IN THE SUPREME COURT OF FLORIDA

NO. SC06-1152

JONATHAN HUEY LAWRENCE,

Petitioner,

v.

JAMES McDONOUGH,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Jonathan Huey Lawrence's first habeas corpus petition in this Court. Art. 1, Sec. 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 Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Lawrence was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original jury trial proceedings shall be referred to as "R." for the record and "TT." For the trial transcript, followed by the appropriate page number(s). The postconviction record on appeal will be referred to as "PC-R." for the evidentiary hearing "EH" represents the transcript, followed by the appropriate page number(s).

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

INTRODUCTION

Significant errors which occurred at Mr. Lawrence's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Further, trial counsel preserved numerous issues by objection and motion, which were not raised on appeal. In addition, appellate counsel failed to challenge numerous constitutionally flawed and vague penalty-phase issues, despite objections by trial counsel.

The issues neglected by appellate counsel demonstrate a deficient performance, which prejudiced Mr. Lawrence. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]" Fitzpatrick, 490 So.2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome" Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined" Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled upon during direct appeal, but should now be revisited in light of subsequent case law, as well as correcting error in the appeal process that denied fundamental constitutional rights.

As this petition will demonstrate, Mr. Lawrence is entitled to habeas relief.

PROCEDURAL HISTORY

On March 24, 2000, Appellant, Jonathan Lawrence, pled guilty to: principal to first-degree murder of Jennifer Robinson, conspiracy to commit first-degree murder, giving alcoholic beverages to a person under twenty-one, and abuse of a dead human corpse. After a penalty phase trial, the jury recommended the death sentence by a vote of 11 to 1 on March 30, 2000. On April 13, 2000, the Court conducted a Spencer hearing. On August 15, 2000, the Court imposed the sentence of death. The following statutory aggravating factors were found: (1) Lawrence was previously convicted of another capital felony or a felony involving the use or threat of violence to the person (great weight); and (2) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight). A Petition for Writ of Certiorari was denied on October 14, 2003 Lawrence v. Florida, 124 S.Ct. 394 (2003).

Undersigned counsel was appointed on July 1, 2003, to represent the appellant for postconviction proceedings. The appellant filed his 3.851 Motion on July 12, 2004. An

evidentiary hearing was conducted on November 3 and 4, 2006. The PC trial court entered its order denying relief on Appellant's 3.851 Motion on January 26, 2006. Appellant filed his Notice of Appeal on February 20, 2006.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues that directly concern the judgment of this Court during the appellate process, and the legality of Mr. Lawrence's convictions and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental errors challenged herein arise in the context of a capital case in which this Court heard and denied petitioner's direct appeal. See Wilson, 474 So.2d at 1163; Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Lawrence to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The end of justice begs the Court to grant the relief sought in this case, because the Court has done so in past, similar cases. This petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as these pled herein, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of Mr. Lawrence's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Lawrence asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ISSUE I

WHETHER THIS COURT SHOULD REVISIT PETITIONER'S PROPORTIONALITY REVIEW IN LIGHT OF APPELLATE COUNSEL'S INEFECTIVE ASSISTANCE AND THIS COURT'S FLAWED PROPORTIONALTIY ANALYSIS IN THIS CASE?

The standard of review for claims of ineffective assistance of appellate counsel is the same standard for trial counsel, as set out in Strickland v. Washington, 466 U.S. 668 (1984).

Petitioner's appellate counsel argued to this Court in its initial brief, reply brief, and motion for rehearing how Petitioner's case was one of the most mitigated this Court has seen. However, Appellate counsel substantially failed to (1) argue how the trial court's analysis for diminishing Petitioner's mitigation was an abuse of discretion and not supported by competent substantial evidence, (2) argue why this Court's proportionality review incorrectly applied Dixon v. State, 283 So.2d 1 (Fla. 1973), and how this Court has misapplied proportionality and similar case application.

POINT (1) – DISCUSSION

The trial court's analysis for diminishing Petitioner's mitigation was an abuse of discretion and not supported by competent substantial evidence.

