IN THE SUPREME COURT OF FLORIDA

NO. SC06-1152

JONATHAN HUEY LAWRENCE,

Petitioner,

v.

JAMES McDONOUGH,

Secretary, Florida Department of Corrections,

Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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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?

Respondent adequately points out in their response to Petitioner's habeas petition the substantial arguments made by appellate counsel in their initial brief, reply brief, supplemental brief, and motion for rehearing. However, Petitioner does not criticize what appellate counsel did present, but what they did not.

Respondent states in their response, "When a trial court has ruled against you, the best standard of review is *de novo* because, under the *de novo* standard, the appellate court owes no deference to the trial court's ruling." Petitioner agrees with Respondent, which is precisely the basis of his petition: rather than a *de novo* review, this Court gave deference to the trial court's rulings.

For example, this Court in Lawrence gave deference to the trial court's finding that the mitigator of substantial domination was not present.

> Regarding the trial court's finding that the substantial domination mitigator was not established by the evidence, we find that there is competent, substantial evidence to support the trial court's finding. While Lawrence's witnesses opined that Lawrence had the propensity to be a follower, there is no evidence establishing that

> Lawrence was dominated by Rodgers. Lawrence provides no evidence that Rodgers threatened him, coerced him, or intimidated him in any way.

Appellate counsel failed to point out to this Court on appeal that its previous opinions did not even require proof of threats, coercion, or intimidation. Hill v. Moore, 175 F.3d 915 (11th CA 1999)(Other circumstantial facts might yield an inference of domination, such as: if defendant was a follower, if he looked up to his accomplice, or if the accomplice was the dominant figure in their relationship); Craig v. State, 510 So.2d 857 (Fla. 1987)(The fact that appellant was the prime instigator with regard to the murder); Witt v. State, 342 S.2d 497 (Fla. 1977)(Five mental health experts testified that Tillman had a severe mental or emotional disturbance and was subject to domination by Witt).

These cases indicate that circumstantial evidence proving domination may be demonstrated through having a mental illness, or who was the leader of the relationship, or who was the instigator in carrying out the murder, etc. Appellate counsel failed to present these cases to this Court, and this Court gave deference to the trial court's findings without considering the testimony of the witnesses, which tended to establish that Rodgers dominated Lawrence. Ironically, Appellate counsel strongly argued

that Detective Hand's testimony regarding Lawrence's ego prejudiced Lawrence. However, when viewing his testimony about the issue of domination, Det. Hand supported the fact that Rodgers dominated Lawrence.

Respondent states at page 19 of their response that Petitioner argues to abolish proportionality. Not true. Petitioner contends that if proportionality is utilized, then a standard should be considered that reviews all cases, irrespective of whether the ultimate sentence was life or death. Petitioner's contention is not unique. A study conducted by a committee selected by the American Bar Association[1] has made the same conclusions about standardizing proportionality.

Interestingly, at page 9 this same report published the finding of the Radelet report which states, "of the [twenty-two] new death sentences in 2000, six came from the First Judicial Circuit, two from the Second, and one from the Third. Hence, north Florida and the panhandle accounted for [forty-one] percent of the new death sentences in that year." Petitioner's case was tried in the First Circuit in 2000.

[1] The American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems, 2006.

In Crook v. State, 813 So.2d 68 (Fla. 2002) [hereinafter referred to as Crook I], this Court remanded the case back to the trial court for reconsideration, partly because "we are not certain whether, if the trial court had properly considered the brain damage and borderline mental retardation and the effect of these mental mitigators on the crime in question, the trial court would have found that the aggravation outweighed the mitigation, especially in light of the abundance of non-statutory mitigation."

In Petitioner's case, the trial court also failed to individually and specifically find and weigh his brain damage and low-80 IQ as a non-statutory mitigator. The trial court merely stated "the three experts established that the Defendant has some organic brain damage." (Order p9). Although there was substantial evidence at trial regarding these two non-statutory mitigators, appellate counsel did not raise these issues on appeal.

