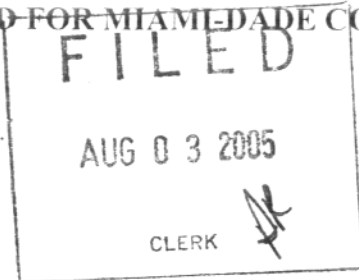


IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA v.

LUIS DIAZ, Defendant.



Case Nos. 79-14159; 79-14556; 79-14557; 79-14559; 79-14560

Judge Scola

JOINT MOTION FOR POST CONVICTION RELIEF

THE STATE OF FLORIDA, by and through its undersigned counsel, and the Defendant, Luis Diaz, by and through his undersigned counsel, file this Joint Motion for Post Conviction Relief and state as follows:

I.

PROCEDURAL HISTORY

In September 1979, the defendant, Luis Diaz, was formally charged in eight separate but similar cases with committing multiple armed sexual batteries, kidnappings, robberies, aggravated assaults, and various other crimes during the years 1977 through 1979, to wit:

1. In Case No. 79-14133, the defendant was charged with Armed Kidnapping, Armed Sexual Battery, Armed Robbery, and Possession of a Firearm During the Commission of a Felony, crimes involving victim L.C.
2. In Case No. 79-14558, the defendant was charged with Aggravated Assault and Possession of a Firearm During the Commission of a felony, crimes involving victim D.C.
3. In Case No. 79-14159, the defendant was charged with Armed Kidnapping, Armed Sexual Battery, Armed Robbery, and Possession of a Firearm During the Commission of a Felony, crimes involving victim C.J.

4. In Case No. 79-14556, the defendant was charged with Attempted Armed Kidnapping, Aggravated Assault, and Possession of a Firearm During the Commission of a Felony, crimes involving victim K.B.
5. In Case No. 79-14559, the defendant was charged with Armed Kidnapping, Armed Sexual Battery, Armed Robbery, Armed Burglary, and Possession of a Firearm During the Commission of a Felony, crimes involving victim C.L.
6. In Case No. 79-14560, the defendant was charged with Armed Kidnapping, Armed Sexual Battery, Armed Robbery and Possession of a Firearm During the Commission of a Felony, crimes involving victim C.C.
7. In Case No. 79-14557, the defendant was charged with Aggravated Assault and Possession of a Firearm During the Commission of a Felony, crimes involving victim D.T.
8. In Case No. 79-15511, the defendant was charged with Aggravated Assault, a crime involving victim J.K.

Prior to the trial of any of these individual cases, the Court ruled that the State would be allowed to introduce testimony concerning the other charged crimes in the individual trials of each of these cases. This type of evidence is commonly referred to as Williams Rule or similar fact evidence. The State sought to introduce the Williams Rule evidence to help prove the identity of the assailant. The State prepared for eight separate trials, to be presented to eight different and independent juries, intending to proceed to trial against the defendant one case at a time, if necessary. However, following the Court's ruling granting the State's Motion to Introduce Williams Rule Evidence, defendant's trial counsel filed his own pre-trial Motion seeking to consolidate all eight cases into one trial before a single six-person jury, intending that one jury would reach a verdict on each crime alleged in each individual case. The Court granted the defense's Motion and consolidated all eight cases involving each crime into one trial before a single jury.

During the consolidated trial in 1980, the victims repeatedly and consistently identified Luis Diaz as their assailant. The victims had previously identified Diaz in separate live line-

ups. attended by defendant's trial counsel. At trial, in addition to the eyewitness identification, the State introduced a biological sample obtained from victim L.C. In 1980 forensic testing of serological evidence could only determine two distinct classes of information. The analysis could determine blood typing and also classify the individual as a secretor or non-secretor. The forensic testimony introduced at trial informed the jury that the L.C. sample contained semen that matched the same blood type grouping as Luis Diaz. Further, the "secretor/non-secretor" identifier found in the semen also matched that of Luis Diaz. At the time of trial, forensic DNA technology did not exist.