The trial court only gave considerable weight to the mitigators: extreme emotional distress, and capacity to conform

his conduct to the requirements of the law was substantially impaired, because Petitioner's mental illness was not predominant during the commission of the offense and because petitioner could conform his conduct to the requirements of the law when he desired. See sentencing order at pages 10-13.

This Court reiterated the trial court's finding in its opinion at page 28. However, appellate counsel failed to point out in the proportionality argument to this Court how the trial court's order failed to properly or fully consider the evidence in its application diminishing the mitigators. In Crook v. State, 908 So.2d 350, 354, 358, 359 (Fla. 2005), this Court found the unrefuted testimony of the mental health experts as persuasive. In this case, Petitioner's mental health experts were also unrefuted. They testified, among other things, that Petitioner suffered from brain damage, major mental illness, short- and long-term memory loss, and low-average intelligence. The mental health experts also provided unrefuted testimony that Petitioner did not possess walking-around sense, he was a follower, he lacked the necessary mental capacity to formulate a complicated plan without help, he suffered from emotional dysfunction, his emotional age was below his chronological age, and he couldn't fully understand the consequences of his actions.

In its proportionality argument, appellate counsel failed to argue to this Court how the trial court failed to consider all of the evidence explained above. The trail court limited the affect of Petitioner's mental state to the time of the offense. While Petitioner may not have reported having hallucinations during the time of the offense, his overall mental inabilities, his dependant relationship with codefendant Rodgers, as well as his basic thought processes, severely affected his ability to conform to the requirements of the law before, during, and after the offense. No record evidence even suggests that Petitioner had hurt another human being until Rodgers showed up on Petitioner's doorstep.

With regard to the issue of domination, appellate counsel failed to argue to this Court that the trial court's finding the record contains no direct evidence that Rodgers dominated Lawrence was error. See Sentencing Order page 14. Note that this Court has previously set out standards establishing what circumstances may support the domination mitigator. Hill v. Moore, 175 F.3d 915, 928 (C.A. 11 (Fla.), 1999):

> What constitutes substantial domination within the meaning of Fla. Stat. ch. 921.141(6)(e) is a question of Florida law. The Florida Supreme Court has spoken to the issue on several occasions. In Groover v. State, 458 So.2d 226, 229 (Fla.1984), the court discussed the circumstances that could permit the inference that the perpetrator of the crime acted under the substantial domination of another. The court

> recognized that threats of violence or death from one party may support the inference that the threatened party was under the substantial domination of the other party; such threats would not, however, mandate such an inference. Id. **Other circumstantial facts that might yield an inference of substantial domination would be if the defendant was a follower, if he looked up to his accomplice, or if the defendant's accomplice was the dominant figure in their relationship.** See Raleigh v. State, 705 So.2d 1324, 1330 (Fla.1997). (Emphasis added).

In Craig v. State, 510 So.2d 857, 870 (Fla. 1987), this Court stated that Schmidt, Craig's co-defendant, could have utilized domination as a mitigator, if Schmidt had been tried for capital murder.

> If Schmidt had been tried for capital felony in the murder of Eubanks, the evidence would have supported a finding in mitigation that he had acted under the domination of appellant. The fact that appellant was the prime mover with regard to the murder of Eubanks distinguishes this case from Malloy.

Ironically though, Schmidt had possession of a weapon and shot both victims, which is evidence to refute domination as discussed in Hill above. If the evidence announced in the Craig opinion supported the mitigation of domination, it is clear that the evidence in this case should also support the mitigator of domination.

Further, in Witt v. State, 342 So.2d 497, 501 (Fla. 1977), this court stated:

> After carefully reviewing the records of the two proceedings, we hold the facts and circumstances support the imposition of the death penalty on the

> appellant Witt and a life sentence for Tillman. Testimony of five psychiatrists who examined Tillman indicated Tillman had a severe mental or emotional disturbance and was subject to domination by Witt.

Clearly the Witt case considered the testimony of experts about a defendant's mental and emotional state being subject to domination as evidence establishing that mitigator. Similar unrefuted facts and testimony were established in Petitioner's case.

When affirming the trial court's finding of no evidence of domination, this Court only considered evidence of "threatened," "coerced," and "intimidated," as possible circumstances of domination. As shown by Craig and Witt above, other circumstances can establish domination. Unfortunately, these same circumstances were presented in Petitioner's case but were ignored by the trial court, and not argued by appellate counsel.