In Crook v. State, 908 So.2d 350 (Fla. 2005) [hereinafter referred to as Crook II], this Court reduced Crook's death sentence to life, finding:

> Most persuasive in the mitigation evidence is the unrefuted testimony of Drs. McCraney, McClain, and McMahon directly tying Crook's impairments to his functioning at the time of the murder—which clearly supports the trial court's attribution of

> "significant weight" to the statutory mitigators involving Crook's diminished mental capacity.6 These circumstances, especially the testimony linking the combination of Crook's brain damage and substance abuse to his behavior at the time of the murder, counterbalance the effect of the aggravating factors. We also find it compelling that the unrefuted expert testimony indicated that Crook would be especially uninhibited when his already damaged brain was exposed to the negative effects of alcohol and drugs. As our cases demonstrate, the existence of this mitigation, and especially that evidence connecting the mental mitigation to the crime, prevents us from classifying this case as among the most aggravated and least mitigated.

Id. at 359.

The trial court acknowledged that Dr. Crown opined that brain damage caused Lawrence to be under the influence of the two statutory mental mitigators at the time of the offense, as well as brain damage influenced his behavior at the time of the offense. However, the trial court found no causal relationship between Lawrence's mental illness and the offense, because Lawrence did not suffer from hallucinations or delusions, and he was able to conform his actions to the law when he so desired.

However, in Coday v. State, SC02-1920 (Fla. 10/26/2006), this court remanded the case to reevaluate Coday's sentence. The trial court in Coday found that he was able to conform his conduct to the law. In response, this court stated:

> In the case now before us, the trial court stated that the statutory mitigating circumstance of Coday's inability to conform his conduct to the requirements of the law had not been established. Initially, it appears that the trial court confused the standard for insanity with the mental mitigation in question. The trial court stated that the "testimony of the mental health experts does not convince the Court that the Defendant is relieved of accountability for his conduct, or otherwise, was not aware of the consequences of his actions upon Gloria Gomez."4 The trial judge relied on evidence that Coday had conducted himself without incident since his return from Germany and stated that because Coday could conform his conduct for so many years, he must have had the capacity to follow and abide by the law at the time of the homicide.

Petitioner acknowledges that the Court in Coday did not consider proportionality because the case was being remanded for failing to find a mitigator, which the court expressed there was substantial evidence to prove.

Petitioner also acknowledges that in his case the trial court did find the two statutory mental mitigators and gave them considerable weight. However, petitioner contends, like in Crook II, the court may not have considered what the weight of brain damage and low IQ had on the aggravators.

Petitioner contends that the mitigation shown at his trial places him outside of the standard of "most aggravated and unmitigated," as announced in Dixon v. State, 283 So.2d 1 (Fla. 1973). Petitioner's mitigation may

be even greater than that found in either Crook or Coday. There certainly can be no objective value to the weighing process when a court can subjectively give weighty statutory mitigators "considerable weight," and then still pronounce a sentence of death.

Perhaps Justice Quince said it best in her concurring opinion in Coday:

> I write to explain that this reevaluation is dictated by the evolution of the death penalty jurisprudence in this State and on the federal level—an evolution that has been thirty-four years in the making. This evolution of the law has required the trial courts, trial counsel, and reviewing courts to give more focused attention to the defendant and to the individual circumstances that have brought the defendant before the court system. If we allow a trial judge to ignore the kind of mitigating evidence presented in this case, then we are only giving lip service to the concepts that are embodied in the case law that has emerged from this Court since the reinstitution of the death penalty in this State. (emphasis added).

Petitioner contends that while appellate counsel presented substantial argument to this Court, they failed to provide sufficient guidance about how this Court was to review the evidence by failing to cite the prevailing law at the time. Further, this Court did not perform its own *de novo* review, as it did in Crook and Corday, but merely agreed with the trial court that substantial, competent evidence existed to support its ruling, while ignoring

other substantial evidence in the record to support and warrant a life sentence in accordance with the standard set out in Dixon.

Petition requests this Court find: appellate counsel was ineffective, reevaluate its proportionally review, or remand to the trial court for reevaluation in order to weight petitioner's brain damage and low IQ.

As to Issue II and III, Petitioner will rely upon his original habeas petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050 on November 15, 2006.

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CERTIFICATE OF COMPLIANCE

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

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