On May 9, 1980, the jury convicted the defendant of all charges in seven of the eight cases. In one case, a non-rape case, the jury acquitted Luis Diaz of all charges (Case No. 79-15511). Following his convictions, the Court, with one exception, sentenced the defendant to the maximum statutory sentence for each crime, including Life sentences for the Armed Kidnapping charges¹, Armed Sexual Battery charges, and Armed Robbery charges. He was sentenced to the statutory maximum of five years in prison for the Aggravated Assault charges and the Possession of Firearm During the Commission of Felony charges, the latter sentences to run concurrent. The Life sentences in Case No. 79-14133 were to run consecutive to each other, and the sentences in all other cases, with the exception of Case No. 79-14559, were to run concurrent with the last Life sentence in Case No. 79-14133. The defendant appealed his convictions and sentences raising the issue of the trial Court's denial of the defendant's request to introduce "reverse Williams Rule" evidence, i.e., evidence that other alleged similar sexual assaults occurred after the arrest of the defendant. On January 12, 1982, the Third District Court of Appeal rejected the defendant's arguments and affirmed the defendant's convictions and sentences. Diaz v. State, 409 So.2d 68 (Fla. 3d DCA 1982). The Court, in its opinion affirming the convictions, noted that seven of the eight cases were similar enough to be introduced by the State as Williams Rule, and further noted that the reason the eighth case was permitted was because the defense had made the strategic decision to consolidate all the cases in one trial.

On September 28, 1994, the defendant filed his first Motion for Post Conviction Relief, seeking to vacate his convictions in each of the seven cases, alleging Newly Discovered

¹ The only exception was that the defendant was sentenced to five years in prison for the kidnapping of KB, in case no. 79-14556.

Evidence in the form of two recantations by victims L.C. and D.C. The Court summarily denied the defendant's Motion as to five cases, but ordered an evidentiary hearing in the two recantation cases involving L.C. and D.C.

The defendant appealed the Court's summary denial of his Post Conviction Motion with respect to the five cases, and the Third District Court of Appeal held that the appeal was premature, stating it would be ripe after the trial Court determined the validity of the Motion with respect to the two recantation cases involving L.C. and D.C. *Diaz v. State*, 686 So.2d 679 (Fla. 3d DCA 1996). After the case was returned to the trial Court, and following continuances by both sides, on March 7, 2002, the parties reached what was termed by the parties and the Court a "global agreement," *a voluntary, joint resolution explicitly accepted by the defendant, executed by the defendant in the presence of his family and friends, and accepted by the Court only after the defendant was questioned as to his understanding and knowledge of what the agreement accomplished.*

In their "global agreement" the State and defendant agreed to vacate the convictions and sentences in the two recantation cases involving L.C. and D.C. As to the remaining five cases only the sentences, *not the convictions*, would be vacated. By explicit agreement, the defendant would be re-sentenced to what was intended and designed to result in him serving a single Life Sentence, with six consecutive minimum mandatory 3 years sentences, with the defendant receiving credit for the nearly 22 years he had already served. In addition, by agreement the Court found that the defendant qualified as a sexual offender and/or predator. Finally, on March 7, 2002 the State entered a *nolle prosequi* on the two cases involving L.C. and D.C. As to the remaining five cases, the defendant agreed to withdraw his Motion for Post Conviction Relief and not appeal any of the matters resolved by the "global resolution."

In 2003, following the adoption in Florida of Fla. R. Crim. Pro. 3.853 permitting incarcerated defendants to seek DNA testing in their cases upon a proper showing, the Innocence Project filed a motion for DNA testing on behalf of defendant Luis Diaz. The State and the defendant entered into an Agreed Order to test all relevant physical evidence introduced at the consolidated trial. The Innocence Project submitted to its lab for testing a portion of the only biological evidence in all the cases, namely a sample contained in the rape treatment kit from victim L.C. This portion of the rape treatment kit

had actually been introduced at the trial (the “biological trial evidence”). The State agreed to have the biological trial evidence tested even though the State had previously entered a *nolle prosequi* on that case and the defendant’s conviction and sentence in that case was already vacated.

In addition to testing of the biological trial evidence, the State also searched for any other physical evidence that might still exist for testing. A review was conducted of the other allegedly similar cases thought possibly to be the work of the “Bird Road Rapist.” Particular focus was given to the approximately twenty cases involving victims who had been given the opportunity to view a live lineup in August 1979. Not one of those victims positively identified Luis Diaz as their assailant. The defendant was never charged for any of those crimes, but information describing each crime was provided to defendant’s trial counsel during Discovery.