Additionally, unrefuted testimony by three mental health experts established the Petitioner as a follower who could not have formulated the plan by himself. Detective Hand, a State witness, testified that Rodgers was the dominant figure between the two. Lawrence had never hurt anyone until Rodger's showed up. Further, all of the mitigating evidence presented by the Petitioner implied, if not directly established, that if not for Jeremiah Rodgers' influence, Lawrence would not have committed this offense.

Appellate counsel was ineffective by failing to remind this Court of their previous opinions; domination may be established by finding evidence of being a follower, as well as other circumstances.

The trial court found that Petitioner's use of the pronoun "we" as contradiction of his involvement. See Sentencing Order at page 14. However, during Petitioner's plea, both counsel said "we" are pleading guilty. Yet, "we" know counsel didn't plead guilty. This misinterpretation by the trial court is further indication why appellate counsel should have argued to this Court how the trial court's findings lacked substantial competent evidence.

POINT (2) – DISCUSSION

This Court's proportionality review incorrectly applied Dixon and Proffitt.

Research indicates that the first case this Court reviewed and found Florida's death penalty statutes constitutional in light of Furman v. Georgia, 408 U.S 238; 32 L.Ed.2d 346; 92 S.Ct. 2726 (1972), was State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Dixon set out the standard to be used in the application of proportionately.

> It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and **unmitigated** of most serious crimes. (Emphasis added).

Subsequent to Dixon, the United States Supreme Court reviewed Florida's application of the death penalty in Proffitt v. Florida, 428 U.S. 242; 96 S. Ct. 296; 49 L.Ed.2d 913 (1976). The Proffitt court found Florida's application of the death penalty constitutional, relying partly on the language in Dixon.

> Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to "(guarantee) that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached **under similar circumstances in another case**. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

The Proffitt court went on to further state:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the **aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida** "to determine independently whether the imposition of the ultimate penalty is warranted." (Emphasis added). Id. at 253.

The three primary factors in Dixon and Proffitt that guide this Court when applying proportionality are: "unmitigated" and "reweighing aggravating and mitigating circumstances" and "comparing similar cases." It is Petitioner's contention that

not one of these factors has been applied consistently in this Court's opinions, and certainly not in Petitioner's case.

UNMITIGATED

In the Petitioner's direct appeal opinion, this Court stated: "We have followed Dixon by stating that the death penalty is "reserved for only the most aggravated and **least mitigated** of first-degree murders." (Emphasis added). Opinion at page 23.

"Unmitigated" and "least mitigated" are not the same standards. While "least mitigated" suggests some mitigation, "unmitigated" clearly indicates no mitigation at all.

According to Petitioner's research, the first time this Court uttered the phrase "least mitigated," after Dixon, was in 1989, in Songer v. State, 544 So.2d 1010 (Fla. 1989). The court in Songer misstated the standard in Dixon; "Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders." The Songer court made no explanation for the change in standard from "unmitigated" to "least mitigated."

Since Dixon, from 1973 until 1989, the term "unmitigated" appears in four cases where this Court analyzed proportionality: Cooper v. State, 336 So.2d 1133 (Fla. 1976)(In this case there were three aggravating and **no mitigating** circumstances.);

Johnson v. State, 393 So.2d 1069 (Fla. 1980)(However, the trial court's findings that there were four other aggravating circumstances and **no statutory or other mitigating** circumstances were proper.); Fitzpartrick v. State, 527 So.2d 809 (Fla. 1988)(It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and **unmitigated** of most serious crimes.); and Hudson v. State, 538 So.2d 829 (Fla. 1989)(In light of our prior case law, I cannot conclude that the death penalty is proportionate under these facts. Barkett concurring in part and dissenting in part, citing Dixon.).

REWEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES

Although the court in Proffitt relied upon the fact that the Florida Supreme Court would reweigh aggravating and mitigating circumstances, this Court cites Bates, Supra in Petitioner's direct appeal opinion for the proposition that the court does not reweigh the aggravators and mitigators. Yet, in some selected cases this court has, in fact, reweighed aggravators and mitigators, although in some cases the analysis is masked by other explanations.

