo-American criminal proceedings. *See* *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

Appellant states that a majority of cases that fit within said holding could be dismissed simply by deciding that the error committed is not sufficient enough to warrant further remedy, like a new trial. Most trial court decisions would presumably fall victim to the harmless-error test, leaving to determine only the cases that *Crawford* had in mind—trials that because of the admitted evidence were unreliable. Moreover, said decision would only encompass trials in which an out-of-court statement was admitted and the originator of the statement was not available at trial. No decisions will be effected if the testimony was subject to cross-examination.

In conclusion, Appellant states that the adverse impact of the *Crawford* decision does not outweigh the effected Appellants' concern for fairness and uniformity in individual cases. Therefore, Appellant states the *Crawford* decision should be applied retroactively to his case, for said decision meets the test for retroactivity set out in *Witt v. State*.

CLAIM TWO:

APPELLANT'S PENALTY PHASE OF HIS TRIAL ENCOMPASSED ADMITTED TESTIMONY IN VIOLATION OF CRAWFORD V. WASHINGTION. THE ADMISSION OF SAID TESTIMONY IS NOT HARMLESS ERROR, AND THEREFORE APPELLANT'S CONVICTIONS AND SENTENCE OF DEATH SHOULD BE VACATED

In *Crawford v. Washington*, the U.S. Supreme Court again dealt with the issue of which test should be used to determine whether testimony is

admissible in a criminal trial when the person whose testimony is offered into evidence is unavailable. (541 U.S. 36 (2004)) The Court analyzed the existing precedent on the issue, and eventually came to the conclusion that a defendant's Sixth Amendment rights with regard to the Confrontation Clause were not being sufficiently fulfilled using this precedent. Therefore, the Court abrogated the decision in *Ohio v. Roberts*, which used a reliability test to determine the admissibility of testimony in trial from an unavailable witness. *Id.* The Court then ruled that the following test should be applied when the prosecution offers evidence of an out-of-court statement (which is considered "testimony") of a declarant who does not testify: (1) The declarant is "unavailable", and (2) There has been an opportunity to cross-examine. *Id.* In so holding, the Court left open much interpretation as to the meanings of "testimony" and "opportunity to cross-examine." However, the Court did state that, at a minimum, "testimony" means prior testimony at a preliminary hearing, before a grand jury, or at a former trial, affidavits, depositions, and to police interrogations. *Id.* Moreover, the definition of "cross-examine" was not defined, and lower courts throughout the country have widely used their own discretion to identify this definition. *See Lopez v. State*, 888 So. 2d 693 (Fla. 1st DCA 2004) [*Holding that discovery depositions are not sufficient to satisfy cross-examination prong of*

Crawford, thereby reversing defendant's conviction.]; Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004) [*Holding that the opportunity to depose a witness satisfied the cross-examination prong of Crawford.].*

In Appellant's penalty phase of trial, Appellant alleges that the State committed various Crawford violations by admitting testimony from an unavailable witness in support of his prior violent felony aggravating factor. Further, Appellant alleges that said violation was not harmless, for the trial court found said aggravator, and gave it great weight in his sentencing order. (R. p. 280-329)

In the penalty phase, to support the prior violent felony aggravating factor, as enumerated in Fla. Stat. 921.141 (5)(b), the State presented testimony of various police officers, some of which provided inculpatory statements from other individuals that did not testify at Appellant's penalty phase. In particular, the State called Detective Lumpkin, who was asked to testify about a previous judgment and sentence with regard to Appellant having committed an unarmed robbery. In violation of *Crawford's* holding, Detective Lumpkin was allowed to give testimony from an unavailable witness: (1) (in response as to how the Detective established identity in said robbery), the Detective stated, "I had went out and interviewed the witnesses and the victim, Mr. Smith. And through that interview, he [the defendant]

was identified by a photo spread which consisted of six photographs, he was identified by two of those […] two independent people witnessed the robbery." (R. p. 1215-1216) (2) (in response to Defendant's counsel asking him if said witnesses told him how many or which individual hit Mr. Smith), Detective Lumpkin stated, "they advised that this individual [Defendant] here was the suspect." (R. p. 1217).