During its search for other physical evidence, the State, with the assistance of the Miami Dade Police Department, located two other items of physical evidence capable of being tested for DNA analysis. One of the items consisted of additional biological evidence from the rape treatment kit of victim L.C. This item had been marked for identification but never introduced as evidence at trial (a “biological trial exhibit”). This biological trial exhibit had been stored in the Clerk of the Court’s Evidence Vault since the conclusion of the trial in 1980. Police also found a second biological item, which had remained in police custody all these years, namely, evidence from an allegedly similar case involving another victim who could never be located after initially reporting her crime (although we know her identity, we will refer to her herein as M.R.). A police investigator assigned to assist in the search for other physical evidence discovered it. As part of the Agreed Order, a new buccal swab (a Q-tip swabbing from the inside of the defendant’s mouth) was obtained from the defendant at the South Florida Reception Center. By previous agreement, all of the above-described items discovered by the State (the L.C. biological trial exhibit, the M.R. biological evidence, and the defendant’s new buccal swab) were submitted to the Miami Dade Police Department Crime Lab for DNA analysis and comparison.

As previously indicated, The Innocence Project submitted the L.C. biological trial evidence for testing to its lab. These were submitted in 2003 and 2004. In 2005, the

Innocence Project received verbal test results conducted on this biological trial evidence from L.C., one of the recanting victims. Some months later, their lab issued a written report containing supporting documentation. That lab determined that *Luis Diaz was not L.C.'s assailant*.

Separately, the State submitted its items to the Miami Dade Police Department Crime Lab for testing after receipt of these findings. The State received verbal test results on the two items submitted shortly thereafter. Miami Dade Police Department's Crime Lab testing of the biological trial exhibit for victim L.C. and the biological physical evidence from victim M.R., also revealed that *Luis Diaz was not L.C.'s assailant*. The test results from the Miami Dade Police Department Crime Lab also revealed that *Luis Diaz was not M.R.'s assailant*. More importantly, however, was the discovery by the Miami Dade Police Department Crime Lab that *the same man assaulted both L.C. and M.R.* based upon the DNA profile obtained from biological evidence they examined. As of this date, law enforcement is attempting to identify this man or match his DNA profile to that of persons in the various state and national databases.

II.

The State acknowledges that under the law the recent DNA analysis constitutes newly discovered evidence that was unavailable to the defendant at the time of his trial. As a consequence, the law mandates that the defendant be granted either a single trial of five consolidated cases, or five individual trials, one for each case. See Jones v. State, 591 So.2d 911 (Fla. 1991). Accordingly, in the interest of justice and as required by law, the State and defendant respectfully move this Court to vacate the remaining five convictions and sentences in cases F79-14556, F79-14557, F79-14159, F79-14559, and F79-14560.

Under the law, however, vacating the convictions and sentences does not automatically result in the cases being "dropped" or dismissed. Once the convictions and sentences are vacated Luis Diaz will still be facing formal charges that he raped, kidnapped, robbed or assaulted five women. At this juncture the State is now faced with the difficult task of deciding whether to proceed on the remaining charges. The decision to proceed or not with a

retrial of the remaining five cases some twenty-five years after the first convictions is a decision solely for the State.

In deciding how to proceed, the State must necessarily look to the interests of justice and dictates of law. Justice requires that victims of crime be given a means of redress through the criminal courts, and the law requires that proof beyond a reasonable doubt be presented to sustain their allegations. Justice mandates that police and prosecutors use all lawful means to find, arrest and successfully prosecute the guilty, while the law requires they be ever mindful of the rights of the accused and abide by the constitutional protections afforded all persons. Justice means the community is protected, and trusts that its police and prosecutors will do everything within the law to prosecute the guilty and protect the innocent. Justice and the law co-exist together, one with the other, to make our community and each of us safe.

In spite of the results from the DNA testing and despite the recantation of two of the eight victims, the State can make no proclamation regarding the innocence of the defendant in the remaining five cases. *Each of the victims testified at trial before a jury, each was subject to cross-examination by a skilled defense attorney, and each identified Diaz as their assailant at trial in 1980.* (In fact, two of the victims reaffirmed their identifications in 1993 and again in 2001.) Our Constitution provides that every accused be afforded “due process”. However, our criminal justice system is not perfect. Luis Diaz received all of his constitutional protections and was still wrongfully convicted on one case. There has never been any suggestion of prosecutorial misconduct, no hint of judicial impropriety, and no allegation that defense counsel was ineffective at trial. Prosecutors are held to the highest legal and ethical standards in law because of our unique powers and responsibilities. The success of the process that brings the parties to this juncture regarding Luis Diaz is evidence that the system worked.