In Cooper v. State, 739 So.2d 82, 86 (Fla. 1999), the majority of the Court reversed Cooper's death sentence and stated:

> This Court has reversed the death penalty in cases where multiple aggravators were posed against comparable mitigation. In addition to the evidence of brutal childhood, brain damage, mental retardation, and mental illness (i.e., paranoid schizophrenia) in the present case, the defendant was eighteen years old at the time of the crime and had no criminal record prior to the present offense. We note that the jury vote was eight-to-four. On this record, we cannot conclude that the present crime is one of the least mitigated murders this Court has reviewed. In fact, the record shows just the opposite--i.e., that this is one of the most mitigated killings we have reviewed. Accordingly, Cooper's death sentence is disproportionate.

However, Justice Wells in his dissenting opinion, in which Justices Harding and Overton concurred, characterized the majorities' proportionality review as:

> This analysis is nothing more than this Court substituting its judgment as to the weight to be given to mitigation evidence under the guise of proportionality review. Id. at 90.

The dissent in Cooper went on to explain how the mitigation relied upon by the majority regarding the defense experts' testimony was refuted by the State's experts. However, in Petitioner Lawrence's case, the experts went unrefuted, as in Crook, Supra.

Again in Crook, the language of this Court indicates a reweighing of the aggravating and mitigating under the mask of proportionality.

> This Court has reversed the death penalty in cases where multiple aggravators were posed against comparable mitigation. In addition to the evidence of

> brutal childhood, brain damage, mental retardation, and mental illness (i.e., paranoid schizophrenia) in the present case, the defendant was eighteen years old at the time of the crime and had no criminal record prior to the present offense. We note that the jury vote was eight-to-four. On this record, we cannot conclude that the present crime is one of the least mitigated murders this Court has reviewed. Id. at 357.

It is important to note that Justice Wells again dissented in this case because he believed the sentence of death was proportionate. In his dissent, he cites to the Petitioner's case in support of proportionality. It is also important to note that Justice Bell, the judge who sentenced Lawrence to death in this case, concurred with the majority to reverse the sentence of death for Crook.

Petitioner contends that there are a substantial number of mitigators found in Crook that squarely coincide with the mitigators found for Petitioner. However, three mitigators found in Crook are somewhat different than that established in Petitioner's case. For example, Crook's mental illness was associated with the crime, lack of substantial criminal history, and an 8-to-4 jury vote.

Mental illness at time of offense –

Although there was no testimony in Petitioner's case that he was suffering from hallucinations at the time of the offense, there was testimony that he had been drinking, although the trial court noted that Lawrence didn't say he was intoxicated.

In addition, it is clear from the record that all of the Petitioner's experts indicated that Petitioner followed anyone he trusted, he lacked judgment, he lacked the capacity to understand the consequences of his actions, he lacked walking-around sense, he unable to hold a job, and he has short- and long-term memory loss. All of these mental factors contributed to Petitioner's actions before and during the offense.

Lack of substantial criminal history –

Petitioner's direct appeal record clearly indicates that prior to Rodgers' appearance on Petitioner's doorstep, Petitioner had never hurt another human being. As pointed out in Petitioner's initial brief, Petitioner did not kill Jennifer Robinson. Petitioner's direct appeal record clearly indicates that but for Rodgers, Jennifer Robinson would still be alive.

While Petitioner acknowledges the law of "principal," the fact remains that the Petitioner did not kill Jennifer Robinson, while Mr. Crook did kill the victim.

Jury vote –

This Court noted the 8-to-4 jury vote in Crook, implying, at least by Petitioner's perception, that the vote was considered as a mitigator; "While we noted the important mitigators of age and abusive childhood, as well as an eight-to-four jury vote on punishment…" In the opinion of Petitioner's

direct appeal at page 28, this Court stated; “Moreover, the jury recommended death by a vote of eleven to one…” suggesting the vote was a non-statutory aggravator.

Petitioner contends that the number of votes, cast by the jury, has no relevance once a majority has been established. For example, a jury vote of 7-to-5 or 12-to-0 is given great weight by the judge when deciding a life or death sentence, which has been expressed by this Court in Craig, Supra.