In analyzing the aforementioned statements by Detective Lumpkin, it is clear that the State would not have been able to prove the violent character, much less the identity of the Appellant. Detective Lumpkin, by himself, and without the aid and testimony of the unavailable witnesses, had no proof or evidence to show that Appellant's unarmed robbery conviction was either violent or threatened the use of violence, or even that Appellant was the one that committed this crime. As such, because testimony was offered in support of Appellant's unarmed robbery crime to prove an aggravating factor, and because such testimony was unavailable and not subject to cross-examination, Appellant's rights under the Sixth Amendments right to Confrontation were violated.

Further, the State violated the holding in *Crawford* when it called and used the testimony of Officer Lee. Officer's Lee's testimony dealt with Appellant's possession of a firearm by a convicted felon conviction, and said

testimony was also apparently used to prove the violent nature of this crime. In response to the explaining the underlying facts of said crime, Officer Lee asserted the following: (1) "Mr. Reeves stated that he had been in an altercation with his sister at which time the Defendant, Mr. Sweet, intervened and then became involved in an altercation at which time Mr. Sweet produced a sawed-off shotgun and struck Mr. Reeves in the head and the ribs several times" (2) (in response to the State asking Officer Lee how he located the Defendant for this crime, Officer Lee stated) "He [Mr. Reeves] stated we may locate him [Defendant] near the L.A. lounge on 8th Street." (R. p. 1224-1225)

Moreover, Appellant's trial counsel, even back at the original trial, was aware of the problems of Officer Lee's testimony with regard to proving a violent felony aggravator. In particular, Appellant's trial counsel asked Officer Lee the following question: "So what you're testifying to is what Mr. Reeves told you when, in fact, you didn't see an incident that happened between Mr. Sweet and Mr. Reeves, is that correct?" (R. p. 1227).

Again, this testimony is in violation of the holding in *Crawford*. All the testimony with regard to this alleged violent crime committed by Defendant was shown through unavailable witnesses why Appellant did not have the opportunity to examine. It is obvious that the statements were

testimony, for they were given to a law enforcement officer and would lead an objective witness to believe the statements would be later used for trial. *Crawford v. Washington*, 541 U.S. 36 (2004)

The two aforementioned situations that were in violation of *Crawford* greatly influenced the decision to sentence Appellant to death. As previously mentioned, the sentencing judge attached "substantial weight" to the aggravating circumstance that the Appellant was previously convicted of a felony involving the use, or threat to use, violence to the person. This aggravating circumstance cannot be found without sufficient proof by the state that the crime was life-threatening, in which the perpetrator in direct contact with a human victim. *Johnson v. State*, 720 So. 2d 232 (Fla. 1998) Also, this aggravating factor cannot be assigned much weight unless the facts surrounding the aggravating factor conclusively proves some type of violent conduct toward the victim. *See* *Larkins v. State*, 739 So. 2d 90 (1999) In the instant case, there can be little or no weight assigned to the prior violent felony aggravator, because all the testimony and facts underlying this aggravator were admitted in violation of *Crawford*, and therefore inadmissible to prove violence or threat to use violence, pursuant to Fla. Stat. 921.141 (5)(b) .

The aggravating factor of Appellant's prior violent felony cannot be considered as harmless error, for the sentencing judge assigned it substantial weight. Therefore, Appellant requests this Honorable Court to reverse the trial court's order denying Appellant's successive 3.851 Motion, thereby vacating his sentence of death.

CONCLUSION

Appellant reasserts that the recent decision by the U.S. Supreme Court in *Crawford v. Washington* meets the test for retroactivity set out by the Florida Supreme Court in *Witt v. State*. Therefore, Appellant's instant appeal is not procedurally barred. Further, because there contained violations of *Crawford* in Appellant's penalty phase of trial, and said violations do not amount to harmless error, Appellant's sentence of death should be vacated and communicated to life.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to all counsel of record, on this ___ day of _____, 2006.

RESPECTFULLY SUBMITTED,

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NOTICE OF CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellee, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellee, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

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