The State is mindful that in 1980 the jury, having listened intently and carefully to the facts of *each* case, acquitted him of all charges on one of the cases, even in light of all the positive identifications and with all the physical evidence that was consistent with the defendants serological grouping. However, we now know that in spite of all the corroboration from the 1980 test results, improvements in technology prove that the defendant was absolutely innocent (not just “not guilty”) on one of the cases for which he was convicted. Moreover, the recent DNA test results for the M.R. evidence clearly reveals that

there was another assailant operating at the same time in the same geographical area. We now know for certain that the unknown assailant attacked two women (L.C. and M.R.). However, proof of actual innocence in one case does not automatically transfer to each of the other cases for which he was convicted.

The only biological evidence that was available and admitted at trial is now useless to the State. It only proves that the biological evidence we presented *could not* have originated from Luis Diaz. We cannot overlook the fact that at least two women provided the same testimony at trial in 1980 and later changed their testimony. As to victim L.C., the 2005 DNA test results prove that L.C. was correct in her recantation and State made the right decision in 2002 when it entered a *nolle prosequi* on her case. We do not have any biological evidence from victim D.C. to prove whether she was also correct in her recantation. All we are left with in that case is that she later changed her testimony and expressed doubt that she had correctly identified her attacker.

The State must acknowledge and consider the recent discovery of the case-to-case link between L.C. and M.R., the exclusion of Luis Diaz as the assailant in those cases, the impact a retrial would have on the lives of the victims, our inability to contact and communicate with each victim so many years after the first trial, the lack of unanimity among those we were able to contact to submit to a new trial, and likelihood the defense would successfully pursue and introduce the State's Williams Rule Evidence at a re-trial to attempt to "disprove" the identity of the defendant (a reverse Williams Rule argument). In this very unique case, at this time and considering these facts, the ability to resurrect a successful prosecution twenty-eight years after the crimes began will be exceedingly difficult, and the likelihood of a conviction is improbable.

It is impossible to ignore the difficulties inherent in retrying five very old cases even under the best of circumstances. Police investigators retire; memories fade; and victims move on with their lives. Some of the victims have voiced a desire to not go through a re-trial on their cases. Luis Diaz, now over sixty-seven years old, has spent the last twenty-five years in jail, serving his time for at least one case we now know for certain he did not commit. We may never know the complete truth of the Bird Road Rapist, or say with certainty that there may not have been two or more, but because of the reasonable doubt now apparent, and under

the totality of all of these circumstances, the State respectfully declines to continue with its prosecution of Luis Diaz and formally announces a *nolle prosequi* of the five remaining cases.

WHEREFORE, the State and the defendant respectfully request the Motion be Granted.

By: [Signature]
Stephen P. Warren, Esq.
Florida Bar # 0788171
Holland & Knight, LLP
701 Brickell Ave., Ste. 300
Miami, FL 33131

[Signature]
Barry Scheck, Esq.
Co-Director
Innocence Project
Benjamin N. Cardozo School of Law
100 Fifth Avenue, 3rd Floor
New York, NY 10011

[Signature]
Colin Starger, Esq.
Staff Attorney
Innocence Project

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

By: [Signature]
Don L. Horn
Chief Assistant State Attorney
Florida Bar #350885
E.R. Graham Building
1350 N.W. 12th Avenue
Miami, Florida 33136-2111
(305) 547-0100

By: [Signature]
Penny Brill
Assistant State Attorney
Chief, Legal Division
Florida Bar #305073

By: [Signature]
Gary S. Winston
Assistant State Attorney
Senior Trial Counsel
Florida Bar #358932

By: [Signature]
Michael Giffarb
Assistant State Attorney
Division Chief
Florida Bar # 957836

STATE OF FLORIDA, COUNTY OF DADE

HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office. AUG 09 2005 AD 20

HARVEY RUVIN, Clerk of Circuit and County Courts

Deputy Clerk [Signature]

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