> The fact that the jury recommended a sentence of life imprisonment for the murder of Eubanks by a vote of seven to five was not a proper matter to consider as an aggravating circumstance regarding that murder. Although vote counts by which juries have recommended death or life imprisonment have been referred to by this Court in opinions deciding capital sentencing cases, the margin by which a jury recommends life imprisonment has no relevance to the question of whether such recommendation should be followed. Even when based on a tie vote, a jury recommendation of life is entitled to great deference. (Citations omitted).

Whether the jury’s vote is in favor of life or death, it is the court’s obligation to provide an independent review in conjunction with great deference to the jury’s vote.

SIMILAR CASE APPLICATION

It is Petitioner’s position that this Court too narrowly applied the “similar case” standard referred to in Proffitt. It appears that this Court has devised a method of analyzing only those cases that support the Court’s conclusion. When the Court

affirms the death sentence, the opinion compares only those cases where death has been upheld. For example, at page 28 of Petitioner's direct appeal opinion, this Court lists only cases where the death penalty has been upheld. However, when the Court reverses the death sentence, the opinion compares only those cases where the death sentence has been reversed. For example, in Crook this Court stated the following in analyzing similar cases:

> We conclude that this case falls squarely in the category of cases where we have reversed death sentences as being disproportionate in light of the overwhelming mitigation, especially the mental mitigation related to the circumstances of the crime. See, e.g., ***Hawk v. State***, 718 So.2d 159, 163-64 (Fla.1998) (death disproportionate despite substantial aggravation, including contemporaneous attempted murder of separate victim, where mental mitigation was substantial); ***Robertson v. State***, 699 So.2d 1343, 1347 (Fla.1997) (death disproportionate where HAC and other aggravation offset by age, impaired capacity, childhood abuse, and mental mitigation); ***Morgan v. State***, 639 So.2d 6, 14 (Fla.1994) (death disproportionate despite HAC and other aggravation where copious mitigation included brain damage and youth). See also Larkins v. State, 739 So.2d 90, 95 (Fla.1999) ("The killing here appears to be similar to the killing that occurred in Livingston and to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces."); ***Urbin***, 714 So.2d at 417-18 (death disproportionate despite multiple aggravators, including prior violent felony, where mitigation included impaired capacity, deprived childhood, and youth); ***Knowles v. State***, 632 So.2d 62, 67 (Fla.1993) (death disproportionate despite contemporaneous murder aggravator where substantial mitigation included brain damage and impaired capacity); ***Nibert v. State***, 574 So.2d 1059, 1062-63 (Fla.1990) (death

> disproportionate where HAC aggravator offset by abused childhood, extreme mental and emotional disturbance, and impaired capacity due to alcohol abuse); *Livingston v. State*, 565 So.2d 1288, 1292 (Fla.1988) (death disproportionate where aggravators, prior violent felony and murder committed during a robbery, offset by severe childhood abuse, youth and immaturity, and diminished intellectual functioning); *Miller v. State*, 373 So.2d 882, 886 (Fla.1979) (death disproportionate despite substantial aggravation, including HAC, where mental mitigation was substantial and related to crime).

Petitioner contents that the intent of Proffitt was for this Court to analyze all cases that are similar to Petitioner's, whether the death sentence was upheld or reversed. Given the numerous death penalty cases in Florida since Dixon, this Court can always find a similar case, whether death was upheld or reversed, to compare with Petitioner's. No two cases are identical. Pointing out differences can support a conclusion. However, do those differences clearly support a substantial distinction? Petitioner contends that there are no clear distinctions between Mr. Crook's mitigation and the Petitioner's, especially since Petitioner's case is not the "least mitigated."

Failure to review all similar cases, whether the death sentence was affirmed or reversed, only supports Justice Scalia's comment: "I have generally rejected tests based on such malleable standards as "proportionality," because they have a way of turning into vehicles for the implementation of

individual judges' policy preferences." Tennessee v. Lane, 541 U.s. 509; 124 S. Ct. 1978; 158 L. Ed.2d 820 (2004)(Scalia dissenting).

Allegedly, the purpose of proportionality review in death cases is to determine if it is the most aggravated and (unmitigated) least mitigated. This Court has varied this application on a number of cases, as described above. While Petitioner's case may be similar with cases where this Court has upheld the death penalty, it cannot be denied that Petitioner's case is also similar to many cases where this Court has reversed the death sentence to life; Cooper, 739 So.2d 82, and Crook, Supra. As stated in Petitioner's initial brief on direct appeal, Petitioner's case is far from the least or unmitigated of cases. Petitioner should at least have had the benefit of this Court's review of "all relevant facts" and not just those announced by the trial judge.

Petitioner is cognizant that a habeas petition is not to be utilized for rearguing a case already decided Brown v. State, 894 So.2d 137 (Fla. 2004). However, given the argument above, Petitioner respectfully requests this honorable court revisit the proportionality review in consideration of the above argument.

ISSUE II

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The Petitioner is cognizant that this issue was raised and denied before this Court in Hill and Rutherford. However, the United States Supreme Court has accepted jurisdiction of Mr. Hill's case, and therefore, Petitioner raises this issue for preservations purposes. The argument below has been adopted from Rutherford's petition.

In light of new scientific evidence that was not previously available to the Florida Supreme Court in Sims v. State, 754 So.2d 657 (Fla. 2000), it is now clear that the existing procedure for lethal injection adopted by the State of Florida for its executions violates the Eighth Amendment to the United States Constitution, as it will inflict upon Mr. Lawrence cruel and unusual punishment.

In denying a lethal injection challenge, this Court in Sims, 754 So. 2d at 668, determined that the possibility of mishaps during the lethal injection process was insufficient to support a finding of cruel and unusual punishment:

> Sims' reliance on Professor Radelet and Dr. Lipman's testimony concerning the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the

> procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned. Sims' argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. n20

(note omitted). Subsequent to the opinion in Sims, recent empirical evidence has established that the infliction of cruel and unusual punishment is no longer speculative.

A recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration is attached to the pleading) and three co-authors detailed the results of their research on the effects of chemicals in lethal injections.[1] See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary

[1]The study focused on several states which conducted autopsies and prepared toxicology reports, and which made such data available to these scholars.

infliction of pain on a person being executed.[2] The authors determined from the toxicology reports they studied, that postmortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. So, in almost half of the cases, the prisoner suffered the effects of suffocation from pancuronium bromide, as well as the burning sensation in the veins followed by the heart attack caused by the potassium chloride.

The chemical process utilized for Florida executions is identical to that identified in the study:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal,[3] an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth

[2]Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty.

[3]The authors of the study note that is simplistic to assume that 2 to 3 grams of sodium thiopental will assure loss of sensation, especially considering that personnel administering it are unskilled, that the execution could last up to 10 minutes, and that people on death row are extremely anxious and their bodies are flooded with adrenaline, thus necessitating more of the drug to render them unconscious.

> syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims, 754 So. 2d at 666 (footnote added).[4]

As set forth in greater detail in the declaration of anesthesiologist, David A. Lubarsky, M.D., the use of this succession of chemicals (sodium pentothal, pancuronium bromide, and potassium chloride) in judicial executions by lethal injection creates a foreseeable risk of unnecessary infliction of pain and suffering. Sodium pentothal, also known as thiopental, is an ultra-short-acting substance, which produces shallow anesthesia. Health-care professionals use it as an initial anesthetic in preparation for surgery while they insert a breathing tube in the patient and use different drugs to bring the to patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is **supposed** to be able to wake up and signal the staff that something is wrong.[5] The second chemical used in lethal injections in Florida is pancuronium bromide,

[4] Mr. Lawrence assumes that the Florida Department of Corrections has not changed this chemical process since the Sims opinion.

[5] Sodium pentothal is unstable in liquid form, and must be mixed up and applied in a way that requires the expertise associated with licensed health-care professionals who cannot by law and professional ethics participate in executions.

sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech.

Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. Its only relevant function is to prevent the media and the Department of Corrections' staff from knowing when the sodium pentothal has worn off and the prisoner is suffering from suffocation or from the administration of the third chemical.

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (App. C). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Lawrence will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise.

Significant is the fact that the American Veterinary Medical Association (AVMA) panel on euthanasia specifically

prohibits the use of pentobarbital with a neuromuscular blocking agent to kill animals. Additionally, 19 states have expressly or implicitly prohibited the use of neuromuscular blocking agents in animal euthanasia because of the risk of unrecognized consciousness.

Because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Lawrence will not be anesthetized at the time of his death.

It is no wonder that the chemicals used in lethal injection are inadequate and to a reasonable degree of medical certainty cause pain and torture to condemned inmates. When the chemicals were first suggested, they were merely a "recommendation" by a doctor in Oklahoma. There were no studies conducted about the proper use of the chemicals, the potential pain that an inmate might suffer, or what alternative chemicals could be used. Also, no testing was conducted prior to the adoption of the chemicals used in Florida execution; two of the chemicals were specifically contained in the original "recommendation" in Oklahoma.

Mr. Lawrence is not challenging the statutory provision that allows for lethal injection as a method of execution. Rather, he is challenging the use of the specific chemicals and the quantity of chemicals used, based upon recent scientific

evidence, that the Department of Corrections uses to carry out executions. Under the present circumstances, the State will violate Mr. Lawrence's right to be free of cruel and unusual punishments secured to him by the Eighth Amendment to the U.S. Constitution, by executing him using the sequence of three chemicals (sodium pentothal a/k/a thiopental, pancuronium bromide, and potassium chloride) which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain, contrary to contemporary standards of decency.

ISSUE III

THE ADMINISTRATION OF PANCURONIUM BROMIDE VIOLATES MR. LAWRENCE'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

The Petitioner is cognizant that this issue was raised and denied before his Court in Hill and Rutherford. However, the United States Supreme Court has accepted jurisdiction of Mr. Hill's case, and therefore, Petitioner raises this issue for preservations purposes. The argument below has been adopted from Rutherford's petition.

If Mr. Lawrence is executed in accordance with the chemical combination set out in Sims, he will be denied his first amendment right to free speech.

The administration of pancuronium bromide during the execution procedure will paralyze Mr. Lawrence's voluntary

muscles, resulting in his inability to speak or move. In the event that he has not been properly anaesthetized, Mr. Lawrence wants to be able to communicate his awareness that he is experiencing excruciating pain.

Mr. Lawrence wants to communicate this information so that other defendants, the State, the judiciary, as well as the public, can evaluate whether Florida's execution procedures violate the Eighth Amendment prohibition against cruel and unusual punishment.

The First Amendment to the United States Constitution prohibits laws "abridging the freedom of speech." The free-speech clause of the First Amendment applies to the states through the Due Process clause of the Fourteenth Amendment. Edwards v. South Carolina, 372 U.S. 229, 235 (1963), DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Saffley, 482 U.S. 78, 84 (1987). Nonetheless, because of the unique characteristics of the prison setting, restrictions on inmates' constitutional rights are not subject to strict scrutiny. A restriction to inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests" Id. at 89. A court must consider: 1) whether there is a valid rational connection between the regulation and the assertedly legitimate penological goal, 2) whether the inmate has alternate means of exercising the right at issue, 3) the

impact that exercising that right has on the institution, and 4) the availability of alternatives to the restriction. Id. at 89-91. When First Amendment rights are restricted, the legitimacy of the government's stated objective depends on whether the restriction is content neutral. Id. at 90. A restriction will not be upheld if it is an "exaggerated response" to the otherwise legitimate penological goals. Id. at 87, Pell v. Procunier, 417 U.S. 817, 827 (1974).

Here, no legitimate penological purpose can be served by paralyzing Mr. Lawrence and preventing him from communicating that the execution process has not functioned as stated and that he is being tortured. This restriction on Mr. Lawrence's speech is impermissibly content based. If the execution protocol works properly, Mr. Lawrence will be unconscious for the duration of the execution and, obviously, will have nothing to bring to anyone's attention. If the protocol does not work properly, Mr. Lawrence will want to communicate that fact but will not be able to. As a result, Mr. Lawrence's First Amendment right to free speech will be denied.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand to Charlemane Milsap, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on June 14, 2006.

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